

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
(Moving Party)**

- and -

**MINISTER OF FOREIGN AFFAIRS
and ATTORNEY GENERAL OF CANADA**

**Respondents
(Responding Party)**

**MOTION RECORD
OF THE APPLICANTS (MOVING PARTY)**

September 3, 2024

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TAB 1

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**WRITTEN REPRESENTATIONS IN REPLY
OF THE APPLICANTS (MOVING PARTY)**

1. On August 21, 2024 the Respondents filed Written Representations in respect of the Applicants' Motion to file an amended Notice of Application.
2. Pursuant to [Rule 369\(3\)](#) of the *Federal Court Rules* and the written directions of Associate Judge Cotter, respectively dated July 31 and August 27, 2024, the Applicants file these Written Representations in Reply.

A Note on the Proposed Amended Notice of Application

3. The Applicants have added five (5) corporate Respondents to their proposed Amended Notice of Application.
4. The Applicants recognize that some references to Respondents throughout the pleading may only be applicable to the government Respondents (i.e., the Minister of Foreign Affairs and the Attorney General of Canada) and may not be applicable to the corporate Respondents.

Section 15 Claims

5. The Respondents argue that the Applicants have not set out a basis for proposed section 15 *Charter* violations.

Written Representations of the Respondents at paras 35-36, Motion Record of the Attorney General of Canada [“AGC MR”], Tab 2, p 52

6. On the contrary, the original Notice of Application filed on March 5, 2024 is replete with allegations of fact that are on their face easily capable of supporting a claim under section 15 of the *Canadian Charter of Rights and Freedoms*, under every ground the Applicants have listed in the proposed Amended Notice of Application.

Motion Record of the Applicants [“MR”], Tab 2: Affidavit of Henry Off, affirmed August 5, 2024, Exhibit “Q”: Proposed Amended Notice of Application

7. A few examples - from paragraph 12 alone - include:
 - “...(an estimated 70 percent of dead and wounded) are said to be women and children.”

- “...destruction or damage to approximately 77% of health facilities”
- “Targeted attacks on hospitals, medical centres, ambulances, and medical convoys”
- “Targeting of Palestinian children (including reports of the deliberate killing of children by IDF snipers)”
- “Killing (targeted and/or indiscriminate) of doctors and medical workers”
- “Sexual assault of Palestinian women in detention centres, including rape”
- “...inciting the commission of genocide against the Palestinian people”

The Evidentiary Standard on This Motion

8. The Respondents argue that there is no admissible evidence of arms transfers from Canada to Israel through the United States.

Written Representations of the Respondents at para 43, AGC MR, Tab 2, p 54

9. This objection is puzzling, as this proceeding has yet to reach the evidentiary stage.
10. If, after the evidentiary record for this Application is complete, the Respondents wish to argue that there is insufficient evidence to support the Applicants’ claims, they may do so. However, this is not the stage to do that. Effectively, the Respondents are attempting to argue the merits on a pleadings motion.
11. At best, this question could be the subject of a motion to strike. But even on a motion to strike, the Applicants’ pleadings must be accepted as true. Here, 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.”

Continuous Course of Conduct

12. The Respondents argue that the Applicants’ proposed amendments are in breach of [Rule 302](#), as the decisions and regulations challenged do not constitute a continuous course of conduct.

Written Representations of the Respondents at paras 39, 44-45, AGC MR, Tab 2, pp 53, 54-55

13. This argument has nothing to do with the governing test for whether leave to amend should be granted. The Applicants’ position is that such arguments are premature, and that “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](#)**

14. In any event, 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](#) at [para 79](#), cited in *Suzuki* [para 173](#)**

15. Here, the Applicants are challenging a single continuous course of conduct by the Respondents.
16. 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 fundamental nature of this course of conduct is the same whether the goods or technology are transferred to Israel directly, or routed through a third country like the US. The fact that the government has implemented a convoluted system of individual permits and regulations to carry out this single course of conduct does not alter this.
17. The Applicants' proposed amendments do not expand, but rather clarify the scope of this proceeding, allowing the Respondents to better know the case they have to meet. Prior documents filed by the Applicants in this proceeding have consistently made explicit reference to relief with respect to indirect arms transfers to Israel:
 - Letter of January 28, 2024: The initial step leading to the commencement of this proceeding was the January 28, 2024 letter from the Applicants CLAIHR, Al-Haq - Law in the Service of Man, Ayman Oweida, and X.Y. to the Respondent Minister of Foreign Affairs asking the Minister to confirm that she had taken steps to stop the exports of military goods and technology from Canada to Israel. One of these steps was to "immediately prevent all transfer of military goods or technology that are assembled in a third state before being transferred to Israel as an end-user until such time as Israel ceases to violate international law as described in the attached

Schedule.” It is the Minister’s course of conduct in deciding not to take any of the steps set out in the letter that triggered this proceeding.

**MR, Tab 2: Affidavit of Henry Off, affirmed August 5, 2024,
Exhibit “A”: Letter to Minister Joly, dated January 28, 2024, p 28**

- Original Notice of Application: The original Notice of Application similarly specifies that it targets both direct and indirect transfers of military goods or technology to Israel. GEP47, as a permit that, as has now been confirmed, is being used to “export military goods or technology... ultimately destined for Israel,” clearly falls within the scope of the Notice of Application as originally worded.

