Federal Court of Appeal  Cour d'appel fédérale

Date: 20180706

Docket: A-59-17

Citation: 2018 FCA 133

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

DANIEL TURP

Appellant

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent

Heard at Montréal, Quebec, on December 6, 2017.

Judgment delivered at Ottawa, Ontario, on July 6, 2018.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: BOIVIN J.A.

CONCURRING REASONS BY: GLEASON J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an appeal from a Federal Court decision rendered by Madam Justice Tremblay-Lamer (the judge) on January 24, 2017 (2017 FC 84), dismissing the appellant's application for judicial review. Specifically, the judge concluded that the appellant could not challenge the decision of the Minister of Foreign Affairs (the Minister) on April 8, 2016, to issue permits for

the export of light armoured vehicles (LAVs) to the Kingdom of Saudi Arabia (Saudi Arabia). LAVs appear on the *Export Control List*, S.O.R./89-202 (the List), established by the Governor in Council under section 3 of the *Export and Import Permits Act*, R.S.C. (1985), c. E-19 (the EIPA). It is important to note that under section 13 of the EIPA, an export permit must be obtained from the Minister in order to export LAVs.

[2] The appellant submits that pursuant to the EIPA, the *Export Controls Handbook* (Global Affairs Canada, August 2017) (the Handbook) and Canada's international obligations, the Minister should have declined to issue said export permits on the ground of a reasonable risk that Saudi Arabia might use the LAVs against civilian populations, particularly in Yemen.

[3] For the reasons that follow, I am of the view that the appeal should be dismissed. Specifically, I am of the view that the judge did not make any error justifying our intervention, and I agree entirely with the reasons she set out to support her conclusion to dismiss the appellant's application for judicial review.

II. Background

[4] General Dynamics Land Systems – Canada Corporation (GDLS) is a corporation based in London, Ontario, that manufactures military equipment, its most sought after products being LAVs. In 2014, an agreement was signed between Saudi Arabia and Canadian Commercial Corporation, agent of the federal Crown, providing for the purchase by Saudi Arabia of a certain quantity of LAVs to be produced by GDLS.

[5] On April 8, 2016, the Minister approved the issuance of six (6) permits for the export to Saudi Arabia of LAVs produced by GDLS. The Minister based his decision on a recommendation from the Deputy Minister of Foreign Affairs dated March 21, 2016.

[6] The Minister's decision to approve the export of LAVs to Saudi Arabia was debated extensively in certain sectors of the Canadian community in view of alleged violations of international humanitarian law and human rights by Saudi Arabia in relation to conflicts in which it is involved.

[7] On March 21, 2016, the appellant filed an application for judicial review before the Federal Court. This application was subsequently amended on April 21, 2016, in response to the Minister's decision of April 8, 2016.

III. Legal framework

[8] The structure providing the basis of the Minister's decision includes both legislative and regulatory instruments as well as less formal tools intended to guide the decision-making process. In the light of this regime's complexity, I will review the instruments constituting the legislative framework in this case before moving on to the Federal Court decision and my analysis.

[9] In short, the authority to issue export permits is provided for in the EIPA (*Export and Import Permits Act*), which makes reference to the List (*Export Control List*), the content of which is specified in *A Guide to Canada's Export Controls* (Global Affairs Canada,

December 2015). The whole process is guided by the Handbook (*Export Controls Handbook*), which channels the Minister's implementation of the statutory regime. In addition to those instruments, there are various international conventions to which Canada is party and which are relevant in this case.

[10] The purpose of the regime provided for in 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. The 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:

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 ou plusieurs 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 ;
(*b*) to ensure that any action taken to	*b*) s'assurer que les mesures prises

promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource;

pour favoriser la transformation au Canada d'une ressource naturelle d'origine canadienne ne deviennent pas inopérantes du fait de son exportation incontrôlée ;

(*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) 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) [Repealed, 1999, c. 31, s. 88]

c.1) [Abrogé, 1999, ch. 31, art. 88]

(*d*) to implement an intergovernmental arrangement or commitment;

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

(*e*) to ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs; or

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*) 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.

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.

7(1) Subject to subsection (2), the Minister may issue to any resident of Canada applying therefore 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

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

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 State by being used to do anything referred to in paragraphs 3 (1) (a) to (n) of the Security of Information Act; or

(*b*) peace, security or stability in any region of the world or within any country.

[my emphasis]

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 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) 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.

[mon soulignement]

[11] The List, meanwhile, provides as follows:

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,

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,

that are intended for export to any destination other than the United States;	qui sont destinées à l'exportation vers toute destination autre que les États-Unis ;

[12] The Guide, mentioned in paragraph 2(a) of the List, establishes multiple categories of goods and technology whose export is controlled under the List. LAVs fall under category 2-6, "Ground vehicles and components," which are listed under group 2, "Munitions List," in the Guide. LAVs have been included on the List since at least 1954.

[13] In its introduction, the Guide indicates that it "includes military . . . goods and technology . . . that are controlled pursuant to Canada's commitments made in multilateral export control regimes, bilateral agreements, as well as certain unilateral controls." Military equipment such as LAVs may consequently be included on the List pursuant to paragraph 3(1)(*a*) of the EIPA so that the government can ensure that these goods are not exported to a country or region where their use might be detrimental to the security of Canada. Furthermore, under paragraph 3(1)(*d*) of the EIPA, these goods may be included on the List to implement an intergovernmental arrangement or commitment. These arrangements include the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies that was reached at the Plenary Meeting in Vienna, Austria, held on July 11 and 12, 1996, and amended by WA-LIST (15) 1 Corr. 1 at the Plenary Meeting in Vienna, Austria, held on December 2 and 3, 2015 (Wassenaar Arrangement). The objectives of this arrangement include the promotion of transparency and accountability in relation to weapon transfers.

