Court File Number: T- 324 -07

FEDERAL COURT

B E T W E E N:

AMNESTY INTERNATIONAL CANADA and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants

-and-

CHIEF OF THE DEFENCE STAFF FOR THE CANADIAN FORCES, MINISTER OF NATIONAL DEFENCE and ATTORNEY GENERAL OF CANADA

Respondents

APPLICANTS' MEMORANDUM OF FACT AND LAW OPPOSING THE MOTION TO STRIKE

PART I – FACTS

Overview

1. By this application, the Applicants are asking the Court to apply the protections of the *Canadian Charter of Rights and Freedoms* and Canada's international human rights and humanitarian law obligations to individuals detained by Canadian Forces ("CF") operating in Afghanistan. The current CF practice is to interrogate the detainees and then transfer them into the hands of Afghan authorities, despite overwhelming evidence that torture and other serious human rights violations are widespread in Afghan custody. The Applicants submit that this practice exposes detainees to a substantial risk of torture, and as such it offends the Charter.

2. The Respondents argue in the present motion that this application is bereft of any chance of success and should be struck without further consideration. Their

primary argument is that any risk of torture is irrelevant because it is plain and obvious that Canadian law cannot apply to the CF acting abroad.

3. This is an erroneous and even frightening view of the law. The exercise of military force, including of detention, is perhaps the most fundamental projection of state power. It cannot be that Canadian courts have no supervisory power whatsoever, including circumstances in which fundamental human rights are at risk. By choosing to deploy the CF in Afghanistan, and directing Canadian soldiers to exercise coercive power in depriving individuals of their liberty, the Respondents are bringing detainees under the effective control of Canada and thus within the jurisdiction of Canadian law.

4. It is unfortunate that the Respondents do not share the view of Justice Binnie of the Supreme Court of Canada, who commented that the issues raised in this application deserve "extensive and scholarly argument".[1] Instead, the Respondents raise numerous other grounds for striking the application, apparently hoping that at least one may find favour and a full hearing will be avoided, or at least delayed.

5. How the *Charter* applies in the context of a foreign war is an important question that is untested in Canadian jurisprudence. It is an issue that cannot be decided wisely in the all-or-nothing calculus of a motion to strike. There is a strong public interest in developing the law on such issues, and as such the matter demands a full hearing on the merits.

6. It is troubling that the Respondents decided to hand over detainees to Afghan custody despite their own reports which say that extra-judicial killing and torture are "all too common". That they continue to do so in the face of six first-hand reports of torture from former CF detainees is intolerable. This motion should be dismissed and a hearing on the merits scheduled without delay.

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1 *R. v. Hape*, [2007] S.C.J. No. 26, at para. 184

The Parties

7. The Applicant Amnesty International Canada (AIC) is part of a worldwide movement for human rights. One of its foremost goals is the eradication of torture in all its forms. Approximately 60,000 Canadians are members.[2]

8. The Applicant British Columbia Civil Liberties Association (BCCLA) is a non-profit society whose primary goal is to preserve and promote Canadian democratic values and civil liberties. The BCCLA advocates for reasonable constraints on government power, including those exercised in the national security arena. The BCCLA is the author of the Prevention of Torture Act – a draft Act to keep Canadians and foreign nationals free from torture in any matter in which Canada has jurisdiction or influence – and is currently working with Members of Parliament towards its passage into law.[3]

9. Since Canada's deployment in Afghanistan, both Applicants have been actively involved in advocating for the humane treatment of individuals detained by CF. This has included writing letters to the Ministers of National Defence and Foreign Affairs, and participating in meetings on the issue. As well, the Parliamentary Standing Committee on National Defence invited Alex Neve, Secretary General for AIC, to provide testimony on this issue.[4]

10. The Minister of National Defence is empowered by section 4 of the *National Defence Act* with the overall management and direction of the CF. Under section 18 of the *National Defence Act*, the Chief of Defence Staff for the Canadian Forces (CDS)

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[2] Affidavit of Alex Neve, sworn August 29, 2007, at paras. 2-3, 6 and11-12 [Applicants' Motion Record ("AMR"), Vol.I, Tab 1, at pp. 1-4]

[3] Affidavit of Murray Mollard, sworn February 22, 2007, at paras. 2, 4 and 10-12 [AMR, Vol. I, Tab 2 at p. #]

[4] Neve Affidavit, paras. 19-25 [AMR, Vol. I, Tab 1, at pp. 6-7]; and Mollard Affidavit, paras. 6-8 [AMR, Vol. I, Tab 2, at 111-112 and 115-116]

is responsible for the command and control of CF.[5] The current CDS is General Rick Hillier.

