Federal Court  Cour fédérale

Date: 20170124

Docket: T-462-16

Citation: 2017 FC 84

[ENGLISH TRANSLATION REVISED]

Ottawa, Ontario, January 24, 2017

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DANIEL TURP

Applicant

and

THE MNISTER OF FOREIGN AFFAIRS

Respondent

REASONS AND JUDGMENT

I. Nature of the matter

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act* RSC 1985, c F-7, of a decision by the Minister of Foreign Affairs [the Minister] approving the issuance of permits for the export of light armoured vehicles [LAVs] to the Kingdom of Saudi Arabia [Saudi Arabia].

II. Facts

[2] General Dynamics Land Systems Canada [GDLS-C], a company based in London, Ontario, specializes in the production of military vehicles. GDLS-C is a division of General Dynamics Corporation, an American company, and it mainly produces LAVs used by the Canadian Armed Forces and exported to several countries, including Saudi Arabia.

[3] Saudi Arabia started using LAVs manufactured by GDLS-C in the 1990s, following the invasion of Kuwait by Iraq, as part of its rearmament program to counter the threat then represented by Iraq and Iran.

[4] At the time and until very recently, the contracts of sale were negotiated between Saudi Arabia and the United States and granted to GDLS-C by the Canadian Commercial Corporation [CCC], which is responsible for managing American military contracts in Canada. Between 1993 and 2015, almost two thousand nine hundred (2,900) LAVs were exported to Saudi Arabia.

[5] In 2014, with the agreement of the United States, Saudi Arabia decided to negotiate directly with the CCC to procure LAVs, and it signed the contract that led to the export permits at issue in this case.

[6] Because LAVs are goods subject to export control under the *Export and Import Permits Act*, RSC 1985, c E-19 [EIPA], it was necessary to obtain an export permit before shipping the goods to Saudi Arabia. An application was therefore submitted to the Minister for this purpose.

[7] On April 8, 2016, the Minister approved the application for export permits in connection with the contract for the production of LAVs by GDLS-C.

III. Decision

[8] In approving the issuance of the export permits sought, the Minister relied on a memorandum prepared by officials in his own department following consultations and expert assessments done internally and with other departments, including the Department of National Defence and Innovation, Science and Economic Development Canada.

[9] The memorandum noted that none of the branches of government consulted had raised any objection to the issuance of the permits. Saudi Arabia was considered a key partner for Canada and an important ally in the fight against terrorism in the Middle East. The export of the goods in question fell within the purview of Canadian foreign policy and objectives in the region. Moreover, the GDLS-C contract was key to ensuring a strong and viable defence industry in Canada and represented thousands of jobs in Ontario.

[10] The memorandum also noted that Canada still had concerns about Saudi Arabia's human rights record. However, the determining factor regarding military exports and human rights was whether the goods were likely to be used to commit human rights violations or whether there existed a reasonable risk that they could be used against the civilian population. To the best of the Department's knowledge, there was no connection between the LAVs and human rights violations in Saudi Arabia. Furthermore, no incident of that nature had been reported since the exports began in the 1990s.

[11] The memorandum also indicated that a UN expert report on the situation in Yemen had concluded that all parties to the conflict in Yemen had violated international humanitarian law, in particular by targeted airstrikes against the civilian population. However, there was no evidence that Canadian equipment, including LAVs, had been used for that purpose.

[12] The Department was therefore unanimous in recommending to the Minister that the export permits be issued.

IV. Issues

1. What is the applicable standard of review?
2. Does the applicant have the necessary public interest standing?
3. Did the Minister commit a reviewable error in issuing the permits to export LAVs to Saudi Arabia?

V. Relevant provisions

[13] The relevant provisions are sections 3, 5 and 7 of the EIPA and paragraph 2(a) of the *Export Control List*, SOR/89-202 [the List]. These provisions are reproduced as an annex hereto.

VI. Positions of the parties

A. *The applicant*

[14] The applicant submits that the issuance of the permits to export LAVs to Saudi Arabia runs counter to the objectives of the EIPA and the *Geneva Conventions Act*, RSC 1985, c G-3

[the GCA], since both Parliament and the Government wanted to ensure that Canadian arms would not be exported to countries that could use them against their own population or against civilians in an armed conflict. The policies and guidelines adopted by the Government in connection with the EIPA call for the exercise of rigorous control over military exports to countries engaged in hostilities or that commit human rights violations. Before making his decision, the Minister was therefore required to assess the risk that the arms for which an export permit was sought would be used to commit human rights violations or to create instability or national or international conflicts.