[14] The tool constituting the framework of application of the EIPA, the List and its Guide is the Handbook, which concerns the export of military products to countries that pose a threat to

Canada or its allies, are involved in hostilities, are under United Nations Security Council sanctions or whose governments commit human rights violations (Handbook, p. 54). Indeed, the Handbook provides further that the objectives of export controls are to ensure that exports of certain goods are consistent with Canada's foreign and defence policies (Handbook, p. 6). At paragraph 35 of her reasons, the judge discusses the Handbook in the following terms:

> The legislation is supplemented by one main administrative tool, the *Export Controls 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.
>
> [emphasis added, notes omitted]

[15] I also reproduce the excerpts from the Handbook cited by the appellant at page 8 of his memorandum of fact and law:

> [TRANSLATION]
> Information contained in this Handbook includes: how to obtain the necessary permits for the export or transfer of controlled items and how to comply with the requirements of the *Export and Import Permits Act* and its related regulations (p. 1).
>
> The main objective of export controls is to ensure that exports of certain goods and technology are consistent with Canada's foreign and defence policies. Among other policy goals, export controls seek to ensure that exports from Canada:

- do not cause harm to Canada and its allies;
- do not undermine national or international security;
- do not contribute to national or regional conflicts or instability;
- do not contribute to the development of nuclear, biological or chemical weapons of mass destruction, or of their delivery systems;
- are not used to commit human rights violations; and
- are consistent with existing economic sanctions' provisions (p. 6).

[emphasis in the original]

[16] It is also important to note that, as indicated by the respondent at paragraph 40 of its memorandum of fact and law, the Handbook essentially reproduces the "Export Controls Policy" issued by the government in 1986 (Appeal Record, volume 1, p. 118), also referred to as the *Guidelines for Exports of Military and Strategic Goods* (the Guidelines). I reproduce the excerpts from the Guidelines cited by the appellant at pages 7 and 8 of his memorandum of fact and law:

> [TRANSLATION]
> The Minister noted that the government will no longer issue permits to export military equipment to countries where the government has seriously and repeatedly violated the rights of citizens, unless it can be demonstrated that there is no reasonable risk that the military equipment will be used against the civilian population. In keeping with the new policy concerning countries with a record of serious human rights violations, it is clearly up to the exporter to prove "that there is no reasonable risk."
>
> . . .
>
> The Minister indicated that the government will closely control the export of military goods and technology to countries:
>
> 1) that pose a threat to Canada and its allies;
> 2) that are involved in or under imminent threat of hostilities;
> 3) that are under United Nations Security Council sanctions; or

> 4) 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.
>
> [emphasis in the original]

[17] Both the Guidelines and the Handbook are aimed at regulating the control of exports of goods included in the List without entirely prohibiting their export. It is also important to note that both the Guidelines and the *Report on Exports of Military Goods from Canada* (Canada, Global Affairs, 2012-2013) (the Report) state the economic importance of the Canadian defence industry and the exports that it generates. Page 2 of the Report, which is cited in the Appeal Record, volume 1, page 158, reads as follows:

> Canada's defence industry makes a valuable contribution to the nation's prosperity and employs tens of thousands of Canadians. It develops high-technology products and is closely integrated with counterparts in allied countries. Export controls are not meant to hinder international trade unnecessarily but to regulate and impose certain restrictions on exports in response to clear policy objectives, described above. Canada's defence industry provides the Canadian Forces, as well as the armed forces of our allies, with the equipment, munitions and spare parts necessary to meet operational needs, including requirements for combat and peacekeeping missions. As stated in the United Nations Charter, all states share a right to legitimate self-defence.
>
> [emphasis added]

[18] I also reproduce the excerpt from the Report cited by the appellant at page 9 of his memorandum of fact and law:

> Canada has some of the strongest export controls in the world. A key priority of Canada's foreign policy is the maintenance of peace and security. To this end, the Government of Canada strives to ensure that Canadian military exports are not prejudicial to peace, security or stability in any region of the world or within any country. (p. 1)

> Once an application to export goods or technology has been received, wide-ranging consultations are held among human rights, international security and defence-industry experts at DFATD (including those residents at Canada's overseas diplomatic missions), the Department of National Defence and, as necessary, other government departments and agencies. Through such consultations, each export permit application is assessed for its consistency with Canada's foreign and defence policies. Regional peace and stability, including civil conflict and human rights, are actively considered (p. 2).
>
> [emphasis in the original]

[19] Finally, according to the appellant, in addition to the Wassenaar Arrangement mentioned above, other international obligations influence Canada's decisions concerning the issuance of permits, among them the Geneva Conventions of 1949 (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, August 12, 1949, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20; *Geneva Convention relative to the Treatment of Prisoners of War*, August 12, 1949, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20) (Geneva Conventions). They provide as follows:

ARTICLE 1	**ARTICLE PREMIER**
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.
ARTICLE 3	**ARTICLE 3**
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a	En cas de conflit armé ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes, chacune des Parties au conflit sera tenue

minimum, the following provisions:	d'appliquer au moins les dispositions suivantes :
…	[…]
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.	Les Parties au conflit s'efforceront, d'autre part, de mettre en vigueur par voie d'accords spéciaux tout ou partie des autres dispositions de la présente Convention.
…	[…]

[20] The Geneva Conventions are approved under Canadian law by the *Geneva Conventions Act*, R.S.C. (1985), c. G-3 (GCA) as follows:

Conventions approved	**Approbation des conventions**
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.

[21] Such is the statutory regime in force at the time of the Minister's decision of April 8, 2016.

IV. Federal Court decision

[22] First, the judge concluded that the standard of review applicable to the Minister's decision was that of reasonableness, adapted to the specific context in which the Minister's discretion was exercised. In her opinion, this context included the objectives of the EIPA, Canada's domestic and international interests, and the Minister's expertise in international relations and human rights (reasons, at paragraph 25).

[23] Next, the judge acknowledged the appellant's role in terms of acting in the public interest but concluded that he could not raise issues of procedural fairness since he was not affected directly by the decision (reasons, at paragraph 32).

[24] The judge then considered the Minister's decision to issue permits for the export of LAVs to Saudi Arabia. She concluded that the Minister did not commit a reviewable error.

[25] The judge first examined the regulatory framework established by the EIPA concerning the Minister's decision. The judge found that the Minister had broad discretion: "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" (reasons, at paragraph 40). At the outset, she noted that neither the EIPA nor the Handbook contains any export prohibitions (reasons, at paragraph 41). After reviewing the Minister's decision, the judge found that he had considered the factors relevant to his decision and had the necessary expertise to assess the risk that the goods might be used against civilians (reasons, at paragraphs 42 and 45). In the judge's opinion, there was nothing in this regard in the Guidelines to fetter the Minister's discretionary power since the Guidelines are not binding (reasons, at paragraphs 46-49). The judge concluded that the Minister had taken into consideration Canada's security and trade interests, that these factors were neither irrelevant nor extraneous and that he had considered the conflict in Yemen (reasons, at paragraphs 51, 54).

