

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**

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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)

**APPEAL MOTION RECORD OF THE APPLICANTS (APPELLANTS)
VOLUME 2 OF 2**

February 3, 2025

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Court File Number: T-473-24

FEDERAL COURT

B E T W E E N :

**HAMMAM FARAH, HIBA FARAH, AYMAN OWEIDA, X.Y., CANADIAN
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AND AL-HAQ - LAW
IN THE SERVICE OF MANIREBIRD OCEAN LTD**

Applicants

and

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

Respondents

RESPONDING MOTION RECORD OF THE RESPONDENTS

August 21, 2024

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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

-and-

MINISTER OF FOREIGN AFFAIRS and
ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF JUDY KORECKY

I, Judy Korecky of the City of Ottawa, in the Province of Ontario, MAKE OATH AND
SAY AS FOLLOWS:

1. I am a Deputy Director in the Export Controls Policy Division of Global Affairs Canada (GAC). I have been working in this position since 2005, and have been working with GAC since 2000. I obtained an LL.B degree in 1997 and an LL.L. degree in 1998. Amongst my responsibilities, I have been involved in amendments to the *Export and Import Permits Act* ("EIPA"), including amendments respecting the Arms Trade Treaty, as well as the creation of *General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States, SOR/2019-230* ("GEP No. 47"). As such, I have personal knowledge of the matters deposed in this affidavit.

A. General Requirements for Exporting Goods from Canada

2. Pursuant to the EIPA, export permits may be issued to any resident of Canada to export goods and technology included under the *Export Control List* ("ECL"), subject to certain terms and conditions.

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3. The ECL identifies specific goods and technology that are controlled for export from Canada to other countries. The ECL is divided into the following nine “Groups” of good and technologies:

- Group 1: Dual-Use List
- Group 2: Munitions List
- Group 3: Nuclear Non-Proliferation List
- Group 4: Nuclear-Related Dual-Use List
- Group 5: Miscellaneous Goods and Technology
- Group 6: Missile Technology Control Regime List
- Group 7: Chemical and Biological Weapons Non-Proliferation List
- Group 8: Repealed – January 2006 (historical section on the Export Control List)
- Group 9: Arms Trade Treaty

4. Each entry on the ECL under its respective “Group” is known as an “item” and each item is numbered. Items are further divided into sub-items. A list of the goods and technologies controlled on the ECL can be found in “A Guide to Canada’s Export Control List”, which is attached as **Exhibit “A”** to this Affidavit.

B. Individual Export Permits

5. Pursuant to section 7(1) of the EIPA, the Minister of Foreign Affairs (“Minister”) may issue to any resident of Canada a permit to export or transfer goods or technology included in the ECL or to a country included in an ACL. An individual export permit allows exports of goods and technologies to a specified consignee in a single country. A consignee is the foreign party who will be importing the goods or technology from the Canadian exporter into a foreign country. The export permit sets out, among other items, the quantity, technical description, nature of the goods or technology to be exported, as well as the final destination country and consignee.

6. The Export Controls Operations Division of GAC is responsible for issuing, suspending, cancelling, and reinstating export permits on behalf of the Minister. An application must be submitted to the Export Controls Operations Division of GAC in order

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to obtain an individual permit. That application must include, but is not limited to, the following information:

- The name and contact information of the exporter;
- The name and contact information for the consignee;
- The country in which the goods or technology are to be used or the country of final destination;
- The country of origin, the corresponding Item Number in the ECL, and the quantity and unit value, of the goods and technology; and,
- An end-use certificate, end-use statement, or other information to establish that the export of the goods or technology is consistent with the purpose for its control on the ECL.

7. Each application is reviewed on a case-by-case basis for consistency with the EIPA. Particular attention is given to the nature of the item, the country of destination, the purpose and intended use, the record and behaviour of the stated consignee and/or end-user, as well as the risk of diversion.

C. General Export Permits

8. General Export Permits (GEPs) are issued pursuant to subsection 7(1.1) of the EIPA, which authorizes the Minister of Foreign Affairs to issue generally to all residents of Canada a permit to export specified goods or technology subject to the terms and conditions described in the permit.

9. A GEP allows for the export or transfer of certain specified items from Canada to certain eligible destinations by means of a simplified procedure, as opposed to applying for an individual export permit. An exporter must self-assess their export needs against the provisions of a particular GEP to determine if it meets the conditions of the GEP. The exporter need only cite the relevant GEP authority on their export declaration and meet any conditions set out in the GEP, such as reporting obligations. Currently, the Minister has issued 13 GEPs pursuant to section 7(1.1) of the EIPA, for various goods and technology destined to various destinations.

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D. Military Goods and Technology Exports to the United States

10. In this motion, the Applicants seek leave to amend their Notice of Application to include an Order declaring section 2(a) of the ECL to be invalid and unlawful, and an Order quashing GEP No. 47.

11. Due to Canada's close and long-standing trade relationships with the United States, Canada and the United States have reciprocal arrangements to ensure permit-free and licence-free movement of most military goods and technology, as well as other types of goods and technologies, between these two countries.

12. This is reflected in section 2(a) of the ECL, which states:

2 The following goods and technology, when intended for export to the destinations specified, are subject to export control for the purposes set out in section 3 of the *Export and Import Permits Act*

(a) goods and technology referred to in Groups 1, 2, 6, and 7 of the schedule, except for goods and technology set out in items 2-1, 2-2.a., 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-2, 7-3, 7-12 and 7-13 of the Guide, that are intended for export to any destination other than the United States... (emphasis added)

13. Despite section 2(a) of the ECL, pursuant to section 2(b) of the ECL certain types of military goods and technology require export permits if they are destined to a consignee in the United States, specifically goods and technology referred to in Groups 3, 4 and 9 of the schedule and goods and technology set out in items 2-1, 2-2.a., 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-3 and 7-13 of the Guide.

E. General Export Permit no. 47 (GEP No. 47)

14. On September 1, 2019, GEP No. 47 issued by the Minister came into effect. GEP No. 47 allows for the following military goods and technology listed under section 2(b) of the ECL to be exported to the United States pursuant to this general permit:

a) Group 2, Items 2-1: Smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less and accessories, and specially designed components therefor.

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- b) Group 2, Items 2-3: Ammunition and fuse setting devices, and specially designed components therefor.
- c) Any goods referred to in Group 9 – “Arms Trade Treaty”.

15. The purpose of GEP No. 47 is to enhance domestic transparency and Canada’s fulfilment of its reporting obligations under the Arms Trade Treaty (“ATT”). The ATT established common standards for international trade in a broad range of conventional arms, with the ultimate goal of ensuring that states have effective national systems to review and control the arms trade. A copy of the Regulatory Impact Analysis Statement (“RIAS”) for GEP No. 47 is attached as **Exhibit “B”** to this Affidavit.

16. GEP No. 47 applies to the export of full system conventional arms and those small arms and light weapons (as opposed to parts and components) that are captured by the ATT and United Nations Conventional Arms Register. The making of GEP No. 47 reflected a balancing of the policy objective of increased transparency over the export of ATT items to the United States with the requirement for ease of movement of controlled items between our two countries given the integration of Canada’s defence production sector with that of the United States.

17. GEP No. 47 does not authorize the export of goods to a country other than the United States.

18. Group 2 of the ECL is comprised of items and components of items that are designed or modified for military purposes. These items have been added to the ECL pursuant to Canada complying with its obligations under the “Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technology” (the “Wassenaar Arrangement”). The Wassenaar Arrangement was established in 1996. Its purpose is to contribute to regional and international stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies. There are 22 categories of items under Group 2, which can be found under “A Guide to Canada’s Export Control List,” attached as Exhibit “A” to this Affidavit.

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19. Group 9 was added to the ECL on June 17, 2019, pursuant to the *Order Amending the Export Control List (Arms Trade Treaty)*, SOR/2019-223. This amendment was part of a broader series of amendments to Canada's export regime to enable Canada's accession to the *Arms Trade Treaty* ("ATT"). The ATT was entered into force in 2014 with the objective of regulating international trade of conventional weapons for the purpose of contributing to international and regional peace, security and stability; reducing human suffering; and promoting co-operation, transparency, and responsible action in the international trade in conventional arms by and among states.

20. The purpose of Group 9 is to enhance transparency and facilitate Canada's international commitments on reporting with respect to ATT items to the United States. Group 9 includes full-system conventional arms in the following categories:

- Items 9-1: Battle tanks that are tracked or wheeled self-propelled armoured fighting vehicles.
- Items 9-2: Armoured combat vehicles 339.
- Items 9-3: Large-calibre artillery systems.
- Items 9-4: Military aircraft and related systems.
- Items 9-5: Military helicopters and related systems.
- Items 9-6: Vessels and submarines that are armed and equipped for military use.
- Items 9-7: Missiles and missile launchers.
- Items 9-8: Small arms.
- Items 9-9: Light weapons.

21. Exporters must notify the Export Controls Operations Division in writing of their intent to use the GEP No. 47 prior to exporting goods pursuant to this GEP. Further, within 30 days after each six-month period ending on June 30 and December 31 of a calendar year, the exporter must provide a report to that Division stating whether they exported a good under the GEP No. 47 during that period and, if a good was reported, they must provide the name and address of each consignee, a description of the good, the relevant Group of the ECL under which the good is captured, and the quantity and value of the good. The exporter must retain the corresponding records for each export pursuant to GEP No. 47 for a period of six years after the year in which the good is exported.

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22. Individual export permits are required for export to the United States of the remaining goods and technology listed under section 2(b) of the ECL. With respect to military goods and technology, these include:

- Group 2, Items 2-2.a.: Guns, howitzers, cannon, mortars, anti-tank weapons, projectile launchers, military flame throwers, rifles, recoilless rifles and smooth-bore weapons.
- Group 2, Items 2-2.b.: Projectors, specially designed or modified for military use, as follows: smoke canister projectors; gas canister projectors; and pyrotechnics projectors.
- Group 2, Items 2-4.a.: Bombs, torpedos, grenades, smoke canisters, rockets, mines, missiles, depth charges, demolition-charges, demolition-devices, demolition-kits, "pyrotechnic" devices, cartridges, submunitions therefor and simulators (i.e. equipment simulating the characteristics of any of these items), specially designed for military use.

23. All items exported from Canada to the United States are thereafter subject to American export controls, regardless of whether a Canadian export permit was required. The Export Controls Division of GAC has no authority over any subsequent export of those goods and technology.

SWORN BEFORE ME at the City of Geneva,

Switzerland, the  of August, 2024

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X 
Judy Korecky

X 
Eric Marin



Conseiller (Gestion) et Consul | Counsellor (Management) and Consul
Mission permanente du Canada | Permanent Mission of Canada

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**This is Exhibit A referred to in
the Affidavit of
JUDY KORECKY
SWORN before me by affiant
on this 20th day of
AUGUST, 2024**

**Les présentes constituent la
pièce A dont il est question
dans l'affidavit de
JUDY KORECKY
assermenté devant moi ce
20 jour de août 2024**


Eric Marin
Conseiller et Consul





Government
of Canada

Gouvernement
du Canada

[Canada.ca](#) › [International trade and investment](#) › [Export and import controls](#)

› [A Guide to Canada's Export Control List \(ECL\)](#)

A Guide to Canada's Export Control List (ECL)

A Guide to Canada's Export Control List identifies the items included on the *Export Control List* that are controlled for export in accordance with section 3 of the *Export and Import Permits Act* and for which an export permit is required.

Date of entry into force	Last day in force	Backgrounder	Non-official HTML version
May 2, 2024		Backgrounder – January 2024	A Guide to Canada's Export Control List – January 2024
July 1, 2023	May 1, 2024	Backgrounder – January 2023	A Guide to Canada's Export Control List – January 2023
December 21, 2022	June 30, 2023	Backgrounder – December 2021	A Guide to Canada's Export Control List – December 2021
July 24, 2021	December 20, 2022		A Guide to Canada's Export Control List – December 2020

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A Guide to Canada's Export Control List (ECL)

Date of entry into force	Last day in force	Backgrounder	Non-official HTML version
May 1, 2020	July 23, 2021	<u>Backgrounder: December 2018</u>	<u>A Guide to Canada's Export Control List - December 2018</u>
May 17, 2019	April 30, 2020	<u>Backgrounder: December 2016</u>	<u>A Guide to Canada's Export Control List - December 2016</u>
August 11, 2017	May 16, 2019		<u>A Guide to Canada's Export Control List - December 2015</u>

Date Modified:

2024-06-04

**This is Exhibit B referred to in
the Affidavit of
JUDY KORECKY
SWORN before me by affiant
on this 20th day of
AUGUST, 2024**

**Les présentes constituent la
pièce B dont il est question
dans l'affidavit de
JUDY KORECKY
assermenté devant moi ce
20 jour de août 2024**



**Eric Marin
Conseiller et Consul**





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General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States: SOR/2019-230

Canada Gazette, Part II, Volume 153, Number 13

Registration

SOR/2019-230 June 17, 2019

EXPORT AND IMPORT PERMITS ACT

The Minister of Foreign Affairs, pursuant to subsection 7(1.1) ^a of the *Export and Import Permits Act* ^b, issues the annexed *General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States*.

Ottawa, June 17, 2019

Chrystia Freeland

Minister of Foreign Affairs

General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States

Interpretation

Definitions

1 The following definitions apply in this Permit.

Act means the *Export and Import Permits Act*. (*Loi sur les licences d'exportation et d'importation*)

Export Controls Operations Division means the Export Controls Operations Division of the Department of Foreign Affairs, Trade and Development. (*Direction des opérations des contrôles à l'exportation*)

Guide has the same meaning as in section 1 of the *Export Control List*. (*Guide*)

General

Authorization

2 Subject to sections 3 to 6, any resident of Canada may export any of the following goods from Canada to the United States:

- (a) any good referred to in item 2-1 of the Guide;
- (b) any good referred to in item 2-3 of the Guide;

(c) any good referred to in Group 9 of the schedule to the *Export Control List*.

Unauthorized goods

3 This Permit does not authorize

- (a) the export of goods to a country other than the United States;
- (b) the export of *prohibited ammunition, prohibited devices, prohibited firearms or prohibited weapons*, as defined in subsection 84(1) of the *Criminal Code*; and
- (c) the export of any good referred to in item 2-2.a. or 2-4.a. of the Guide.

Conditions

Firearms Act

4 A resident of Canada who exports a firearm under this Permit must

- (a) hold a licence under the *Firearms Act* issued by the chief firearms officer of the province in which they reside; and
- (b) if the firearm is a restricted firearm, hold a registration certificate for it issued under that Act.

Information

5 (1) A resident of Canada who exports under this Permit a good referred to in Group 9 of the schedule to the *Export Control List* must provide in writing to the Export Controls Operations Division

(a) before exporting under this Permit in a calendar year, their name, address, telephone number, email address and any facsimile number;

(b) within 30 days after each six-month period ending on June 30 and December 31 of the calendar year for which the information in paragraph (a) was provided, a report stating

(i) whether they exported a good under this Permit during that period, and

(ii) if a good was exported,

(A) the name and address of each consignee,

(B) a description of the good, the provision of the schedule to the *Export Control List* that refers to it and the item number assigned to it by the Guide, and

(C) the quantity and value in Canadian dollars of the good; and

(c) within 15 days after the day on which the resident of Canada receives a request from the Export Controls Operations Division, any information referred to in paragraph

(b) that is requested by it in respect of exports during the period specified in the request.