11. This case concerns declaratory and other *Charter* relief in respect of unnamed individuals in Afghanistan who are detained by CF. The detainees are unknown because the Respondents keep their names secret. When a Canadian lawyer asked the Respondents for permission to contact and take instructions from the detainees, the request was refused. As the Respondent General Hillier wrote to one lawyer:

> [T]here is no requirement to offer detained persons access to legal counsel prior to transferring to Afghan authorities.
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> ...I cannot agree to provide you with access to and information on detainees that the Canadian Forces has transferred or will transfer to Afghan authorities.[6]

The Canadian Mission in Afghanistan

12. Canadian Forces have participated in the armed conflict in Afghanistan since 2002. Approximately 2,500 CF personnel are currently deployed in that country.[7]

13. The purpose of Canada's mission in Afghanistan is outlined in an agreement signed with the Afghanistan government on December 18, 2005. According to these "Technical Arrangements", Canada's presence is predicated on, among other things, the country's right to self-defence. Canada's objectives include providing security and stability to Afghanistan as well as eliminating Al Qaida, the Taliban and other groups that threaten international peace and security.[8]

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5 *National Defence Act*, R.S. 1985, c. N-5, sections 4 and 18

6 Letter from Gen. Rick Hillier to Yavar Hameed, dated July 17, 2006 [AMR, Vol. I, Tab 4, at p. 197]

7 Notice of Application for Judicial Review, dated February 21, 2007 [Respondents' Record ("RR"), Vol. 1, Tab 1, p. 3]

8 Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, paras. 4 and 9 [RR, Vol. 1, Tab 6, pp. 192 and 194].

14. According the Technical Arrangements, the parties "understand" that Canadian Forces may use deadly force to ensure the accomplishment of these objectives and it may conduct operations "anywhere in Afghanistan as required". The Technical Arrangements also contemplate that Canada may hold individuals in detention, and states,

> Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.[9]

15. The Arrangements do not say that Canada is required to transfer detainees to Afghan custody, nor does it suggest that Canada is prohibited from transferring detainees to another power, such as the United States, which had been its previous practice. It also does not state the permissible basis or applicable law for the apprehension or continued detention of individuals in Afghanistan.

16. Canada also signed a Status of Forces Arrangement, which is an annex to the Technical Arrangements. This document indicates that Canadian personnel are immune from Afghan law and "have complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan."[10]

17. There is no mechanism or provision in the Technical Arrangements that would require Canada to leave Afghanistan in the event it was invited to do so. Despite the fact the Arrangements concern the deployment of a foreign military force in Afghan

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[9] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 12. [RR, Vol. 1, Tab 6, p. 194].

[10] Arrangement Regarding the Status of Canadian Personnel in Afghanistan, paras. 1.1, 1.3, 4.1 and 6.1. [RR, Vol. 1, Tab 6, pp. 196-198]

territory, the senior Canadian military commander is identified as the final authority regarding their interpretation, and his determinations are final.[11]

Canadian Forces' Detention of Individuals in Afghanistan

18. The previous Minister of Defence, Gordon O'Connor, has stated that, in any Afghan mission and regardless of its command structure, it is the government's intent to transfer all persons the CF detain to Afghan custody.[12]

19. This intent is formalized in a December 18, 2005 document (the "Detainee Agreement") that the Respondent General Hillier signed with the Afghan Ministry of Defence. It does not oblige Canada to transfer detainees to Afghanistan, but prescribes procedures "in the event of a transfer ... to the custody of any detention facility operated by ... Afghanistan".[13]

20. The CF possess a wide discretion to detain Afghan civilians, including those having no role in hostilities. The CF Theatre Standing Order regarding "Detention of Afghan Nationals and Other Persons" (TSO 321A) states that the CF may detain any person on a "reasonable belief" (defined as "neither mere speculation nor absolute certainty") that he or she is adverse in interest. This includes "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF / Coalition Forces".[14]

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[11] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 13[RR, Vol. 1, Tab 6, p. 195].