[26] The judge concluded this portion of her analysis by stating that the scope of her power was limited to ascertaining that the Minister's discretion had been exercised in good faith on the

basis of the relevant considerations. Insofar as it was so exercised, the Court could not intervene (reasons, at paragraph 55).

[27] The judge then moved on to Canada's international obligations. First, she accepted the respondent's position according to which a treaty that does not confer any rights on individuals—as is the case in Common Article 1 of the Geneva Conventions—cannot be applicable even if it has been incorporated into domestic law (reasons, at paragraph 58).

[28] With respect to the authority of the Geneva Conventions under Canadian law, the judge noted that such agreements must generally "be endorsed by Parliament and expressly integrated into Canadian law in order to have force of law" (reasons, at paragraph 60). As such, approval of the Geneva Conventions in section 2 of the GCA does not necessarily amount to their incorporation into Canadian law (reasons, at paragraph 63). Although Parliament incorporated the serious offences provisions of the Geneva Conventions (section 3 GCA), by appending the Conventions, Parliament did not necessarily intend to implement the document in its entirety (reasons, at paragraph 62).

[29] Without ruling on the issue, the judge noted, however, that if an international rule does not require a modification of domestic law, Canada's treaty obligations—notably Common Article 1 of the Geneva Conventions—may be incorporated into Canadian law by administrative means (reasons, at paragraph 63).

[30] This being said, the judge determined that in any event, since the only armed conflict referred to—that in Yemen—is not an international armed conflict, it is not Common Article 1 of the Geneva Conventions that applies but rather Common Article 3 (reasons, at paragraph 67). She makes reference to the doctrine according to which that since Canada is not directly involved in the Yemeni conflict, limits on arms trade do not apply to it, since they apply only to states that are already involved in an armed conflict. Citing the testimony of the international law experts brought forward by the parties, notably professor Éric David for the appellant and professor Michael Schmitt for the respondent, the judge held that Common Article 1 of the Geneva Conventions does not impose any obligations on the signatory states with respect to non-international conflicts (reasons, at paragraph 74). In this regard, the judge concluded that it is up to the executive, rather than the courts, to make decisions regarding international relations and that the Court could not intervene even if Common Article 1 did apply in this case (reasons, at paragraph 75).

[31] In paragraph 76 of her reasons, the judge concluded as follows:

> 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.

[32] Therefore, the judge dismissed the appellant's application for judicial review without costs.

V. Issues

1. What is the standard of review?
2. Is the Federal Court's decision reasonable?
    i) Did the judge err in concluding that the Minister exercised his discretion in a reasonable manner?
    ii) Did the judge err by refusing to consider the appellant's argument that the Minister had a closed mind when he made his decision?
    iii) Did the judge err when she rejected the appellant's arguments based on Common Article 1 of the Conventions?

VI. Analysis

1. Standard of review

[33] With regard to the standard of review applicable to the Federal Court decision, this Court must determine whether the judge correctly identified the appropriate standard of review (in this case, that of reasonableness) and then determine whether she applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 46 and 47) [*Agraira*]. In practical terms for this Court, this means stepping into the shoes of the Federal Court judge (*Agraira*, at paragraph 46). I agree entirely with the parties that the standard of review applicable to evaluation of the Minister's decision is that of reasonableness.

2. Is the Federal Court's decision reasonable?

[34] Before proceeding with my analysis, I find it useful—given its importance to the controversy generated by the appeal—to summarize in greater detail the Memorandum submitted to the Minister on March 21, 2016, by Deputy Minister of Foreign Affairs Daniel Jean concerning the export of LAVs by GDLS to Saudi Arabia.

[35] In short, this Memorandum addresses three main considerations: Saudi Arabia's military role in the Middle East, Canada's concerns regarding Saudi Arabia's respect for human rights, and the direct and indirect economic advantages created in Canada by the contract between GDLS and Saudi Arabia.

[36] Firstly, the Memorandum notes that export permits are generally approved, for all intents and purposes, by Department officials on the Minister's behalf. The Memorandum also notes that the Minister's decision is rarely sought, except when the officials cannot reach a consensus or when the recommendation is unfavorable. In some situations, as in this case, the Minister's intervention is requested even though the officials have agreed (Memorandum, at paragraph 7).

[37] The Memorandum describes GDLS's stature as a global leader specializing in the production of LAVs used by the Canadian Forces and exported around the world. GDLS is a major employer in southern Ontario (GDLS has approximately 2100 employees in Canada, most of whom work in southern Ontario) and supports a supply chain consisting of nearly 500 small and medium-sized Canadian businesses (Memorandum, at paragraph 2).

[38] Since the 1990s, following Iraq's invasion of Kuwait, Canada has been involved in the defence of Saudi Arabia by providing it with access to military equipment to face the threats posed by Iraq, Iran and, more recently, the Islamic State. Since 1993, Canada has issued export permits to GDLS, which is among the preferred suppliers of military equipment, particularly LAVs. More than 2900 LAVs were exported to Saudi Arabia between 1993 and 2015, representing nearly 90% of the value of Canadian military exports to the country, which total approximately 2.5 billion dollars (Memorandum, at paragraph 3). The contract in this case, signed in 2014, is part of this Canadian-Saudi Arabian military history and is valued at approximately 11 billion dollars (Memorandum, at paragraph 5).

[39] The following parties reviewed the permit application, and their comments are set out in Annex A of the Memorandum: more specifically, within Global Affairs Canada, the Europe and Middle East department, the International Security branch and the International Trade Development branch; the Department of National Defence; and Innovation, Science and Economic Development Canada. All recommended that the permits be approved. I note that a separate, but similar, Memorandum for Action was submitted to the Minister of International Trade for his comments and recommendations on December 21, 2015. None of the entities consulted raised concerns about the export of LAVs (Memorandum, at paragraph 8).

[40] In addition, the Memorandum addresses the issue of human rights in Saudi Arabia given the violation of democratic and human rights and the discrimination reported about that country. The Memorandum notes that Canada maintains a dialogue with Saudi Arabia in that regard and expresses its concerns when necessary (Memorandum, at paragraph 9).

[41] Canada, as well as its American and European allies, has maintained a military relationship with Saudi Arabia for a quarter century, which has often taken the form of access to military equipment. From a defence and trade standpoint, GDLS is a major supplier to the Canadian Forces, which will benefit from the economies of scale resulting from the proposed contract. The Memorandum also considers the importance of the contract and of LAVs in the effort to fight instability in Yemen. From an economic perspective, the contract will support thousands of manufacturing jobs in Canada and the Canadian supply chain and industry.

