Court File No. _____

FEDERAL COURT

BETWEEN:

AIRBRIDGECARGO AIRLINES LLC

Applicant

and

CANADA (MINISTER OF FOREIGN AFFAIRS) and THE ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER sections 18 and 18.1 of the Federal Courts Act, RSC 1985, c F-7.

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____ Issued by: _____

(Registry Officer)

Address of local office: Federal Court of Canada
Registry Office
Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario, K1A 0H9

TO: The Minister of Foreign Affairs
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2

AND TO: The Attorney General of Canada
Office of the Deputy Attorney General of Canada
248 Wellington Street
Ottawa, Ontario K1A 0H8

APPLICATION

This is an application for judicial review pursuant to section 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the "*Federal Courts Act*") in respect of the delay and/or failure of the Honourable Minister of Foreign Affairs, the Honourable Mélanie Joly, P.C., M.P. (the "Minister") to make a decision within the legislatively prescribed time limit on the application by AirBridgeCargo Airlines LLC (the "Applicant") to be removed from Part 2, Schedule 1 (the "Sanctions List") of the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 (the "Russia Regulations").

On April 5, 2023, the Applicant was added to the Sanctions List through the *Regulations Amending the Special Economic Measures (Russia) Regulations*, SOR/2023-72. On June 20, 2023, the Applicant filed an application to be removed from the Sanctions List pursuant to section 8 of the Russia Regulations (the "Delisting Application").

Section 8 of the Russia Regulations imposes a mandatory statutory duty upon the Minister to make a decision within 90 days of receiving a delisting application, and to give notice of the decision to the Applicant without delay. It has been 153 days since the Applicant filed the Delisting Application, and the Minister has failed to make a decision.

This application for judicial review also challenges:

a. The initial and ongoing inclusion of the Applicant on the Sanctions List;

b. The absence of a reasonable basis to include the Applicant under Part 2, Schedule 1 of the Russia Regulations, as this decision was taken based on an erroneous finding of fact, without the support of credible and reliable evidence, or otherwise in an arbitrary manner;

c. The failure by the Minister to remove the Applicant forthwith when presented with compelling, objective and credible evidence supporting the removal;

d. The ongoing delay and/or failure of the Minister to perform mandatory statutory duties under section 8 of the Russia Regulations to make a decision on the Delisting Application within 90 days of it being received. In so failing to make that decision, the

Minister has acted and continues to act unreasonably and in a manner contrary to the law; and

e. The lawfulness of the Russia Regulations, as amended by the *Regulations Amending the Special Economic Measures (Russia) Regulations*, SOR/2023-72, insofar as they concern the Applicant because:

   i. the listing of the Applicant is *ultra vires* the *Special Economic Measures Act*, S.C. 1992, c.17 (the "*Special Economic Measures Act*") as it does not fall within the scope of the objectives of the Russia Regulations nor Canada's sanctions regime; and

   ii. the inclusion of the Applicant under Part 2, Schedule 1 of the Russia Regulations is a breach of customary principles of international law regarding countermeasures, as codified in the *Articles on the Responsibility of States for Internationally Wrongful Acts* ("ARSIWA"), which was adopted by the United Nations' International Law Commission in 2001.

THE APPLICANT APPLIES FOR THE FOLLOWING RELIEF:

1. Pursuant to paragraph 18(1)(a) and subsection 18.1(3) of the *Federal Courts Act*:

   a. An order declaring that the Minister is in breach of section 8 of the Russia Regulations by delaying, failing and/or refusing to make a decision within 90 days of receiving the Delisting Application;

   b. An order declaring that the Russia Regulations, insofar as they concern the Applicant, are *ultra vires* the *Special Economic Measures Act*, the Russia Regulations, and Canada's sanctions regime because the listing of the Applicant does not fall within the scope of the objectives of the legislative scheme, and because sanctions against it are not "in relation to a foreign state", and that they are therefore are invalid;

   c. An order declaring that the initial and continued inclusion of the Applicant under Part 2, Schedule 1 of the Russia Regulations is in breach of the *Special Economic Measures Act* and the Russia Regulations because the Applicant does not, and did not at the time of its listing, meet the criteria enumerated in section 2 of the Russia Regulations;

