Court File No. T-473-24

FEDERAL COURT

BETWEEN:

HAMMAM FARAH, HIBA FARAH, AYMAN OWEIDA, X. Y., CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, and AL-HAQ - LAW IN THE SERVICE OF MAN

Applicants
(Appellants)

- and -

MINISTER OF FOREIGN AFFAIRS and ATTORNEY GENERAL OF CANADA

Respondents
(Respondents in Appeal)

- and -

PRATT & WHITNEY CANADA CORP, TTM TECHNOLOGIES TORONTO INC, GEOSPECTRUM TECHNOLOGIES INC, EXCELITAS CANADA INC, APOLLO MICROWAVES LTD

Respondents
(Respondents in Appeal)

REPLY MOTION RECORD OF THE APPLICANTS (APPELLANTS)

February 26, 2025

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TAB 1

Court File No. T-473-24

FEDERAL COURT

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Respondents
(Respondents in Appeal)

WRITTEN REPRESENTATIONS IN REPLY OF THE APPLICANTS (APPELLANTS)
(Motion to Appeal Order of Associate Judge)
Pursuant to Section 51 of the *Federal Court Rules*

SUBMISSIONS

A. "Interests of justice" is not a complete legal test

1. The Respondents argue that the opening line of the applicable test - which exhorts that "an amendment should be allowed at any stage" - is essentially superfluous, and it is sufficient that the Associate Judge mentioned the "interests of justice." On the contrary, the opening line is a central and indispensable element of the test, and in terms of providing actual substance plays a far greater role than "interests of justice."

> **Responding Motion Record of the Respondents Minister of Foreign Affairs and Attorney General of Canada, dated February 20, 2025 ["RMR"], Tab 1: Written Representations at paras 33-44**

2. "Interests of justice" as a phrase is virtually meaningless and is not a complete legal test on its own. This is because it is a notoriously "vague and time-worn phrase, which can serve as a text for any purpose." To operate as a functional legal test, it must be infused with meaning through at least some guidance to calibrate it to the specific legal context in which it is being used.

> ***Dudzic v. Law Society of Upper Canada (Ont. Div. Ct.)*, 1989 CanLII 4127 (ON SC)**

3. Without such elaboration or refinement, "interests of justice" is an amorphous and ill-defined standard that is functionally equivalent to absolute discretion. However, as the Ontario Court of Appeal has noted, "interests of justice" and similar "vague terms are not to be understood as radically indeterminate, such that they permit virtually any outcome. Vague terms must be interpreted in context." [Emphasis added]

> ***Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc.*, 2018 ONCA 999 at para 48**

4. Here, the only context is the opening line exhorting that, in principle, "an amendment should be allowed at any stage." For this reason, this framing guidance is centrally important to the entire test, as it is the lens through which the test must be applied. It cannot simply be ignored; it is there for a reason.

5. It is absolutely not the case, as the Respondents argue, that the test sets out a purely "discretionary" decision for the Associate Judge to merely weigh the advantages and disadvantages in a contextual vacuum, and impose his preference according to his personal impression of what the interests of justice are. In treating it as such, the Associate Judge respectfully erred.

RMR, Tab 1: Written Representations at paras 1, 37, 44

B. Precedent case law supports the Applicants' arguments

6. The Respondents take issue with some of the Applicants' submissions with respect to precedent case law.

7. Notably, the Respondents do not contest the Applicants' observation that this Court has never dismissed a motion to amend for reasons of delay at such an early stage in the proceeding and that to do so now would therefore be unprecedented.

8. However, the Respondents do attempt to distinguish the Applicants' supporting case law on the basis that they are all in the context of actions, rather than applications.

RMR, Tab 1: Written Representations at paras 1, 37, 44

9. If anything, delay is more significant in the context of an action, which features lengthy and involved discovery and trial processes. The Applicants' precedents show that even then, the permissive guiding principle of the test should prevail where possible.

C. The Applicants are challenging a single continuing course of conduct: the continuing export of military goods and technology to Israel

10. The Respondents argue that the Indirect Arms Exports Amendments should be dismissed because Rule 302 limits a judicial review application to a single order in respect of which relief is sought, unless a judge orders otherwise.