[12] Neve Affidavit, Exhibit "F": Ministerial Answers to Questions on the Order Paper, answers (a) and (b) [AMR, Vol. I, Tab 1, p. 94]

[13] Arrangement For the Transfer of Detainees Between The Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, dated December 18, 2005, para. 1 [RR, Vol. 2 Tab 9-D, p. 365]

[14] Task Force Afghanistan Theatre Standing Order 321A, paras. 13, 19-20 [RR, Vol. 1, Tab 6, pp. 208, 210]

21. The CF interrogate detainees, search their belongings, and take their fingerprints. All of this information is transmitted to Afghan authorities at the time of transfer. The Respondents deny detainees access to legal counsel during detention by CF.[15]

22. The CF have sole discretion to transfer or not transfer a detainee. The Theatre Standing Orders vest the discretion to transfer solely in the Canadian commander of Task Force Afghanistan:

> Comd TFA is the sole authority empowered to make the determination whether a temporarily detained person shall be retained in custody, transferred to ANSF [Afghan National Security Forces] or released...[16]

Risk of Torture and Abuse in Afghan custody

23. Individuals held in Afghan detention face a substantial risk that they will be tortured by Afghan authorities.[17]

24. The United Nations, the U.S. government, and the Afghan Independent Human Rights Commission all concur that detainees are routinely tortured and otherwise abused in Afghan custody. The following extracts focus on the actions of the Afghan

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15 Task Force Afghanistan Theatre Standing Order 321A, paras. 35-37 [RR, Vol. 1, Tab 6, pp. 213, 210]

16 Task Force Afghanistan Theatre Standing Order 321A, para. 32 [RR, Vol. 1, Tab 6, p. 212]

17 Notice of Application for Judicial Review, dated February 21, 2007 [Respondents' Record ("RR"), Vol. 1, Tab 1, pp. 3-4]

local police, the ANP and the NDS, which are mandated under CF standing orders as the "appropriate" Afghan units to receive transferred detainees.[18]

19. The U.N. High Commissioner for Human Rights, Louise Arbour, last year described torture in NDS custody as "common":

> The NSD, responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture, and systematic due process violations. Multiple security institutions managed by the NSD, the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common...[19]

20. The U.S. State Department this year also reported "torture and abuse" in Afghan custody, and described some techniques in use such as "pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy."[20]

21. The Afghan Independent Human Rights Commission (AIHRC) is a branch of the Afghan government, established under Article 58 of the Constitution to "monitor[] the observation of human rights in Afghanistan". It writes:

> Torture continues to take place as a routine part of ANP [i.e. Afghan National Police] procedures and appears to be closely linked to illegal detention centers and illegal detention, particularly at the investigation stage in order to extort confessions from detainees. Torture was found to be especially prevalent in

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[18] Notice of Application for Judicial Review, dated February 21, 2007 [Respondents' Record ("RR"), Vol. 1, Tab 1, p. 3]; and Task Force Afghanistan Theatre Standing Order 321A, para. 7 [RR, Vol. 1, Tab 6, p. 207]

[19] Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievement of technical assistance in the field of human rights, March 3, 2006, at p. 15, para. 68 [AMR, Vol. I, Tab 4, p. 278]

[20] U.S. State Department Afghanistan Country Report on Human Rights Practices, dated March 6, 2007, at p. 1, 3-4 [AMR, Vol. I, Tab 4, pp. 284, 286-287]

> Paktia and Kandahar provinces, linked to the high numbers of illegal detainees. High numbers of complaints of torture were received from all regional offices in the past year.[21]

25. Canada's Department of Foreign Affairs conducted its own review of the human rights situation in Afghanistan. In a report issued earlier this year, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are all too common."[22]

26. After this application was commenced, and hours before an injunction was scheduled to be heard, the Canadian government concluded a new arrangement with Afghanistan regarding the transfer of detainees. The new arrangement states that it "supplements" the earlier Detainee Agreement. It also states that Canadian officials will have access to any persons transferred by the CF to Afghan authorities.[23]

27. Canadian officials have received at least six first-hand reports of torture from individuals who were transferred by the CF to Afghan authorities. Four of those reports came within the first six visits conducted pursuant to the Supplementary Arrangement. These first-hand reports of torture have not stopped Canada from continuing to transfer detainees to Afghan authorities.[24]

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[21] Afghan Independent Human Rights Commission 2004-2005 Annual Report, Section 4.7 [AMR, Vol. I, Tab 4, pp. 239 and 242]

[22] Transcript of Cross-Examination of Scott Proudfoot on July 11, 2007, pp.10, 28 [AMR, Vol. I, Tab 3, p. 152 and 170]

[23] Arrangement For the Transfer of Detainees Between The Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, dated May 3, 2007, paras. 1 and 2 [RR, Vol. 1, Tab7, p. 236]

[24] Transcript of Cross-Examination of Scott Proudfoot on July 11, 2007, pp.17, 21 and 25 [AMR, Vol. I, Tab 3, p. 159, 163, and 167]

PART II – ISSUES

28. In exercising its discretion to grant an interlocutory injunction, the Court must consider the following issues raised by the Respondents:

(a) Do the Applicants have standing in this matter?
(b) Does the application have a valid basis under the *Federal Courts Act*?
(c) Can the *Charter* apply extraterritorially in this matter?
(d) Are substantive *Charter* rights engaged?
(e) Is the application justiciable?
(f) Is the application moot?
(g) Is international law dispositive of the *Charter* claims?