Exception

(2) Despite paragraph (1)(b), a resident of Canada who provides the information referred to in paragraph (1)(a) during the six month period ending on December 31 is not obliged to provide a report for the six-month period ending on June 30 during the same calendar year.

Temporary export

(3) Subsection (1) does not apply to the export of a good if the good is to be returned to Canada and to the resident of Canada who exported it within two years after the day of export.

Good not returned within two years

(4) If a good referred to in subsection (3) is not returned to the resident of Canada within two years after the day of export, the resident of Canada must provide in writing to the Export Controls Operations Division the information referred to in subsection (1) no later than 30 days after the day that is two years after the day of export.

Records

6 A resident of Canada who exports a good under this Permit must retain, for a period of six years after the year in which the good is exported, the following records:

- (a) the date on which the good was exported;
- (b) the name and address of each consignee;
- (c) the quantity and value in Canadian dollars of the exported good; and
- (d) a description of the exported good, the provision of the schedule to the *Export Control List* that refers to it and the item number assigned to it by the Guide.

Coming into Force

S.C. 2018, c. 26

7 This Permit comes into force on the day on which section 6 of *An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)*, chapter 26 of the Statutes of Canada, 2018, comes into force, but if it is registered after that day, it comes into force on the day on which it is registered.

REGULATORY IMPACT ANALYSIS STATEMENT

(This statement is not part of the Permit.)

Issues

The Government of Canada wishes to accede to the Arms Trade Treaty (ATT or the Treaty).

The ATT establishes common standards for international trade in a broad range of conventional arms with the goal of ensuring that states have effective national systems to review and control the arms trade. Accession to the ATT gives Canada the opportunity to further strengthen its export control regime. Article 13 of the ATT requires that States Parties report on the export of eight categories of full-system conventional arms listed in article 2(1): battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Canada hitherto controlled the export of all ATT-listed items to all destinations other than the United States and only required permits for the export of certain ATT items to the United States (e.g. prohibited firearms and missiles).

On December 13, 2018, *An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)* [the Act] received royal assent. However, in line with concerns raised by stakeholders during parliamentary debate on the Act, and with a view to increasing transparency and ensuring full compliance with the ATT, the Government of Canada is

implementing regulatory changes that allow it to collect data to report on exports of ATT items to the United States without requiring individual permits.

Through a separate regulatory package submitted to the Governor in Council (see the Regulatory Impact Analysis Statement for the *Brokering Control List*) an amendment to the *Export Control List* is being implemented to require a permit for the export of ATT-listed items to the United States. This General Export Permit (GEP) facilitates that process and reduces the administrative burden on Canadian companies and the impact on the Canadian economy, while ensuring reporting on the export of ATT items to the United States.

Background

The *Export and Import Permits Act* (henceforth referred to as “the EIPA”) authorizes the Governor in Council to establish a list of goods and technology called the *Export Control List*, which identifies goods and technology that are controlled for export or transfer from Canada to other countries. Most items on the *Export Control List* derive from Canada’s commitments to like-minded countries that participate in multilateral export control regimes or from Canada’s obligations as a signatory to bilateral or multilateral international agreements (Wassenaar

Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group, Australia Group, and the Arms Trade Treaty, amongst others).

The principal objective of Canada's export control regime is to ensure that exports of goods and technology included on the *Export Control List* are in accordance with Canada's foreign and defence policies. Unless otherwise stated, exports or transfers of goods and technology included on the *Export Control List* require a permit issued under the authority of the Minister of Foreign Affairs in order to be lawfully exported or transferred from Canada.

Subsection 7(1.1) of the EIPA authorizes the Minister of Foreign Affairs to issue to all residents of Canada a general permit to export or transfer goods or technology included in the *Export Control List* subject to such terms and conditions as described in the permit. These general export permits allow the export or transfer of certain specified items from Canada to certain eligible destinations by means of a simplified procedure as opposed to the more burdensome and lengthier process of applying for an individual export permit. When making use of a general export permit, exporters must abide by all associated terms and conditions, including any pre-notification or reporting requirements.

During the debates surrounding Canada's accession to the ATT and recent public consultations on "Global Affairs Canada's proposed strengthening of Canada's export controls regime" (December 13, 2018, to February 11, 2019), civil society and certain academic stakeholders called for increased transparency over the export of ATT items to the United States. Industry stakeholders indicated that the permit-free movement of most controlled items between Canada and the United States is vital for the preservation of the Canadian defence industry. Parliamentarians recognized both points of view and the Government of Canada committed to explore options to increase transparency that would not involve a requirement for new individual permits for exports to the United States.

Objective

The objective of *General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States* (GEP-47 or *General Export Permit No. 47*) is to provide a streamlined permitting process for the export of most ATT items to the United States. The reporting requirements in GEP-47 enable the Government of Canada to fill a significant reporting gap and increase transparency by reporting on the permanent export of ATT items to the United States.

Description

Canada currently controls all ATT-listed items for export to all destinations, other than the United States. Controls on the export of ATT items to the United States are currently limited to items such as prohibited firearms and certain missiles. While all ATT items are captured in different parts of Group 2 of the *Export Control List*, a new Group 9 (Arms Trade Treaty) of the *Export Control List* is being established through a separate regulatory package submitted to the Governor in Council in order to capture all ATT items in one distinct identifiable group.

The current reciprocal permit-free movement of most military items between Canada and the United States has been in place since World War II, pursuant to various arrangements between the governments of both countries. A series of Exchanges of Notes between Canada and the United States stemming from the Hyde Park Agreement of 1941 reference the need and the general principles required for greater economic and defence integration. One such Exchange of Notes, dated October 26, 1950, states that “[b]arriers which impede the flow between Canada and the United States of goods essential for the common defense efforts should be removed as far as possible.” The combined regulatory amendments to the *Export Control List* and the creation of the new *General Export Permit No. 47* are not intended to alter this existing and long-standing permit-free movement of such military goods. Canada continues to benefit

from its close defence and security relationship with the United States and continues to have confidence in the highly rigorous nature of the U.S. export control system. This is not impacted by the U.S. administration's recent decision to "un-sign" the ATT. Many of our key ATT partners and allies have expedited licensing measures to the United States, reflecting the high level of confidence in the U.S. export controls system, even though the U.S. is not an ATT State Party.

The Government of Canada believes that it continues to be in Canada's best interest to ensure an expedited process for the movement of military goods between Canada and the United States. Therefore, in parallel with the amendments to the *Export Control List* that require individual permits for the export of all Group 9 items to the United States, the Minister of Foreign Affairs has created this General Export Permit. *General Export Permit No. 47* allows Canadian companies and residents intending to export the majority of goods listed in Group 9 of the *Export Control List* in order to export the goods without applying for an individual permit, if they pre-notify Global Affairs Canada of their intent to export these items in a calendar year. Exporters using GEP-47 are required to report biannually on their exports.

General Export Permit No. 47 authorizes, subject to certain terms and conditions, the export of certain goods listed in the new group. The requirement to report on permanent exports of Group 9 items increases transparency on Canadian ATT exports

to the United States. This is in line with the Government of Canada's commitment to further strengthen the rigour and transparency of Canada's export controls.

Regulatory development

Consultation

Results from the public consultations

Global Affairs Canada has proactively consulted stakeholders interested in this proposal. There are, broadly speaking, three main groups of stakeholders: the Canadian security, defence and aerospace industry; Canadian civil society organizations, including academics, whose work focuses on the global arms trade, human rights, and conflict prevention and mitigation; and Canadian firearms owners and users. These groups were consulted during the recent online consultation entitled "Global Affairs Canada's proposed strengthening of Canada's export controls regime" that was undertaken from December 13, 2018, until January 31, 2019. In addition to the online consultation, departmental officials met with representatives from industry and civil society through a series of meetings, workshops, webinars and round-table discussions that took place across the country between December 13, 2018, and February 11, 2019. Beyond these recent consultations, these groups of stakeholders

were actively consulted throughout the parliamentary process for the amendments to the *Export and Import Permits Act* and in the negotiations of the ATT.

During these consultations, industry stakeholders were supportive of the Government of Canada's intention to join the ATT and were supportive of the proposal to create a general export permit with reporting requirements for the export of ATT-listed items to the United States. Civil society stakeholders also welcomed Canada's desire to accede to the ATT and have urged the Government of Canada to apply further rigour and transparency in its assessments of Canada's controlled exports. During the legislative process, some civil society stakeholders expressed concerns about the existing practice of not requiring permits for the export of all ATT items to the United States. During both parliamentary consideration of the Act and the recent consultations, they asked the Government of Canada to increase its transparency by reporting on ATT exports at least to the same level of rigour as ATT exports to all other destinations.

Canadian firearm owner groups have expressed concerns that the ATT could be used to reintroduce a gun registry and that ATT reporting requirements might include details of individual gun owners, thus leading to a *de facto* gun registry. Officials have sought to clarify that neither the ATT nor its implementation in Canada would result in such changes.

Results from the public comment period following prepublication of the Regulations

The Regulations were published in the *Canada Gazette*, Part I, for public comment from March 16 to April 15, 2019. Emails and notifications of this comment period were sent to over 3 500 groups and individuals including all the participants in the December 2018/January 2019 public consultations on “Global Affairs Canada’s proposed strengthening of Canada’s export controls regime,” industry members, industry associations, non-governmental organizations, and other stakeholders. In-person and telephone engagement sessions were held during the public comment period to provide information and to answer questions about the Regulations.

A total of 12 responses (via emails, meetings and telephone calls) were received during the 30-day public comment period. All responses supported Canada’s steps to accede to the Arms Trade Treaty or were neutral about the broad lines of the Regulations. The Canadian Association of Defence and Security Industries (CADSI) and the Aerospace Industries Association of Canada (AIAC) issued a joint letter of support stating they remain committed to continue working with Global Affairs Canada to assist in a smooth transition to implement the new controls. A joint civil society submission from the Canadian Red Cross and

International Committee of the Red Cross was supportive of the ongoing consultations and steps taken to move towards ATT compliance.

Some concerns and questions, however, were raised about specific elements of the Regulations. Similar to the feedback received during the earlier public consultations, concerns identified by industry included the potential unintended impacts related to the scope of the Regulations. Similar to the feedback received during the parliamentary study of the Act and the earlier public consultations, civil society organizations' set out how they would like to see the Government of Canada do more in certain areas to further strengthen the Regulations and Canada's adherence to the ATT, particularly with respect to increasing transparency and addressing diversion concerns. These comments were articulated in a joint submission from Amnesty International, Canadians for Justice and Peace in the Middle East, Oxfam Quebec, Project Ploughshares and The Rideau Instituted and in a joint submission from the Canadian Red Cross and the International Committee of the Red Cross.

With respect to GEP-47, the aforementioned civil society organizations raised concerns that through issuing a general permit to all Canadians, the Government would not be able to adhere to the ATT requirement to assess the potential risk individual exports under articles 6 and 7 of the ATT. The ATT requires that states implement their obligations in a consistent,

objective and non-discriminatory manner, but it does not prohibit expedited licensing and many allies have also put in place similar measures. It should be noted that Canada's long-standing policy of not requiring individual permits for most items to the United States is based on a thorough assessment of the U.S. as a trusted export destination with a highly robust and rigorous system of export controls. Should circumstances change, the Government maintains the ability to amend the regulations underpinning any general export or brokering permit.

Civil society also requested that the Government amend the record keeping requirement for exporters using the GEP from six years to ten to reflect the requirement in article 12 of the ATT that records be kept for ten years. It should be noted that the article 12 obligations apply only to States Parties and not to individual exporters. Canada will maintain electronic records of all reports received from exporters for the mandated ten-year period. With respect to records held by exporters, the six-year obligation in these Regulations flow from EIPA subsection 10.3(6) and are the standard for export control related regulations under the EIPA.

An industry stakeholder also raised the suggestion that the reporting requirements of the GEP should be waived for those items that have been temporarily imported into Canada from the U.S. and are being returned unmodified. The Government

understands the reasoning behind this suggestion and is considering potential future general export permits to address the export of items that have been temporarily imported into Canada for trade shows, for repair or for return.

Outreach and engagement actions including further face-to-face meetings will be undertaken to clarify the implications of the Regulations, and to help address any questions or concerns.

Instrument choice

Although other non-regulatory instruments were considered, Global Affairs Canada determined that the most effective mechanism to capture data on the export of ATT items to the United States, while still maintaining the free movement of those items and not unduly burdening industry, was through an amendment to the *Export Control List* to require a permit for the export of ATT items to the United States, and the creation of a related general export permit for these newly listed items, with reporting requirements.

One non-regulatory option that was considered was to draw on data already available through Statistics Canada on the export of defence material to the United States. These figures are derived from data collected by the Canada Border Services Agency based on the Harmonized Commodity Description and Coding System (HS codes). However, since there is no correlation between the HS codes used by Statistics Canada and the ATT classifications of

conventional arms, a meaningful comparison of the information from these sources is not possible. For instance, the same HS code may include both controlled ATT items and non-military goods, such as civil-certified aircraft, or guns designed exclusively for industrial uses such as those used in the lighting of gas flares at oil wells. Global Affairs Canada also spoke with international partners who had also attempted to use HS codes for this purpose without success.

Some stakeholders recommended that the Government of Canada consider instituting a policy of voluntary reporting for exporters of ATT items. There are a limited number of companies whose line of business includes exporting such items to the United States and that are already familiar with the export controls system. However, a policy of voluntary reporting would lack rigour as the absence of a legal requirement to report would make it difficult for Global Affairs Canada to follow up with exporters and ensure compliance, particularly individuals and entities not familiar with Canada's export controls and reporting mechanisms.

Regulatory analysis

Costs and benefits

The incremental costs to businesses and individuals of the *Order Amending the Export Control List (Arms Trade Treaty)* derive from the requirement to apply for individual permits for the export of

ATT items to the United States that did not previously require individual export permits (prohibited firearms, prohibited weapons, prohibited devices and items in items 2-4.a and 2-2.a of the *Export Control List*, which includes large calibre weapons, bombs, torpedoes, and missiles). These costs are mostly negated by *General Export Permit No. 47*. However, there is a small new additional pre-notification and reporting requirement for businesses or individuals permanently exporting ATT items to the United States.

As ATT items are controlled by both Group 2 and Group 9 of the *Export Control List*, exporters of ATT items that are exported to non-U.S. destinations are encouraged to also assess the goods they intend to export in light of the new Group 9 when completing their individual permit application, in accordance with the existing practice. Around 25 companies apply for permits to export ATT items to non-U.S. destinations. Global Affairs Canada will advise these companies and work with them to ensure that they understand this minor change that should result in no incremental costs (no new field/box will be added to the export permit application).

The companies that export the larger full-system conventional arms that fall under the scope of the ATT are already familiar with the process for reporting on their exports and imports of these items, and therefore already have administrative procedures in place to address this requirement. There may be

modest costs to those not accustomed to reporting on their exports, such as those in the film industry exporting ATT items to the United States. This is expected to be a small number of cases. With respect to exports of firearms, measures have been put in place to limit the burden with respect to the reporting requirement, as exporters only have to report on permanent exports that are destined for end use by police or military forces in the United States. This scope is compliant with the reporting requirements of the ATT (article 13.3) and the UN Register of Conventional Arms.