d. An order declaring that the inclusion of the Applicant under Part 2, Schedule 1 of the Russia Regulations is a breach of customary principles of international law that apply to countermeasures and therefore invalid; and

e. The issuance of a writ of *mandamus* compelling the Minister to immediately:

i. Recommend to the Governor in Council that the Applicant be removed from the Part 2, Schedule 1 of the Russia Regulations; or

ii. In the alternative, issue a decision on the Delisting Application and communicate that decision to the Applicant within five days;

2. An order assigning a case management Judge or Prothonotary pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106 (the "*Federal Courts Rules*");

3. An order expediting the hearing of this Application pursuant to Rule 8(1) of the *Federal Courts Rules*;

4. An order requiring the Respondents to pay the Applicant's costs of this application; and

5. Such other relief as counsel may request and that this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Background

1. Under section 2 of the Russia Regulations, an entity may be listed in Schedule 1 if the Governor in Council, on the recommendation of the Minister, is satisfied that there are "reasonable grounds to believe" that the entity falls within one of the enumerated categories;

2. On April 5, 2023, the Minister announced amendments to the Russia Regulations to add 14 individuals and 34 entities on the basis that Global Affairs Canada considers them to be individuals and entities "complicit in Putin's war of choice, including several security targets linked to the Wagner Group and the aviation sector";

3. The Minister has failed to provide details regarding the basis for listing the Applicant, including the "reasonable grounds to believe" relied upon;

4. On June 20, 2023, the Applicant filed a Delisting Application with Global Affairs Canada pursuant to section 8 of the Russia Regulations on the basis that it does not fall within any of the section 2 listed categories. Specifically, the Applicant is not "complicit in Putin's war of choice, nor has it "provided any aviation service to the Wagner Group or otherwise in relation to the military operations in Ukraine". The Delisting Application was very detailed and included objective and credible evidence that established reasonable grounds for the Minister to recommend to the Governor in Council that the Applicant be removed from Part 2, Schedule 1 of the Russia Regulations;

5. The Delisting Application requested that, should the contents of the application not fully address Canada's basis for the Applicant's listing, Canada provide a copy of all information, documents and evidence relied upon to recommend its listing under section 2 of the Russia Regulations and that the Applicant be given an opportunity to respond to that information;

6. Under section 8 of the Russia Regulations, the Minister is statutorily required to decide within 90 days whether there are reasonable grounds to recommend to the Governor in Council that the Applicant be removed from the Sanctions List. The Minister has failed to make such a decision within that mandatory statutory time period;

7. On July 7, 2023, the Applicant sent correspondence to the Minister requesting that the Minister issue a determination on the Delisting Application by October 2, 2023;

8. Neither Global Affairs Canada nor the Minister have made any further inquiry regarding the Applicant's Delisting Application;

9. The Minister has not issued a decision in response to the Delisting Application.

The Applicant

10. The Applicant was established as an entity in 2004. It is a scheduled all-cargo airline. Previously, it used to operate flight routes between Europe, Russia, Asia, and North America, covering more than 30 destinations worldwide. It also transported cargo requiring special handling procedures, such as pharmaceutical products;

11. The Applicant has been involved with several humanitarian aid missions, including:

a. Delivering 160 tons of humanitarian aid for victims of the devastating cyclone in Myanmar and earthquake in South-West China;

b. Delivering yellow fever vaccines from Moscow, Russia to Frankfurt, Germany as part of a 36-ton UNICEF shipment; and

c. Delivering over 200 tons of packaging machines for COVID-19 associated items from Frankfurt, Germany to Atlanta, USA;

12. On February 24, 2022, in response to the invasion by Russia of Ukraine, the US Department of Commerce, Bureau of Industry and Security issued new rules (the "Rules") that impacted all airlines operating aircraft manufactured by Boeing. The Rules effectively prohibit the export, re-export, or in-country transfer or use of Boeing (or other US-manufactured) aircraft (as well as other aircraft and aircraft components with at least 25 percent US content) in or to Russia without a license. The Applicant only operates Boeing aircraft. In order to ensure compliance with these US Rules, the Applicant has grounded all of its aircraft and is no longer operating;

