

CITATION: R. v. Yadegari, 2011 ONCA 287
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COURT OF APPEAL FOR ONTARIO

Moldaver, Cronk and Lang JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Mahmoud Yadegari

Appellant

Frank Addario and William Thompson, for the appellant

Croft Michaelson and Jennifer Conroy, for the respondent

Heard: February 3, 2011

On appeal from the convictions entered by Justice C. Mocha of the Ontario Court of Justice on July 6, 2010 and the sentences imposed on July 29, 2010.

Cronk J.A.:

I. Introduction

[1] The proliferation of nuclear weapons and the threat of nuclear terrorism are persisting global concerns. For this reason, the United Nations Security Council has imposed restrictions on the supply, sale or transfer of nuclear-related goods to various

countries, including Iran. In order to honour its international obligations, Canada has enacted legislation that restricts the exportation to Iran of certain goods, including devices known as “pressure transducers”, if they meet certain technical specifications.

[2] Pressure transducers are devices that convert a pressure measurement into an electrical signal that can be recorded or displayed on a computer. They have a wide variety of lawful commercial applications (*e.g.* use in medical sterilization, food freeze drying or vacuum drying processes). They are also an essential component in the enrichment of uranium through the gas centrifugation method.

[3] The appellant, Mahmoud Yadegari, was charged on a ten-count information with offences related to the attempted exportation of two pressure transducers to a person in Iran. The transducers were “dual-use” goods, in that they were suitable for use in several lawful commercial applications and in the process of uranium enrichment. It was the Crown’s position at trial that the transducers were subject to restrictions designed to prevent the exportation of nuclear-related items from Canada to Iran.

[4] After a trial by judge alone, the appellant was convicted of the following nine offences:

- 1) Count 1 – attempting to knowingly sell, supply or transfer restricted goods to a person in Iran or for the benefit of Iran, without first obtaining a certificate of exemption, contrary to the *United Nations Act*, R.S.C. 1985, c. U-2 (the “UN Act”) and the *Regulations Implementing the United Nations Resolutions on Iran*, SOR/2007-44 (the “Iran Regulations”) (the “UN Offence”);

- 2) Count 2 – attempting to export or transfer restricted goods without first obtaining an export permit, contrary to the *Export and Import Permits Act*, R.S.C. 1985, c. E-19 (the “EIPA”) and associated regulations;
- 3) Counts 3, 4 and 5 – failing to report the restricted nature of the goods in question, or their proper value, and making a false or deceptive statement in writing to customs officials, contrary to the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);
- 4) Count 6 – attempting to export controlled nuclear equipment without first obtaining an export licence, contrary to the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (the “NSCA”) and associated regulations; and
- 5) Counts 7, 8 and 10 – knowingly making a false waybill and knowingly using a forged waybill and end-use certificate when attempting to export the pressure transducers from Canada, contrary to the forgery provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Code”).

[5] The appellant was acquitted of count 9, an additional count of forgery (making a false end-use certificate) under the Code.

[6] After 31 months’ credit for pre-sentence detention, the appellant was sentenced to 20 months’ imprisonment.

[7] The appellant appeals his convictions on counts 1, 2, 3 and 6 (the attempt to export and the failure to report the exportation of the transducers). He also appeals his sentence.

II. Restrictions on the Exportation of Pressure Transducers

[8] In 1970, the *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 161, came into force. The parties to the Treaty undertake to co-operate in

facilitating the application of safeguards introduced by the International Atomic Energy Agency (the “IAEA”) to curtail the proliferation of nuclear weapons and nuclear-related material. Canada and Iran are both parties to the Treaty.

[9] It is undisputed that Iran has failed to comply with its treaty obligations, prompting repeated resolutions by the United Nations Security Council calling on Iran to honour its obligations and halt its uranium enrichment program. In December 2006, UN Security Council Resolution 1737, UNSCOR, 2006, UN DOC. S/RES/1737, imposed the first sanctions on Iran in connection with its ongoing failure to adhere to the Treaty. Under this Resolution, member states are required to take necessary measures to prevent the supply, sale or transfer of certain nuclear-related, dual-use goods by their nationals, to or for the benefit of Iran. The proscribed goods are identified in the IAEA Information Circular, *Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology*, UNIAEA OR, 2006, UN Doc. INFCIRC/254/Rev. 7/Part 2, (“Circular 254”). Pressure transducers that meet certain technical parameters enumerated in Circular 254 (the “Specifications”) are among the proscribed products.

[10] Canada promulgated the Iran Regulations under the authority of the UN Act in order to comply with its obligations under Resolution 1737. Section 3 of the Iran Regulations makes it an offence in Canada to knowingly sell, supply or transfer, directly or indirectly, certain products to any person in Iran or for the benefit of Iran, including the pressure transducers described in the Specifications set out in Circular 254.

[11] In addition, the exportation, transfer or attempted exportation or transfer of pressure transducers that meet essentially the same technical characteristics described in the Specifications is prohibited under the NSCA and the EIPA, and the regulations associated with those statutes, unless applicable licences, permits, certificates or other regulatory approvals are obtained first. Unlike the provisions of the Iran Regulations, these prohibitions apply to the exportation, transfer or attempted exportation or transfer of the prescribed transducers to any destination.