RMR, Tab 1: Written Representations at paras 61-65

11. At such an early stage in the proceeding, and given the lack of a proper evidentiary basis, such arguments are premature, and "the serious question of whether the proper approach is to view the underlying applications as directed to a continuous course of conduct is a question that ought to be determined by the application judge."

***David Suzuki Foundation v. Canada (Health)*, 2018 FC 380 ("*Suzuki*") at para 203**

12. In the alternative, it is well-established law that "more than one decision may be reviewed in a single application – as an exception to Rule 302 – where it is a continuing act … or a continuing cour[se] of conduct." The focus is on whether there is a "closely connected course of allegedly unlawful government action."

***Suzuki* at para 173, citing *Mahmood v. Canada (1998)*, 1998 CanLII 8450 (FC) ("*Mahmood*") and *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 ("*Truehope*"); *Fisher v Canada (Attorney General)*, 2013 FC 1108 ("*Fisher*") at para 79, cited in *Suzuki* para 173**

13. This case is highly similar to this Court's decision in *Suzuki*. There, the Respondents argued that the Applicants were in violation of Rule 302 by attempting to review 79 decisions with respect to the registration of various pesticides. The Court held that the Applicants were challenging the Respondents' "course of conduct" in registering pesticides on a conditional basis in the absence of necessary studies regarding the

environmental risks they posed. Similarly, the Applicants here are challenging the Respondents' course of conduct in allowing military exports to Israel despite the risks they pose of serious rights violations.

***Suzuki* at paras 7-8, 204**

14. The gravamen of this proceeding is the Respondents' single continuous course of conduct in allowing the transfer of military goods or technology to Israel. The issuance of individual permits to export military goods or technology to Israel directly, and the issuance of general permits and regulations that allow military exports to go to Israel indirectly through third states, despite clear evidence that this is happening, are part of a single continuing course of conduct of continuing to allow military exports to go to Israel. The fact that the government has implemented a complicated system of individual permits, general permits, and regulations to carry out this single course of conduct does not alter this.

15. Individual permits, general permits, and the *ECL* are all just different constituent elements of the same, single interwoven regime that regulates Canadian military exports under the same statute, the *EIPA*. They are designed to function together as complementary parts of a whole. As such they are more effectively reviewed together as part of this single regime, rather than individually on a piecemeal basis, in isolation from the context of the broader system they are components of.

16. The alternative would be to have separate parallel proceedings, one (or more) to review the legality of just military exports to Israel that go through the US, and the other to review all other military exports to Israel. Two or more such parallel proceedings would raise a multitude of common questions both factual and legal.

17. The reasoning of this Court in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)* is instructive on this point. As here, that case involved a challenge to multiple decisions that raised "a legal challenge based on the infringement of the same *Charter* rights." The Court allowed a judicial review of two decisions under one application on the basis that "both decisions originated from the same office, both had the same factual basis and the same allegations were made in respect of both proceedings." Campbell J. observed that "to require two separate judicial review applications to be made, given the similarities, would be a waste of time and effort."

Truehope at paras 18-19

18. Similarly, in *Whitehead*, the Court noted that when the similarities between decisions outweigh the differences, they should be reviewed in one application to avoid inefficiencies. There, the Court reviewed "four decisions of the same decision-maker, operating under the same statute, dealing with similar factual situations and seek[ing] similar forms of relief." Here, individual permits and general permits are issued by the same decision maker, the Respondent Minister. While the *ECL* is set by the Governor-in-Council (represented in this proceeding by the Respondent Attorney General), all exercise powers derived from the same statute, the *EIPA*.

Whitehead v Pelican Lake First Nation, 2009 FC 1270 ("_Whitehead_") at paras 51-52; _Truehope_ at paras 18-19

19. In avoiding inefficiencies, an important consideration is "whether the evidence and legal arguments relating to each attack have a connection." Here, the supporting fact evidence as to Israeli atrocities and the arguments on the *Charter* would be substantially identical for all the decisions challenged.