Small business lens

Overall, no significant or disproportionate impacts are anticipated for small business. The number of exporters of ATT items from Canada is very low (less than 25 exporters for export to non-U.S. destinations). The new permit aims to lower the administrative burden on business, particularly on small businesses, which are also able to benefit from this streamlined process. Small businesses do not manufacture the items for which the export to the United States requires reporting under this regulatory amendment, except for certain small arms and light weapons.

There are fewer than 10 small businesses that export firearms to the United States. There may also be small businesses operating in other sectors, such as the film industry, that may export ATT

items to the United States. Global Affairs Canada understands that small businesses have special needs, and officials are prepared to assist these businesses in understanding whether they are impacted by the new obligations imposed by this permit and to support them in complying with their reporting obligations under this General Export Permit.

In addition, small businesses will benefit from measures that Global Affairs Canada will implement to support all businesses in their compliance efforts with Canada's export controls. These include

- providing assistance to applicants who need guidance on permit applications and processes through a telephone helpline; and
- a proactive outreach campaign, including updating departmental information resources (such as the Export Controls Handbook).

"One-for-One" Rule

These Regulations are tied to the *Order Amending the Export Control List (Arms Trade Treaty)*, which was approved by the Governor in Council. The "One-for-One" Rule is triggered for the *Order Amending the Export Control List (Arms Trade Treaty)* for increasing the administrative burden under existing regulations. The General Export Permit decreases the additional burden imposed by the *Export Control List* amendment as the General

Export Permit streamlines the authorization process for such exports. Rather than being required to apply for an individual permit, exporters only have to notify Global Affairs Canada of their intention to use the General Export Permit and to report twice a year on actual exports undertaken against the permit or advise that no exports took place. As the increased administrative burden on business associated with the *Order Amending the Export Control List (Arms Trade Treaty)* was exempted from the “One-for-One” Rule because it is required in order to meet Canada’s international obligations under the ATT, Global Affairs Canada will not be given a credit for the OUT associated with the General Export Permit.

Regulatory cooperation and alignment

This permit aligns with the practices of almost all of Canada’s main allies, who maintain expedited measures for low-risk transactions to certain destinations, while remaining in compliance with the requirements of the ATT. For instance, in the United Kingdom, the *Open General Export Licences* (OGELs) are a form of general licence open to any company registered in the United Kingdom to export certain military items to select destinations, including Canada and the United States. Most OGELs require companies using them to report on any exports undertaken during the previous calendar year. Similarly, European Union *Directive 2009/43/EC* allows for the establishment of common general licences in defined

circumstances where the exports are deemed low-risk. European Union companies making use of these general licences also have to report on the exports undertaken under the licence.

Strategic environmental assessment

In accordance with *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, a preliminary scan concluded that a strategic environmental assessment is not required. The approved preliminary scan determined that the Regulations are unlikely to result in important environmental effects and that further analysis is not required.

Gender-based analysis plus

An assessment indicates that there are no gender-based analysis plus (GBA+) impacts in this permit. However, there are relevant considerations in the broader context of Canada's accession to the ATT. The ATT is the first international treaty that specifically mentions gender-based violence as an outcome to prevent. By acceding to the Treaty, Canada is supporting this objective.

Rationale

Canada's export control regime aims to balance national and international security concerns associated with the export of strategic and military goods and technology with Canada's interests as a trading nation. The introduction of this streamlined process for exports to the United States allows the Government

of Canada to provide Canadian businesses with a mechanism to remain competitive in the global marketplace while at the same time increasing transparency and ensuring that Canada clearly meets all its obligations under the Arms Trade Treaty.

Implementation, compliance and enforcement, and service standards

Global Affairs Canada's Export Controls Operations Division, which is responsible for issuing export licences, now includes a dedicated compliance section. This section will promote compliance with this permit through its regular mechanisms, such as documentation reviews. Global Affairs Canada is currently exploring additional mechanisms to increase compliance, including through communication products and in-person outreach.

There are certain conditions associated with GEP-47, and exporters need to comply with those conditions in order to lawfully export under this General Export Permit. It is a condition of the General Export Permit that exporters pre-notify their intention to use this permit on an annual basis and report on a semi-annual basis on any permanent exports that have been carried out under the authority of the permit.

Non-compliance with any condition of this General Export Permit could lead to prosecution under the relevant provisions of the Act. The Canada Border Services Agency and the Royal Canadian

Mounted Police are responsible for the enforcement of export controls.

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Footnotes

a S.C. 2004, c. 15, s. 56

b R.S., c. E-19

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FEDERAL COURT

B E T W E E N:

**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 Parties)

-and-

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

Respondents
(Responding Parties)

WRITTEN REPRESENTATIONS OF THE RESPONDENTS

OVERVIEW

1. As originally framed, this application for judicial review challenges several export permits issued by the Minister of Foreign Affairs to applicants seeking to broker or export military goods or technology to Israel following the attack upon Israel by Hamas on October 7, 2023. The applicants argue that the Minister’s issuance of export permits for military good or technology to Israel violates section 7.4 of the *Export and Import Permits Act* (EIPA) in light of alleged violations of international human rights law and international humanitarian law. Until this motion for leave to amend the Notice of Application, the focus of the proceeding has been on applications for export permits issued “in respect of arms, ammunition, implements or munitions of

war” for export to Israel. As the Notice of Application is originally drafted, the relief requested would invalidate forty-five export permits issued to five corporations, all of whom the respondents agree should be named as respondents to this application.

2. The applicants want to expand the scope of the application to include a new challenge of exports of military goods and technology to the United States of America (US) as well as to Israel, and seek Orders striking down section 2(a) of the *Export Control List* (ECL) and *General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States* (GEP No. 47), on the theory that some military goods and technology exported from Canada to the US may end up being exported to Israel. If these amendments are allowed, the scope of the application will be vastly broadened to encompass goods and technology exported to the US that are either not subject to any export controls by operation of section 2(a) of the ECL, or are governed by a general export permit that on its face only authorizes the export of goods and technology to the US, and not third countries. Allowing the amendments sought by the applicants would transform this application for judicial review into a wholly new challenge seeking to strike down a regulation made decades ago and a general export permit made several years ago, with the purpose of facilitating the integration of Canada’s national defence production sector with that of the US.

3. The applicants want to expand the scope of the application to challenge exports of military goods and technology to the United States of America (US) as well as Israel, and seek Orders striking down section 2(a) of the *Export Control List* (ECL) and GEP No. 47, on the theory that some military goods and technology exported from Canada to the US may end up being exported to Israel. If the amendments are allowed, the scope of the application would be vastly broadened to encompass goods and technology exported to the US that are either not subject to any export controls by operation of section 2(a) of the ECL, or are governed by a general export permit that on its face only authorizes the export of goods and technology to the US, and not third countries.

4. There is no possibility that such a challenge could succeed. No grounds

are asserted in the draft amended Notice of Application that would support striking down section 2(a) of the ECL or GEP No. 47.

5. Leave to make the proposed amendments should also be denied because they threaten the efficient and timely conduct of this application. The evidentiary record for these two new challenges would be immense as compared with the record in respect of the existing challenge to the several export permits to Israel issued by the Minister. The Court should prevent the applicants from transform an application regarding the export of certain military goods to Israel into a wide-ranging review of Canada’s military goods export regime to the US.

PART I – FACTS

A. Canada’s Export Regime

6. The EIPA sets out the authority for the lawful import and export of controlled goods and technology to and from Canada. The purpose of the EIPA “is to enable the federal government to regulate and control the export and import of certain goods and technology according to Canada’s economic, political and military interests”.¹

7. Subsection 3(1) of the EIPA authorizes the Governor-in-Council to establish the *Export Control List* (“ECL”).² Goods and technology that are listed in the ECL require a permit to be exported from Canada, subject to certain exceptions.³ Canada also publishes “A Guide to Canada’s Export Control List” (the “ECL Guide”), which lists the items enumerated on the ECL.⁴

8. The EIPA grants the Minister of Foreign Affairs (the “Minister”) broad

¹ *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 at para 10.

² *Export and Import Permits Act*, RSC 1985, c E-19 [EIPA], s 3(1), Appendix “A”; *Export Control List*, SOR/89-202 [“ECL”].

³ Affidavit of Judy Korecky, sworn August 20, 2024 [“Korecky Affidavit”] at para 4, **Motion Record of the Attorney General of Canada** [“AGC MR”], Tab 1, p 2.

⁴ Korecky Affidavit at para 5, Exhibit “A”, AGC MR, Tab 1, p 2; *A Guide to Canada’s Export Control List*, January 2024 [“ECL Guide”].

discretion with respect to the issuance of permits. In general, there are two ways in which a controlled good or technology listed in the ECL may be exported from Canada: (1) by an individual export permit issued by the Minister pursuant to section 7(1) of the EIPA; or (2) pursuant to a general permit issued by the Minister to all residents of Canada to export or transfer controlled goods or technology to a country specified in the permit pursuant to section 7(1.1) of the EIPA, i.e. a general export permit.

9. Subsection 7(1) of the EIPA sets out the authority for issuing individual export permits.⁵ An individual export permit allows exports of goods and technology to a specified consignee in a single country. Applications for individual permits must be submitted to the Export Controls Operations Division of GAC.⁶ The *Export Permit Regulations* set out the information that must be included in an application, which includes, but is not limited, to:

- the name and contact information of the exporter;
- the name and contact information for the consignee;
- the country in which the goods or technology are to be used, or the country of final destination;
- the country of origin, the corresponding Item Number in the ECL Guide, and the quantity and unit value of the goods and technology; and,
- an end-use certificate, end-use statement, or other information to establish that the export of the goods or technology is consistent with the purpose for its control on the ECL.⁷

10. Every application for an individual export permit is reviewed for consistency with the EIPA. This includes assessing the application against the considerations set forth in the EIPA with respect to security,⁸ and, with respect to arms, ammunitions, implements, or munitions of war, whether the export would contribute to peace and security or could be used to commit or facilitate various acts, including

⁵ EIPA, [s 7\(1\)](#); Korecky Affidavit at para 6, **AGC MR, Tab 1, p 2**.

⁶ Korecky Affidavit at para 7, **AGC MR, Tab 1, p 3**.

⁷ Korecky Affidavit at para 7, **AGC MR, Tab 1, p 3**; *Export Permits Regulations*, [SOR/97-204, s 3, Appendix “A”](#).

⁸ EIPA, [s 7.2, Appendix “A”](#).

serious violations of international humanitarian law or international human rights law.⁹ Pursuant to section 7.4 of the EIPA, individual export permits for these goods will not be issued if the Minister determines that there is a substantial risk that the export would result in any of the negative consequences listed under section 7.3(1) of the EIPA.

11. Sections 7.3(1) and 7(4) of the EIPA provide as follows:

Mandatory considerations — export and brokering

7.3 (1) In deciding whether to issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war, the Minister shall take into consideration whether the goods or technology specified in the application for the permit

- (a) would contribute to peace and security or undermine it; and
- (b) could be used to commit or facilitate
 - (i) a serious violation of international humanitarian law,
 - (ii) a serious violation of international human rights law,
 - (iii) an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party,
 - (iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or
 - (v) serious acts of gender-based violence or serious acts of violence against women and children.

Substantial risk

7.4 The Minister shall not issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war if, after considering available mitigating measures, he or she determines that there is a substantial risk that the export or the brokering of the goods or technology specified in the application for the permit would result in any of the negative consequences referred to in subsection 7.3(1)

12. In contrast to individual export permits issued pursuant to section 7(1), a general export permit issued pursuant to section 7(1.1) allows for specified goods to be exported by all residents of Canada without individual exporters needing to apply

⁹ EIPA, [s 7.3](#), **Appendix “A”**.

for or obtain an individual export permit.¹⁰ Exporters must self-assess their export needs against the provisions of the general export permit, and if they determine that the conditions of the general export permit are met, they need only cite its authority on their export declaration form and carry out any conditions and reporting obligations.¹¹

13. The Minister does not render any decisions regarding specific exports under a general export permit.

B. Export Control of Military Goods and Technologies

14. Various military goods and technologies are listed under the ECL. These items are found under Group 2 – “Munitions List”, and Group 9 – “Arms Trade Treaty”.¹²

15. Group 2 of the ECL is comprised of items and components of items that are designed or modified for military purposes that have been added to the ECL in compliance with Canada’s obligations under the “Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technology” (the “Wassenaar Arrangement”). Established in 1996, the purpose of the Wassenaar Arrangement is to contribute to regional and international stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies.¹³

16. Group 9 was added to the ECL on June 17, 2019 as part of a broader series of amendments to Canada’s export regime to enable Canada’s accession to the *Arms Trade Treaty* (the “ATT”).¹⁴ The ATT came into force in 2014 with the objective of regulating international trade of conventional weapons. The purpose of Group 9 is to enhance transparency and facilitate Canada’s international commitments on

¹⁰ EIPA, [s 7\(1.1\)](#), **Appendix “A”**; Korecky Affidavit at para 9, **AGC MR, Tab 1, p 3**.

¹¹ Korecky Affidavit at para 10, **AGC MR, Tab 1, p 4**.

¹² Korecky Affidavit at para 4, **AGC MR, Tab 1, p 2**.

¹³ Korecky Affidavit at para 19, **AGC MR, Tab 1, p 6**.

¹⁴ Korecky Affidavit at para 11, **AGC MR, Tab 1, p 4**.

reporting, particularly with respect to exports of conventional arms to the US.¹⁵ Group 9 includes full-system conventional arms, i.e. not components, in various categories including military aircraft and related systems.¹⁶

C. Exports of military goods and technology to the United States

17. Canada and the US have a close and long-standing trade relationships, including in trade of military goods and technology. As such, export permits are not required for many goods and technology listed in the ECL if they are destined to consignees in the US.¹⁷ This is reflected in sections 2(a) and 2(b) of the ECL, which states:

2 The following goods and technology, when intended for export to the destinations specified, are subject to export control for the purposes set out in section 3 of the *Export and Import Permits Act*:

(a) goods and technology referred to in Groups 1, 2, 6 and 7 of the schedule, except for goods and technology set out in items 2-1, 2-2.a. and 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-2, 7-3, 7-12 and 7-13 of the Guide, that are intended for export to any destination **other than the United States**; (emphasis added)

(b) goods and technology referred to in Groups 3, 4 and 9 of the schedule and goods and technology set out in items 2-1, 2-2.a., 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-3 and 7-13 of the Guide that are intended for export to any destination;

18. Section 2(b) of the ECL provides that certain types of military goods and technology are subject to export control, even if they are destined to a consignee in the US.¹⁸

19. On September 1, 2019, the Minister issued GEP No. 47¹⁹ pursuant to subsection 7(1.1) of the *EIPA*. The purpose of GEP No. 47 is to enhance domestic transparency and Canada's fulfilment of its reporting obligations under the ATT, which established common standards for international trade in a broad range of conventional

¹⁵ Korecky Affidavit at para 21, **AGC MR, Tab 1, p 6.**

¹⁶ Korecky Affidavit at para 21, **AGC MR, Tab 1, p 6.**

¹⁷ Korecky Affidavit at para 12, **AGC MR, Tab 1, p 4.**

¹⁸ Korecky Affidavit at para 14, **AGC MR, Tab 1, p 4.**

¹⁹ *General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States*, [SOR/2019-230](#) ["GEP No. 47"].

arms, with the ultimate goal of ensuring that states have effective national systems to review and control trade in conventional arms.