[42] The Memorandum concludes that the exports under consideration are consistent with Canada's foreign affairs priorities and the objectives for the country and the area involved. Saudi Arabia does not pose a security threat to Canada or our allies, and is facing legitimate threats to its own safety (at paragraph 14).

[43] More specifically, paragraphs 15 to 18 of the Memorandum read as follows:

> [TRANSLATION]
>
> 15. However, as noted above, Canada has had and continues to have concerns about Saudi Arabia's human rights history. A key consideration in reviewing export permit applications is whether the nature of the goods or technology to be exported lends itself to human rights violations and whether there is a reasonable risk that the goods will be used against the civilian population. The Minister is unaware of any connection between the military equipment in the application and the violation of human and political rights. According to the information provided, we do not think 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 these vehicles have been used to commit human rights violations.

16. In recent months, several articles have appeared in the popular media about Canada's sale of LAVs to Saudi Arabia. One of the questions journalists raise regards the role of Canadian-manufactured LAVs in the 2011 uprising in Bahrain. Saudi Arabia supported Bahrain during those events under the "Peninsula Shield" of the Gulf Cooperation Council. To the best of the Department's knowledge, Saudi troops were posted to protect important buildings and infrastructure and were not involved in the suppression of peaceful protests.

17. In recent months, certain NGOs, such as Amnesty International and Human Rights Watch, have criticized the airstrikes made by the coalition led by Saudi Arabia and, to a lesser extent, some of the actions of Houthi/Saleh forces in Yemen. More recently, the UN joined in on the criticism to denounce the high number of civilian deaths. The Final Report of the United Nations Panel of Experts on Yemen, published on February 23, 2016, notes that all the participants in the conflict in Yemen, including Saudi Arabia, committed international humanitarian law violations, namely by intentionally targeting civilians and attacking humanitarian organizations. The Report's allegations about Saudi Arabia concern the use of aerial bombing, shelling and artillery fuses in regions occupied by civilians. The Panel also observed that the coalition provided weapons to resistance forces without taking the necessary measures to ensure the transparency and accountability of troops. They do not suggest that Canadian-manufactured equipment, including LAVs, might have been used in acts violating international humanitarian law. The members of the Panel experienced challenges when preparing the Report and were unable to travel to Yemen to obtain information from direct sources. The coalition led by Saudi Arabia issued an official statement to declare its compliance with the rules of international humanitarian law and human rights laws, as well as the commitment of its military personnel to these rules. Moreover, on January 31, 2016, the coalition led by Saudi Arabia announced the creation of an independent team of specialists to

> evaluate and verify the incidents of civilian deaths, prepare clear and objective reports on those incidents, make the necessary conclusions, and issue their recommendations on the procedures to put in place in the future to prevent such losses.
>
> 18. The media also reported that a Canadian-manufactured weapon (the LRT-3 long-range rifle [sniper rifle]) was photographed in the hands of a Houthi soldier in Yemen. More than 1300 long-range rifles—including hundreds of that model—were exported from Canada to Saudi Arabian military and security forces with valid permits. The Canadian embassy in Riyadh determined that this rifle, as well as other Saudi military equipment, was probably captured by Houthi soldiers during military operations along the border between Saudi Arabia and Yemen. The reports from open sources are to the effect that Houthi/Saleh raids along the Saudi border resulted in over 370 deaths, most of which were among the Royal Saudi Land Forces and border guards, as well as the seizure of equipment, weapons and ammunition. This type of loss of equipment in the battlefield is inevitable given Saudi Arabia's military operations. The Canadian embassy in Riyadh remains in contact with Saudi authorities to facilitate the exchange of information on these losses.
>
> [emphasis added]

[44] In the light of all these circumstances, the Memorandum recommends that the Minister approve and issue the permits for GDLS to export LAVs to Saudi Arabia (Memorandum, at paragraph 19).

> i) Did the judge err in finding that the Minister exercised his discretion in a reasonable manner?

[45] According to the appellant, the judge made several errors by concluding as she did. Firstly, by citing the following Supreme Court cases: *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108, *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 147 D.L.R. (4th) 193 [*Baker* with references to S.C.R.], and *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 [*Kanthasamy*], the appellant submits that the Minister could not simply consider the relevant factors set out in the Handbook. Instead, considering the legislative objectives in the Handbook and Guidelines as well as Canada's obligations under the GCA, the Minister had to give considerable weight to the factors set out in the Handbook. It is submitted that, having failed to give the necessary weight to these factors in making his decision, the Minister rendered an unreasonable decision, and the judge then erred by confirming it.

[46] Secondly, the appellant is making a distinction between the grounds that warrant the refusal of a permit and those that warrant the issuance of one. In his opinion, the former must take precedence over the latter, and economic and trade considerations are irrelevant [TRANSLATION] "unless an export or transfer would harm Canadian trade or the economy" (appellant's memorandum of fact and law, at paragraph 24). Consequently, the appellant argues that since the judge failed to consider that distinction, she committed a reviewable error.

[47] Thirdly, the appellant argues that, since LAVs are included on the List, the judge had to consider the purposes set out in section 3 of the EIPA. The appellant submits that the objective of paragraph 3(1)(*d*) of the EIPA must apply in this case, that is, to implement an intergovernmental

arrangement or commitment, in this case, the Wassenaar Arrangement, which includes the following factor:

> e. Is there a clearly identifiable risk that the weapons might be used to commit or facilitate the violation and suppression of human rights and fundamental freedoms or the laws of armed conflict?
>
> (Wassenaar Arrangement, "Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons" amended at the plenary meeting in 2011, article 1(e)).