Truehope at para 9

20. In the present case, identical questions of fact - that would likely fall to be determined on substantially identical evidence - include:

    a. Whether Israel's military and government have committed and continue to commit potential human rights violations since October 9, 2023, such as:

        i. killing of and injuries to Palestinians in Gaza, including the targeting of Palestinian children and unarmed civilians;

        ii. forced displacement of the Palestinian population in Gaza;

        iii. arbitrary detention and inhumane treatment of Palestinians in Gaza;

        iv. forced displacement, extrajudicial killings, and arbitrary detentions of Palestinians living in the West Bank;

        v. sexual assault of Palestinian women in detention centres, including rape;

        vi. indiscriminate attacks on civilian infrastructure in Gaza, including housing, schools and universities, sanitation facilities, municipal services, telecommunications infrastructure, and commercial sites;

        vii. targeted attacks on hospitals, medical centres, ambulances, and medical convoys;

        viii. targeted attacks of "safe zones" and "safe routes" after being designated as such by Israel;

        ix. employment of starvation as a method of warfare, including the withholding of food, water, fuel, and electricity;

        x. attacks on humanitarian aid convoys;

        xi. attacks on Palestinians seeking essential aid supplies;

xii. killing of doctors and medical workers, journalists, and civil defence and aid workers;

xiii. acts of genocide against the Palestinian population in Gaza; and

xiv. incitement of violence against the Palestinian civilian population, including the incitement of the commission of genocide.

21. Similarly, both proceedings would raise a multitude of identical legal questions including:

a. Whether any single one of the above acts committed by Israel are a violation of international human rights law so as to engage the extraterritorial application of the *Charter*;

b. Whether the transfer of military goods or technology to Israel constitutes a sufficient causal connection to engage responsibility under the *Charter*;

c. Whether the decision(s)/permit(s)/regulation(s) authorizing the transfer of military goods or technology to Israel, on its/their face or in its/their impact, constitute(s) (a) deprivation(s) of life, liberty, or security of the person under section 7 of the *Charter*;

d. Whether any such deprivation is in accordance with the principles of fundamental justice;

e. Whether any violation of section 7 rights is subject to a limit prescribed by law;

f. Whether any such law has a pressing and substantial objective;

g. Whether the law is rationally connected to the pressing and substantial objective;

h. Whether the law minimally impairs the section 7 right;

i. Whether the law's salutary effect outweigh its deleterious effects;

j. Whether the decision(s)/permit(s)/regulation(s) authorizing the transfer of military goods or technology to Israel, on its/their face or in its/their impact, create a distinction based on race or national or ethnic origin;

k. Whether any such distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage;

l. Whether the decision(s)/permit(s)/regulation(s) authorizing the transfer of military goods or technology to Israel, on its/their face or in its/their impact, create a distinction based on sex;

m. Whether any such distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage;

n. Whether the decision(s)/permit(s)/regulation(s) authorizing the transfer of military goods or technology to Israel, on its/their face or in its/their impact, create a distinction based on age;

o. Whether any such distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage;

p. Whether the decision(s)/permit(s)/regulation(s) authorizing the transfer of military goods or technology to Israel, on its/their face or in its/their impact, create a distinction based on mental or physical disability;

q. Whether any such distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage;

r. Whether any violation of section 15 rights is subject to a limit prescribed by law;

s. Whether any such law has a pressing and substantial objective;

t. Whether the law is rationally connected to the pressing and substantial connective;

u. Whether the law minimally impairs the section 15 rights violated;

v. Whether the law's salutary effect outweigh its deleterious effects;

w. Whether the decision(s)/permit(s)/regulation(s) place(s) the Respondents in breach of Canada's obligations under the *Geneva Conventions Act*;

x. Whether the decision(s)/permit(s)/regulation(s) place(s) the Respondents in breach of Canada's international treaty obligations, including under the *Geneva Conventions*, the *Genocide Convention*, the *Rome Statute*, the *Arms Trade Treaty*, the *International Covenant on Civil and Political Rights*, and other human rights treaties;

y. Whether the decision(s)/permit(s)/regulation(s) place(s) the Respondents in breach of Canada's legal obligations under customary international law and *jus cogens*; and

z. Whether the Applicants are entitled to relief under section 24 of the *Charter*.

22. There is also no way here to effectively challenge the transfer of arms exports to Israel other than as a series of acts comprising a continuous course of conduct. As the Respondents have not yet produced the Certified Tribunal Record, the Applicants do not even have the information they would need to identify and challenge a single individual permit.