20. The following goods listed under the ECL Guide, and also identified under section 2(b) of the ECL, can be exported to the United States pursuant to GEP No. 47:

Items 2-1: Smooth-bore weapons with a calibre of less than 20 mm, other than arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less and accessories, and specially designed components therefor;

Items 2-3: Ammunition and fuse setting devices, and specially designed components therefor; and,

Any goods referred to in Group 9 – “Arms Trade Treaty”.²⁰

21. Prior to exporting goods under GEP No. 47 in a given calendar year, an exporter is required to provide their contact information to the Export Controls Operations Division of Global Affairs Canada.²¹ Exporters must also provide a report for each six-month period of the year stating whether they exported a good under GEP No. 47, and if so, must provide the following information: the name and address of each consignee, a description of the good, the ECL Guide number for the good, and the quantity and value in Canadian dollars of the good.²²

22. Sections 7.3(1) and 7.4 do not apply to the Minister’s exercise of discretion to issue a general export permit under section 7(1.1). In other words, the grounds alleged by the applicants for the invalidity of the individual permits issued for the export of military goods or technology to Israel do not apply to exports to the US made under GEP No. 47.

23. Individual export permits are required to export other goods to the US listed under section 2(b) of the ECL. With respect to military goods and technologies, these include:

²⁰ GEP No. 47, [s 2](#), **Appendix “A”**; ECL Guide at [pp 159](#), [161](#), [349](#).

²¹ Korecky Affidavit at para 21, **AGC MR, Tab 1, p 6**.

²² Korecky Affidavit at para 21, **AGC MR, Tab 1, p 6**.

Group 2, Items 2-2.a.: Guns, howitzers, cannon, mortars, anti-tank weapons, projectile launchers, military flame throwers, rifles, recoilless rifles and smooth bore weapons;

Group 2, Items 2-2.b.: Projectors, specially designed or modified for military use, as follows: smoke canister projectors; gas canister projectors; and pyrotechnics projectors.

Group 2, Items 2-4.a.: Bombs, torpedoes, grenades, smoke canisters, rockets, mines, missiles, depth charges, demolition-charges, demolition-devices, demolition-kits, “pyrotechnic” devices, cartridges, submunitions therefor and simulators (i.e. equipment simulating the characteristics of any of these items), specially designed for military use.²³

D. The Application for Judicial Review

24. On March 5, 2024, the applicants brought an application for judicial review in respect of export and brokering permits for arms, ammunition, implements or munitions of war to Israel authorized by the Minister pursuant to section 7(1) of the EIPA at any time on or after October 9, 2023.²⁴

25. The essential thrust of the application is the allegation that the issuance of permits to Israel violates section 7.4 of the EIPA and section 7 of the *Charter* due to the substantial risk that military goods or technology will be used by Israel to commit or facilitate serious violations of international humanitarian law, international human rights law, and/or serious acts of violence against women and children, and/or to undermine peace and security.²⁵

26. As currently framed, the relief sought in the application would affect 45 individual export permits issued by the Minister destined to Israel pursuant to section 7(1) of the EIPA for goods or technology to five corporations. The current application does not challenge any GEPs, or exports made under a GEP.

E. The Proposed Amendments to the Notice of

²³ ECL, [s 2\(b\)](#), **Appendix “A”**; Korecky Affidavit at para 22, **AGC MR, Tab 1, p 7**.

²⁴ Affidavit of Henry Off affirmed August 5, 2024 [“Off Affidavit”], Exhibit “Q”, Proposed Amended Notice of Application, **Applicants’ Motion Record [“AMR”], Tab 1(Q), p 196**.

²⁵ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at style of cause, paras 1(b), **AMR, Tab 1(Q), p 196**.

Application

27. The applicants seek leave to amend the Notice of Application, and describe their proposed amendments as falling into three broad categories:

- a) **The “Arms Companies” Amendments:** These proposed amendments seek to exclude from the scope of the application permit decisions for the export of military goods and technology that are expressly not intended for military or other active use in or by Israel, and to name as Respondents the companies who hold the permits captured by this Application.²⁶
- b) **The “Charter” Amendments:** The applicants propose amendments to paragraphs 1(d) and 33 of the Notice of Application to allege that the permits issued by the Minister pursuant to section 7(1) of the EIPA to export military goods or technology to Israel violate section 15 of the *Charter*.²⁷ The applicants do not set any specific prohibited ground(s) of discrimination under section 15 that is engaged by the permits issued by the Minister, and set out no grounds supporting a claim of discrimination on an enumerated or prohibited ground under section 15.
- c) **The “Indirect Arms Exports” Amendments:** The applicants propose amendments to paragraphs 1(h), 1(k), 22-28, 35 and 36 of the Notice of Application seeking to strike down section 2(a) of the ECL and GEP No. 47 on the basis that this regulation and general export permit result in the indirect export of military goods and technologies to Israel through the US. No legal grounds are advanced in support of an order striking down the regulation, or invalidating the general export permit.²⁸

28. The Respondents do not oppose the “Arms Companies” amendments.

²⁶ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at style of cause, paras 1(a), 1(h), **AMR, Tab 1(Q), pp 196-198.**

²⁷ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at paras 1(c), 1(d), 1(n), 33, **AMR, Tab 1(Q), pp 197, 198, 206-207**

²⁸ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at paras 1(h), 1(k), 22-28, 35, 36, 3(g), **AMR, Tab 1(Q), pp 198, 205, 207, 209.**

The Respondents oppose the “*Charter*” amendments and the so-called “Indirect Arms Exports” amendments that broaden the scope of the application to include challenges to section 2(a) of the ECL and GEP No. 47.

PART II – ISSUES

29. The issue on this motion is whether the applicants should be granted leave to amend their Notice of Application to seek an Order setting aside the permits issued by the Minister pursuant to section 7(1) of the EIPA for violating section 15 of the *Charter*, an Order quashing GEP No. 47, and a Declaration that section 2(a) of the ECL is invalid and unlawful.

30. The Respondents oppose the amendments seeking to set aside the permits issued by the Minister pursuant to section 7(1) of the EIPA on section 15 *Charter* grounds, and the amendments seeking to declare invalid section 2(a) of the ECL and GEP No. 47, on the grounds that they allow for export of military goods and technology to the US, which is a supplier of arms to Israel.

PART III – ARGUMENT

A. The Test for Leave to Amend a Pleading

31. Rule 75 of the *Federal Courts Rules* provides that the Court may, on motion and at any time, allow a party to amend a document on such terms as will protect the rights of all parties. The Federal Court of Appeal has described the operation of this Rule as follows:

an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.²⁹

²⁹ *Canderel Ltd v Canada*, [1993 CanLII 2990 \(FCA\)](#) at [p 10](#) [*Canderel*]; *Teva Canada Limited v Gilead Sciences Inc*, [2016 FCA 176](#) at [para 26](#) [*Teva*]; *GCT Canada Limited*

32. As a preliminary threshold, proposed amendments must have a reasonable prospect of success.³⁰ A proposed amendment to a pleading, including a notice of application, will be refused if it is plain and obvious that the amendments disclose no reasonable cause of action.³¹

33. After passing the initial threshold of having a reasonable prospect of success, the central issue under Rule 75 is whether it is more consonant with the interests of justice that the amendment be permitted or denied.³² The Court may consider a number of factors, including the timeliness of the motion to amend; the extent to which the proposed amendments would delay the expeditious resolution of the matter; the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which would be difficult or impossible to alter; and, whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits.³³

34. Although no single factor predominates, a proposed amendment may not be allowed where doing so would not advance the determination of the real questions in controversy between the parties.³⁴ Further, amendments must comply with the *Federal Courts Rules*, including those applicable to notices of application. under Rules 301-303.³⁵

B. The Section 15 “Charter” amendments have no prospect of success

Partnership v Vancouver Fraser Port Authority, [2020 FC 348](#) at [para 65](#) [GCT Canada].

³⁰ *Teva* at [paras 28-31](#).

³¹ *McCain Foods Limited v J.R. Simplot Company*, [2021 FCA 4](#) at [para 20](#); GCT Canada at [paras 67, 71](#).

³² *Janssen Inc v Abbvie Corporation*, [2014 FCA 242](#) at [para 3](#).

³³ *Tait v Canada (Royal Canadian Mounted Police)*, [2024 FC 217](#) at [para 50](#).

³⁴ *9107-7438 Québec Inc v Trust Express Inc*, [2022 FC 1197](#) at [para 27](#) [*Trust Express*]; *Teva* at [para 26](#).

³⁵ *Servier Canada Inc v Canada (Minister of Health)*, [2007 FC 196](#) at [para 20](#) [*Servier*]; *Canada (Attorney General) v Iris Technologies*, [2021 FCA 244](#) at [para 47](#) [*Iris Technologies*].

35. The proposed Amended Notice of Application refers to section 15 of the *Charter* in paragraphs 1(d) and 33. The amendment to paragraph 1(d) includes a reference to section 15, in addition to section 7, and lists every ground of discrimination set out in section 15, except religion. Paragraph 33 merely sets out the text of section 15.³⁶ This is the full extent of the grounds in support of this new *Charter* claim against the permits issued by the Minister. The “*Charter*” amendments, however, do not go any further than this bare recitation of the protection afforded under section 15.

36. The applicants have not set out any basis for this proposed section 15 challenge. There is no reference to the specific prohibited grounds upon which any discrimination is alleged to have occurred, or how the issuance of permits meets the two-step test for establishing discrimination under section 15.³⁷ These amendments are wholly silent on these requisite elements of a section 15 challenge. As such, the proposed Amended Notice of Application fails to disclose a cause of action for a section 15 violation and these amendments should not be allowed.

C. The “Indirect Arms Exports” amendments should not be allowed

37. As framed in the original Notice of Application, the true substance of the dispute is a challenge to the issuance of permits to export military goods or technology to Israel, or that are ultimately destined for Israel, at any time on or after October 9, 2023.³⁸ The Applicants have sought judicial review of individual permits for goods destined for Israel made under the EIPA pursuant to section 7(1) of the EIPA, alleging that the issuance of those permits was in violation of section 7.4 of the EIPA, section 7 of the *Charter*, and various international treaty obligations.

38. The “Indirect Arms Exports” amendments will not assist the Court in determining whether the decision to issue those export permits is unreasonable. Rather, they serve to transform this application into a wholly different challenge, expanding

³⁶ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at para 33, **AMR, Tab 1(Q), pp 206-207.**

³⁷ *R v Sharma*, [2022 SCC 39](#) at [para 28](#).

³⁸ Off Affidavit, Exhibit “Q”, Proposed Amended Notice of Application at para 1(a), **AMR, Tab 1(Q), p 196.**

the scope of the application to challenge a regulation that exempts the US from export controls for certain types of military goods and technology, and a general export permit which authorizes other types of certain military goods and technology exports to the US without further approval from the Minister.

39. Further, the amendments, if allowed, would violate Rule 302 of the *Federal Courts Rules*, which provides that only a single order may be challenged in an application for judicial review. As it is, the applicants currently challenge 45 export permits issued to 5 corporations, and have not sought leave to do so pursuant to Rule 302. The new challenge to section 2(a) of the ECL and the GEP No. 47 does not fall within the exception for challenging a “continuing act or course of conduct”. The proposed amendments with respect to section 2(a) of the ECL and GEP No. 47 would transform this application into a broad and sweeping challenge of the policy of integrating Canada’s national defence production with our ally and trading partner, the US.

1. The Challenge to GEP No. 47 and section 2(a) of the ECL has no prospect of success

40. There are no legal grounds set out in the proposed Amended Notice of Application that would support striking down GEP No. 47 and section 2(a) of the ECL.

41. In terms of striking down section 2(a) of the ECL, the proposed Amended Notice of Application fails to set out any administrative law or constitutional law grounds that would justify the Court declaring this regulation to invalid or unlawful. This contravenes Rule 301(e) of the *Federal Courts Rules*, which provides that a notice of application must set out a “complete and concise statement of the grounds intended to be argued...” on the application.³⁹

42. As the application is currently framed, the applicants seek to invalidate the export permits issued for goods destined to Israel in large part on the grounds that

³⁹ *Federal Courts Rules*, [SOR/98-106](#), [Rule 301\(e\)](#), **Appendix “A”**; *Iris Technologies* at [para 44](#).

issuing these permits is inconsistent with the mandatory security considerations under subsection 7.3(1) and the substantial risk test under section 7.4 of the EIPA. Sections 7.3(1) and 7.4 of the EIPA, however, do not apply to the Minister's exercise of discretion to issue GEP No. 47 under section 7(1.1). Nor does it apply to the Governor-in-Council's exercise of regulation-making authority in exempting the US from export controls in section 2(a) of the ECL. The applicants have failed to set out any other administrative law or constitutional grounds that would justify the Court striking them down. As such, on the face of the proposed Amended Notice of Application, it is plain and obvious that the challenges to the GEP No. 47 and section 2(a) of the ECL simply cannot succeed.

43. Further, there is no admissible evidence in the applicants' motion record to support any such order. The articles pulled by the applicants from the internet do not establish that any exports from Canada exempted from export controls, or made pursuant to GEP No. 47 have been or will be sent to Israel via the US.

2. The “Indirect Arms Exports” Amendments Contravene Rule 302

44. Rule 302 of the *Federal Courts Rules* provides that an application for judicial review shall be limited to a single order in respect of which relief is sought. The case law is clear that it is a violation of Rule 302 for an applicant to challenge two decisions within a single application, unless the Court orders otherwise or the applicant can show that the decisions at issue form part of a “continuing acts or course of conduct”. The factors to consider in determining whether there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort.⁴⁰

45. These various matters do not amount to a “continuing course of

⁴⁰ *David Suzuki Foundation v Canada (Health)*, [2018 FC 380](#) at [para 173](#)

conduct” within the meaning of the case law. A continuing course of conduct is one involving acts of a “continuing nature, making it difficult for the applicant to pinpoint a single decision from which relief can be sought by this Court.”⁴¹ In this case, the applicants are not challenging different permitting decisions made by the Minister to authorize the export of military goods or technology to Israel pursuant to section 7(1) of the EIPA. Instead, the applicants are attempting to tack on a challenge to the validity of a regulation that exempts from export controls certain items of military goods or technology destined to the US (section 2(a) of the ECL), and a general export permit for other types of military goods or technology destined to the US (GEP No. 47), made pursuant to section 7(1.) of the EIPA. This is not a case of a “continuing course of conduct”.

3. The amendments will not facilitate the Court’s consideration of the true substance of the dispute on its merits

46. The “Indirect Arms Exports” amendments would expand the scope of this application to impugn exports to the US made pursuant to entirely different mechanisms under the EIPA. The challenged exports to Israel, which is the focus of the application, require individual export permits under subsection 7(1) of the EIPA that are subject to the substantial risk and other considerations set out under sections 7.2-7.4 of the EIPA. In contrast, the authority to issue a general export permit, like GEP No. 47, is governed exclusively under subsection 7(1.1) of the EIPA.

47. The issuance of the GEP, done for the purposes of the Arms Trade Treaty, and the process for exporting goods pursuant to the GEP, is wholly distinct from the issuance of an individual export permit. There are no individual decisions to issue export permits made pursuant to GEP No. 47, because under this regulation, the Minister a general authority to export goods.

48. The ECL, in further contrast, was promulgated pursuant to the powers granted to the Governor-in-Council under section 3 of the EIPA to establish controls on the export or transfer of certain goods. These are all distinct matters that would

⁴¹ *Mahmood v Canada*, [\[1998\] FCJ No 1345](#) at [para 10](#).

require their own evidentiary records and Certified Tribunal Records in order to support judicial review.