[48] The appellant pursued his reasoning by reminding the Court that Canada ratified the Geneva Conventions [TRANSLATION] "by which it undertakes 'to ensure respect for the Conventions and additional protocols in all circumstances' (Common Article 1)" (appellant's memorandum of fact and law, at paragraph 30). According to the appellant, in making his decision on April 8, 2016, the Minister provided no analysis as to his obligations under the Geneva Conventions and the GCA. At paragraph 31 of his memorandum of fact and law, the appellant states as follows:

> [TRANSLATION] These international commitments reflect the commitment made to Canadians that "the government will no longer issue permits to export military equipment to countries where the government has seriously and repeatedly violated the rights of citizens, unless it can be demonstrated that there is no reasonable risk that the military equipment will be used against the civilian population."
>
> [notes omitted]

[49] Fourthly, the appellant addresses the concept of reasonable risk found in the Handbook, the Guidelines and the Wassenaar Arrangement. The appellant says he is of the view that even though the judge acknowledged the importance of this concept, she erred by placing the burden on him to prove that the LAVs would be used to violate humanitarian law. Given that reversal of

the burden of proof, the judge concluded that there was no evidence showing that the LAVs had been used to violate humanitarian law in Yemen. According to the appellant, that finding was unreasonable, since there could be no doubt that the purchase and export of LAVs to Saudi Arabia were intended for use in Yemen, [TRANSLATION] "where large-scale violations of international humanitarian law had been committed" (appellant's memorandum of fact and law, at paragraph 50). This led the appellant to state that Canada was encouraging the use of LAVs in Yemen. At paragraphs 52 and 53 of his memorandum of fact and law, the appellant explained as follows:

> [TRANSLATION]
> 52. Reasonable inferences had to be made from the facts set out in the memorandum. Knowing that Saudi Arabia has disregarded international humanitarian law to date in its military interventions in Yemen, and knowing that LAVs authorized to be exported will be used in Yemen in the current armed conflict, it is extremely likely that the LAVs will be used to commit violations of international humanitarian law. However, this issue is in no way addressed in the memorandum constituting the entirety of the federal office's case. The notion of reasonable risk is even excluded from the passage on Yemen.
>
> 53. In addition, the evidence submitted in the application, which was not contradicted by the defence and which the trial judge completely ignored, shows that Canadian-manufactured LAVs were sent by Saudi Arabia to Najran, a city on the Yemen border at the centre of the conflict. Rather than conducting an investigation or opting to apply the precautionary principle given the very severe conclusions of the UN experts, the respondent preferred to refer to the commitment of the coalition led by Saudi Arabia to respect the rules of international humanitarian law and fundamental rights, rules it was not respecting when it made that commitment. In so doing, the respondent demonstrated wilful blindness, further tainting his decision.
>
> [notes omitted]

[50] Lastly, the appellant argues that, in view of the doctrine propounded by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], the

reasonableness of a decision is based on transparency and intelligibility within the decision-making process.

[51] According to the appellant, it is impossible to determine, from the Memorandum, the nature and extent of the review conducted by the officials responsible for human rights issues. The appellant also stated that the Global Affairs Canada division in charge of these issues, the "Human Rights and Indigenous Affairs Division" does not appear to have been consulted. The appellant also notes that, in rendering his decision, the Minister considered only the Memorandum and no other documents. According to the appellant, the Minister could not have made an informed decision under the circumstances because he gave no consideration to the investigation methods and documents reviewed by the officials who were involved in the preparation of the Memorandum. Consequently, the appellant is inviting us to conclude that the decision-making process lacks transparency given [TRANSLATION] "the weak factual basis the Minister had to decide whether to issue the permits" (appellant's memorandum of fact and law, at paragraph 58).

[52] In my opinion, the appellant's arguments cannot be accepted for the following reasons.

[53] My first comment is that there is no doubt that the Minister considered all relevant factors that he was required to consider according to the legislative framework, including those set out in the Handbook and the Guidelines. More specifically, as paragraphs [35] to [43] of my reasons make it clear, the Minister considered the following factors:

- Saudi Arabia is a key military partner for Canada in its region (paragraphs 9, 12 of the Memorandum);
- The importance of trade relations between Canada and Saudi Arabia (paragraphs 9, 12);
- The absence of sanctions against Saudi Arabia (Annex A, page 8);
- Canada's concerns about human rights (paragraphs 10, 15);
- The defence relationship between Canada and Saudi Arabia (paragraph 11);
- The importance of exports to the Canadian military industry (paragraphs 12-13);
- Saudi Arabia's involvement in the conflict in Yemen (paragraphs 17-18);
- The fact that, since 1993, more than 2900 LAVs have been exported to Saudi Arabia (paragraphs 15-16).

[54] The Minister considered not only economic and trade factors, but also humanitarian law and human rights issues. In my opinion, a reading of paragraphs 15 to 18 of the Memorandum leaves no doubt about this subject. It is thus appropriate to reproduce paragraph 54 of the judge's reasons, which reads as follows:

> [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.
>
> [emphasis added]

[55] In my view, there is no doubt that the factors listed in the Handbook, which are essentially the same as those in the Guidelines, were considered in the Memorandum submitted

to the Minister. More specifically, the Memorandum discusses in detail the human rights issue involving Saudi Arabia and raises the question whether there is a reasonable risk that the LAVs will be used to commit human rights violations in Saudi Arabia or Yemen (Memorandum, at paragraph 15).

[56] The appellant, citing a Supreme Court case, *Baker*, submits that the Minister had to give significant, if not decisive, weight to humanitarian considerations and is asking us to reach a different conclusion than that of the Minister. In my opinion, the appellant's argument is unsound. At paragraphs 37 and 38 of its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 [*Suresh*], the Supreme Court made the following comments:

> 37. The passages in *Baker* referring to the "weight" of particular factors must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors . . .
>
> 38. This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.
>
> [emphasis added, notes omitted]

[57] In my view, the reading of *Baker* the appellant is advancing is inconsistent with the Supreme Court's reading of that case in *Suresh*, where the Court clearly stated that it is for the Minister, and not the courts, to determine the significance of the factors to be considered. Recently, in *Agraira*, the Supreme Court reiterated the same remarks (*Agraira*, at paragraph 91).

[58] In that perspective, it is important to note that section 7 of the EIPA, which gives the Minister a discretion as to whether or not to issue a permit, imposes no order of priority on the factors to be considered. More specifically, subsection 7(1.01) provides that the Minister may consider any factor he considers relevant to the objective of the EIPA as well as the two factors set out in paragraphs 7(1.01)(*a*) and (*b*).

[59] It is also important to note that the factors set out in the Handbook and the Guidelines are simply elements that the Minister must consider in deciding whether to issue a permit. I am of the opinion that, contrary to the appellant's arguments, the Guidelines are not of a binding nature and cannot be considered as legal requirements where non-compliance would taint the Minister's decision (*Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 at pages 6 and 7, 137 D.L.R. (3d) 558); *Agraira* at paragraph 60; *Kanthasamy* at paragraph 32; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 FC 247 at pages 8-9, 164 N.R. 342).