[12] Further, under the *Reporting of Exported Goods Regulations*, SOR/2005-23, associated with the *Customs Act*, all exported “restricted” goods and goods having a value over \$2,000 must be reported in writing. It is also an offence under the *Customs Act* to make a false or deceptive statement orally or in writing to Canadian customs officials. Once again, these provisions are not Iran-specific.

[13] The exportation of pressure transducers that meet the Specifications is therefore restricted under each of the Iran Regulations, the NSCA and the EIPA. Section 3.A.7 of Circular 254 delineates the following Specifications concerning restricted pressure transducers:

Pressure transducers capable of measuring absolute pressure at any point in the range 0 to 13 kPa¹ and having both of the following characteristics:

a. Pressure sensing elements made of or protected by aluminium, aluminium alloy, nickel, or nickel alloy with more than 60% nickel by weight; *and*

¹ The term “kPa” refers to kilopascal, a unit of pressure in physics.

b. Having either of the following characteristics:

(i) A full scale of less than 13 kPa and an “accuracy” of better than $\pm 1\%$ of full scale; *or*

(ii) A full scale of 13 kPa or greater and an “accuracy” of better than ± 130 Pa.

[Emphasis in original.]

[14] In order to attract export restrictions, a pressure transducer must satisfy all three of the prerequisites of the Specifications: (1) it must be capable of measuring absolute pressure at any point in the range 0 to 13 kPa; (2) it must have “pressure sensing elements” made of or protected by a specified metal or metal alloy (aluminum, aluminum alloy, nickel or nickel alloy), with more than 60% nickel by weight (the “nickel content requirement”); and (3) transducers with a full scale of *less than* 13 kPa must have an “accuracy” of “better than $\pm 1\%$ of full scale”, and transducers with a full scale of 13 kPa *or greater* must have an “accuracy” of “better than ± 130 Pa” (the “accuracy requirements”).

III. Facts

[15] At trial, most of the pertinent facts were uncontested. The issue for the trial judge was what inferences could reasonably be drawn from the undisputed facts.

(1) Appellant’s Background and Conduct

[16] The appellant was born in Iran and immigrated to Canada about 13 years ago. He is 37 years of age, has no prior criminal record, is married, and has a two-year old son. He is a Canadian citizen.

[17] The appellant was educated in computer science in Iran and Toronto. When he was unable to secure employment in that field, he became a truck driver. In late 2005, he incorporated N & N Express Inc., which operated the two transport trucks used in the appellant's trucking business.

[18] Over time, the appellant attempted to expand his business to include the exportation of goods from North America to the Middle East and Eastern Europe. The appellant received requests from abroad for various products and sought price quotes from suppliers, which he then forwarded to prospective overseas purchasers for approval. Most of the goods relating to these quotations were unrelated to uranium enrichment and were not subject to any export restrictions.

[19] The evidence at trial included voluminous e-mail communications authored or received by the appellant (almost 300 pages). The product requests received by him included e-mail requests from Nima Tabari. Based on his e-mail address, Mr. Tabari was associated with a company called TSI Limited ("TSI"). In communications with a supplier, the appellant described TSI as an engineering, procurement and construction contractor on a natural gas project off the coast of Iran.

[20] Expert evidence at trial indicated that two e-mails sent to the appellant from Mr. Tabari in April 2009 originated from computers in Iran. The experts were unable to determine the place of origin of Mr. Tabari's other e-mails to the appellant.

[21] Between December 2008 and April 2009, the appellant attempted to obtain several items from a number of different suppliers. This included attempts to acquire pressure transducers from three different suppliers located in the United States and Europe. Eventually, the appellant purchased ten pressure transducers from Alpha Controls and Instrumentation, the distributor for transducer manufacturer Setra Systems, Inc. (“Setra”), at a cost of approximately \$1,109 each.

[22] On March 4, 2009, the appellant attended at the offices of an international freight forwarding company, DHL Express, and dropped off a package for shipment addressed to “Keft Trading Co.” in Dubai, the United Arab Emirates. The package contained two Setra pressure transducers. However, the labels identifying the devices as Setra transducers had been removed, both from the box that contained the transducers and from the devices themselves. Instead, the transducers were marked simply as “Sample 1” and “Sample 2”.

[23] The proposed shipment was accompanied by a DHL Express waybill and a commercial invoice. Both documents were signed and dated by the appellant. They described the contents of the box as “Setra Electrical Accessory” and ascribed a value of \$100 to the goods. Subsequently, after the shipment was detained by the authorities, the appellant was requested to complete an export declaration form. The appellant completed the form, describing the devices as “pressure gauges” and attributing a value of \$1,309 to them.

[24] Neither the appellant nor his company, N & N Express Inc., applied for or obtained the requisite approvals or authorizations under the Iran Regulations, the EIPA and the NSCA for the exportation of the transducers. Nor did they report any export of restricted or controlled goods, or goods valued at more than \$2,000, to Canadian customs authorities. In the event, the authorities detained the shipment and the transducers did not leave Canada.

[25] The appellant was arrested at his home on April 16, 2009. The police searched his premises and his home computer and a number of items were seized, including the e-mail communications mentioned above.

(2) Directed Verdicts Motion

[26] At the conclusion of the Crown's case, the defence moved for directed verdicts on counts 1, 2, 3, 6 and 9. With respect to the attempt to export and the failure to report the exportation of the transducers (counts 1, 2, 3 and 6), the defence argued that the Crown had failed to prove that the transducers met the nickel content and accuracy requirements of the Specifications, with the result that the transducers were not subject to export restrictions.