49. The distinct nature of these matters is further demonstrated by the limits on the operation of GEP No. 47, when considered in light of the focus of the original Notice of Application in this case. While the applicants speculate that the goods exported to the United States pursuant to GEP No. 47 are ultimately exported to Israel, GEP No. 47 does not provide a mechanism by which the Minister may assess where goods may end up after they have been lawfully exported to the United States. Once the good is no longer in Canada and has reached its destination in the United States, Canada has no ability to limit the subsequent export of that good from the United States. Consequently, by virtue of these proposed amendments, the applicants are seeking to include in this application decisions that are not consonant with the decisions they seek to challenge. The attempt to include decisions ultimately made by foreign countries to export goods to Israel transforms this application into a broad inquiry into the export of arms from Canada, as opposed to the export of arms from Canada to Israel.

50. The decisions at issue were also made in different time periods. The original Notice of Application challenges the issuance of export permits to Israel post-October 9, 2023, whereas the GEP No. 47 came into effect on September 1, 2019. The current version of section 2(a) was added to the ECL on January 20, 2006, though exceptions allowing for goods to be exported to the United States without a permit have been in place since the inception of the ECL in 1954.⁴² The evidentiary record relevant to these decisions vastly exceeds that which is relevant to the export permits for military goods and technology issued after October 9, 2023.

51. In *Servier Canada Inc v Canada (Minister of Health)*, Justice Noël refused to allow amendments to a notice of application that would permit a challenge to two decisions related to the approval of one drug product.⁴³ He noted that the

⁴² *Order Amending the Export Control List*, [SOR/2006-16](#); *Export and Import Permits Act – Export Control List P.C. 1954-791*, [SOR/54-203](#).

⁴³ *Servier Canada Inc v Canada (Minister of Health)*, [2007 FC 196](#) [Servier].

decisions were made at different times and pursuant to different regulations, and that different relief was being sought in relation to each decision.⁴⁴

52. The findings in *Servier* apply equally to the “Indirect Arms Exports” amendments, such that these amendments must be refused. The effect of these amendments would be to challenge individual export permits for military goods and technology destined for Israel, the Minister’s decision to issue GEP No. 47, **and** the exercise of discretion pursuant to section 3 of the EIPA to exempt exports to the United States from the ECL all within a single application. 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 rather than being rolled into what emerges as an attempt to have the Court conduct a wide-ranging review of Canada’s arms export regime with the US.

53. The proposed amendment would distract from, rather than assist in determining any question in controversy in the original application.⁴⁵ To allow these amendments would, as the Court held in *Olumide*, “invite litigants to use applications as a pipeline in which to funnel any and all grievances they may have against a respondent as they arise, whether or not they are related, and is clearly not in the interest of justice”.⁴⁶ So too would be the effect of allowing the applicants to amend their Notice of Application to challenge GEP No. 47 and section 2(a) of the ECL.

4. The ECL Declaration Amendments Should Not be Granted

54. As noted above, the applicants seek to expand the scope of declaratory relief sought in this Application by proposing to seek a declaration that section 2(a) of the ECL is invalid and unlawful. Section 2(a) of the ECL is the section by which certain goods are not controlled if intended for export to the US.

55. The effect of the declaration sought in this case would be to remove

⁴⁴ *Servier* at [para 18](#).

⁴⁵ *Olumide v Canada (Attorney General)*, [2016 FC 934](#) [*Olumide*].

⁴⁶ *Olumide* at [para 14](#).

export controls for the items listed in Groups 1, 2, 6, and 7 of the ECL that do not otherwise appear under section 2 of the ECL. If granted, an exporter would no longer require an export permit to export these goods or technologies, regardless of their country of destination. The effect of this amendment is to seek a declaration that goes well beyond the review of the reasonableness of permits issued for military goods and technology destined for Israel. As such, it would expand the scope of the relevant inquiry in this case into an inquiry into the controls placed on exporting the goods listed thereunder, at large, as opposed to the exports of military goods and technologies from Canada to Israel since October 9, 2023.

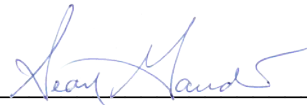
PART IV – ORDER SOUGHT

56. The Attorney General of Canada seeks the following relief:

- (a) That this motion for leave to amend the Notice of Application be dismissed in part;
- (b) That leave to amend paragraphs 1(d), 1(h), 1(k), 22-28, 35-36, of the Grounds for the Application in the proposed Amended Notice of Application be denied; and
- (c) An Order for the costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 21st day of August, 2024



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PART V – LIST OF AUTHORITIES

Legislation

1. *Export and Import Permits Act*, [RSC 1985, c E-19, s 3\(1\), s 7\(1\), s 7\(1.1\), s 7.2, s 7.3, s 7.4](#)
2. *Export and Import Permits Act – Export Control List P.C. 1954-791*, [SOR/54-203](#)
3. *Export Control List*, [SOR/89-202, s 2\(b\)](#)
4. *Export Permits Regulations*, [SOR/97-204, s 3](#)
5. *General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States*, [SOR/2019-230, s 2](#)
6. *Order Amending the Export Control List*, [SOR/2006-16](#)

Government of Canada Publications

1. [A Guide to Canada’s Export Control List](#), January 2024 [“ECL Guide”]

Case law

1. *9107-7438 Québec Inc v Trust Express Inc*, [2022 FC 1197](#)
2. *Canada (Attorney General) v Iris Technologies*, [2021 FCA 244](#)
3. *Canderel Ltd v Canada*, [1993 CanLII 2990 \(FCA\)](#)
4. *David Suzuki Foundation v Canada (Health)*, [2018 FC 380](#)
5. *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, [2020 FC 348](#)
6. *Janssen Inc v Abbvie Corporation*, [2014 FCA 242](#)
7. *Khadr (Next Friend of) v Canada (Minister of Foreign Affairs)*, [2004 FC 1145](#)

8. *McCain Foods Limited v J.R. Simplot Company*, [2021 FCA 4](#)
9. *Mahmood v Canada*, [\[1998\] FCJ No 1345](#)
10. *Olumide v Canada (Attorney General)*, [2016 FC 934](#)
11. *R v Sharma*, [2022 SCC 39](#)
12. *Servier Canada Inc v Canada (Minister of Health)*, [2007 FC 196](#)
13. *Tait v Canada (Royal Canadian Mounted Police)*, [2024 FC 217](#)
14. *Teva Canada Limited v Gilead Sciences Inc*, [2016 FCA 176](#)
15. *Truehope Nutritional Support Ltd v Canada (Attorney General)*, [2004 FC 658](#)
16. *Turp v Canada (Foreign Affairs)*, [2018 FCA 133](#)

APPENDIX A – STATUTES AND REGULATIONS

1. *Export and Import Permits Act*, [RSC 1985, c E-19](#)
2. *Export Control List*, [SOR/89-202](#)
3. *Export Permits Regulations*, [SOR/97-204](#)
4. *Federal Courts Rules*, [SOR/98-106](#)
5. *General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States*, [SOR/2019-230](#)

<i>Export and Import Permits Act</i>, RSC 1985, c E-19 - <i>Loi sur les licences d'exportation et d'importation</i> (L.R.C. (1985), ch. E-19) Sections 3(1), 7(1), 7(1.1), 7.2, 7.3, 7.4	
Export control list of goods and technology 3 (1) The Governor in Council may establish a list of goods and technology, to be called an Export Control List, including therein any article the export or transfer of which the Governor in Council deems it necessary to control for any of the following purposes: (a) to ensure that arms, ammunition, implements or munitions of war, naval, army or air stores or any articles deemed capable of being converted thereinto or made useful in the production thereof or otherwise having a strategic nature or value will not be made available to any destination where their use might be detrimental to the security of Canada; (b) to ensure that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not	Exportation contrôlée 3 (1) Le gouverneur en conseil peut dresser une liste des marchandises et des technologies dont, à son avis, il est nécessaire de contrôler l'exportation ou le transfert à l'une ou plusieurs des fins suivantes : (a) s'assurer que des armes, des munitions, du matériel ou des armements de guerre, des approvisionnements navals, des approvisionnements de l'armée ou des approvisionnements de l'aviation, ou des articles jugés susceptibles d'être transformés en l'un de ceux-ci ou de pouvoir servir à leur production ou ayant d'autre part une nature ou valeur stratégiques, ne seront pas rendus disponibles à une destination où leur emploi pourrait être préjudiciable à la sécurité du Canada; (b) s'assurer que les mesures prises pour favoriser la transformation au Canada d'une ressource naturelle d'origine canadienne ne

rendered ineffective by reason of the unrestricted exportation of that natural resource; (c) to limit or keep under surveillance the export of any raw or processed material that is produced in Canada in circumstances of surplus supply and depressed prices and that is not a produce of agriculture; (c.1) [Repealed, 1999, c. 31, s. 88] (d) to implement an intergovernmental arrangement or commitment; (e) to ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs; (f) to ensure the orderly export marketing of any goods that are subject to a limitation imposed by any country or customs territory on the quantity of the goods that, on importation into that country or customs territory in any given period, is eligible for the benefit provided for goods imported within that limitation; or (g) to facilitate the collection of information in respect of the exportation of goods that were, are, or are likely to be, the subject of trade investigations or trade disputes	deviennent pas inopérantes du fait de son exportation incontrôlée; (c) limiter, en période de surproduction et de chute des cours, les exportations de matières premières ou transformées d'origine canadienne, sauf les produits agricoles, ou en conserver le contrôle (c.1) [Abrogé, 1999, ch. 31, art. 88] (d) mettre en oeuvre un accord ou un engagement intergouvernemental; (e) s'assurer d'un approvisionnement et d'une distribution de cet article en quantité suffisante pour répondre aux besoins canadiens, notamment en matière de défense; (f) assurer la commercialisation ordonnée à l'exportation de toute marchandise soumise à une limitation de la quantité de marchandise pouvant être importée dans un pays ou un territoire douanier qui, au moment de son importation dans ce pays ou territoire douanier dans une période donnée, est susceptible de bénéficier du régime préférentiel prévu dans le cadre de cette limitation; (g) faciliter la collecte de renseignements sur l'exportation de marchandises qui ont fait l'objet d'enquêtes commerciales ou de différends commerciaux, en font l'objet ou sont susceptibles d'en faire l'objet.
Export permits	Licences d'exportation

7 (1) Subject to subsection (2), the Minister may issue to any resident of Canada applying therefor a permit to export or transfer goods or technology included in an Export Control List or to export or transfer goods or technology to a country included in an Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations. (1.01) [Repealed, 2018, c. 26, s. 6] General permits (1.1) Notwithstanding subsection (1), the Minister may, by order, issue generally to all residents of Canada a general permit to export or transfer to any country specified in the permit any goods or technology included in an Export Control List that are specified in the permit, subject to such terms and conditions as are described in the permit.	7 (1) Sous réserve du paragraphe (2), le ministre peut délivrer à tout résident du Canada qui en fait la demande une licence autorisant, sous réserve des conditions prévues dans la licence ou les règlements, notamment quant à la quantité, à la qualité, aux personnes et aux endroits visés, l'exportation ou le transfert des marchandises ou des technologies inscrites sur la liste des marchandises d'exportation contrôlée ou destinées à un pays inscrit sur la liste des pays visés. (1.01) [Abrogé, 2018, ch, 26, art. 7] Licence de portée générale (1.1) Malgré le paragraphe (1), le ministre peut, par arrêté, délivrer aux résidents du Canada une licence de portée générale autorisant, sous réserve des conditions qui y sont prévues, l'exportation ou le transfert, vers les pays qui y sont mentionnés, des marchandises ou des technologies inscrites sur la liste des marchandises d'exportation contrôlée qui y sont mentionnées.
Security considerations — export and brokering 7.2 In deciding whether to issue a permit under subsection 7(1) or 7.1(1), the Minister may, in addition to any other matter that the Minister may consider, take into consideration whether the goods or technology specified in the application for the permit may be used for a purpose prejudicial to the safety or interests of the State by being used to do anything	Prise en considération de facteurs discrétionnaires : exportation et courtage 7.2 Pour décider s'il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1), le ministre peut prendre en considération, notamment, le fait que les marchandises ou les technologies mentionnées dans la demande peuvent être utilisées dans le dessein de nuire à la sécurité ou aux intérêts de l'État par l'utilisation qui peut en être faite pour accomplir l'une ou l'autre des actions visées aux alinéas

referred to in paragraphs 3(1)(a) to (n) of the Security of Information Act .	3(1)a) à n) de la Loi sur la protection de l'information .
Mandatory considerations — export and brokering 7.3 (1) In deciding whether to issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war, the Minister shall take into consideration whether the goods or technology specified in the application for the permit (a) would contribute to peace and security or undermine it; and (b) could be used to commit or facilitate (i) a serious violation of international humanitarian law, (ii) a serious violation of international human rights law, (iii) an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party, (iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or (v) serious acts of gender-based violence or serious acts of violence against women and children. Additional mandatory considerations (2) In deciding whether to issue a permit under subsection 7(1) or 7.1(1), the Minister shall also take into	Prise en considération de facteurs obligatoires : exportation et courtage 7.3 (1) Pour décider s'il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1) à l'égard d'armes, de munitions, de matériels ou d'armements de guerre, le ministre prend en considération le fait que les marchandises ou les technologies mentionnées dans la demande : (a) contribueraient à la paix et à la sécurité ou y porteraient atteinte; (b) pourraient servir à la commission ou à faciliter la commission : (i) d'une violation grave du droit international humanitaire, (ii) d'une violation grave du droit international en matière de droits de la personne, (iii) d'un acte constituant une infraction au regard des conventions et protocoles internationaux relatifs au terrorisme auxquels le Canada est partie, (iv) d'un acte constituant une infraction au regard des conventions et protocoles internationaux relatifs au crime organisé transnational auxquels le Canada est partie, (v) d'actes graves de violence fondée sur le sexe ou d'actes graves de violence contre les femmes et les enfants. Facteurs obligatoires supplémentaires (2) Pour décider s'il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1), il prend également en considération tout facteur prévu par règlement pris au titre des alinéas 12a.2) ou a.3).