13. Aleksey Isaykin became the majority owner of AirBridgeCargo Airlines LLC in 2011. Mr. Isaykin was also added to the Sanctions List on April 5, 2023, along with the Applicant. It is unclear on what basis Mr. Isaykin has been listed by Global Affairs Canada. If the Minister agrees that Mr. Isaykin should be removed from the Sanctions List, it then follows that the Applicant should also be removed;

14. As AirBridgeCargo Airlines LLC has grounded all of its aircraft and is no longer operating, the Applicant does not provide, and has never provided, any aviation service to the Wagner Group or otherwise in relation to the military operations in Ukraine;

15. Contrary to statements by Global Affairs Canada, the Applicant is not engaged in "activities that directly or indirectly support funding for or contribute to the violation of the sovereignty or territorial integrity of Ukraine";

16. The Applicant has no affiliation with the Russian regime or to the ongoing military operations carried out in Ukraine by the Russian government. This confirms that the Applicant is not

an entity owned, held or controlled, directly or indirectly, by Russia or acting on behalf of or at the direction of Russia;

17. The detailed information supplied in the Delisting Application demonstrated that the Applicant is not engaged in activities that directly or indirectly support, provide funding for, or contribute to a violation of the sovereignty or territorial integrity of Ukraine. This is supported by objective and credible evidence highlighted in the Delisting Application; and

18. The Delisting Application establishes reasonable grounds for the Minister to recommend to the Governor in Council that the Applicant be removed from Part 2, Schedule 1 of the Russia Regulations.

The Hearing of this Application Should be Expedited

19. Pursuant to Rule 8(1) of the *Federal Courts Rules*, it is respectfully submitted that it would be appropriate to expedite the hearing of this Application as this matter is urgent and has already been unreasonably and unacceptably delayed by the Minister's failure to make a decision within the prescribed time period, at law, which results in significant ongoing harm being caused to the Applicant.

The Minister's Refusal to Exercise her Jurisdiction is Unreasonable and in Violation of the Russia Regulations

20. Under section 8(3) of the Russia Regulations, "[t]he Minister must make a decision on the application within 90 days after the day on which the application is received". The Applicant has yet to receive a decision from the Minister;

21. The Minister's failure to make a decision regarding the Applicant's Delisting Application is unreasonable and in breach of the law that governs her because:

    a. As of the date of this Application, it has been 153 days since the filing of the Delisting Application on June 20, 2023, which is significantly greater than the specified 90-day prescribed time limit under section 8 of the Russia Regulations;

    b. The Applicant is in no way responsible for the delay; and

    c. The Minister has not provided any justification for the delay in making a decision.

The Minister Has Failed to Observe Principles of Natural Justice and/or Procedural Fairness

22. The Minister has failed to observe principles of natural justice and/or procedural fairness by failing to provide the Applicant with the reasons or any evidentiary basis for its listing under the Russia Regulations;

23. In addition, the Minister has failed to observe the procedure she was required by law to observe by failing to make a decision within the time period set out in the Russia Regulations; and

24. The Minister, *inter alia*, failed to observe an adequate level of procedural fairness because she did not consider:

    a. The impact and importance of the decision to the Applicant, including the ongoing harm suffered by the Applicant; and

    b. The legitimate expectations of the Applicant that it would receive a decision on its delisting within 90 days of the application being received by the Minister, as per subsection 8(3) of the Russia Regulations.