[15] The Minister was also required to ensure compliance with the GCA, whereby Parliament incorporated into Canadian law the four Geneva Conventions of 1949 [the Conventions]. Common Article 1 of the Conventions requires Canada to ensure respect for the Conventions and their additional protocols in all circumstances. The evidence establishes that there exists a reasonable risk that LAVs exported to Saudi Arabia would be used in a manner that would threaten the safety of Shiite minorities and jeopardize the peace, safety or stability of the Arabian Peninsula. In addition, Saudi Arabia is directly involved in the hostilities in Yemen through a coalition that it leads. The Minister has therefore ignored the principles that should have guided his discretion under the EIPA and acted in violation of the GCA.

[16] The applicant also submits that the administrative process leading up to the Minister's decision was flawed because that decision was guided by considerations other than respect for fundamental rights and international humanitarian law. The Minister failed to consider critical facts before making his decision. Furthermore, the Minister had already made his decision before

looking at the file, or he felt compelled to make that decision. His mind was closed to any other possibilities.

[17] Moreover, the Minister applied the wrong test in dismissing the fundamental rights concerns. All that is required is a reasonable risk that the arms will be used in a prohibited manner, there does not have to be evidence demonstrating that the arms have been so used. Saudi Arabia's past and present conduct were sufficient to establish that risk.

B. *The respondent*

[18] The respondent submits that the Minister's sole obligation was to take into account all the relevant factors having regard to the existing legislative framework, its purpose and the circumstances of the case. Nothing indicates that he failed to consider these factors.

[19] The purpose of the scheme under 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 and political interests. Existing guidelines and policies provide for strict controls over the export of goods such as LAVs, but contain no prohibitions. Furthermore, administrative instruments recognize the economic importance of Canada's defence industry. It was therefore entirely appropriate in the circumstances to take into account political and economic factors in addition to the human rights considerations. Moreover, if the Minister had taken irrelevant factors into consideration, they would have to have formed the primary basis for his decision in order to warrant this Court's intervention.

[20] Furthermore, it is for the Minister to assess the risk that the LAVs might be used against the civilian population and to determine the basis upon which that assessment will be made. He was authorized to make his decision on the basis of the recommendations of the officials in his department, whose expertise in relation to the application of the EIPA has moreover been recognized by this Court.

[21] The respondent notes that common Article 1 has not been incorporated into Canadian law and that, even if it had been, the applicant lacks the necessary standing to raise the issue of its violation, as this article is binding only on States and does not confer any rights on individuals. Further, section 2 of the GCA does not constitute an implementation of the Conventions as a whole, since parliamentary approval is not tantamount to incorporation. Indeed, the debates preceding the adoption of the GCA show that Parliament did not intend to implement the Conventions as a whole. It is therefore incorrect to maintain that the GCA was violated in the present case, as Article 1 of the Conventions is not part of Canadian law. The respondent nevertheless notes that the Minister's decision is consistent with the values expressed in the Conventions.

[22] Should the Court decide nonetheless to rule on this issue, the respondent submits that the Minister's decision does not violate Article 1. There is no evidence that the State Parties to the Conventions subscribe to the interpretation of this provision put forward by the applicant's expert, and State practice does not support it. Moreover, the evidence regarding the potential violation of international humanitarian law by Saudi Arabia in Yemen is inconclusive and the Court cannot accept that premise as a fact. Furthermore, Article 1 applies solely in the context of

international armed conflicts; the conflict in Yemen does not fit that description, and Canada has no involvement in it whatsoever. Finally, even if Article 1 were applicable, Canada may choose the measures that are appropriate to ensure compliance with the Conventions, as the provision does not require that specific measures be taken in response to violations of international humanitarian law.