consideration the considerations specified in regulations made under paragraphs 12(a.2) or (a.3).	
Substantial risk 7.4 The Minister shall not issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war if, after considering available mitigating measures, he or she determines that there is a substantial risk that the export or the brokering of the goods or technology specified in the application for the permit would result in any of the negative consequences referred to in subsection 7.3(1).	Risque sérieux 7.4 Le ministre ne peut délivrer la licence en vertu des paragraphes 7(1) ou 7.1(1) à l'égard d'armes, de munitions, de matériels ou d'armements de guerre s'il détermine, après avoir pris en compte les mesures d'atténuation disponibles, qu'il existe un risque sérieux que l'exportation ou le courtage des marchandises ou des technologies mentionnées dans la demande entraînerait une conséquence négative visée au paragraphe 7.3(1).
Export Control List, SOR/89-202 - Liste des marchandises et technologies d'exportation contrôlée (DORS/89-202) Sections 2, 2(b)	
2 The following goods and technology, when intended for export to the destinations specified, are subject to export control for the purposes set out in section 3 of the Export and Import Permits Act: (a) goods and technology referred to in Groups 1, 2, 6, and 7 of the schedule, except for goods and technology set out in items 2-1, 2-2.a. and 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-2, 7-3, 7-12 and 7-13 of the Guide, that are intended for export to any destination other than the United States; (b) goods and technology referred to in Groups 3, 4 and 9 of the schedule and goods and technology set out in items 2-1, 2-2.a., 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-3 and 7-13 of the Guide	2 Les marchandises et technologies ci-après, lorsqu'elles sont destinées à l'exportation vers les destinations précisées, sont assujetties à un contrôle d'exportation aux fins visées à l'article 3 de la Loi sur les licences d'exportation et d'importation : (a) les marchandises et technologies des groupes 1, 2, 6 et 7 de l'annexe, sauf celles visées à l'article 2-1, aux alinéas 2-2.a. et 2-2.b., à l'article 2-3, à l'alinéa 2-4.a. et aux articles 6-1, 6-2, 7-2, 7-3, 7-12 et 7-13 du Guide, qui sont destinées à l'exportation vers toute destination autre que les États-Unis; (b) les marchandises et technologies des groupes 3, 4 et 9 de l'annexe, ainsi que celles visées à l'article 2-1, aux alinéas 2-2.a. et 2-2.b., à l'article 2-3, à l'alinéa 2-4.a. et aux articles 6-1, 6-2, 7-3 et 7-13

that are intended for export to any destination; (c) goods and technology referred to in Group 5 of the schedule that are intended for export to any destination referred to in the item of the schedule in which the goods or technology is described; and (d) goods and technology set out in items 7-2 and 7-12 of the Guide that are intended for export to any destination referred to in the item of the Guide in which the goods or technology is described.	du Guide, qui sont destinées à l'exportation vers toute destination; (c) les marchandises et technologies du groupe 5 de l'annexe, qui sont destinées à l'exportation vers toute destination mentionnée dans l'article de l'annexe où elles sont visées; (d) les marchandises et technologies visées aux articles 7-2 et 7-12 du Guide, qui sont destinées à l'exportation vers toute destination mentionnée dans l'article du Guide où elles sont visées.
Export Permits Regulations, SOR/97-204 - Règlement sur les licences d'exportation (DORS/97-204) Section 3	
Application for a Permit: Strategic and Military Goods and Technology 3 (1) This section does not apply to the exportation of goods referred to in subsection 4(1). (2) An applicant for a permit must submit to the Minister a duly completed and signed application form, provided by the Minister, containing the following information: (a) the date on which the application form is completed; (b) the applicant's name, address, telephone number, email address and any facsimile number and any identifier number assigned by the Minister and, if the applicant is a corporation, the name and telephone number of a contact person familiar with the application;	Demande de licence : marchandises et technologies stratégiques et militaires 3 (1) Le présent article ne s'applique pas à l'exportation des marchandises visées au paragraphe 4(1). (2) Le requérant qui demande une licence présente au ministre, sur le formulaire fourni par celui-ci, dûment rempli et signé, les renseignements suivants : (a) la date à laquelle le formulaire a été rempli; (b) ses nom, adresse, numéro de téléphone, adresse électronique et, le cas échéant, numéro de télécopieur et numéro d'identification attribué par le ministre et, s'il s'agit d'une personne morale, les nom et numéro de téléphone d'une personne-ressource qui a pris connaissance de la demande;

(c) if the applicant is applying for a permit on behalf of, or for the use of another person or corporation who will export or transfer the goods or technology, the name, address, telephone number, email address and any facsimile number of the other person or corporation and any identifier number assigned by the Minister and the name and telephone number of a contact person familiar with the application; (d) the name, address, telephone number, email address and any facsimile number of each consignee and the name and telephone number of a contact person associated with the consignee who is familiar with the application; (e) the country in which the goods or technology are to be used or the country of final destination; (f) for each type of separately identifiable goods or technology, (i) their country of origin and, if any portion of them is of United States origin and is included in item 5400 of Group 5 of the schedule to the List, their proportion to the total cost of the goods or technology, expressed as a percentage, (ii) if they are included in the schedule to the List, their corresponding item number in the Guide, (iii) a description of the goods and technology including, as applicable, their purpose and	(c) s'agissant d'une demande de licence qu'il présente au nom ou pour l'usage d'une autre personne ou personne morale qui exportera ou transférera les marchandises ou les technologies, les nom, adresse, numéro de téléphone et adresse électronique de celle-ci et, le cas échéant, ses numéro de télécopieur et numéro d'identification attribué par le ministre, ainsi que les nom et numéro de téléphone d'une personne-ressource qui a pris connaissance de la demande; (d) les nom, adresse, numéro de téléphone, adresse électronique et, le cas échéant, numéro de télécopieur de chaque consignataire, et les nom et numéro de téléphone d'une personne-ressource liée au consignataire qui a pris connaissance de la demande; (e) le pays dans lequel les marchandises ou les technologies doivent être utilisées ou le pays de destination finale; (f) pour chaque type de marchandises ou de technologies séparément identifiables : (i) le pays d'origine des marchandises ou des technologies et, si une partie de celles-ci est originaire des États-Unis et est visée par l'article 5400 du groupe 5 de l'annexe de la Liste, le pourcentage du coût total des marchandises ou des technologies que représente cette partie, (ii) le numéro d'article figurant dans le Guide, si elles sont visées par l'annexe de la Liste,
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technical specifications, with sufficient detail to disclose their true identity and in terms that avoid the use of trade names, technical names or general terms that do not adequately describe them, (iv) the quantity, unit value and total market value of the goods or technology, (v) the factory where the goods or technology were made or the first shipping point in Canada, and (vi) the approximate mass, net weight or volume of the goods or technology; (g) an indication of the means by which the permit should be sent to the applicant or the exporter; and (h) information to establish that the export or transfer of the goods or technology is consistent with the purpose for which the export or transfer of the goods or technology is controlled, consisting of one or more of the following: (i) an International Import Certificate, (ii) an End-use Certificate, (iii) an End-use Statement, (iv) a copy of the contract of sale between the applicant or the exporter and the person from whom the applicant or the exporter purchased the goods or technology, (v) a copy of the contract of sale between the applicant or the exporter and the person to	(iii) une description suffisamment détaillée de celles-ci, y compris leurs spécifications techniques et leur fonction, le cas échéant, de manière à les identifier correctement et n'ayant pas recours au nom commercial ou technique ni à des termes généraux qui ne les décrivent pas adéquatement, (iv) leur quantité, leur valeur unitaire et leur valeur marchande totale, (v) l'usine où elles ont été fabriquées ou leur premier point d'expédition au Canada, (vi) leur masse, leur poids net ou leur volume approximatifs; (g) une mention indiquant la manière dont la licence doit lui être envoyée ou être envoyée à l'exportateur; (h) un ou plusieurs des renseignements ou documents ci-après, afin d'établir que l'exportation ou le transfert des marchandises ou des technologies est conforme à la finalité pour laquelle elles sont contrôlées : (i) un certificat international d'importation, (ii) un certificat d'utilisation finale, (iii) une déclaration d'utilisation finale, (iv) une copie du contrat de vente entre le requérant ou l'exportateur et la personne de qui il a acheté les marchandises ou les technologies, (v) une copie du contrat de vente entre le requérant ou l'exportateur et la personne à qui il a vendu les
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whom the applicant sold the goods or technology for export or transfer, (vi) a copy of the commercial invoice that relates to the export or transfer, (vii) a copy of a letter of credit or other financial documentation which identifies the Canadian and foreign financial institutions involved in the export or transfer, (viii) the name and address of the person from whom the applicant or exporter acquired the goods or technology, (ix) the intended end-use of the goods or technology by their consignee, (x) the intended end-use location of the goods or technology, if different from the location of the consignee, (xi) an import permit issued by the government of the country for which the goods or technology are destined, or (xii) an in-transit authorization. (3) In addition to the application form, the applicant must submit to the Minister (a) a declaration that, to the best of their knowledge, the goods or technology will enter into the economy of the country under paragraph (2)(e) that is identified in the application form, and will not be transhipped or diverted from that country;	marchandises ou technologies pour exportation ou transfert, (vi) une copie de la facture commerciale concernant l'exportation ou le transfert, (vii) une copie de la lettre de crédit ou d'autres documents financiers qui indiquent les institutions financières canadiennes et étrangères associées à l'exportation ou au transfert, (viii) les nom et adresse de la personne de qui le requérant ou l'exportateur a acquis les marchandises ou les technologies, (ix) l'utilisation finale que leur consignataire entend en faire, (x) le lieu de cette utilisation finale, s'il diffère de celui où se trouve le consignataire, (xi) une licence d'importation délivrée par le gouvernement du pays de destination des marchandises ou des technologies, (xii) une autorisation de transit. (3) En plus du formulaire, le requérant présente au ministre ce qui suit : (a) une déclaration certifiant que, à sa connaissance, les marchandises ou les technologies entreront dans l'économie du pays indiqué sur le formulaire en application de l'alinéa (2)e) et n'en seront pas transbordées ou détournées; (b) dans le cas des marchandises ou des technologies visées au groupe 2, au groupe 6 ou à l'article 5504 du groupe 5 de l'annexe de la Liste : (i) si elles sont des marchandises contrôlées de la LPD, (A) soit une preuve d'inscription ou d'exemption d'inscription
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(b) in the case of goods or technology referred to in Group 2, Group 6 or item 5504 of Group 5 of the schedule to the List: (i) if they are DPA controlled goods (A) proof of registration or exemption from registration under the Defence Production Act and the Controlled Goods Regulations; or (B) proof that the applicant or the exporter is a person that Part 2 of the Defence Production Act does not apply to, under section 36 of that Act; and (ii) if they are not DPA controlled goods, a declaration attesting that the applicant has reviewed the Defence Production Act and determined that they are not exporting or transferring DPA controlled goods; and (c) a United States export authorization in respect of the following goods (i) any DPA controlled goods that are of United States origin, (ii) any goods incorporating DPA controlled goods of United States origin, or iii) any goods manufactured in Canada using any DPA controlled goods of United States origin.	accordée sous le régime de la Loi sur la production de défense et du Règlement sur les marchandises contrôlées, (B) soit une preuve que le requérant ou l'exportateur est soustrait à l'application de la partie 2 de la Loi sur la production de défense, en vertu de l'article 36 de cette loi, (ii) sinon, une déclaration attestant qu'il a examiné la Loi sur la production de défense et a conclu qu'il n'exportait ni ne transférait des marchandises contrôlées de la LPD; (c) une autorisation d'exportation des États-Unis, dans le cas des marchandises suivantes : (i) soit des marchandises contrôlées de la LPD originaires des États-Unis, (ii) soit des marchandises auxquelles ont été incorporées des marchandises contrôlées de la LPD originaires des États-Unis, (iii) soit des marchandises fabriquées au Canada à partir de marchandises contrôlées de la LPD originaires des États-Unis.
<i>Federal Courts Rules, SOR/98-106 - Règles des Cours fédérales (DORS/98-106)</i> Rule 301 (e)	

Contents of application 301 An application shall be commenced by a notice of application in Form 301, setting out (e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on;	Avis de demande — forme et contenu 301 La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants : (e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable
<i>General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States, SOR/2019-230 - Licence générale d’exportation no 47 — articles visés par le Traité sur le commerce des armes vers les États-Unis (DORS/2019-230)</i> Section 2	
Authorization 2 Subject to sections 3 to 6, any resident of Canada may export any of the following goods from Canada to the United States: (a) any good referred to in item 2-1 of the Guide; (b) any good referred to in item 2-3 of the Guide; (c) any good referred to in Group 9 of the schedule to the Export Control List.	Autorisation 2 Sous réserve des articles 3 à 6, tout résident du Canada peut exporter les marchandises ci-après à partir du Canada vers les États-Unis : (a) celles visées à l’article 2-1 du Guide; (b) celles visées à l’article 2-3 du Guide; (c) celles visées au groupe 9 de l’annexe de la Liste des marchandises et technologies d’exportation contrôlée

TAB 5

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Andrew Murray		
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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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AND TO: Attorney General of Canada
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Ontario Regional Office
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TAB 1

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)**

**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).

Court File No.: T-473-24

HAMMAM FARAH, HIBA FARAH,
 AYMAN OWEIDA, X. Y., CLAIHR, AL-HAQ
 Applicants (Moving Party)

- and -

MINISTER OF FOREIGN AFFAIRS
 and ATTORNEY GENERAL OF CANADA
 Respondents (Responding Party)

FEDERAL COURT
 Proceeding commenced at Toronto

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

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Court File No.: T-473-24

HAMMAM FARAH, HIBA FARAH,
 AYMAN OWEIDA, X. Y., CLAIHR, AL-HAQ
 Applicants (Moving Party)

- and -

MINISTER OF FOREIGN AFFAIRS
 and ATTORNEY GENERAL OF CANADA
 Respondents (Responding Party)

FEDERAL COURT
 Proceeding commenced at Toronto

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

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Counsel for the Applicants

TAB 6

Federal Court



Cour fédérale

Date: 20241220

Docket: T-473-24

Citation: 2024 FC 2078

Toronto, Ontario, December 20, 2024

PRESENT: Case Management Judge John C. Cotter

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

and

MINISTER OF FOREIGN AFFAIRS AND
ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

UPON MOTION by the applicants dated August 6, 2024, and filed on that date as part of the motion record of the applicants (moving party) [Applicants' Motion Record], made in writing pursuant to Rule 369 (any reference in these Reasons to a Rule is to those in the *Federal Courts Rules*, SOR/98-106) for the following relief as set out in the notice of motion:

1. An Order granting the Applicants leave to amend the Notice of Application dated March 5, 2024 by:
 - a. adding Excelitas Canada Inc. (“Excelitas”), TTM Technologies Toronto, Inc. (“TTM Technologies”), GeoSpectrum Technologies Inc. (“GeoSpectrum”), Apollo Microwave Ltd. (“Apollo”), and Pratt & Whitney Canada Corp. (“Pratt & Whitney”) as Respondents to this judicial review application;
 - b. adding or clarifying, for greater certainty, that the decision in question in the application for judicial review, namely the Minister of Foreign Affairs’ (the “Minister’s”) issuance of permits to broker or export military goods or technology “to Israel, or ultimately destined for Israel” (the “Decision”),
 - i. includes the decision to authorize the transfer of military goods and technology to Israel that can and does occur indirectly through third countries, notably the United States (“US”); and
 - ii. excludes the decision to issue permits for the transfer of military goods or technology with the express intention that they be subsequently transferred to a country other than Israel and never put to military or other active use in or by Israel;
 - c. seeking an order for declaratory relief that the Minister’s Decision violates section 15 of the *Canadian Charter of Rights and Freedoms* (the “Charter”);
 - d. seeking an order for declaratory relief that section 2(a) of the Export Control List, SOR/89/202 is invalid and unlawful;
 - e. requesting relief under section 24 of the *Charter*.
 - f. making other related and consequential amendments to the Notice of Application, in the form attached as Exhibit “Q” in the Affidavit of Henry Off, affirmed August 5, 2024.
2. An Order that no costs shall be awarded for or against the Applicants for this motion; and

3. Such further and other relief as counsel may advise and this Honourable Court may deem just.

AND UPON reviewing and considering:

- a) the Applicants' Motion Record, including the proposed amended notice of application [Proposed Amended Notice of Application] that is Exhibit "Q" to the affidavit of Henry Off affirmed August 5, 2024 [Off Affidavit];
- b) the responding motion record of the respondents [AGC] dated and filed August 21, 2024 [AGC's Motion Record]; and
- c) the motion record of the applicants (moving party) dated and filed September 3, 2024 [Applicants' Reply Motion Record];

AND UPON considering:

[1] The notice of application for judicial review issued on March 5, 2024 [Original Notice of Application] challenges any permit issued on or after October 9, 2023, to broker or export military goods or technology to Israel, or ultimately destined for Israel.

