Comment: Canada's Trade-off Between Arms and Human Rights

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Canada has exported light armoured vehicles to Saudi Arabia for many years. In 2016, the federal government approved the export of more of these vehicles worth billions of dollars and supplying many Canadian jobs. There had been no reported incidents of these vehicles being used against civilian populations until last summer, when photos and videos of the deployment of these weapons raised concerns about their use. A judicial review application of the approval of the newest export permits was dismissed for lack of this critical evidence in January, 2017. After the videos came to light, another application was filed by the same applicant seeking the cancellation of the permits. On January 9, 2018, a Federal Court judge refused to stop the second application at the instance of the federal government.

On January 9, 2018, the Federal Court refused to strike out an application for judicial review of the largest arms export in Canadian history to the Kingdom of Saudi Arabia.[1] New photo and video evidence allegedly shows that the exported Canadian-built light armoured vehicles (LAVs) have been participating in repressive action against civilians contrary to the policy of Canada's *Export and Import Permits Act* (EIPA).[2] When the Conservative government signed the initial contract in 2014, the end-user conditions specified that the LAVs were not to be used against civilian populations.[3] This new

Federal Court decision followed a decision a year ago by the Court refusing judicial review of the issuance of the export permits because of a lack of this kind of evidence.[4]

Human Rights v. Jobs

For the last couple of years in Canada, public opinion has favoured human rights over jobs in the arms industry, at least where arms sales might result in breaches of rights abroad. Polls taken in January, 2016 showed that 6 of 10 Canadians favoured human rights over the 3000 or so jobs that would be created by this new arms deal between Canadian companies and Saudi Arabia.[5] But recently videos and photographs show built-in-Canada LAVS being deployed in the Al-Qatif region of eastern Saudi Arabia: a region where Saudi forces have cracked down on Shia dissidents and civilians in towns such as Alwamiyah.[6] On being pressed for a reaction to this new evidence, the Minister of Foreign Affairs ordered an investigation into whether Canadian-produced military hardware subject to export control, was used against the civilian population. Polls taken in the period when this evidence came to light, between August and September of 2017, reveal Canadian minds have not changed on the human rights/jobs balance: 44% of Canadians oppose and 20% somewhat oppose the sale of LAVs to Saudi Arabia.[7]

Turp No. 1

Daniel Turp, a law professor and former MP and MNA from Quebec, had little trouble obtaining public interest standing in his first judicial review application challenging the Minister of Foreign Affair's decision to approve the export permits for the LAV exports to Saudi Arabia.[8] But the applications judge dismissed his application on January 24, 2017 and he has appealed.

The judge's decision proceeded this way. Almost 3000 LAVs were exported to Saudi Arabia between 1993 and 2015. LAVs are military equipment under the Export Control List subject to export permit approval.[9] The Minister of Foreign Affairs approved the permits on April 8, 2016. His decision was based on a Memorandum prepared by officials and was recently posted in redacted form on the internet[10] and summarized by the Applications judge: it reports no objections within government, but says that Saudi Arabia was Canada's ally in the fight against terrorism, that the contract would develop sustainability in the defence industry in Canada and would provide thousands of jobs in Ontario. The officials who prepared the Memorandum did express concern about Saudi Arabia's human rights record, but the decisive point for them was that they had no knowledge of a connection between the use of the LAVs, which had been in use in Saudi Arabia since the 90s, and human rights violations: they were not aware of any such incident during that time. The officials recommended the approval of the export permits to the Minister.[11]

Turp argued that all that he had to show to impugn the Minister's decision was evidence of a reasonable risk that the vehicles would be used in a breach of human rights and the peace.[12]

The applications judge held that the Minister's decision to approve the permits had to be shown to be reasonable in order to pass judicial review. But his discretion to approve was broad, with few

legislative constraints: s. 7(1.01) of the EIPA required him to consider whether the exported vehicles might be used for a purpose prejudicial to Canada's security, such as terrorism or by way of the compromise of Canada's military, all as described in the *Security of Information Act*,[13] or for a purpose prejudicial to the "peace, security or stability in any region of the world or within any country". She added that these EIPA considerations were supplemented by the "Export Controls Handbook" which set out Cabinet guidelines that the Minister should consider: whether the exports were going to a country that posed a threat to Canada, to a country that is under imminent threat of hostilities, to a country that is subject to UN sanctions or to a country where the "government[has] 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".[14] But the applications judge observed that the Minister's decision to approve permits should not be fettered by these guidelines because they were not part of the legislative framework of the EIPA process. This disposed of Turp's argument that the guidelines' made the Minister's refusal of a permit mandatory where there was a reasonable risk that the exported vehicles might be used against civilians.[15]

The applications judge concluded that the Minister had considered relevant factors in good faith[16]: Saudi Arabia was an ally, it was not a threat to Canada, there were no UN sanctions against it, and, despite the human rights abuses attributable to all participants in the current Yemen fight, there was no indication that Canadian equipment was involved or that there was a reasonable risk of this happening. The judge found this last point most telling: a reasonable risk must be based on a connection between the human rights violations alleged and the exported goods.[17] This was missing in the evidence before her. It was interesting that she was focusing on the non-binding guidelines.