[27] The trial judge rejected this argument. She held that the transducers have "three pressure sensing elements", two of which are made of a nickel alloy with more than 60 per cent nickel by weight, thus satisfying the nickel content requirement. She also concluded that the transducers meet the accuracy requirements of the Specifications. She therefore ruled that there was "some evidence" that the transducers have each of the

requisite characteristics under the Specifications, thus triggering the applicable export restrictions.

[28] The defence next argued that there was insufficient evidence to establish that the appellant had made the forged end-use certificate that he furnished to authorities in relation to the transducers (count 9). The trial judge disagreed. In her view, based on the contents of the appellant's home computer discovered by the police, there was some evidence that the appellant knew that some of the contents of the end-use certificate were false and that he had made the forged certificate.

[29] In the result, the trial judge ruled that there was some evidence on which "a reasonable jury properly instructed could convict on each of the requisite elements for all of the counts on the information". She therefore dismissed the directed verdicts motion in its entirety.

(3) Trial Judge's Findings at Trial

[30] At trial, the trial judge's central findings were as follows:

- 1) for the reasons set out in her ruling on the directed verdicts motion, she was satisfied beyond a reasonable doubt that the transducers had the characteristics set out in the Specifications;
- 2) the appellant was attempting to locate various goods, including the pressure transducers at issue, as specified by his client, Nima Tabari, for TSI;
- 3) Mr. Tabari was in Iran when he sent two e-mails to the appellant in April, 2009;

- 4) the appellant knew that Mr. Tabari was in Iran and that TSI was said to be managing a project in Iran;
- 5) on numerous occasions, the appellant was reminded by suppliers that the vendor of the transducers needed to know the end destination of the product, of his obligation to comply with export and customs restrictions, including those in force in Canada, and that regulations restricted the export of transducers;
- 6) the appellant knew or was wilfully blind to the fact that the transducers had the characteristics that made them restricted goods under the UN Act;
- 7) the appellant knowingly attempted to sell or export the transducers to Mr. Tabari, a person in Iran, without a certificate of exemption under the Iran Regulations (count 1), an export permit under the EIPA (count 2), and an export licence under the NSCA (count 6);
- 8) the appellant failed, without lawful excuse, to report the export of restricted goods as required under the *Customs Act* (count 3). He also failed to report goods having a value in excess of \$2,000, contrary to the *Customs Act* (count 4); and
- 9) in his efforts to export the transducers to Iran, the appellant made a false or deceptive statement in writing to Canadian customs officials (count 5), forged and used a forged express waybill (counts 7 and 8), and used a forged end-use certificate (count 10).

[31] Based on these findings, the trial judge convicted the appellant on all counts, except count 9, the charge of forging an end-use certificate with the intent that it be acted upon as genuine.

IV. Issues

[32] I would frame the issues on the conviction appeal in this fashion:

- (1) Did the trial judge err by concluding that the transducers satisfied (a) the nickel content requirement and (b) the accuracy requirements, of the Specifications?
- (2) Is the appellant's conviction on the UN Offence unreasonable?

[33] There are two main issues on the sentence appeal:

- (1) Did the trial judge err by finding that the pressure transducers were intended for use in Iran's nuclear enrichment program and by treating this as an aggravating factor on sentencing?
- (2) Is the appellant's sentence harsh and unreasonable in all the circumstances?

V. Analysis

A. Conviction Appeal

(1) Interpretation of the Specifications

[34] On appeal, the appellant admits that he attempted to export the pressure transducers from Canada. However, he renews his argument, advanced at trial, that the nickel content and the accuracy requirements of the Specifications do not apply to the transducers that he attempted to export and, therefore, that the transducers are not restricted goods within the meaning of the Iran Regulations and related legislation.

(a) Nickel content requirement

[35] The process of uranium enrichment involves exposure to corrosive gases. Thus, in order for a pressure transducer to be used in this process, it must be made of a substance that is resistant to gas corrosion, like nickel or a nickel alloy.

[36] There is no issue that parts of the seized transducers contain nickel alloy. However, the appellant argues that the Crown failed to prove that the "pressure sensing

elements” in the transducers contain “more than 60% nickel by weight”, as required by the nickel content requirement of the Specifications.

[37] The evidence at trial concerning the technical characteristics of the transducers was provided by Kevin Bourbeau, a Setra engineering manager. Mr. Bourbeau said that the Setra transducers measure pressure using a diaphragm and an electrode, which convert the pressure in the gas into a DC voltage that can be read by a computer as a measurement of the amount of pressure. Mr. Bourbeau indicated that the Setra model of the seized transducers has a pressure sensing element comprised of three welded parts: the tube, the housing and the diaphragm. The housing and the tube are made of Inconel 600 – a highly corrosive-resistant nickel alloy – while the diaphragm is made of Inconel 718, which is 50 to 55 per cent nickel by weight.