VII. Analysis

1. What is the applicable standard of review?

[23] The appropriate standard of review is reasonableness. In *Dunsmuir v New Brunswick,* 2008 SCC 9 at paragraph 51 [*Dunsmuir*], the Supreme Court of Canada stated that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness". This Court will only intervene if the Minister's decision is not justified, transparent or intelligible, or if it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[24] To determine whether the Minister's decision falls within the range of possible outcomes, the Court must define the scope and limits of the Minister's discretion in light of the specific context in which the decision was made, that is, the legislative and regulatory framework and its associated policies (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18 [*Catalyst Paper Corp*]; *Wilson v Atomic Energy of Canada Limited*, 2016 SCC 29 at para 22; see also *Halifax (Regional*

Municipality) v Nova Scotia (Human Rights Commission), 2012 SCC 10 at para 44). As the Supreme Court confirmed more recently in *Catalyst Paper Corp*:

> [18] The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand.

[25] In this case, the contextual analysis must take into account the economic and trade objectives of the EIPA, Canada's national and international security interests and the Minister's expertise with regard to international relations, as well as considerations relating to human rights.

2. Does the applicant have the necessary public interest standing?

[26] The applicant is asking this Court to grant him public interest standing in the context of this judicial review. The respondent is not opposed to this request, but submits that it is not open to the applicant to raise issues of procedural fairness, as the impugned decision involves government policies.

[27] In deciding whether to grant public interest standing to an applicant, courts must consider three factors:

1. whether there is a serious justiciable issue raised;
2. whether the plaintiff has a real stake or a genuine interest in it; and

> 3. whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.
>
> (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37).

[28] In all cases, the principles applicable to the granting of public interest standing should be given a liberal and generous interpretation by the courts (*Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236).

[29] I am of the view that the question of the issuance of export permits for controlled goods is sufficiently important from the public's perspective to meet the first criterion. As for the second criterion, the applicant is a professor of constitutional and international law for whom the principles of the rule of law, respect for fundamental rights and international humanitarian law are of particular concern. Among other things, through several interventions before the courts, he has shown himself to be an engaged citizen with a genuine interest in issues involving fundamental rights around the world. I also find that this judicial review is a reasonable and effective way to bring the issue before the Court. Aside from the administrative avenues that have already been exhausted, there exists no other way to bring such a challenge before the Court. No other party has a higher interest than the applicant when it comes to challenging the approval of export permits by the Minister, with the possible exception of a Canadian living in Saudi Arabia or Yemen.

[30] In light of the above, I find it appropriate to grant public interest standing to the applicant with respect to the issue of the reasonableness of the Minister's decision to issue the export permits.

[31] As to the issues raised by the applicant regarding procedural errors and the Minister's closed mind, they fall within the realm of procedural fairness, and it is not open to a public interest litigant to rely on such arguments in this context. The impugned decision is based on federal government interests and policies in various fields. In *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307, at paragraph 95, the Federal Court of Appeal held as follows:

> [95] […] At common law, the Governor in Council is not subject to procedural fairness obligations where it is deciding matters with significant policy content that affect a wide range of constituencies : […]. On the other hand, there may be some scope for the imposition of procedural fairness obligations where the rights and privileges of an individual or a relatively discrete group of individuals are being directly affected on the basis of provisions that impose objective standards and criteria […].
>
> [Citations omitted.]

[32] In the circumstances, only the rights and interests of GDLS-C were directly affected by the process for issuing export permits for the LAVs manufactured by the company. It is not open to the applicant, who is not directly affected by the decision, to raise these arguments. Therefore, this Court will rule only on the reasonableness of the impugned decision.

3. Did the Minister commit a reviewable error in issuing permits to export LAVs to Saudi Arabia?

(i) The legal and regulatory framework

[33] As mentioned above, LAVs are subject to export controls under the regime provided for in the EIPA and its regulations. Sections 3 and 5 of the EIPA clearly indicate that the Governor in Council may establish a list of goods, the export of which it is necessary to control on account of Canada's national interests. LAVs are goods covered by paragraph 2(a) of the List and described in paragraph 2-6.a of "A Guide to Canada's Export Controls" (Foreign Affairs, Trade and Development Canada, December 2013).