Notice of Application, dated March 5, 2024

18. The Respondents rely on the decision in *Servier*. That decision is not helpful to them, as it is distinguishable.

**Written Representations of the Respondents at para 51, AGC MR,
Tab 2, pp 56-57; *Servier Canada Inc. v Canada (Health)*, [2007 FC 196](#) (“*Servier*”)**

19. In *Servier*, the applicant attempted to challenge two decisions made under two different statutory regimes, with two different purposes. One decision was made pursuant to regulations under the *Patent Act*, and was for the purpose of verifying the product’s compliance with intellectual property laws, in order to protect patent owners. The other decision was made pursuant to regulations under the *Food and Drugs Act* and was for the purpose of verifying the product’s safety and effectiveness, in order to protect consumers.

20. Here, in contrast, all decisions challenged by the Applicants fall under the same statutory regime of the *Export and Import Permits Act* and regulations made thereunder. All raise the same question of whether the Respondents should take steps to stop the export of arms to Israel given the current circumstances.
21. Moreover, in this case, the decisions for which the Applicants seek judicial review originate from the same department, they have the same or similar factual bases, and the Applicants raise the same allegations with respect to all decisions.
22. In *Whitehead*, the Applicants successfully requested relief for “four decisions of the same decision-maker, operating under the same statute, dealing with similar factual situations and [sought] similar forms of relief”. This Court in *Whitehead* helpfully distinguished it from *Servier* on the basis that the Applicants in *Servier* applied for judicial review of two decisions made under different statutory regimes, relating to different factual situations and sought two different types of relief. The Court reasoned that *Whitehead* was analogous to *Truehope* because in *Truehope* 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.”

***Whitehead v Pelican Lake First Nation*, [2009 FC 1270](#) (“*Whitehead*”) at [paras 51-52](#), citing *Servier* at [para 18](#) and *Truehope* at [para 18](#)**

23. The decisions challenged by the Applicants here are therefore more akin to acts “of a continuing nature, making it difficult for the applicant to pinpoint a single decision from which relief could be sought by this Court.”

***Mahmood* at [para 10](#); cited in *Truehope* at [para 6](#)**

24. Specifically, there is 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 Applicants have done in this proceeding. 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.
25. This case is more similar to this Court’s decision in *Suzuki*. There, the Respondents had argued on a motion to strike that the Applicants were in violation of [Rule 302](#) by attempting to review 79 discrete decisions to register or amend the registration of various pesticides. The Court upheld the Prothonotary’s decision that the Applicants were not seeking to review “discrete” registration decisions but, rather, 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.

***Suzuki* at paras [7-8](#), [204](#)**

26. The reasoning of this Court in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)* is also instructive. As here, that case involved a challenge to multiple decisions that raised “a legal challenge based on the infringement of the same *Charter* rights.” As such, Campbell J. reasoned, “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](#)**

27. This Court has assessed that, where the similarities between the decisions outweigh their differences, the decisions should be reviewed in one application to avoid inefficiencies in pursuing more than one judicial review.

***Whitehead*, cited in *Suzuki* at [paras 62, 187, 200](#); *Truehope* at [paras 18-19](#)**

28. In avoiding inefficiencies, an important consideration is “whether the evidence and legal arguments relating to each attack have a connection.”

***Truehope* at [para 9](#)**

29. Here, the supporting fact evidence as to Israeli atrocities would be substantially identical for all the decisions challenged. The fundamental overarching legal question falling to be decided with respect to all decisions, meanwhile, would be whether the Respondents have a resulting obligation – be it under the *Charter* or the *Export and Import Permits Act*, [RSC, 1985, c. E-19](#) (“*EIPA*”) – to take steps to stop the direct or indirect export of arms to Israel in light of this evidence.

30. Conducting multiple proceedings to duplicate this exact process would be vastly inefficient. For example, it is difficult to imagine a situation where one of General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States, [SOR/2019-230](#) (“[GEP47](#)”) and the Export Control List, [SOR/89-202](#) (“[ECL](#)”) [s. 2\(a\)](#) violates the *Charter*, and the other does not.

31. Notably, if this were an action, the Applicants would be able to amend as of right pursuant to [Rule 200](#).

32. 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), [Rules 3, 200](#)

33. Ultimately, the fundamental difference between the parties’ positions reduces to judicial efficiency. The Respondents argue that “These are discrete matters for which the Court, in reviewing them, would require separate records, evidence, and submissions. They are more appropriately challenged in separate proceedings.”

Written Representations of the Respondents at para 52, AGC MR, Tab 2, p 57

34. Conversely, the Applicants’ position is that, 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](#)**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: September 3, 2024

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SCHEDULE “A”

LIST OF AUTHORITIES

	Case Law	Paragraphs
1	<i>David Suzuki Foundation v. Canada (Health)</i> , 2018 FC 380	7-8, 62, 203, 173, 187, 200, 204
2	<i>Mahmood v. Canada (1998)</i> , 1998 CanLII 8450 (FC)	10
3	<i>Truehope Nutritional Support Ltd v Canada (Attorney General)</i> , 2004 FC 658	6, 9, 16, 18-19
4	<i>Fisher v Canada (Attorney General)</i> , 2013 FC 1108	79
5	<i>Servier Canada Inc. v Canada (Health)</i> , 2007 FC 196	18
6	<i>Whitehead v Pelican Lake First Nation</i> , 2009 FC 1270	51-52
7	<i>Dakota Plains Wahpeton Oyate First Nation v Smoke</i> , 2022 FC 918	25

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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.

Rule 200

Amendment as of right

200 Notwithstanding [rules 75](#) and [76](#), a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties.

Rule 302

Limited to single order

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

Rule 369(3)

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent’s record under subsection (2).

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