[38] In her ruling on the directed verdicts motion, the trial judge stated that the transducers have “three pressure sensing elements” and concluded that there was no requirement that each of these elements be made of a metal or metal alloy with more than 60 per cent nickel by weight. Rather, as “two pressure sensing elements”, the housing and the tube, have more than 60 per cent nickel by weight, the nickel content requirement was met. The trial judge put it this way:

Two of the three pressure sensing elements are made of an alloy with seventy-two per cent nickel by weight which is sufficient compliance with [the Specifications]. I am satisfied that the transducers have two pressure sensing elements made of a nickel alloy with more than sixty per cent nickel by weight. [Emphasis added.]

The trial judge reiterated these conclusions at the end of the trial.

[39] The appellant contends that by referring to “three pressure sensing elements,” the trial judge misapprehended Mr. Bourbeau’s evidence regarding the nature of the pressure sensing devices in the Setra transducers that the appellant sought to export. The appellant then submits that the trial judge erred in her interpretation of the nickel content requirement by holding that it requires that only some part, rather than the whole, of a transducer’s “pressure sensing elements” be made of a metal or metal alloy that meets the required percentage of nickel by weight. I would reject these arguments.

[40] For convenience, I restate the relevant part of the Specifications:

Pressure transducers capable of measuring absolute pressure at any point in the range 0 to 13 kPa and having ... the following [characteristic]:

- a. Pressure sensing elements made of or protected by [a specified metal or metal alloy] with more than 60% nickel by weight;

[41] Notwithstanding the trial judge’s mistaken reference to “three pressure sensing elements”, I am not persuaded that she misapprehended Mr. Bourbeau’s evidence in any material fashion. As the Crown points out, it appears that the terms “pressure sensing elements” and “pressure sensing element” were used somewhat interchangeably at trial. More importantly, when the trial judge’s ruling regarding the nickel content requirement is read as a whole, I think it manifest that she was alive to the real issue, namely, whether the Specifications require that those parts of a transducer that perform a pressure sensing

function be wholly or only partially made of or protected by a metal or metal alloy that satisfies the requisite percentage of nickel by weight.

[42] As the trial judge noted in her ruling on the directed verdicts motion, there was no evidence at trial of the relative weight of the constituent parts of the pressure sensing device in each of the seized transducers. Thus, if the phrase “pressure sensing elements” is interpreted to mean the whole of the three-part element, that is, “all three parts combined”, there was no evidence at trial on which it could be inferred that the constituent parts of the pressure sensing device in each of the seized transducers “equals a total composition of greater than sixty per cent nickel by weight”.

[43] These observations by the trial judge indicate that she appreciated that the requisite inquiry had to be focused on the meaning of subparagraph (a) in its entirety, including, especially, on the meaning of the phrase “pressure sensing elements”. She concluded that if the intent was to impose a nickel content requirement on the whole of a pressure sensing device in a transducer, the applicable language in subparagraph (a) would refer to a pressure sensing “element”, rather than “elements”. I agree.

[44] Subparagraph (a) must be construed according to the well-established rules of statutory interpretation. As the Supreme Court has repeatedly confirmed, the modern approach to statutory interpretation requires that: “[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see for

example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26. This contextual and purposive approach focuses on the plain meaning of the words used in an enactment, in the context of the purpose of the legislation and of the provision under scrutiny.

[45] In this case, the use of the plural “elements”, rather than the singular “element”, in subparagraph (a), suggests that the nickel content requirement applies to those parts of a transducer that serve a pressure sensing function. There is no language in subparagraph (a) indicating that “all” those parts, or the unit as a whole, must meet the nickel content requirement. Nor is there any language in subparagraph (a) requiring that pressure sensing elements “only” consist of, or be protected by, metal or a metal alloy that is more than 60% nickel by weight. In contrast, Circular 254 describes certain restricted valves as being “[w]holly made of or lined with [a specified metal or metal alloy] containing more than 60% nickel by weight” (emphasis added): s. 3.A.3(c). If a similarly narrow, and more restrictive, requirement had been intended with respect to pressure transducers, it can be expected that this intention would have been expressed in clear and unambiguous language.

[46] The appellant argues that the trial judge’s interpretation of the nickel content requirement is inconsistent with the purpose of the Specifications. He maintains that, on the trial judge’s interpretation of subparagraph (a), a transducer would be caught by the export restrictions where its pressure sensing device is made entirely of tin, but also contains a single screw that is composed of 60% nickel, notwithstanding that the

transducer would be “useless” for enriching uranium. I agree that this cannot be the intent of the nickel content requirement. It would effect an absurd and unintended result by sweeping into the nickel content requirement transducers that have no capacity for use in nuclear-related applications.

[47] On the other hand, the appellant’s contention that the nickel content requirement is concerned only with the composition of the *whole* of a pressure sensing device can also lead to a skewed – and potentially far more dangerous – result. For example, under the appellant’s construction of the nickel content requirement, a transducer that has a pressure sensing device consisting of a diaphragm that is made entirely of nickel, but tube and housing components made of corrosive plastic, would fall outside the Specifications. Yet, such a transducer potentially *could* be used for uranium enrichment. On this example, the narrow construction of subparagraph (a) urged by the appellant would defeat the protective aims of that subparagraph and of the Specifications as a whole.

[48] The Specifications are intended to establish categories of restricted goods in order to reduce the threat of nuclear proliferation. To facilitate this objective, subparagraph (a) targets transducers that are capable of use in uranium enrichment processes. These protective purposes of the Specifications and of subparagraph (a) in particular, argue strongly against an interpretation of subparagraph (a) that unduly narrows its reach.