[34] The Minister may issue export permits for such goods under section 7 of the EIPA. Subsection 7(1.01) identifies the factors to be taken into account in deciding whether to issue such permits:

7 (1.01) In deciding whether to issue a permit under subsection (1), the Minister may, in addition to any other matter that the Minister may consider, have regard to whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to	7(1.01) Pour décider s'il délivre la licence, 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 :
(a) the safety or interests of the State by being used to do anything referred to in paragraphs 3(1)(a) to (n) of the Security of Information Act; or	a) 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 la protection de l'information;

(b) peace, security or stability in any region of the world or within any country.	b) de nuire à la paix, à la sécurité ou à la stabilité dans n'importe quelle région du monde ou à l'intérieur des frontières de n'importe quel pays.
[…]	[…]

[35] The legislation is supplemented by one main administrative tool, the "Export Controls Handbook" (Global Affairs Canada, June 2015) [the Handbook]. The Handbook describes as follows the factors to consider before issuing an export permit:

> With respect to military goods and technology, Canadian export control policy has, for many years, been restrictive. Under present policy guidelines set out by Cabinet in 1986, Canada closely controls the export of military items to:
>
> - countries which pose a threat to Canada and its allies;
> - countries involved in or under imminent threat of hostilities;
> - countries under United Nations Security Council sanctions;
> - countries whose governments have a persistent record of serious violations of the human rights of their citizens, unless it can be demonstrated that there is no reasonable risk that the goods might be used against the civilian population.

(ii) The Minister's discretion within the EIPA framework

[36] A plain reading of the language chosen in the EIPA to frame the Minister's powers indicates that the Minister has broad discretion in issuing export permits for controlled goods. Subsection 7(1) of the EIPA states in this regard:

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.	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.

[37] These factors guide the Minister. It is for him to decide how to assess them and how much weight to give to each, as long as he exercises his power in accordance with the object and in the spirit of the EIPA (*Németh v Canada (Justice*), 2010 SCC 56 at para 58).

[38] The role of this Court is thus to determine whether the Minister acted within his jurisdiction and exercised his discretion on the basis of proper considerations (*Canadian Council for Refugees v Canada*, 2008 FCA 229 at para 78). If he considered the relevant factors in conformity with the constraints imposed by the legislation, the reviewing court must uphold his decision, even if it would have arrived at a different conclusion *(Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at paras 37 - 38).

[39] The applicant submits that under subsection 7(1.01) of the EIPA and the Handbook, and in light of Canada’s international obligations, the Minister is not only obliged to consider the factors set out in subsection 7(1.01) of the EIPA, but must also refuse to issue an export permit if

there exists a reasonable risk that the exported goods might be used against the civilian population.

[40] For the reasons that follow, I am of the opinion that the Minister remains free to issue an export permit if he concludes that it is in Canada's interest to do so, considering the relevant factors.

[41] I note to begin with that neither the EIPA nor the Handbook contains any export prohibitions. It is open to Parliament to adopt such measures under the *Special Economic Measures Act*, SC 1992, c 17, following a decision, resolution or recommendation of an international organization of states or association of states of which Canada is a member, or where the Minister is of the opinion that a grave breach of international peace and security by a foreign state has occurred that has resulted or is likely to result in a serious international crisis. However, the evidence indicates that neither the United Nations Security Council nor the Parliament of Canada has adopted any resolution against Saudi Arabia. The export of military vehicles to Saudi Arabia was therefore permitted under the scheme of the EIPA, subject to the abovementioned provisions.

[42] With regard to the factors set out in the Handbook, they were explicitly considered during the consultations leading up to the decision. The Department of Defence noted that Saudi Arabia was "a key Western military ally in the Middle East and supports international efforts to counter ISIS in Iraq and Syria as well as counter instability in Yemen", a conclusion also supported by Global Affairs Canada. Therefore, this is not a country that poses a threat to Canada and its

allies. The two departments also considered Saudi Arabia's participation in the conflict in Yemen, noting that the final report of the United Nations Panel of Experts on Yemen had concluded that Saudi Arabia and the other parties to the conflict had violated international humanitarian law during the conflict, but that these violations were not connected with the use of LAVs. Their findings are reproduced in the decision:

> 17. In recent months, airstrikes by the Saudi-led coalition and, to a lesser extent, actions by the Houthi/Saleh forces in Yemen have been criticised by NGOS, including Amnesty International and Human Rights Watch and more recently by the UN due to the high civilian toll. The final UN Panel of Experts on Yemen report released on February 23, 2016, notes that all parties to the ongoing conflict in Yemen, including Saudi Arabia, have violated international humanitarian law, including by intentionally targeting civilians and attacking humanitarian organizations. The report's allegations against Saudi Arabia pertain to the use of aerial bombardment, indiscriminate shelling, and the use of artillery rockets against civilian areas. The Panel also observed that the Coalition has supplied weapons to resistance forces without appropriate measures to ensure accountability. <u>There has been no indication that equipment of Canadian origin, including LAVs, may have been used in acts contrary to international humanitarian law.</u> […].
>
> [Emphasis added.]

[43] Global Affairs Canada also noted that no sanctions had been imposed on Saudi Arabia.

[44] Finally, the decision addressed human rights concerns, as evidenced by the following passage:

> 15. However, as noted above, Canada has had, and continues to have, concerns with Saudi Arabia's human rights records. A key determinant in assessing export permit applications against human rights concerns is whether the nature of the goods or technology proposed for export lends itself to human rights violations, and whether there is a reasonable risk that the goods might be used against the civilian population. The Department is not aware of any

> reports linking violations of civil and political rights to the use of the proposed military-purposed exports. Based on the information provided, we do not believe that the proposed exports would be used to violate human rights in Saudi Arabia. Canada has sold thousands of LAVs to Saudi Arabia since the 1990s, and, to the best of the Department's knowledge, there have been no incidents where they have been used in perpetration of human rights violations.
>
> […]
>
> [Emphasis added.]

[45] It is for the Minister, whose expertise in such matters has been recognized by the courts (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 37 [*Lake*]), to assess whether there is a reasonable risk that the goods might be used against the civilian population. The fact that there have been no incidents in which LAVs have been used in human rights violations in Saudi Arabia since trade relations between that country and Canada began in the 1990s is significant evidence in the context of this assessment. For there to be a reasonable risk, there must at least be some connection between Saudi Arabia's alleged human rights violations and the use of the exported goods.

[46] Moreover, the guidelines, while useful for informing the exercise of the Minister's discretion and the interpretation of the statutory provisions, are not binding. In *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 60 [*Agraira*], the Supreme Court ruled as follows:

> The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications. As a result, the

> Guidelines can be of assistance to the Court in understanding the Minister's implied interpretation of the "national interest".

[47] The Minister should not fetter the exercise of his discretion by treating these informal Guidelines as if they were mandatory requirements (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32 [*Kanthasamy*]). Accepting the applicant's interpretation would be tantamount to incorporating or creating a restriction on the discretion that is not contemplated by the legislative framework of the EIPA, or to recognizing the existence of a non-discretionary power.

[48] In *Maple Lodge Farms v Government of Canada* [1982] 2 SCR 2 at pp 6 and 7 [*Maple Lodge Farms*], in considering the export and import regime under the provision that was the equivalent of today's section 7 of the EIPA, the Supreme Court stated that guidelines could not fetter the Minister's discretion in such a fashion:

> […] The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion.

[49] In *Droit administratif*, 6th ed, Éditions Yvon Blais, at pp 183 and 184, Patrice Garant writes the following:

> [TRANSLATION]
>
> The distinction between a discretionary power and a non-discretionary power has to do with the appropriateness of acting or not acting, and taking the most appropriate measure in the circumstances or context. In the first case, the administration decides what is appropriate in light of the public interest.
>
> […] In the second case, its conduct is predetermined in that it is dictated in advance by the statute or regulations.
>
> The best definition we can provide of discretionary power is as follows: the ability to act or not to act, or to take the measures that are appropriate in the circumstances on the context, assessing appropriateness of the measures from the standpoint of the public interest. [Citations omitted.]

[50] Incorporating an obligation not to issue an export permit in the circumstances of this case would fetter this ability to act or not to act, although the Minister's discretion under section 7 of the EIPA is subject to no express or implied limitation other than the duty to exercise his discretion in good faith, in accordance with the principles of natural justice and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose (*Maple Lodge Farms*, at pp 7 and 8).