The applications judge did agree with Turp that the Minister could consider international human rights issues in addition to relevant security and economic factors. She held that Parliament had recognized the spirit of common Article 1 of the Geneva Conventions – to ensure respect for all the Conventions in all circumstances – in s. 7(1.01) of the EIPA, but that the Minister had effectively considered the relevant human rights issues.

In any event, she went on to hold that common Article 1 did not provide Turp with standing in court to complain about its breach because the Conventions bind States and not individuals.[18] She added furthermore that the "approval" of the four Geneva Conventions of 1949 in s. 2 of the *Geneva Conventions Act* (GCA)[19] did not give the force of law to the entirety of the Conventions, including Article 1: the "approval" of Parliament was not clear enough to be an "incorporation" of the entirety of the Conventions into domestic law.[20] She equivocated somewhat on the incorporation issue, while finding that it was not necessary to decide the point, by saying that Article 1 may have been incorporated by proper executive action in compliance with the Conventions in the absence of evidence that there was domestic law to the contrary.[21] She also noted that the Supreme Court of Canada had referred to the domestic incorporation of the Conventions by the GCA in *Khadr*.[22]She went on to reason that international humanitarian law was not relevant to Turp's cause anyway, because the Yemeni fight the Saudis were involved in was not an international armed conflict, so only

modified humanitarian rules were engaged: Common Article 3 of the Conventions provided for humane treatment for non-combatants and for the norm of non-discrimination.[23] She noted that Canada itself was not involved in the Yemeni fight, so she presumed that the international humanitarian laws governing the arms trade did not apply.[24] She found that there were no UN sanctions against Saudi Arabia for its role in the Yemeni fight. So to conclude, even if the Conventions were incorporated, Article 1 did not apply here. She supported her conclusion with common sense: to extend Article 1 to this non-international armed conflict where Canada was not involved would prevent military exports without any evidence that they created a "substantial risk" of being used to breach international humanitarian law.[25] She added that a declaration that the approval of the permits was a breach of Article 1 would have no practical effect: Article 1 does not impose specific measures that States Parties must take to respond to a breach of the Conventions.[26] The courts should not usurp the expertise of the executive in international relations.

The Applications judge dismissed Turp's Application. He appealed.

New Evidence

On August 3, 2017, Turp wrote to the Minister asking her to use her power under s. 10 of the EIPA to suspend or cancel the export permits based on new evidence. Though the Minister said that the government would investigate the allegations of the use of Canadian vehicles in repressing civilian dissenters, she did not commit to the permits' cancellation. So Turp commenced another application for judicial review based on the videos and photos of August and September, while the appeal of the first judicial review was pending: this time, he challenged the explicit or implicit refusal to suspend or cancel the permits under s. 10 of the EIPA.

Turp No. 2

Rather than treat this as a new judicial review Application, the government applied to the Federal Court to strike it out because it had no chance of success or because it was an abuse of process.[27] The applications judge listed the government's objections to the new proceedings: Turp had no legal standing to raise the issue, the Minister owed him no obligation to consider his request to suspend or cancel the permits under s. 10 and that it was not clear that the remedy of suspension or cancellation was available on judicial review. The judge dismissed the Application to strike because he was of the view that the questions raised in the application should be decided on their merits at a full hearing and not on an extraordinary motion to strike.[28]

The judge rejected the government's argument that the new judicial review application was an abuse of process because it raised the same issue as the first application. The judge's review of *Turp no. 1* convinced him that the first one was about the approval of the permits under s. 7: the second judicial review application raised the new issue of a suspension or cancellation of the permits under s. 10 based on new evidence.[29] He reasoned that the Application in *Turp no. 1* was filed before the Minister had approved the original permits on April 8, 2016 under s. 7 of the EIPA, based on the Memorandum

that said that there was no reason to believe that the LAVs would be used to infringe human rights.[30] The judge thought that this point was crucial because the Minister now had evidence apparently to the contrary: that the LAVs were allegedly being used against civilians and that Turp was now attempting to use this new evidence to seek the permits' cancellation under s. 10 of the EIPA.[31]