[49] On the evidence in this case, it is beyond dispute that the pressure sensing devices in the seized transducers are comprised of sufficient nickel alloy components so as to

render the transducers capable of use in a uranium enrichment process. In my view, it is precisely this type of pressure transducer that the export restrictions are intended to capture.

[50] I therefore conclude that the plain and ordinary meaning of the language employed in subparagraph (a), the purpose of the Specifications as a whole, and the object of subparagraph (a) in particular, compel the conclusion that the transducers in this case satisfy the nickel content requirement of the Specifications.

(b) Accuracy requirements

[51] With respect to the accuracy requirements, the Specifications identify:

Pressure transducers capable of measuring absolute pressure
at any point in the range 0 to 13 kPa and ...

...

b. Having either of the following characteristics:

- (i) A full scale of less than 13 kPa and an “accuracy” of better than $\pm 1\%$ of full scale; *or*
- (ii) A full scale of 13 kPa or greater and an “accuracy” of better than ± 130 Pa.

[Emphasis in original.]

[52] The trial judge made three critical findings concerning the accuracy requirements of the Specifications. First, she held that the seized transducers have a full scale greater than 13 kPa. Thus, the accuracy requirement in subparagraph (b)(ii) of the Specifications, which requires that the transducer in question have an “accuracy” of “better than ± 130 Pa”, is engaged.

[53] Second, she held that the intent of subparagraph (b)(ii) is that the relevant transducers have an accuracy “better than ± 130 Pa” when measuring pressure in the range from 0 to 13 kPa.

[54] Third, she indicated that, unlike the accuracy requirement in subparagraph (b)(i), which is focused on accuracy measured as a percentage “of full scale”, subparagraph (b)(ii) is concerned with pressure sensing devices “where only a portion of its range will be within the area of concern”. Consequently, the accuracy requirement under subparagraph (b)(ii) is satisfied even where a transducer only meets the specified level of accuracy in the relevant pressure range (0 to 13 kPa).

[55] During oral argument, the appellant did not pursue his attack on these findings by the trial judge, relying instead on his written submissions. In those submissions, he maintained that the trial judge erred in her interpretation of the accuracy requirements: (1) by holding that they applied only to the 0 to 13 kPa portion of the transducers’ overall range of measurement; and (2) by concluding that the accuracy requirement in subparagraph (b)(ii) could be met on measurement of only one of three bases of accuracy. These complaints may be dealt with summarily.

[56] In a supplementary agreed statement of facts filed at trial, the parties agreed that: “To operate safely and to optimize productivity of enriched uranium, the gas pressure inside a centrifuge must be kept below 13 kilopascals [13 kPa].” It is for this reason, in my opinion, that subparagraph (b) of the Specifications is concerned only with the

accuracy of pressure transducers within the range suitable for use in uranium enrichment processes, that is, between 0 and 13 kPa. As the parties essentially agreed, it is this range that is critical in the centrifugal uranium enrichment process.

[57] That this is the focus of the accuracy requirements is reinforced by the introductory language of the Specifications, which identifies the restricted goods as pressure transducers “capable of measuring absolute pressure at any point in the range 0 to 13 kPa”. It follows that the accuracy of transducers operating outside the range of 0 to 13 kPa is irrelevant to the mischief at which the accuracy requirements are directed.

[58] I therefore agree with the trial judge that, while a seized transducer might have the capacity to measure beyond the range of 0 to 13 kPa, “the area of concern” that is addressed by the accuracy requirements is the accuracy of a pressure transducer operating within the range of 0 to 13 kPa.

[59] I would also reject the appellant’s claim that the accuracy testing of the seized transducers was deficient. In my view, the trial judge was correct to reject this contention.

[60] A technical note at the bottom of the Specifications indicates that “accuracy” for the purpose of the Specifications “*includes* non-linearity, hysteresis and repeatability at ambient temperature” (emphasis added).² According to Mr. Bourbeau, the measurement of the accuracy of the transducers in this case was done as a “percentage of reading”, a

² A similar technical note appears in the relevant provisions of the *Nuclear Non-proliferation Import and Export Control Regulations*, SOR/2000-210, under the NSCA.

method that measures accuracy at a given pressure. He said that non-linearity, one of the three listed factors in the technical note, is “built into” this methodology. Thus, the accuracy testing of the seized transducers included measurement of accuracy based on one of the factors identified in the technical note.

[61] The trial judge held that the term “includes”, when used in this context, “clearly means one of the listed items” in the technical note at the end of the Specifications. The appellant submits that the use of the conjunction “and” between the factors listed in the technical note suggests that accuracy testing must include measurements of accuracy based on all three listed factors.

[62] I disagree. The term “and” can be interpreted as joint or as joint and several, depending on the context. Where the term is seen as joint and several, “all the possibilities may be, but need not be, included”: Ruth Sullivan, *Statutory Interpretation* (Concord, Ontario: Irwin Law, 1997) at p. 88. In my view, the use of the word “includes” in the technical note clearly suggests that the word “and” should be interpreted as joint and several. Moreover, a plain and ordinary interpretation of the word “includes” as used in the technical note, suggests that accuracy measurements may, but need not, be based on the listed factors. In any event, in this case, non-linearity, one of the listed factors, was encompassed in the accuracy testing that was undertaken.