[51] The impugned decision shows that the Minister, in reaching it, took into consideration Canada's national and international security interests as well as its economic and trade interests. These factors are neither irrelevant nor extraneous to the statutory purpose.

[52] As for Canada's international obligations, it should be pointed out that the Supreme Court, in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at

paragraphs 70-71, held that the values reflected in international law may be considered in determining whether a decision is reasonable.

[53] In my view, Parliament recognized the spirit of Article 1 of the Conventions in enacting subsection 7(1.01) of the EIPA and issuing the Handbook, which invite the Minister to assess human rights factors before authorizing the export of military goods to countries suspected of having violated fundamental rights and international humanitarian law.

[54] Contrary to the applicant's claim, the Minister considered the conflict in Yemen at paragraph 17 of his decision, cited above. The decision refers to comments by the United Nations Panel of Experts on the situation in Yemen and indicates that there was no evidence that Canadian military equipment, including the LAVs, had been used to commit the alleged violations of international humanitarian law. The decision also takes into account media reports of the appearance of military equipment of Canadian origin among the rebel forces, but notes that the Canadian Embassy in Riyadh had concluded that these arms had been captured in the course of military operations and that this type of loss was inevitable in wartime. Whether or not one agrees with the outcome of his analysis, the Minister's conclusions were based on the evidence in the record.

[55] In short, the scope of this Court's judicial review power is limited to making sure that the Minister's discretion was exercised in good faith on the basis of the relevant considerations. In this case, the Court is satisfied that it was so exercised. It therefore cannot intervene, as the

Minister's decision constitutes a possible, acceptable outcome that is defensible in respect of the facts and law.

(iii) Canada's international obligations

[56] As a further argument, the applicant submits that the Minister's decision violates Article 1 of the Conventions, which he argues was incorporated into Canadian law through the GCA. The four Geneva Conventions of 1949 and their additional protocols form the basis of international humanitarian law (Claude Emanuelli, International Humanitarian Law (Cowansville: Éditions Yvon Blais, 2009) at 19). Common Article 1of the Conventions states:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.	Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances.

[57] The respondent submits in the first place that the applicant does not have the standing to raise the violation of Article 1 of the Conventions, even if it has been incorporated into domestic law. If a treaty does not confer any rights on individuals, its incorporation into domestic law does not create any (UL Canada inc. c Québec (Procureur général) [1999] J.Q. No 1540 at para 89). I agree with the respondent on this point.

[58] I note that Article 1 of the Conventions confers rights and imposes obligations on the State Parties to the Conventions, but not on individuals. The protection of individuals under the Conventions is instead conferred directly to the State Party, and it is solely the responsibility of the State Party to discharge these obligations under the Conventions (Kate Partlett, *The*

Individual in the International Legal System: Continuity and Change in International Law (Cambridge University Press, 2011) at 182).

[59] However, considering the lengthy discussion of the applicability of the GCA and the Conventions in the factums of both parties and at the hearing, the Court is prepared to consider the issue briefly and to make the following comments.

[60] The respondent submits that Article 1 was not incorporated into Canadian law through the GCA. Reception of international law into Canadian law occurs by incorporation or by adoption, depending on the nature of the rules of law in question. Generally, treaty obligations, such as those in the Conventions, must be endorsed by Parliament and expressly integrated into Canadian law in order to have force of law, particularly if respecting these obligations involves a modification of domestic law (*Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] JCJ No. 5, [1937] AC 326 [*Labour Agreements Reference*]).

[61] Section 2 of the GCA reads as follows :

2 (1) The Geneva Conventions for the Protection of War Victims, signed at Geneva on August 12, 1949 and set out in Schedules I to IV, are approved.	2 (1) Sont approuvées les Conventions de Genève pour la protection des victimes de guerre, signées à Genève le 12 août 1949 et reproduites aux annexes I à IV.
[…]	[…]

[62] The respondent emphasizes that legislative approval is not tantamount to incorporation (*Baker Petrolite Corp. v Canwell Enviro-Industries Ltd*. [2003] 1 FC 49, 2002 FCA 158 at para

25; *Pfizer Inc. v Canada* [1999] 4 FC 441 at para 37; *Council of Canadians v Canada (Attorney General)*, 277 DLR (4th) 527, 2006 CanLII 40222 at para 25). In the present case, only certain parts of the Conventions were implemented by the GCA. For example, Parliament incorporated the serious offences provisions of the Conventions by making those offences criminal acts in Canada. When Parliament wishes to implement an international convention in its entirety by appending it to an act, it clearly says so. Section 2 of the GCA does not have the effect of giving force of law to Article 1 of the Conventions.