[2] After the commencement of this proceeding, the applicants were notified of entities holding permits relating to the relief sought in the Original Notice of Application. As a result of communications among the parties and these entities, and following various case management conferences, the applicants brought the present motion seeking to amend the Original Notice of Application.

[3] As explained below, leave to amend is granted for the Unopposed Amendments and the Minor Corrections (these terms are defined below). The motion is dismissed for the remainder of the proposed amendments.

I. Legislative Framework

[4] The applicable statute is the *Export and Import Permits Act*, RSC 1985, c E-19 [*EIPA*]. The *EIPA* sets out the authority for the lawful import and export of controlled goods and technology to and from Canada. The purpose of the *EIPA* “is to enable the federal government to regulate and control the export and import of certain goods and technology according to Canada’s economic, political and military interests” (*Turp v Canada (Foreign Affairs)*, 2018 FCA 133 [*Turp*] at para 10). Further, “[t]he object of this regime is set out in sections 3 and 7 of the *EIPA*, which grant the Minister broad discretion with respect to the issuance of permits” (*Turp* at para 10).

[5] Subsection 3(1) of the *EIPA* authorizes the Governor in Council to establish the “Export Control List”, which is “a list of goods and technology” that may include “any article the export or transfer of which the Governor in Council deems it necessary to control for” for the purposes listed in that provision.

[6] In general, there are two ways in which a controlled good or technology listed in the Export Control List may be exported from Canada:

- a) by an individual export permit issued by the Minister of Foreign Affairs [Minister] pursuant to section 7(1) of the *EIPA*. It is permits of this type that are at issue in the Original Notice of Application; or
- b) pursuant to a general permit issued under section 7(1.1) of the *EIPA* by the Minister to all residents of Canada to export or transfer controlled goods or technology to a country specified in the permit. It is a permit of this type (*i.e.*, a general export permit) that the applicants seek to put in issue in the Proposed Amended Notice of Application. Specifically, *General Export Permit No. 47 — Export of Arms Trade Treaty Items to the United States*, SOR/2019-230 [*GEP No. 47*].

[7] Key provisions of the *EIPA* that are engaged as a result of the Original Notice of Application include:

Export permits

7 (1) Subject to subsection (2), the Minister may issue to any resident of Canada applying therefor a permit to export or transfer goods or technology included in an Export Control List or to export or transfer goods or technology to a country included in an Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations.

Licences d'exportation

7 (1) Sous réserve du paragraphe (2), le ministre peut délivrer à tout résident du Canada qui en fait la demande une licence autorisant, sous réserve des conditions prévues dans la licence ou les règlements, notamment quant à la quantité, à la qualité, aux personnes et aux endroits visés, l'exportation ou le transfert des marchandises ou des technologies inscrites sur la liste des marchandises d'exportation contrôlée ou destinées à un pays inscrit sur la liste des pays visés.

[...]

[...]

Export permit for automatic firearm

Licence d'exportation d'arme automatique

(2) The Minister may not issue a permit under subsection (1) to export any thing referred to in any of paragraphs 4.1(a) to (c), or any component or part of such a thing, that is included in an Export Control List unless

(2) Le ministre ne peut délivrer une licence d'exportation de tout objet visé à l'article 4.1 — ou de quelque élément ou pièce d'un tel objet — inscrit sur la liste des marchandises d'exportation contrôlée, que si les conditions suivantes sont remplies :

(a) the export is to a country included in an Automatic Firearms Country Control List; and

a) les armes seront exportées vers un pays inscrit sur la liste des pays désignés (armes automatiques);

(b) the prohibited weapon or component or part thereof is exported to the government of, or a consignee authorized by the government of, that country.

b) les armes, ou les éléments ou pièces, sont destinés au gouvernement de ce pays ou à un consignataire qu'il a autorisé.

[...]

[...]

Security considerations — export and brokering

Prise en considération de facteurs discrétionnaires : exportation et courtage

7.2 In deciding whether to issue a permit under subsection 7(1) or 7.1(1), the Minister may, in addition to any other matter that the Minister may consider, take into consideration whether the goods or technology specified in the application for the permit may be used for a purpose prejudicial to the safety or interests of the State by being used to do anything referred to in paragraphs 3(1)(a) to (n) of the *Foreign Interference and Security of Information Act*.

**Mandatory considerations
— export and brokering**

7.3 (1) In deciding whether to issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war, the Minister shall take into consideration whether the goods or technology specified in the application for the permit

(a) would contribute to peace and security or undermine it; and

(b) could be used to commit or facilitate

(i) a serious violation of international humanitarian law,

(ii) a serious violation of international human rights law,

7.2 Pour décider s’il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1), le ministre peut prendre en considération, notamment, le fait que les marchandises ou les technologies mentionnées dans la demande peuvent être utilisées dans le dessein de nuire à la sécurité ou aux intérêts de l’État par l’utilisation qui peut en être faite pour accomplir l’une ou l’autre des actions visées aux alinéas 3(1)a) à n) de la *Loi sur l’ingérence étrangère et la protection de l’information*.

**Prise en considération de facteurs obligatoires :
exportation et courtage**

7.3 (1) Pour décider s’il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1) à l’égard d’armes, de munitions, de matériels ou d’armements de guerre, le ministre prend en considération le fait que les marchandises ou les technologies mentionnées dans la demande :

a) contribueraient à la paix et à la sécurité ou y porteraient atteinte;

b) pourraient servir à la commission ou à faciliter la commission :

(i) d’une violation grave du droit international humanitaire,

(ii) d’une violation grave du droit international en matière de droits de la personne,

(iii) an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party,

(iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or

(v) serious acts of gender-based violence or serious acts of violence against women and children.

Additional mandatory considerations

(2) In deciding whether to issue a permit under subsection 7(1) or 7.1(1), the Minister shall also take into consideration the considerations specified in regulations made under paragraphs 12(a.2) or (a.3).

Substantial risk

7.4 The Minister shall not issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war if, after considering available mitigating measures, he or she determines that there is a substantial risk that the export or the brokering of the goods or technology specified in the application for the permit would result in any of

(iii) d'un acte constituant une infraction au regard des conventions et protocoles internationaux relatifs au terrorisme auxquels le Canada est partie,

(iv) d'un acte constituant une infraction au regard des conventions et protocoles internationaux relatifs au crime organisé transnational auxquels le Canada est partie,

(v) d'actes graves de violence fondée sur le sexe ou d'actes graves de violence contre les femmes et les enfants.

Facteurs obligatoires supplémentaires

(2) Pour décider s'il délivre la licence en vertu des paragraphes 7(1) ou 7.1(1), il prend également en considération tout facteur prévu par règlement pris au titre des alinéas 12a.2) ou a.3).

Risque sérieux

7.4 Le ministre ne peut délivrer la licence en vertu des paragraphes 7(1) ou 7.1(1) à l'égard d'armes, de munitions, de matériels ou d'armements de guerre s'il détermine, après avoir pris en compte les mesures d'atténuation disponibles, qu'il existe un risque sérieux que l'exportation ou le courtage des marchandises ou des technologies mentionnées

the negative consequences referred to in subsection 7.3(1).

dans la demande entraînerait une conséquence négative visée au paragraphe 7.3(1).

[8] The Proposed Amended Notice of Application seeks to bring into play subsection 7(1.1) dealing with general permits, which provides:

General permits

(1.1) Notwithstanding subsection (1), the Minister may, by order, issue generally to all residents of Canada a general permit to export or transfer to any country specified in the permit any goods or technology included in an Export Control List that are specified in the permit, subject to such terms and conditions as are described in the permit.

Licence de portée générale

(1.1) Malgré le paragraphe (1), le ministre peut, par arrêté, délivrer aux résidents du Canada une licence de portée générale autorisant, sous réserve des conditions qui y sont prévues, l'exportation ou le transfert, vers les pays qui y sont mentionnés, des marchandises ou des technologies inscrites sur la liste des marchandises d'exportation contrôlée qui y sont mentionnées.

II. Proposed Amendments

[9] The applicants divide their proposed amendments into three categories which they label as: a) the “Arms Companies Amendments” and which I refer to as the “Unopposed Amendments”; b) the “Charter Amendments”; and c) the “Indirect Arms Exports Amendments”. I consider it useful to divide some of these into subcategories as certain of them raise different issues. I would also add a fourth category, “Minor Corrections”.

[10] The applicants do not identify which proposed amendments fall into which category. The AGC does (paragraph 27 and footnotes 26-28 of the AGC's written representations [AGC's Written Representations] included in the AGC's Motion Record). I generally agree with the AGC's allocation of the proposed amendments into each of the applicant's three categories with the exception of what I characterize as minor corrections (which are identified below).

[11] To avoid confusion regarding the paragraph numbers in the Proposed Amended Notice of Application referred to in this Order and Reasons, it is useful to point out:

- a) paragraph references that begin with 1 (*i.e.*, 1 a), 1 c), 1 d), 1 h), 1 i), 1 k) and 1 n)), are under the portion of the Proposed Amended Notice of Application dealing with the relief sought: "1. THE APPLICATION IS FOR";
- b) paragraph references that begin with 3 (*i.e.*, 3 g) and 3 h)), are under the portion of the Proposed Amended Notice of Application beginning with: "3. THE APPLICANTS RELY ON THE FOLLOWING AUTHORITIES AND RULES"; and
- c) the remainder of the paragraph references (*i.e.*, 22 to 28, 33, 35 and 36), are under the portion of the Proposed Amended Notice of Application beginning with: "2. THE GROUNDS FOR THE APPLICATION ARE".

[12] Unless otherwise indicated, paragraph references used in these reasons are those in the Proposed Amended Notice of Application.

[13] The four broad categories of proposed amendments are:

a) Unopposed Amendments: These fall into two subcategories:

- i. To name as respondents the following five entities who hold the individual permits being challenged in the Original Notice of Application: Excelitas Canada Inc., TTM Technologies Toronto, Inc., GeoSpectrum Technologies Inc., Apollo Microwave Ltd. and Pratt & Whitney Canada Corp [collectively, the Five Individual Permit Holders]. In this case, the request to add respondents is more a matter of joinder than an amendment.
- ii. Paragraph 1 a) of the Original Notice of Application seeks a declaration in respect of the “issuance of permits to broker or export military goods or technology to Israel, or ultimately destined for Israel, at any time on or after October 9, 2023”. The proposed amendments seek to exclude from the scope of this proceeding permits to broker or export military goods and technology “with the express intention that they be subsequently transferred to a country other than Israel and never put to military or other active use in or by Israel”. This is the proposed amended found in paragraph 1a).

b) Charter Amendments: The amendments relating to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*] fall into two subcategories:

- i. To assert a breach of section 15 of the *Charter* [Section 15 Amendments].
These are the proposed amendments found in paragraphs 1 d) and 33.
- ii. To claim relief under section 24(1) of the *Charter* [Section 24(1) Amendments]. This is the proposed amendment found in paragraph 1 n).
- c) Indirect Arms Exports Amendments: These proposed amendments seek to strike down section 2(a) of the Export Control List and *GEP No. 47*. These are the proposed amendments to paragraphs 1 h), 1 k), 22-28, 35, 36 and 3 g).
- d) Minor Corrections. These are found in paragraphs 1 c), 1 i) and 3 h).

III. Affidavit Evidence

[14] The applicants and the AGC each filed affidavit evidence on the motion. Certain aspects of the affidavit evidence are problematic:

- a) The Applicants' Motion Record includes the Off Affidavit. Exhibits "B" to "K" of that affidavit are various news articles. Articles are generally inadmissible as hearsay (*Democracy Watch v Canada (Attorney General)*, 2024 FCA 75 at para 7). The stated basis in the affidavit for including the articles is: "I am attaching several articles relevant to the Applicants' decision to seek to amend the Notice of Application". However, there is no indication in the affidavit as to how these relate to the applicants' decision to seek to amend the Original Notice of Application, and no submissions by the applicants on the admissibility of the

articles in any of their written representations. It is, however, apparent from the written representations of the applicants included in the Applicants' Motion Record [Applicants' Written Representations], that they rely on the articles as evidence of the facts contained in the articles (see, for example, paras 6-8, 43). I find Exhibits "B" to "K" to be inadmissible as hearsay.

- b) The AGC's Motion Record includes the affidavit of Judy Korecky sworn August 20, 2024. To the extent that this affidavit purports to set out the law on matters relating to the *EIPA*, I have not considered it.

[15] While the discussion immediately above focuses on what is in the affidavit evidence, it is useful to also comment on one point that it is not in the affidavit evidence. The AGC states that there are 45 individual export permits in issue (see paragraphs 26 and 39 of the AGC's Written Representations). However, there is no evidence of this. It is also not a fact alleged in the Original Notice of Application, or the Proposed Amended Notice of Application. As a result, I have not considered that asserted fact. However, I have considered that there are individual permits issued to five entities.

IV. Amendments – General Principles

[16] As per Rule 75, the Court may, on a motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

[17] The applicable test on a motion to amend emanates from *Continental Bank Leasing Corp. v R.*, [1993] T.C.J. No. 18, (1993) 93 D.T.C. 298 [*Continental Bank*] at page 302, which was adopted by the Federal Court of Appeal (see *Janssen Inc. v Abbvie Corporation*, 2014 FCA 242 [*Janssen*] at para 3; and *Enercorp Sand Solutions Inc. v Specialized Desanders Inc.*, 2018 FCA 215 [*Enercorp*] at paras 20-21). Relying on *Janssen*, Justice Manson described the test as follows in *Tait v Canada (Royal Canadian Mounted Police)*, 2024 FC 217 [*Tait*]:

[50] On a motion to amend, the Court must consider whether it is more consonant with the interests of justice that the amendment be permitted or that it be denied (*Janssen Inc v Abbvie Corporation*, 2014 FCA 242 [*Janssen*] at para 3). The Court may consider the following factors: (1) the timeliness of the motion to amend, (2) the extent to which the proposed amendments would delay the expeditious resolution of the matter, (3) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which would be difficult or impossible to alter, and (4) whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits. No single factor predominates (*Janssen* at para 3).

[18] As stated in *Continental Bank* (see *Janssen* at para 3; *Enercorp* at para 20):

No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[19] In addition, “the absence of a reasonable prospect of success is a well-established reason for a court to dismiss a motion for leave to amend” and is a threshold issue (*Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176 at paras 29-31). If it is plain and obvious that the amendment would be struck if pleaded, it should not be allowed (*Enercorp* at para 22; for an

example where this has been applied on a motion to amend a notice of application, see *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348 at para 67).

V. Joinder

[20] While the addition of parties is often intertwined with amendments, seeking to add respondents in an application for judicial review engages Rules 104(1)(b) and 303(1)(a).

[21] As explained by Associate Judge Ring in *Matsqui-Abbotsford Impact Society v Canada (Attorney General)*, 2024 FC 1301 on the test for joinder:

[26] The test for joinder is set out in Rule 104(1)(b). It provides that a person may be added as a respondent where (a) they should have been a respondent in the first place, or (b) their presence before the Court is necessary. Satisfaction of either of these requirements is sufficient: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at para 11 [...]