The issue of whether the second application for judicial review duplicated the first was complicated by the fact that although *Turp no. 1* had been filed before the approvals were granted, the first application had been amended to seek their cancellation after being approved and that first judicial review application had been rejected.[32] But a close look at the first application showed that *Turp no. 1* had decided Turp's standing, the justiciability of reviewing the decision to approve a military export permit and the reasonableness of the approval decision under s. 7. *Turp no. 2* was about the reasonableness of the Ministerial refusal to cancel the permits because of new evidence, evidence that could not have been considered in *Turp no. 1* under s. 10 and so the second judicial review application was not a duplicative abuse of process.[33] Further, the judge in *Turp no. 1* had allowed the Minister a broad discretion under s. 7 to approve the permits based on the absence of proof that the LAVs had been used against the civilian population. If the lack of this evidence had carried such great weight at the approval stage, the alleged materialization of this evidence, (even allegedly admitted by the Saudis[34]), should be equally relevant to the decision to suspend or cancel requested by Turp on August 3, 2017 and deserved a full hearing.[35] Turp's November 21, 2017 amended second application asked the court to order the Minister to cancel the permits, or to declare her refusal unreasonable and to send the matter back for her reconsideration, or to suspend or cancel the permits, or to quash the decision of the Minister to refuse to cancel the permits.[36] The judge held that this expansion of his remedial claim showed that Turp was not trying to re-litigate *Turp no. 1*. His pleadings also implied he was not going to re-litigate the international law issues again either.[37]

The applications judge then rejected the government's argument that Turp had no standing to request cancellation of the permits and to seek judicial review of the failure of the government to do so, because he had been granted a similar public interest standing in *Turp no. 1*.[38]

Further, the government's explicit or implicit refusal to act on a request to cancel based on new facts allegedly relevant to the EIPA appeared to the applications judge to constitute a new decision subject to judicial review, or at least, it raised enough of an issue that it should not be struck out without full examination.[39] Suspension and cancellation is the other side of the coin of approval. What if the exporter does not comply with the considerations that resulted in approval? How is the policy of the law to be fulfilled if no one brings forward new evidence that show the government's reasons to approve the permits were no longer accurate?

The applications judge thought these concerns were ripe for a full hearing, and should not to be shut down in preliminary proceedings.[40] He picked up on a comment recorded in the evidence made by an MP in a question to the Minister asking why the government wanted to accede to The Arms Trade Treaty (ATT) without an intention to respect it.[41] (The ATT provides at article 7(7) that an exporting State must reconsider the export permit if it receives new evidence of human rights abuse.[42]) The

judge pursued this point by noting that the government had tabled Bill C-47 that had gone to 2nd reading October 3, 2017 to enable Canada to accede to the ATT, but had made no change to s. 7 of the EIPA on the assumption that its current policy complied with the ATT.[43] The judge expressed a concern about the lack of transparency in the EIPA process, and decided that since the Minister had the new evidence for some time, she may well have made a reviewable decision. He decided the second judicial review should proceed because the courts were duty-bound to ensure that the government complied with the law even in the fog of the lack of government response.[44] The judge refused to stop the judicial review application.

The Arms Trade Treaty

Canada announced in June, 2016 that it would accede to the ATT, being, at that point, the only NATO partner and member of the G7 not to have signed or ratified it.[45] At that time, Minister Dion stated that Canada did not comply with two terms of the ATT, one being s. 7:

Article 7 of the ATT requires that each state party take a number of factors into consideration prior to authorizing the export of items covered by the treaty. We already take these factors into account, but this is neither explicit nor formalized in our current export criteria. The government will need to amend the Export and Import Permits Act to make explicit reference to the ATT criteria and to create a legal requirement for any minister of foreign affairs to take them into account as well as outlining a clear policy on overriding risk. We will do that.

Article 7 of the ATT provides that a State Part shall objectively and non-discriminatorily consider the potential for the exported product to be used to commit or facilitate the commission of breaches of international human rights or humanitarian law together with any potential mitigation of these consequences, and to refuse the export permit if there is an “overriding risk” of this happening. Despite Minister Dion’s Statement, the government bill aimed at accession has been criticized because it does not enshrine the hard factors outlined in article 7 of the ATT in the statute and discriminatorily exempts exports to the US, where Canadian components may be used in exports that might be used in serious human rights or humanitarian breaches by customers.[46] The government’s actual preparation for accession in Bill C-47 does not amend s. 7 of the EIPA, but leaves the criteria to regulations.

Conclusion

The Trudeau government promised to accede to the ATT. In April of 2016, it approved the export of armoured vehicles to Saudi Arabia, despite the Saudi’s poor human rights record, apparently on the basis that the thousands of LAVs subject to export were not likely to be used in breaches of the human rights of Saudi civilians because of the previous incidents of this happening were unknown. The government successfully defended its export permits in *Turp no. 1*, once again largely on the basis that there were no known incidents of breaches of human rights using Canadian armoured vehicles. But evidence gathered largely in August and September of 2017 allegedly undermines this

assumption. Turp made his second application for judicial review when the government knew of this evidence, but did not cancel the permits, but did announce an investigation of the matter. The Minister of Foreign Affairs has promised action. *Turp no. 2* is an attempt to finesse a cancellation of the permits from the government over a decision or "non-decision." The lack of transparency over the last few months does not clarify whether anything has happened based on the new evidence using the power of the Minister to suspend or cancel the permits. It appears that Bill C-47 aimed at readying Canada to accede to the ATT will not change much. We'll have to wait for the government's response to the new evidence or the courts' response to the appeal of *Turp no. 1* or the judicial review in *Turp no. 2*.

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