[63] Finally, I note that the appellant does not contest that the seized transducers are capable of measuring absolute pressure within the range of 0 to 13 kPa. On the evidence

at trial, the accuracy of the transducers within that range fell easily within the accuracy requirement of subparagraph (b)(ii).

**(c) Conclusion concerning interpretation
of the Specifications**

[64] I would therefore reject the appellant's challenge to the trial judge's interpretation of the Specifications. The seized transducers are of a type that is subject to export restrictions under the relevant statutory framework.

**(2) Reasonableness of Conviction
on UN Offence**

[65] The test for determining the reasonableness of a verdict is well-settled. If a properly instructed jury, acting judicially, could reasonably have rendered the verdict in question, it cannot be said to be unreasonable. See for example, *R. v. Biniaris*, [2000] 1 S.C.R. 381.

[66] The Crown's case against the appellant in relation to the UN offence was largely circumstantial. The appellant did not testify or offer any evidence on his own behalf.

[67] As I have already explained, the trial judge was correct to hold that the transducers in this case are subject to export restrictions. Further, it was undisputed at trial that the appellant did not obtain the requisite certificate of exemption prior to attempting to export the transducers. The only remaining issue, therefore, is whether the Crown

established beyond a reasonable doubt at trial that the appellant knowingly sought to supply the transducers to a “person in Iran”.³

[68] The appellant argues that since the evidence at trial failed to prove either the location of the intended purchaser of the transducers or the appellant’s knowledge of that location beyond a reasonable doubt, the appellant should have been acquitted on count 1.

[69] Again, I disagree. In my opinion, viewed cumulatively, there was ample evidence at trial to ground the trial judge’s conclusion that the appellant knowingly attempted to supply the transducers to a person in Iran and that he had the requisite level of knowledge concerning the intended destination of the transducers.

[70] First, as the Crown points out, apart from various product suppliers, Mr. Tabari was the only individual with whom the appellant communicated about price quotations and specifications for products, including pressure transducers. More particularly, in a series of e-mails between December 2008 and January 2009, the appellant and Mr. Tabari appeared to confirm the details of an order for pressure transducers and the appellant forwarded inquiries received from various suppliers to Mr. Tabari, seeking instructions on how to respond. As found by the trial judge, these e-mails established that Mr. Tabari was the appellant’s client.

[71] Second, the trial judge accepted the Crown’s expert evidence that at least two of Mr. Tabari’s e-mails to the appellant originated from Iran.

³ The Crown did not argue that the transducers were exported “for the benefit of Iran”.

[72] Third, Mr. Tabari's e-mails indicated that he was associated with TSI and that TSI was involved in a project in Iran. In his e-mail communications with potential suppliers, the appellant twice indicated that he wished to acquire products for a project in Iran and, on one occasion, identified TSI as the project manager for a project in Iran.

[73] Fourth, the appellant's e-mail communications, many of which pre-dated his attempt to export the transducers on March 4, 2009, disclosed multiple inquiries for goods, including transducers, destined for Iran. These e-mails included:

- (1) an e-mail to the appellant dated January 13, 2009, in which Mr. Tabari indicated that the appellant should consider sending the transducers to "Dubai or To Iran";
- (2) an e-mail to the appellant dated February 17, 2009, in which a valve supplier declined to quote for the provision of valves "destined for an embargoed country", namely, the South Pars Field in the Iranian sector of the Persian Gulf; and
- (3) an exchange of e-mails during the period February 19, 2009 to February 21, 2009, between the appellant and Ali Sadeghianpour of Samson Controls Incorporated, in which Mr. Sadeghianpour requested information concerning the intended end-user of valves for which the appellant had sought quotes. The appellant replied that the valves were destined for "Oil field Industries" in the "Iran-South pars zone" and Mr. Sadeghianpour responded that "Based on UN rules and restrictions, South-Gas pars is not in the list of restricted companies to work with".

[74] Fifth, Mr. Sadeghianpour testified at trial that he met with the appellant on February 25, 2009. He said that the appellant told him that the products he was interested in were destined for a project in Iran, that the involved procurement and construction

company was TSI, a company with a Persian or Farsi name, and that the National Iranian Gas Company may have been involved.

[75] In addition, in an April 2009 e-mail response to a query from a valve supplier about the intended end destination for the requested valves, the appellant stated that his client was in Iran.

[76] Sixth, on March 4, 2009, the day on which he attempted to export the transducers to Iran, the appellant was asked by the sales representative of a German supplier to complete a “Customer Certification and Letter of Assurance” regarding the intended use of the goods that the appellant sought to purchase. The contents of that document make it abundantly clear that the appellant was aware of export control regulations and restrictions on nuclear development-related goods destined for Iran or for Iranian nationals. In completing the same document on March 5, 2009, the appellant expressly agreed not to transfer, export or re-export any products acquired from the supplier to a series of countries, including Iran.

[77] Finally, the voluminous e-mails introduced at trial contain repeated supplier notifications to the appellant of regulations and restrictions applicable to the exportation of certain products to embargoed countries, including Iran. They also reveal numerous efforts by the appellant to deceive suppliers as to the intended destination of products for which he sought price quotes.

[78] This evidence was more than sufficient to support the trial judge's conclusion that, "on the totality of the evidence", the Crown had established that the appellant knowingly "attempted to sell products [restricted under the Iran Regulations] to a person in Iran" without obtaining the requisite certificate of exemption. The appellant's conviction on the UN offence was therefore reasonable.