[63] Moreover, I note that according to the doctrine, if the rule does not require a modification of domestic law, international treaty obligations contracted by Canada may be given effect by administrative means. Professor Kindred explains that:

> If existing law grants a minister of the government regulation-making authority of sufficient scope to include the provisions of the treaty, they may be given internal force of law by executive act . . .
>
> Hugh Kindred, *International Law Chiefly as Interpreted and Applied in Canada*, 8th ed. (Toronto: Emond Montgomery Publications, 2014) at 174.

[64] This was the case, for example, when the government was able to implement the *Agreement on Government Procurement* (1994) by simply modifying its rules for calls for tender with the Minister's agreement so as to integrate the obligation not to discriminate against foreign products (*Rousseau Metal Inc. v Canada* [1987] FCJ No 40).

[65] While no ruling is made on this issue because it is not necessary to the outcome of this case, it is possible that Article 1 of the Conventions has been integrated into Canadian law. The

resulting obligations are contextual. It was not shown that their incorporation requires a modification to domestic law.

[66] I also note that the Supreme Court stated the following in *obiter* at paragraph 25 of *Canada (Justice) v Khadr*, 2008 SCC 28:

> Canada is a signatory of the four *Geneva Conventions* of 1949, which it ratified in 1965 (Can T.S. 1965 No. 20) and has incorporated into Canadian law with the *Geneva Conventions Act*, R.S.C. 1985, c. G−3. […].
>
> [Emphasis added.]

[67] In any event, the only armed conflict the applicant has referred to is that in Yemen. The conflict in Yemen is not an international armed conflict. It opposes the Houthi rebel forces against those of Yemeni President Hadi, who are supported by a coalition made up of a number of countries in the Arabian Peninsula, including Saudi Arabia. The presence of foreign forces in this context does not transform the conflict into an international armed conflict since it is not a conflict between different states. This distinction is significant because the rules that apply are not the same for an internal conflict.

[68] The applicant's expert witness, Professor David, provides the following explanation:

> [TRANSLATION]
>
> The distinction [between an international armed conflict and a non-international armed conflict] is essential because the law of armed conflict only applies in its entirety to an international armed conflict. Only certain rules apply to an internal armed conflict.
>
> Éric David, *Principes de droit des conflits armés*, 3rd ed (Brussels: Bruylant, 2002) at p 104.

[69] He later states at p. 482 that the rules that apply to non-international armed conflicts are limited to Common Article 3 of the Conventions.

[70] Moreover, Canada is an important partner of Saudi Arabia, but is not directly involved in the Yemeni conflict or in any other defence initiatives involving Saudi Arabia. Author Maya Brehm affirms that, since it cannot be presumed that weapons sold legally will be used to obstruct international humanitarian law, the limits on arms trade that are based on respecting international humanitarian law only apply to states that are already involved in an armed conflict (Maya Brehm, "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law" (2007) 12 J Confl & Sec. L. 359 at 377).

[71] Additionally, although the ICRC considers that Article 1 applies equally to international armed conflicts and to non-international armed conflicts, Canadian case law has determined that Article 1 does not impose any obligation in the context of non-international armed conflicts. In *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FCR 791 at paragraph 81, this Court held as follows:

> […] Since Canada has no involvement whatsoever in that dispute [the civil war in Sri Lanka], common Article 1 of the Geneva Conventions of 1949 does not impose upon our country an obligation to ensure that the parties to that conflict respect common Article 3.[…]

[72] Lastly, I also note that no sanction has been imposed on Saudi Arabia in connection with its intervention in Yemen and that the United Nations Panel of Experts recommended that Saudi Arabia continue to play a military role by authorizing the coalition it leads to inspect vessels suspected to be carrying weapons intended for Yemen (Panel of Experts on Yemen, *Final Report*

of the Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014), 2016, UN Doc S/2016/73, at p 50/259.