[60] Furthermore, considering the wording of the EIPA, I am of the opinion that the Court must show great restraint when called upon to review a decision by the Minister as to whether or not to issue export permits, such as in this case. As I have already stated, in *Suresh* and *Agraira*,

the Supreme Court propounded an unambiguous doctrine: the courts have absolutely no power to question the Minister's evaluation process as long as the Minister has considered all the relevant factors with regard to the applicable legislation and its objectives. Therefore, it is not for the Court to determine the weight that should be given to one factor or another, but rather to ensure that the necessary factors have, indeed, been considered. Furthermore, considering that issues relating to the conduct of international relations and decisions about Canada's defence and economic interests are the prerogative of the federal cabinet, the courts must act with great caution and restraint with respect to these issues (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraphs 37 and 38, [2010] 1 S.C.R. 44).

[61] Consequently, in the absence of a challenge based on the *Canadian Charter of Rights and Freedoms*, which is not the case here, neither the Federal Court nor this Court can intervene by reviewing a discretionary decision such as this, unless it "was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors" (*Suresh*, at paragraph 29). The appellant is in no way suggesting that the Minister acted in bad faith and, as I discussed it, the Minister, in my opinion, considered all the factors relevant to the evidence before him.

[62] I must make one additional comment. At paragraph 76 of her reasons, which I reproduced at paragraph [31] of my reasons, the judge states that her role "is not to pass moral judgment on the Minister's decision to issue the export permits but only to verity the legality of such a decision. Of course, his broad discretion would have allowed him to deny the permits." In other words, if I properly understand the scope of the judge's comments, the question before her was

not whether the Minister should have refused to issue the permits on the basis of moral or humanitarian considerations. In her opinion, although such considerations would have allowed the Minister to refuse to issue the permits, the statutory regime allowed him to find otherwise. As the judge emphasizes at paragraph 50 of her reasons, section 7 of the EIPA "is subject to no express or implied limitation [at the Minister's discretion], 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."

[63] Before concluding on this question, I must address the appellant's argument that the Minister's decision lacked transparency because the Minister considered only the Memorandum to render his decision. More specifically, the appellant submits that the Minister could not render an informed decision in the case without having considered all the documents and analyses on which the Memorandum was based. In my opinion, the appellant's argument is also without merit.

[64] We must remember that the statutory regime in force does not impose upon the Minister any methodology with respect to the decision that he must make. In other words, all that the statutory regime requires the Minister to do is consider all the factors appropriate to the application to export LAVs to Saudi Arabia. The case law is clear: the Minister could, if he so wished, base his decision solely on the recommendation of public servants with expertise and experience in the matter (*Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735 at page 763, 115 D.L.R. (3rd) 1; *Cyanamid Canada Inc. v. Canada (Minister of Health & Welfare)* (1992), 45 C.P.R. (3rd) 390, 148 N.R. 147 (FCA), at paragraph 21; *Waycobah First Nation v.*

Canada (Attorney General), 2011 FCA 191, 421 N.R. 193 at paragraphs 30-33). It goes without saying that the Minister could, if he so wished, ask public servants to send him all the documents that were used to create the Memorandum. In this case, it seems that the Minister did not think it necessary to make this request, and he made his decision solely on the basis of the Memorandum that had been submitted to him.

[65] In my opinion, whether the Minister should have considered something other than the Memorandum is a question that we do not need to answer. The Minister's responsibility under the statutory regime was to consider all the factors appropriate to the issuance of permits and, in my opinion, the Minister considered all these factors. The appellant submits that a more informed decision called for the consideration of documents other than the Memorandum. Perhaps the answer to this question should be in the affirmative, but, considering the legislation in force, it is up to the Minister to decide whether to consider the Memorandum only, or any other document that he thinks it necessary to consider in the circumstances.

[66] There can be no doubt that the appellant disagrees with the Minister's decision to issue permits to export to Saudi Arabia. In his opinion, the evidence shows that LAVs will certainly be used for purposes constituting a human rights violation in Saudi Arabia and Yemen. This conclusion stems from his assessment of the evidence. Unfortunately for the appellant, Parliament gave the Minister the task of weighing of the evidence for the purpose of issuing or refusing to issue export permits. Insofar as the Minister considered all the appropriate factors mandated by the statutory regime, he could decide whether or not to issue export permits. The Court is not required to ask, because that is not its role, whether the Minister's decision is the

correct one under the circumstances. The Court has only to ask whether the Minister considered all the appropriate factors. In the affirmative, the Court cannot interfere in the decision-making process—with the exception made, of course, for cases in which matters of procedural fairness are at issue. The Minister could, despite the reasonable risk that the exported equipment will be used against a civilian population, decide to issue permits because, in his opinion, exporting LAVs was in Canada's interest in compliance with the EIPA.

[67] I must make one final comment concerning the exercise of the Minister's discretion to issue permits. The appellant submits that the Minister also erred because he did not take into account his obligations with respect to the GCA. In other words, according to the appellant, the Minister disregarded the interpretative value of the GCA. More specifically, the appellant states that the Minister did not offer any analysis concerning his obligations under the Geneva Conventions, which were incorporated in Canada via the GCA. According to the appellant, Canada's international commitments reflect the commitment made to Canadians that, citing the text of a press release dated September 10, 1996:

> [TRANSLATION]
> . . . the government will no longer issue permits to export military equipment to countries where the government has seriously and repeatedly violated the rights of citizens, unless it can show that there is no reasonable risk that the military equipment will be used against the civilian population.
>
> (appellant's memorandum of fact and law at paragraph 31 referring to the Appeal Book, volume 1, page 118).

[68] The appellant's position is incorrect. In my opinion, in exercising his discretion under section 7 of the EIPA, the Minister considered the factors pertaining to humanitarian law and, more specifically, he considered the conflict in Yemen and wondered about the potential human

rights violations in this country. Consequently, I cannot accept the appellant's suggestion that the Minister did not consider questions concerning compliance with humanitarian law and respect for human rights, which are inherent to the Geneva Conventions.

[69] It is clear that the appellant's position regarding permits issued by the Minister is one that reflects the first paragraph of his memorandum of fact and law, where he states: [TRANSLATION] "choosing the economy and business over the protection of innocent lives is not only unreasonable but also inhuman." In his opinion, in exercising his discretion, the Minister should consider only the potential impact on human lives resulting from the export of military weapons. As I tried to explain above, the statutory regime is not consistent with the appellant's view, because it is up to the Minister to decide, after considering all the appropriate factors, whether one or more permits must be issued. It goes without saying that there could be political consequences or repercussions stemming from the Minister's decision to issue permits, but there can be no doubt that the controversy that might ensue is outside this Court's jurisdiction.