B. Sentence Appeal

[79] The appellant challenges the sentence imposed by the trial judge on several grounds. He argues, first, that the trial judge erred by finding that the purpose of the exportation of the pressure transducers was the enrichment of uranium in Iran. The appellant submits that this was not established beyond a reasonable doubt on the evidence at trial and, therefore, that the trial judge erred by treating it as an aggravating factor on sentencing. Without a link to Iran's uranium enrichment program, the appellant says, his attempted exportation of the transducers is analogous to "ordinary smuggling", an offence which he says typically results in sentences of less than two years' imprisonment and stiff fines.

[80] In contrast, the Crown maintains that, even without proof of a nexus between Iran's nuclear enrichment program and the appellant's attempted exportation of the transducers, the sentence imposed was fit having regard to the serious nature of the appellant's conduct and his high degree of moral blameworthiness. The Crown emphasizes that, on the trial judge's findings, the appellant knew or was wilfully blind to the fact that the transducers were restricted goods and that they were destined for Iran.

[81] In support of his submission, the appellant relies principally on the following comments by the trial judge near the outset of her sentencing reasons:

Let me first clarify my findings about Mr. Yadegari's proven level of knowledge. Mr. Yadegari knew that Mr. Tabari did not want to be forthcoming about where the transducers were ultimately going and how they were to be used, hence the falsified end-use certificate. Mr. Yadegari knew that Mr. Tabari was in Iran. Mr. Yadegari knew or was wilfully blind about the properties of these pressure transducers. Mr. Yadegari made a false statement to Customs, forged a waybill and used a forged end-use certificate in his attempts to get these transducers to Iran. These are not the actions of a person who believes the product is for a legitimate purpose, and the only illegal purpose for these transducers is the enrichment of uranium.

[82] In this passage, the trial judge underscored her previous findings that Mr. Yadegari knew that Mr. Tabari was in Iran and that he knew or was wilfully blind about the restricted nature of the pressure transducers. She then briefly reviewed the appellant's actions in attempting "to get these transducers to Iran" and stated, "These are not the actions of a person who believes the product is for a legitimate purpose, and the only illegal purpose for these transducers is the enrichment of uranium."

[83] However, on the evidence, all that was established was that the transducers were intended for delivery to Mr. Tabari or TSI in Iran, that Mr. Tabari was secretive about their intended end-use and that, to the appellant's knowledge, the transducers were subject to export restrictions. While this may have supported the inference that the transducers had some illegitimate purpose, the evidence provided no basis for the trial judge to infer that the "only" illegal purpose for the transducers was the enrichment of

uranium and, more importantly, that the appellant was aware of this presumed tie to uranium enrichment.

[84] In my opinion, therefore, in embarking as she did on her sentencing analysis, the trial judge erred. First, as Crown counsel on appeal responsibly acknowledged during oral argument, there was no demonstrated link between the appellant's attempted exportation of the transducers and the Iranian government's uranium enrichment program. Second, knowledge of a prospective unlawful use of the transducers is not the same as actual knowledge of the specific unlawful purpose of use of the transducers in Iran's nuclear enrichment program.

[85] I note that the trial judge herself later held in her sentencing reasons:

I accept that Mr. Yadegari's focus was on the money he could make. I accept that Mr. Yadegari was not intentionally trying to assist Iran in the development of its nuclear program. There would be a very different set of charges against Mr. Yadegari were the Crown in possession of this type of evidence. However, the fact that Mr. Yadegari was blinded by greed and did not consider the potentially devastating consequences of his actions does not mean this Court will ignore them. [Emphasis added.]

[86] The appellant's sentencing should therefore have proceeded on the basis that, motivated by greed, the appellant failed to comply with export restrictions and regulations applicable to the transducers and was reckless as to how the transducers were to be used. In my view, these factors alone compel a significant sentence of imprisonment.

[87] The appellant's remaining submissions regarding sentence must be understood in the context of the sentences imposed by the trial judge on each of the counts on which the appellant was convicted. Her division was as follows:

Count 1 – UN offence	8 months' imprisonment, after 31 months' credit for pre-sentence detention
Count 2 – EIPA offence	20 months' imprisonment, concurrent to count 1
Count 3 – <i>Customs Act</i> , fail to report restricted goods	1 month imprisonment, concurrent to count 1
Count 4 – <i>Customs Act</i> , fail to report value of goods	1 month imprisonment, concurrent to count 1
Count 5 – <i>Customs Act</i> , making a false and deceptive statement	6 months' imprisonment, <i>consecutive</i> to count 1
Count 6 – NSCA offence	6 months' imprisonment, concurrent to count 1
Count 7 – forgery (making a false waybill)	6 months' imprisonment, <i>consecutive</i> to counts 1 and 5
Count 8 – using a forged document	3 months' imprisonment, concurrent to count 1
Count 10 – using a forged document	6 months' imprisonment, concurrent to count 1
TOTAL:	51 months' imprisonment, less 31 months' credit for pre-sentence detention

[88] Against this backdrop, the appellant makes three additional arguments. First, he submits that the trial judge determined that the appellant should be imprisoned for a set period of time on the UN Offence, after credit for his pre-sentence detention, and then impermissibly “worked backward to achieve that end result”. This resulted in an effective net sentence of imprisonment of 39 months on count 1 (eight months’ imprisonment, plus 31 months’ credit for pre-sentence detention), a sentence that the appellant says bears no relation to the aggravating and mitigating factors in this case.