23. In the alternative, should this Court be of the opinion that the decisions challenged do not constitute a continuous course of conduct, the Applicants seek leave under Rule 302 to seek remedies with respect to multiple decisions in a single proceeding. This would be

consistent with Rule 3 of the *Rules*, which requires that the *Rules* be interpreted and applied "so as to secure the just, most expeditious and least expensive outcome of every proceeding."

***Federal Court Rules* (SOR/98-106), Rule 3**

24. As this Court observed in *Dakota Plains*, "it would be a waste of this Court's resources to require separate applications … one judicial review strikes me as the most expeditious and judicially economical way of dealing with the matter at hand, in keeping with Rule 3 of the *Rules*."

***Dakota Plains Wahpeton Oyate First Nation v Smoke*, 2022 FC 918 at para 25**

25. Requiring two parallel proceedings with so many overlapping factual and legal questions would not only be a waste of judicial resources, it would also pose a high risk of conflicting decisions.

D. The Indirect Arms Exports Amendments are not bound to fail

26. The Respondents argue that the Indirect Arms Exports Amendments are bound to fail.

RMR, Tab 1: Written Representations at paras 66-69

27. The basis for this argument is unclear. The Applicants have properly pleaded that transfers of military goods or technology from Canada to Israel "can and do occur indirectly through third countries, notably the United States," and that Israel has in turn committed serious violations of "international human rights law ("IHRL"), international humanitarian law ("IHL"), and… serious violence against women and children." The Applicants have also pleaded that the *Charter* "is engaged when the federal government makes decisions to allow the transfer of military goods or technology to other states," and "applies to actions of government authorities with extraterritorial reach."

28. The Respondents argue that there is no admissible evidence to establish the pleading that military exports from Canada to Israel "can and do occur indirectly through… the United States."

RMR, Tab 1: Written Representations at para 67

29. However, on a question of whether a claim has a reasonable prospect of success, facts pleaded are accepted as true. The Applicants will produce the admissible evidence required to establish their claim in due course in this proceeding.

30. The Respondents also argue that the Indirect Arms Exports Amendments have no reasonable prospect of success because the Minister exercises no legal authority over a good once it has been exported pursuant to *GEP No. 47* or subsection 2(a) of the *ECL*.

RMR, Tab 1: Written Representations at para 68

31. This is precisely why the Applicants argue that the Minister (and/or the Governor-in-Council as represented by the Respondent Attorney General) should exercise that legal authority prior to that good being exported from Canada.

32. The Respondent further argues that any "challenge to the US's export of goods is properly made in the US."

RMR, Tab 1: Written Representations at para 68

33. However it is not true that a state can exercise no authority over military exports once they are exported. For example, US federal regulations prohibit the reexport of US military exports from Canada to a destination other than the United States without prior US approval. Canada imposes no such reexport controls reciprocally.

Canadian Exemptions, 22 CFR § 126.5(d)

E. The *Charter* Amendments are not bound to fail

34. The Respondents do not appear to contest that Israel's conduct as pleaded by the Applicants - which includes acts of genocide, sexual assault, and targeting of children - is of a nature that is capable of constituting discrimination on the grounds pleaded. Rather, the Respondents appear to suggest that these are acts of Israel that do not engage Canada's responsibility under the *Charter*.

RMR, Tab 1: Written Representations at para 48

35. However, it is trite law that, as the Supreme Court has noted, legal responsibility "can attach equally to one who pulls the trigger and one who provides the gun." This standard applies as much to states as it does to individuals. The Applicants have amply pleaded that Canada is providing military exports to Israel, both directly and indirectly.

***Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 1 `**

36. The Supreme Court's decision in *Canada (Justice) v. Khadr* demonstrates that Canada's *Charter* obligations can be engaged by its role in a violation of international human rights law that is principally committed by another state. It is certainly more than arguable that Canada's responsibility under the *Charter* is engaged in the present circumstances.

***Canada (Justice) v. Khadr*, 2008 SCC 28 at para 2**

F. Other arguments

37. The Respondents inaccurately state that the Applicants do not challenge the Associate Judge's decision to exclude some of the newspaper articles attached to the affidavit of Henry Off.

RMR, Tab 1: Written Representations at para 67

38. As explained in their written submissions, the Applicants do challenge this decision as they were not introduced for the truth of their contents, but rather to demonstrate the timeliness of the Applicants' motion to amend, which was filed promptly and on the basis of reasonable, newly available information. The Respondents cite to the Applicants' Notice of Motion in this appeal, which does not mention this aspect of the Associate Judge's decision because the Associate Judge's Order itself does not either.