[70] For these reasons, it is my view that the Minister did not exercise his discretion in an unreasonable manner and, consequently, the judge was correct in finding as she did. As I indicated in paragraph [3] of my reasons, I fully concur with the reasons given by the judge to support her conclusion.

> ii) Did the judge err by refusing to consider the appellant's argument that the Minister had a closed mind when he made his decision?

[71] The appellant submits that the judge was wrong to find that he could not mention the fact that the Minister had found in favour of exporting LAVs even before rendering his decision. According to the appellant, the duties of impartiality and procedural fairness apply in the case even if the Minister's decision had a political component.

[72] In my opinion, there is no merit to this argument. Even supposing that the appellant correctly submits that the Minister had been predisposed toward issuing the requested permits, the issue that the Federal Court had to resolve was whether the Minister had considered all the factors appropriate to the export of LAVs to Saudi Arabia, and particularly the fact that LAVs could be used for purposes that constitute violations of human rights and humanitarian law.

[73] Insofar as the Minister considered that which he had to consider under the applicable statutory regime, which in my opinion is the case here, the question of impartiality and procedural fairness has no relevance unless the Minister's decision is based on irrelevant considerations or his bad faith. Consequently, we do not have to decide, in this case, whether the judge erred when she refused to consider the appellant's argument that the Minister had a closed

mind when he made his decision. In my opinion, insofar as the Minister's actions are compliant with the statutory regime in force, namely that all the appropriate factors were taken into account, his decision satisfies the test of legality.

> iii) Did the judge err when she rejected the appellant's arguments based on Common Article 1 of the Conventions?

[74] The appellant presents several arguments based on the GCA, a law that [TRANSLATION] "is binding on Canada and prevents it from exporting weapons when they are likely to be used in violation of international humanitarian law" (appellant's memorandum of fact and law, at paragraph 65). More specifically, the appellant submits that the Minister's decision contravenes Common Article 1 of the Geneva Conventions, reproduced above at paragraph [19] of my reasons, incorporated into Canadian law by the GCA, and according to which the signatory countries "undertake to respect and to ensure respect for the present Convention in all circumstances."

[75] The appellant submits that the judge committed three errors, including having ruled that he did not have the appropriate standing to complain of a violation of the Geneva Conventions, even if they were incorporated into Canadian law.

[76] According to the appellant, given the rule of law and the fact that he is seeking only the enforcement of a Canadian law, the judge should have intervened because the Minister's decision to issue permits contravenes the GCA and, as a result, the Minister's decision

[TRANSLATION] “was not within the possible outcomes within the meaning of *Dunsmuir*” (appellant’s memorandum of fact and law, at paragraph 68).

[77] Since it is my view that the judge correctly ruled that the appellant did not have the standing necessary to raise a violation of the Geneva Conventions, we will not have to linger over the appellant’s other arguments concerning this issue.

[78] In my view, only the states that have signed the Geneva Conventions can raise a violation of those instruments and, more specifically, a violation of Common Article 1. The language of Common Article 1 leaves no doubt about this subject. The Geneva Conventions provide the contracting parties with the right, and may I say, the duty to “ensure respect for the present Convention in all circumstances” (Common Article 1 of the Conventions). Consequently, individuals like the appellant are not at liberty to raise violations of the Geneva Conventions and demand their enforcement before the courts. Clearly, any individual can raise these questions as part of political and democratic debates and ask their government to take action. However, an individual cannot do so, as the appellant is trying to do, through an application for judicial review of the Minister’s decision to issue permits under the EIPA as I explained above.

[79] In this respect, I fully concur with the comments of the respondent’s expert, Professor Schmitt, which are found at paragraphs 20 to 22 of his affidavit dated June 29, 2016, where he opines that a violation of the Geneva Conventions by a signatory state constitutes an “internationally wrongful act” with respect to states not responsible for the violation. Moreover,

according to Professor Schmitt, a violation in no way gives rise to a remedy to individuals affected by the violation.

[80] In other words, the individuals or persons affected by the violation cannot seek any remedy against the state responsible for violating the Geneva Conventions. That is the sole right of a signatory state that is not responsible for the violation. Consequently, according to Professor Schmitt, an individual such as the appellant in this case cannot raise a conventions violation before the courts. Author Kate Parlett shares this conclusion in her work entitled *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge, Cambridge University Press, 2011. More specifically, on page 182 of her work, under the heading *The Individual in International Humanitarian Law*, the author states the following, under the title *The 1949 Geneva Convention*:

> The substantive provisions of the four Geneva Conventions generally express the protection of individuals as protective obligations on state parties to a conflict, rather than as specific rights conferred directly on individuals. Common Article 1 of each of the Geneva Conventions states that the High Contracting Parties "undertake to respect and to ensure respect for the present Convention in all circumstances". Additionally, the first and second Geneva Conventions provide that "[e] ach Party to the conflict . . . shall ensure the detailed execution" of the provisions of those conventions. The provisions relating to execution in all four conventions refer exclusively to obligations incumbent upon states.
>
> The vast majority of the provisions of the conventions which provide for the protection of various categories of individuals are expressed in terms which indicate that obligations are imposed on states parties to a conflict, rather than rights directly conferred on the relevant individuals.

[81] Consequently, as the judge ruled, the appellant does not have the appropriate standing to raise a violation of Common Article 1 of the Geneva Conventions, even if it has been incorporated into domestic law.

3. Proof of international law through expertise

[82] Before concluding, I would like to comment on the use of experts to prove international law. I think it is useful to remark, without ruling on the question since the parties have not submitted any argument to this effect, that, in my opinion, the parties do not need to file experts' reports to prove international law, because the Court can take judicial notice of said law.

[83] In *R. v. "The Ship "North""*, [1906] 37 S.C.R. 385, 26 C.L.T. 380, one of the questions the Supreme Court of Canada had to decide was whether the Court could take judicial notice of the doctrine of the right to hot pursuit and whether to interpret the relevant legislation in the light of this doctrine. That was an admiralty case about a foreign vessel that had violated Canadian laws on fisheries within the three nautical miles that were, at that time, the territorial limit of Canada and about the right to pursue and seize it on the high seas.