VI. Analysis - Unopposed Amendments

[22] I will first deal with the request to add as respondents the Five Individual Permit Holders. Having considered Rules 104(1)(b) and 303(1)(a), and the principles set out in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236, the Five Individual Permit Holders should be added as respondents.

[23] Having regard to the factors outlined in the test set out in *Continental Bank, Janssen and Tait* [Amendment Test], it is in the interests of justice to permit the other Unopposed Amendment, specifically, the amendment to paragraph 1 a) so as to exclude from the scope of

this proceeding permits to broker or export military goods or technology “with the express intention that they be subsequently transferred to a country other than Israel and never put to military or other active use in or by Israel”.

VII. Analysis - Charter Amendments

[24] Dealing first with the Section 15 Amendments, they fail on the threshold issue. The result would be the same whether or not the Indirect Arms Exports Amendments were to be allowed.

[25] The pleading requirements for a notice of application for judicial review were set out by Justice Stratas in *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] as follows:

[38] In a notice of application for judicial review, an applicant must set out a “precise” statement of the relief sought and a “complete” and “concise” statement of the grounds intended to be argued: *Federal Courts Rules*, SOR/98-106, paragraphs 301(d) and (e).

[39] A “complete” statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought.

[40] A “concise” statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought. It does not include the evidence by which those facts are to be proved.

[...]

[42] While the grounds in a notice of application for judicial review are supposed to be “concise”, they should not be bald. Applicants who have some evidence to support a ground can state the ground with some particularity. Applicants without any evidence, who are just fishing for something, cannot.

[...]

[44] The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.

[26] In *R. v Sharma*, 2022 SCC 39 the Supreme Court described the requirements for a claim under section 15(1) of the *Charter* as follows:

[28] The two-step test for assessing a s. 15(1) claim is not at issue in this case. It requires the claimant to demonstrate that the impugned law or state action:

- (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
- (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[27] Although it dealt with a statement of claim, the decision in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 is instructive. Regarding *Charter* claims, the Federal Court of Appeal stated:

[21] There are no separate rules of pleadings for *Charter* cases. The requirement of material facts applies to pleadings of *Charter* infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each *Charter* right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, “rather, it is essential to the proper presentation of *Charter* issues”: *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

[28] The AGC argues that the proposed Section 15 Amendments should fail because (para 36 of the AGC's Written Representations; see also para 35):

The applicants have not set out any basis for this proposed section 15 challenge. There is no reference to the specific prohibited grounds upon which any discrimination is alleged to have occurred, or how the issuance of permits meets the two-step test for establishing discrimination under section 15. These amendments are wholly silent on these requisite elements of a section 15 challenge.

[29] In response, the applicants argue (see para 6 of the written representations in reply of the applicants [Applicants' Reply Representations] in the Applicants' Reply Motion Record):

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.

[30] Despite making the above-noted assertion, the only details pointed to in the Applicants' Reply Representations is the conduct of Israel that is alleged in paragraph 12 of both the Original Notice of Application and the Proposed Amended Notice of Application. The applicants have not connected the dots in their proposed amendments as to how the conduct of Israel amounts to a violation of section 15 *Charter* rights, if at all. They have not met the pleading requirements set out in *JP Morgan*. As a result, the Section 15 Amendments will not be permitted. As these proposed amendments have failed on the threshold issue, I have not assessed them under the Amendment Test.

[31] This conclusion on the Section 15 Amendments does not preclude a further motion by the applicants for leave to amend the notice of application to assert a section 15 *Charter* violation. If such a motion were to be brought, it would be assessed on its merits at that time.

[32] Regarding the Section 24(1) Amendments, the AGC has not made any submissions opposing these amendments. As the Original Notice of Application asserts a violation of section 7 of the *Charter*, and considering the factors outlined in the Amendment Test, it is in the interests of justice to permit these amendments.

VIII. Analysis - Indirect Arms Exports Amendments

[33] The Indirect Arms Exports Amendments seek to challenge section 2(a) of the Export Control List and *GEP No. 47*.

[34] The Export Control List is established pursuant to section 3 of the *EIPA* as described at paragraph 5 of these reasons. Subsections 2(a) and (b) of Export Control List, SOR/89-202 provide:

General

2 The following goods and technology, when intended for export to the destinations specified, are subject to export control for the purposes set out in section 3 of the *Export and Import Permits Act*:

Dispositions générales

2 Les marchandises et technologies ci-après, lorsqu'elles sont destinées à l'exportation vers les destinations précisées, sont assujetties à un contrôle d'exportation aux fins visées à l'article 3 de la *Loi sur les licences d'exportation et d'importation* :

(a) goods and technology referred to in Groups 1, 2, 6, and 7 of the schedule, except for goods and technology set out in items 2-1, 2-2.a. and 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-2, 7-3, 7-12 and 7-13 of the Guide, that are intended for export to any destination other than the United States;

a) les marchandises et technologies des groupes 1, 2, 6 et 7 de l'annexe, sauf celles visées à l'article 2-1, aux alinéas 2-2.a. et 2-2.b., à l'article 2-3, à l'alinéa 2-4.a. et aux articles 6-1, 6-2, 7-2, 7-3, 7-12 et 7-13 du Guide, qui sont destinées à l'exportation vers toute destination autre que les États-Unis;

(b) goods and technology referred to in Groups 3, 4 and 9 of the schedule and goods and technology set out in items 2-1, 2-2.a., 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-3 and 7-13 of the Guide that are intended for export to any destination;

b) les marchandises et technologies des groupes 3, 4 et 9 de l'annexe, ainsi que celles visées à l'article 2-1, aux alinéas 2-2.a. et 2-2.b., à l'article 2-3, à l'alinéa 2-4.a. et aux articles 6-1, 6-2, 7-3 et 7-13 du Guide, qui sont destinées à l'exportation vers toute destination;

[35] As a result, export permits are not required for many goods and technology listed in the Export Control List if they are intended for export to the United States (subsection 2(a) of the Export Control List). However, certain types of goods and technology are subject to export control even if they are intended for export to the United States (subsection 2(b) of the Export Control List).

[36] It is subsection 2(a) of the Export Control List that the applicants seek to strike down in the Proposed Amended Notice of Application.

[37] The applicants also challenge *GEP No. 47*. Pursuant to subsection 7(1.1) of the *EIPA*, the Minister issued *GEP No. 47*, which was registered on June 17, 2019. *GEP No. 47* permits any

resident of Canada to export certain goods listed in the Export Control List to the United States.

This is provided for in section 2 of *GEP No. 47*, which states:

Authorization	Autorisation
2 Subject to sections 3 to 6, any resident of Canada may export any of the following goods from Canada to the United States:	2 Sous réserve des articles 3 à 6, tout résident du Canada peut exporter les marchandises ci-après à partir du Canada vers les États-Unis :
(a) any good referred to in item 2-1 of the Guide;	a) celles visées à l'article 2-1 du Guide;
(b) any good referred to in item 2-3 of the Guide;	b) celles visées à l'article 2-3 du Guide;
(c) any good referred to in Group 9 of the schedule to the <i>Export Control List</i> .	c) celles visées au groupe 9 de l'annexe de la Liste des marchandises et technologies d'exportation contrôlée.

[38] The applicants argue that the Indirect Arms Exports Amendments only add clarity and precision to, and do not modify, what was already in the Original Notice of Application (for example, see Applicants' Written Representations, paras 22.c, 40 and 62). I reject this. It is apparent from a review of the Original Notice of Application that this is not the case. This can be seen starting with the relief sought in paragraph 1 a), which states:

A Declaration that the issuance of permits to broker or export military goods or technology to Israel, or ultimately destined for Israel, at any time on or after October 9, 2023, places the Respondents in breach of the *Export and Import Permits Act* (the "*EIPA*");

[39] The relief sought in the Original Notice of Application that follows in paragraphs 1 b) to i) refers to “such permits”, which can only be read as a reference to the permits referred to in paragraph a). Of significance, the relief sought in subparagraph a) of the Original Notice of Application is limited to permits, and to those issued on or after October 9, 2023. As a result, it does not include either the Export Control List or *GEP No. 47*. The Export Control List is not a permit. Rather, it is established pursuant to section 3(1) of the *EIPA*. Regarding *GEP No. 47*, it was not issued on or after October 9, 2023. In addition, there is no reference in the Original Notice of Application to either the Export Control List or *GEP No. 47*, or the provisions of the *EIPA* that pertain to them, sections 3 and 7(1.1) respectively. The Original Notice of Application does, however, refer to provisions relating to individual permits such as sections 7.3 and 7.4. (see paras 1 b), 17, 24 and 25).

[40] Considering the factors set out in the Amendment Test, it is not in the interests of justice to permit the proposed Indirect Arms Exports Amendments to be included in this particular proceeding. Of those factors, the single most significant one for present purposes is “the extent to which the proposed amendments would delay the expeditious resolution of the matter” [Delay Factor]. This factor alone is sufficient reason not to permit these proposed amendments. These proposed amendments would have an adverse impact on the expeditious resolution of this proceeding. The current proceeding is already complex. The proposed Indirect Arms Exports Amendments would significantly expand the scope of the application in many ways, including the number of issues, potential respondents and volume of materials, and would delay it. Regarding the number of issues, these proposed amendments would add a challenge to subsection 2(a) of the Export Control List, as well as *GEP No. 47*, bringing into play additional

statutory provisions. Regarding potential respondents, the current proceeding with the Unopposed Amendments seeks to challenge individual permits issued to the Five Individual Permit Holders and will increase the number of respondents from two to seven. Although there is no evidence on the specific number of potential respondents if the Indirect Arms Exports Amendments were to be permitted, it is clear that there are potential respondents given the scope of what the applicants seek to challenge. Simply by way of example, *GEP No. 47* permits “any resident of Canada” to export certain goods to the United States. Regarding the volume of materials, the issuance of individual permits to the Five Individual Permit Holders will already involve a certified tribunal record(s) relating to multiple matters. As the proposed Indirect Arms Exports Amendments involve different matters, they would require additional evidentiary and certified tribunal records.

[41] While the significance of the Delay Factor in this case is sufficient reason not to permit the proposed amendments, the fourth factor (as listed in *Tait*) reinforces that conclusion: “whether the amendments sought will facilitate the Court’s consideration of the true substance of the dispute on its merits”. The true substance of the dispute as set out in the Original Notice of Application is a challenge to the issuance of individual permits. The proposed Indirect Arms Exports Amendments do not seek to challenge individual permits, but rather, concern a different, much broader dispute involving different statutory provisions. Adding these additional issues into this particular proceeding will not facilitate the Court’s consideration of the issues relating to the issuance of individual permits to the Five Individual Permit Holders.

[42] As a result of the conclusion that it is not in the interests of justice to permit the proposed Indirect Arms Exports Amendments, it is not necessary to consider whether these proposed amendments have a reasonable prospect of success (*i.e.*, the threshold issue), or the Rule 302 issue.

IX. Analysis - Minor Corrections

[43] Having regard to the factors set out in the Amendment Test, it is in the interests of justice to permit the Minor Corrections.

X. Conclusion

[44] The following amendments as set out in the Proposed Amended Notice of Application are permitted:

- a) regarding the Unopposed Amendments, the proposed amendments to the style of cause to add the Five Individual Permit Holders, and to paragraph 1 a);
- b) regarding the Section 24(1) Amendments, the proposed amendments to paragraph 1 n); and
- c) regarding the Minor Corrections, the proposed amendments to paragraphs 1 c), 1 i) and 3 h).

[45] The remainder of the proposed amendments set out in the Proposed Notice of Application are not permitted.

XI. Costs

[46] Having regard to Rules 400 and 401(1), including the factors articulated in Rule 400(3), and having regard to the AGC's success on the contested portions of this motion, costs are awarded to the AGC. Although the AGC requested costs, no submissions were made on quantum, or the basis upon which costs should be awarded. In these circumstances, and having regard to Tariff B, costs are fixed in the total amount of \$1,000, to be paid by the applicants to the AGC by January 31, 2025.

XII. Next Steps

[47] Pursuant to Rule 104(2), I give the following directions regarding the service and filing of the amended notice of application:

- a) As the amended notice of application adds as parties the Five Individual Permit Holders, the applicants shall file the amended notice of application before serving it.
- b) The rules regarding personal service of an originating document shall apply to the service of the amended notice of application on the five new respondents (*i.e.*, the Five Individual Permit Holders). As some or all of the five new respondents have counsel that has already engaged in some way with applicants' counsel, it may be that cooperative counsel will accept service of the amended notice of application and avoid the need for personal service.

[48] Now that this motion has been determined, counsel for the parties should confer and submit a proposed schedule for next steps. This is detailed in the Order below.

[49] I note that the Proposed Amended Notice of Application, like the Original Notice of Application, lists three different lawyers/firms as solicitors of record, none of which are at the same firm. A party is not allowed to have multiple solicitors of record as of right, and leave is required to do so (*Farmobile, LLC v Farmers Edge Inc.*, 2021 FC 1200 at paras 14 to 20; see also *Smooth Payment Inc. v Klarna Bank Ab*, 2024 FC 1274 at paras 16-17). The applicants have not sought leave. This issue needs to be addressed and should be included in the proposed schedule to be submitted.

ORDER in T-473-24**THIS COURT ORDERS that:**

1. Leave is granted to the applicants to amend the notice of application consistent with the reasons above. The permitted amendments shall be shown in the same manner as set out in the Proposed Amended Notice of Application.
2. The following entities are added as respondents effective on the filing of the amended notice of application, and the style of cause amended accordingly, also effective on the filing of the amended notice of application:
 - a) Apollo Microwaves Ltd.;
 - b) Excelitas Canada Inc.;
 - c) GeoSpectrum Technologies Inc.;
 - d) Pratt & Whitney Canada Corp.; and
 - e) TTM Technologies Toronto, Inc.
3. Costs are awarded to the current respondents, fixed in the total amount of \$1,000, which shall be paid by the applicants by January 31, 2025.
4. By January 20, 2025, counsel for the parties shall confer and submit a joint letter to the Court providing:

- a) a status update on the proceeding, including any pending or anticipated motions;
- b) a proposed timetable for next steps; and
- c) dates and times of mutual availability for a case management conference should the Court wish to convene one.

If the parties are unable to agree on any of the foregoing and have discussed same by video, telephone or in person, any points of difference shall be identified in the letter.

"John C. Cotter"
Case Management Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-473-24

STYLE OF CAUSE: HAMMAM FARAH, HIBA FARAH, AYMAN
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- LAW IN THE SERVICE OF MAN v MINISTER OF
FOREIGN AFFAIRS, AND ATTORNEY GENERAL
OF CANADA

**MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL
APPEARANCE OF THE PARTIES**

ORDER AND REASONS: CASE MANAGEMENT JUDGE JOHN C. COTTER

DATED: DECEMBER 20, 2024

WRITTEN SUBMISSIONS BY:

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James Yap	FOR THE APPLICANTS
Veromi Arsiradam	FOR THE APPLICANTS
Sean Gaudet	FOR THE RESPONDENTS
Andrea Bourke	
Jennifer Caruso	
Margaret Cormack	

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- 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

**APPEAL MOTION RECORD
 OF THE APPLICANTS (APPELLANTS)
 VOLUME 2 OF 2**

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