[89] Second, the appellant maintains that, as there are no directly comparable cases in Canada for the purpose of establishing an appropriate sentencing range, the range recognized in similar cases in the United States affords guidance as to the sentence that should have been imposed on the appellant. The sentences imposed in the authorities cited range from a fine and probation, in cases involving dual-use items with no proven threat to national security, to five years’ imprisonment, in cases involving contraband intended for military applications and an accused who was a senior member of the procurement chain, like Mr. Tabari. The appellant contends that the effective 51-month net sentence imposed here falls at the high end of this range, notwithstanding the appellant’s position at the “very bottom” of the procurement chain and the absence of evidence that the transducers were to be used for a nuclear purpose.

[90] Finally, the appellant submits that the sentences imposed on counts 4, 5, 7, 8 and 10, those relating to customs and forgery offences, were harsh and unreasonable given the nature of the offences at issue and the fact that the appellant was a first offender.

[91] Contrary to the appellant's submission, I am not persuaded that the trial judge employed a flawed methodology in fashioning an appropriate sentence. Read as a whole, her sentencing reasons reveal that she was steadfast in her approach of deducting the appropriate credit for pre-sentence detention from the overall sentence that she regarded as fit for the UN Offence. This is demonstrated by her discussions with counsel after the initial imposition of the sentence, when the trial judge made further adjustments to the sentence to correct an inadvertent miscalculation of the period of pre-sentence detention. This correction advantaged the appellant by affording him full two-for-one credit for his pre-sentence detention and by reducing his sentence on the UN Offence from 12 to 8 months' imprisonment. In any event, even if the trial judge had employed the less desirable approach of considering credit for pre-sentence detention before determining the additional custodial part of the appellant's sentence, this would not have constituted reversible error: see *R. v. Orr* (2008), 2008 C.C.C. (3d) 432 (B.C.C.A.), at para. 22.

[92] The remaining grounds advanced by the appellant concern the overall appropriateness of the net sentence imposed by the trial judge. The trial judge recognized that sentencing in this case was a matter of first impression. It appears that there have been no previous comparable cases in Canada. Based on the cases in the United States cited by the appellant, it also appears that the appellant's sentence is at the upper end of the range applicable in that jurisdiction in similar cases, especially for a first offender. See for example, *U.S.A. v. Seyed Eftekhari*, Case No. 5:06-CR-516(1)-OLG (N.D. Tex.

2006); *U.S.A. v. Mohammed v. Fazeli*, Docket No. CR-06-185(A)-GHK (N.D. Cal. 2006); *U.S.A. v. Jacques Monsieur*, Case No. 1:09-CR-00186-WS-C (N.D. Ala. 2010).

[93] That said, unlike the cases most heavily relied on by the appellant, this case did not involve a guilty plea. Moreover, the trial judge expressly took account of the applicable mitigating factors in this case. For instance, she expressly noted that the appellant was a first offender, that he had “lost everything” as a result of his arrest, and that he was not the “driving force” behind the exportation scheme.

[94] Although I might not have imposed the same overall sentence as that of the trial judge, I cannot conclude that it is manifestly unfit solely because it falls at the higher end of the sentencing range recognized for similar offences in the United States.

[95] The appellant’s conduct was serious, especially in relation to the UN and the EIPA and the NSCA offences. The trial judge correctly emphasized that general deterrence was of “paramount importance”, given the potential harm involved in the appellant’s offences. She also noted that the appellant was persistent in obtaining the transducers, as well as quotes for many others, and deceptive in his attempt to export them. She held that the sentence imposed should promote a sense of responsibility in the offender, and acknowledge the potential harm to the global community. I agree.

[96] We are left, then, with the need to consider whether some reduction in the appellant’s sentence is warranted by the trial judge’s finding, absent sufficient proof, that

the transducers were to be used for a nuclear-related purpose. In my view, this error does warrant a slight adjustment to the sentence imposed on the UN offence.

[97] In the particular circumstances of this case, including the appellant's position as a first offender, his subordinate position and role compared to that of Mr. Tabari, the consequences already suffered by the appellant as a result of his criminal conduct and the Crown's admitted failure to prove that the transducers were in fact intended for use in the process of uranium enrichment in Iran, it is my opinion that a fit sentence on the UN Offence is three years imprisonment. After credit of 31 months for pre-sentence detention, this results in a sentence of five months' imprisonment for this offence.

[98] Finally, I am not persuaded that the sentences imposed on counts 4, 5, 7, 8 and 10 are unfit or that the trial judge erred in principle in her sentencing analysis on these counts.

VI. Disposition

[99] For the reasons given, I would dismiss the conviction appeal. I would allow the sentence appeal in part by substituting a sentence of five months' imprisonment on count 1, the UN offence, after credit of 31 months for pre-sentence detention. In all other respects, I would not interfere with the trial judge's sentencing disposition.

RELEASED:

"APR 12 2011"
"MJM"

"E.A. Cronk J.A."
"I agree M.J. Moldaver J.A."
"I agree S.E. Lang J.A."