[73] As Canada is not involved in the conflict in Yemen and it is a non-international armed conflict, in my opinion Article 1 does not apply. Extending the scope of Article 1 to states that are not parties to an armed conflict would prevent the export of military equipment without there being any evidence of a substantial risk that such equipment will be used to commit a violation of international humanitarian law. In the present case, the history of exports of LAVs to Saudi Arabia does not support such a conclusion.

[74] Moreover, a declaration by the Court that issuing export permits is contrary to the GCA would not have any practical effect because the Court cannot dictate to the executive the measures to be taken in the event of violations of Article 1 of the Conventions. The experts of both parties recognize that Article 1 of the Conventions does not impose on the State Parties in the taking of any specific measure in response to a violation of international humanitarian law by another state (Affidavit of Michael Schmitt at paras 94 - 99). This is also the ICRC's interpretation in its *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016) at paragraphs 146 -149 and 164 -165. The ICRC clearly states that:

> States remain in principle free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect.
>
> ICRC, *Commentary on the First Geneva Convention* (2016) at para 165.

[75] The doctrine recognizes that states are often powerless when faced with violations of international humanitarian law (Emanuelli at p 309). The rules of international humanitarian law, interpreted and applied consistently with the general rules of international law, including the principle of state sovereignty, do not always allow for such situations to be addressed. In this specific context, Canadian case law has recognized that the executive, rather than the courts, has the expertise necessary to make decisions regarding international relations, and the Court cannot intervene except when the exercise of the government's discretionary powers could violate the rights guaranteed under the *Canadian Charter of Rights and Freedoms* (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 40). The applicant has never claimed that the alleged infringement of Article 1 resulted in a violation of the Charter in that case. Canada's obligations under this article fall strictly within the framework of its foreign policy. Even if Article 1 did apply in this case, the Court would not be able to intervene.

VIII. Conclusion

[76] The provisions of the EIPA confer a broad discretionary power on the Minister over the assessment of the relevant factors relating to the granting of export permits for goods on the Export Control List. In the impugned decision, the Minister considered the economic impact of the proposed export, Canada's national and international security interests, Saudi Arabia's human rights record and the conflict in Yemen before granting the export permits, thereby respecting the values underlying the Conventions. The role of the Court is not to pass moral judgment on the Minister's decision to issue the export permits but only to make sure of the legality of such a decision. Of course, his broad discretion would have allowed him to deny the

permits. However, the Court is of the opinion that the Minister considered the relevant factors. In such a case, it is not open to the Court to set aside the decision.

[77] For these reasons, the application for judicial review is dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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ANNEX A: LEGISLATION

Export and Import Permits Act, R.S.C. (1985), c. E-19

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:	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 des fins suivantes :
(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;	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;
[…]	[…]
(d) to implement an intergovernmental arrangement or commitment;	d) mettre en œuvre un accord ou un engagement intergouvernemental;
[…]	[…]
5 (1) The Governor in Council may establish a list of goods, to be called an Import Control	5 (1) Le gouverneur en conseil peut dresser la liste des marchandises d'importation

List, including therein any article the import of which the Governor in Council deems it necessary to control for any of the following purposes:

[…]

(e) to implement an intergovernmental arrangement or commitment; or

[…]

7 (1) Subject to subsection (2), the Minister may issue to any resident of Canada applying there for 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) In deciding whether to issue a permit under subsection (1), the Minister may, in addition to any other matter that the Minister may consider, have regard to whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to

(a) the safety or interests of the

contrôlée comprenant les articles dont, à son avis, il est nécessaire de contrôler l'importation pour l'une des fins suivantes :

[…]

e) mettre en œuvre un accord ou un engagement intergouvernemental;

[…]

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) Pour décider s'il délivre la licence, 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 :

a) de nuire à la sécurité ou aux intérêts de l'État par

State by being used to do anything referred to in paragraphs 3(1)(a) to (n) of the Security of Information Act; or	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 la protection de l'information;
(b) peace, security or stability in any region of the world or within any country.	b) de nuire à la paix, à la sécurité ou à la stabilité dans n'importe quelle région du monde ou à l'intérieur des frontières de n'importe quel pays.
[…]	[…]

Export Control List, SOR/89-202

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:	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;
[…]	[…]