[84] One of the appellant's arguments before the Supreme Court was that the admiralty judge, sitting in first instance, had taken judicial notice of the doctrine of hot pursuit and had therefore erred. Justice Davies, with Justice Maclennan concurring, concluded that the admiralty judge had not committed any errors. At page 394, Justice Davies explained the following:

> . . . I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas beyond the territorial limits and there taken.
>
> . . .
>
> The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.

[emphasis added]

[85] More recently, in *Jose Pereira E Hijos SA v. Canada (Attorney General)*, [1997] 2 FC 84, 126 F.T.R. 167, a case concerning the seizure of a Spanish vessel breaking Canadian fisheries laws, Justice MacKay of the Federal Court ruled that it could take judicial notice of international law. More specifically, Justice MacKay had to decide whether the alleged facts mentioned in the plaintiffs' statement of claim concerning international law should be struck out under Rule 419(1) of the *Federal Courts Rules*, C.R.C., c. 663. At paragraphs 20 to 22 of his reasons, Justice MacKay stated as follows:

> 20. The principles concerning the application of international law in our courts are well settled, and they are not here disputed by plaintiffs. One may sum those up in the following terms: accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law.
>
> . . .
>
> 21. The plaintiffs profess to accept those principles governing the relationships of international and domestic law. They do not contest that if there is conflict, the Court will apply domestic law. But they do urge, and seek the opportunity to establish at trial, that the amended Regulations are unlawful for a variety of reasons.
>
> . . .
>
> 22. That issue, one fundamental to these proceedings, may be raised without reference in the pleadings or particulars to specific international treaties or conventions which, in so far as they are considered a source of law, will be applied in the action only if they are incorporated in Canadian domestic law by legislation specifically so providing. To the extent that international conventions or treaties are considered authority for international law principles, it is unnecessary to plead them specifically, in the same way that it is unnecessary to plead other authority, e.g., jurisprudence or legislation, and such pleading is not of facts, the essence of pleading, but of law, which is not to be pleaded. Thus, I would direct that the sentences, phrases or references to particular conventions in paragraph 8 of the statement of claim and paragraphs 3(a), 3(b), 3(c) and 3(d) of the reply to demand for particulars be struck from the record.

[emphasis added]

[86] At paragraph 25 of his reasons, Justice MacKay decided this question as follows:

> My opinion about the portions to be struck is based on my conclusion that those matters now to be deleted are immaterial and redundant to the plaintiffs' claim. They do not state material facts, but rather they plead law, a matter not to be pleaded, for it is unnecessary to do so. Thus, I would strike them pursuant to paragraph 419(1)(*b*) of the Rules.

[87] Finally, I would like to refer to a Scottish High Court of Justiciary case, *Lords Advocate's Reference No. 1*, [2001] ScotHC 15, [2001] S.L.T. 507. In that case, four individuals had been accused of crimes stemming from events that occurred aboard the *Maytime* while it was at anchor in the port of Loch Goil, Scotland. One of the questions that the Court had to answer was whether it was necessary to prove the content of customary international law. More specifically, as indicated in paragraph 21 of the Court's reasons, the issue to be resolved was as follows: "In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?" The following passages, found at paragraphs 23, 24 and 27, are relevant:

> 23. We are in no doubt that in relation to evidence in the trial itself this Question must be answered in the negative. A rule of customary international law is a rule of Scots law. As such, in solemn proceedings it is a matter for the judge and not for the jury. The jury must be directed by the judge upon such a matter, and must accept any such direction. There can thus be no question of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is.
>
> 24. It was pointed out to us that evidence as to foreign law may competently be led in Scottish proceedings. This is because the law in question is foreign, and in Scottish proceedings is a question of fact and not of law. Any analogy between such foreign law and customary international law is false . . .
>
> 27. We can see some initial attraction in the suggestion that if a court is willing to read what a particular expert has written in a general context, it might on occasion be sensible to hear what he has to say, in the particular context of the case in

> hand. We do not feel it appropriate to rule out that possibility, as a matter of law. Such argument as was addressed to us in relation to Question 1 was of course directed primarily to the question of evidence *in causa*, before the jury; and while the possible usefulness of such material to a judge was touched upon, having regard to what the sheriff had said, the point was not fully argued. At that level, we are inclined to think that the matter would be one for the judge's discretion, although we would wish to reserve our opinion on that point. We would, however, add that if in any particular situation it were thought necessary by those representing a party to have recourse to some specialist source of advice, the appropriate course would of course normally be to seek that advice, whether in writing or by consultation or both, so that the appropriate submissions could be made, by that party's representative, at the appropriate time. In matters of customary international law, we can appreciate that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate. But having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand, we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party.
>
> [emphasis added]

[88] I fully concur with those cases. Consequently, I think that in a case like the one before us, the parties do not need to rely on expertise in international law. International law, being a question of law, is the prerogative of courts, which can take judicial notice of this law with the help of attorneys arguing the case.

[89] It goes without saying that the purpose of my comments is not to prevent this question from being argued when it will again be presented before the Federal Court and this Court.

VII. Conclusion

[90] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I concur.
Richard Boivin J.A."

GLEASON J.A. (Concurring reasons)

[91] I agree with the result at which my colleague, Justice Nadon, has arrived. I do not, however, fully agree with his reasoning. More specifically, I do not think it necessary to comment on the reasonable or unreasonable nature of the Minister's decision to permit the export of light armoured vehicles (LAVs) where, according to the Minister, there is a reasonable risk that these vehicles will be used in contravention of international human rights rules or where, in the light of the facts, this is the only conclusion that the Minister could reasonably come to.

[92] In my opinion, we do not have to rule on this question here, because it has not been raised. This case rather turns on the facts, which do not establish that the Minister had ruled—or needed to rule—on the existence of a reasonable risk that Saudi Arabia would use the LAVs to attack the people of Yemen, in contravention of international human rights rules.

[93] As the Federal Court states at paragraphs 44, 53 and 54 of its reasons, at the time it made its ruling on the issue, the Minister had reasonable reasons to determine the absence of reasonable risk. Indeed, there was no evidence that Saudi Arabia had already used LAVs exported from Canada for purposes that contravened international human rights rules. Such exports began in 1990.

[94] In the light of the above and considering the considerable deference that we are required to show ministerial decisions of this nature, I concur with the conclusion that the decision at issue is reasonable. Consequently, I agree with the conclusion that this appeal should be dismissed with costs.

"Mary J.L. Gleason"
J.A.

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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