39. The Respondents argue that an Associate Judge's decisions attract a high degree of deference due to superior expertise arising from "day to day management of the proceeding."

RMR, Tab 1: Written Representations at para 1

40. However this proceeding is at a very early stage and has had very little case management. In the matters in issue here, an Associate Judge has no greater expertise than a Judge.

41. The Respondents observe that the Minister does not render any decisions regarding individual exports under a general permit.

RMR, Tab 1: Written Representations at para 14

42. However the Minister has the power under s. 10(1) of the EIPA to cancel or suspend such a permit. This is reflected in the Applicants' request for relief in the form of an order that the Respondents "cancel all such permits issued since October 9, 2023, or prior to that date but continuing in effect on or after October 9, 2023."

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: February 26, 2025

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SCHEDULE "A"

LIST OF AUTHORITIES

	Case Law	**Paragraphs**
1	*Dudzic v. Law Society of Upper Canada (Ont. Div. Ct.)*, 1989 CanLII 4127 (ON SC)	
2	*Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc.*, 2018 ONCA 999	48
3	*David Suzuki Foundation v. Canada (Health)*, 2018 FC 380	203, 173, 7-8, 204
4	*Mahmood v. Canada (1998)*, 1998 CanLII 8450 (FC)	12
5	*Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658	18-19, 9
6	*Fisher v Canada (Attorney General)*, 2013 FC 1108	79, 12
7	*Whitehead v Pelican Lake First Nation*, 2009 FC 1270	51-52
8	*Dakota Plains Wahpeton Oyate First Nation v Smoke*, 2022 FC 918	25
9	*Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40	1
10	*Canada (Justice) v. Khadr*, 2008 SCC 28	2

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

US Law

Canadian exemptions, 22 CFR § 126.5

…

(d) Reexports/retransfer. Reexport/retransfer in Canada to another end-user or end-use or from Canada to another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end-user the request for reexport/retransfer may be made directly to the Directorate of Defense Trade Controls. All requests must include the information in § 123.9(c) of this subchapter. Reexport/retransfer approval is acquired by:

(1) If the reexport/retransfer being requested could be made pursuant to this section (i.e., a retransfer within Canada to another eligible Canadian recipient under this section) if exported directly from the U.S., upon receipt by the U.S. company of a request by a Canadian end user, the original U.S. exporter is authorized to grant on behalf of the U.S. Government by confirming in writing to the Canadian requester that the reexport/retransfer is authorized subject to the conditions of this section; or

(2) If the reexport/retransfer is to an end use or end user that, if directly exported from the U.S. requires a license, retransfer must be handled in accordance with § 123.9 of this subchapter.

Federal Courts Rules **(SOR/98-106)**

Rule 3

General principle
3 These Rules shall be interpreted and applied
(a) so as to secure the just, most expeditious and least expensive outcome of every proceeding; and
(b) with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.

Court File No.: T-473-24

HAMMAM FARAH, HIBA FARAH,
AYMAN OWEIDA, X. Y., CLAIHR, AL-HAQ

- and -

MINISTER OF FOREIGN AFFAIRS and AGC, and
PRATT & WHITNEY, TTM, GEOSPECTRUM,
EXCELITAS, and APOLLO MICROWAVES

Applicants (Appellants)

Respondents (Respondents on Appeal)

FEDERAL COURT
Proceeding commenced at Toronto

WRITTEN REPRESENTATIONS IN REPLY
OF THE APPLICANTS (APPELLANTS)
(Motion to Appeal Order of Associate Judge)
Pursuant to Section 51 of the *Federal Court Rules*

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Court File No.: T-473-24

HAMMAM FARAH, HIBA FARAH, AYMAN OWEIDA, X. Y., CLAIHR, AL-HAQ	- and -	MINISTER OF FOREIGN AFFAIRS and AGC, and PRATT & WHITNEY, TTM, GEOSPECTRUM, EXCELITAS, and APOLLO MICROWAVES
Applicants (Appellants)		Respondents (Respondents on Appeal)

FEDERAL COURT
Proceeding commenced at Toronto

REPLY MOTION RECORD
OF THE APPLICANTS (APPELLANTS)

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