The Minister Erred in Making the Decision to List the Applicant under the Russia Regulations and in Failing to Remove the Applicant from the Sanctions List Following the Receipt of the Delisting Application

25. The Minister, *inter alia*, erred in law because she used the incorrect legal standard to determine that there are reasonable grounds to believe that the Applicant falls within one of the prescribed categories under section 2 of the Russia Regulations. The standard that was used by the Minister did not:

    a. Have an objective basis for the recommendation;

    b. Rely on credible, compelling and up-to-date information; or

    c. Assess the credibility and reliability of the information used in the decision making process;

26. The Minister's decision to list the Applicant, and the delay, failure or refusal to make a decision on the Delisting Application is not authorized by the enabling legislation, does not meet the legislation's objectives, and/or is based on an erroneous finding of fact;

27. The Minister was improperly influenced by irrelevant considerations in making the decision to add the Applicant to the Sanctions List and in failing to make a decision on the Delisting Application, and was therefore not an unbiased decision maker, and acted in bad faith with a closed mind;

28. The Applicant recognizes that in light of the Russian military invasion of Ukraine, the Canadian Government and the international community have responded with targeted economic sanctions. It also understands that the Canadian Government identifies entities as appropriate targets for economic sanctions in fluid and quickly evolving circumstances, with a view to maximize pressure for modifying Russian governmental actions. This initial analysis can, however, be based upon a misunderstanding of the facts. As set out in detail in the Delisting Application, this is exactly what has happened to the Applicant when Canada mistakenly added it to the Sanctions List;

29. The Minister made an erroneous finding of fact that the Applicant is "complicit in Putin's war of choice", or a "security targe[t] linked to the Wagner Group and the aviation sector", and has maintained that erroneous finding of fact by failing to remove the Applicant even though the Delisting Application supports such a decision, because:

    a. The decision was made capriciously, perversely, or without regard to the evidence, including that presented in the context of the Delisting Application; and

    b. The Minister's decision was based on erroneous information, and the Minister failed to properly consider the evidence put before her in the Delisting Application;

30. The Minister acted contrary to law upon making her initial decision, and in failing to make a decision to remove the Applicant. The Minister is in breach of the Russia Regulations and of Canada's international law obligations regarding the use of countermeasures, as codified in the ARSIWA, which was adopted by the United Nations International Law Commission in 2001. The sanctions against the Applicant are not targeted against the State responsible for the internationally wrongful act and are not proportionate. Furthermore, they affect *jus cogens*

norms, including the due process rights of the Applicant. The economic countermeasures targeting the Applicant, as established by the Russia Regulations, are unlawful under international law insofar as they concern the Applicant; and

31. The Minister's initial decision to recommend that the Applicant be listed in Part 2, Schedule 1 of the Russia Regulations, and the Minister's failure to recommend that the Applicant be removed from that Schedule, have been made in bad faith, for an improper purpose, and based on irrelevant considerations.

The Minister's Failure to Make a decision as per the Statutory Timeline Necessitates the Relief Sought by the Applicant

32. No equitable bar to relief in the nature of *mandamus* exist in these circumstances;

33. This Court has jurisdiction to hear this application and to grant the relief sought under sections 18 and 18.1 of the *Federal Courts Act*;

34. In particular, this Court has the express jurisdiction, under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Minister to make a decision on the Applicant's application for delisting under subsection 8(3) of the Russia Regulations;

35. All of the preconditions for this Honourable Court to issue a writ of mandamus have been met;

36. Under section 8(3) of the Russia Regulations, "[t]he Minister must make a decision on the application within 90 days after the day on which the application is received". The Applicant has yet to receive a decision from the Minister;

37. The Minister's failure to make a decision regarding the Applicant's Delisting Application is unreasonable and in breach of the law that governs her because:

    a. As of the date of this Application, it has been 153 days since the filing of the Delisting Application on June 20, 2023, which is significantly greater than the specified 90-day prescribed time limit under section 8 of the Russia Regulations;

    b. The Applicant is in no way responsible for the delay; and

    c. The Minister has not provided any justification for the delay in making a decision;

38. The Applicant further relies on the *Federal Courts Rules* and such additional grounds as counsel may identify.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

a. Affidavits and attached documentary evidence, to be sworn;

b. Documentary evidence that the Applicant used or produced in support of the Delisting Application and subsequent correspondence pursuant to Rule 306 of the *Federal Courts Rules*; and

c. Such further and other Affidavits and materials as counsel may advise and this Honourable Court permit.

November 20, 2023

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