PART III – ARGUMENTS

A. General Principles in a Motion to Strike an Application

29. The general test for a motion to strike an action is whether it is plain, obvious and beyond doubt that a claim will not succeed. The fact that a claim reveals "an arguable, difficult or important point of law" cannot justify striking it out. On the contrary, courts should be particularly reluctant to strike such cases, as they are critical for the development of the law.[25]

30. The above test relates to motions to strike an action. However, there is no provision in the *Federal Courts Rules* to strike an application for judicial review. According to the Federal Court of Appeal, this is intentional because an application is

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[25] *Federal Courts Rules,* Rule 221; *Hunt v. Carey Canada Inc.,*[1990] 2 S.C.R. 959 at 990-991, 990 for quote; and *Vulcan Equipment Co. v. Coats Co.,* [1982] 2 F.C. 77 (F.C.A.) at 78.

in itself a summary procedure that is meant to be dealt with as quickly as possible. Nevertheless, the Court of Appeal also conceded that the Federal Court has inherent jurisdiction to strike an application at a preliminary stage.[26]

31. While the Federal Court of Appeal in *David Bull* reluctantly allowed that applications could be struck in a summary manner, it emphasized that such cases must be "very exceptional" and "so clearly improper as to be bereft of any possibility of success."[27] More recently, the Federal Court summarized the law this way:

> It is well established that a motion to strike an application must meet a very high threshold. This remedy, being the most extreme, is only justified in exceptional cases and shall not be granted lightly. It is only appropriate and shall only be granted in the clearest of cases; generally speaking, the proper way to contest an originating notice of application which a respondent thinks to be without merit will be to appear and argue at the hearing of the application itself rather than to bring a motion to strike.[28]

32. Generally, no evidence may be led on a motion to strike and the facts alleged by the applicant must be accepted as true.[29] By analogy to Rule 221(1)(b), there is an exception to that rule on an issue of mootness.[30] Here, the Respondents go further, and argue that evidence may be led on *any* jurisdictional issue, relying on the Court's ratio in *Mil Davie*. The Applicant submits that the exception in *Mil Davie* should be limited to cases in which the Court has no discretion whatsoever to assume jurisdiction. Some examples are statutory bars, alternate procedures, or time limits.[31]

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26 *Federal Courts Act,* R.S.C. 1985, c. F-7, section 18.4(1); and *David Bull Laboratories (Canada) v. Pharmacia Inc.,* [1994] F.C.J. No. 1629 (F.C.A.) at paras. 9-10 and 15.

27 *David Bull, supra*, para. 15

28 *Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v. Canada (Attorney General),* [2005] F.C.J. No. 1266 (F.C.) at para. 14

29 *Addison & Leyen Ltd. v. Canada,* [2006] F.C.J. No. 489 (F.C.A.) at para. 6; rev'd on other grounds, [2007] S.C.J. No. 489.

30 *Federal Courts Rules*, Rule 221(1)(b), (2)

31 See, for example, *Bast v. Canada (Attorney General)*, [1998] F.C.J. No. 1250 (F.C.); and *Dutt v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1518 (F.C.).

B. The Applicants Have Standing

33. The Applicants AIC and the BCCLA are well-known organizations with national and international reputations advocating for the protection of human rights. They are deeply committed to the eradication of torture, and engage in many activities in that regard. In the present case, the Applicants are profoundly concerned that the Respondents are violating the rights of individuals to be free from torture.

34. The individuals whose Charter rights are directly engaged in this matter are detainees held by the CF in Afghanistan. The Respondents have enforced strict secrecy regarding the details of these prisoners, including their identities, where they are being held, the basis for their detention, and so on. But the Respondents have conceded that individuals are being detained, and they are being transferred to Afghan custody without access to legal counsel.

35. In these circumstances, it is not simply impractical for these detainees to assert their own Charter rights, it is impossible because they are effectively barred from doing so by force. For the reasons that follow, the Applicants submit that they easily qualify for public interest standing pursuant to the applicable legal test.

Public Interest Standing

36. The Applicants submit that they easily satisfy the three-part test for public interest standing expressed in *Canadian Council of Churches v. Canada*. Succinctly put, these are:

(i) Whether there is a serious issue to be tried;
(ii) Whether the applicant has a genuine interest in the matter; and

(iii) Whether there is another reasonable and effective way to bring the issue before the court.[32]

37. Meeting this test would be part of the Applicants' burden of proof if this were a hearing into the merits of the application. However, on a preliminary motion to strike, the burden of proof is on the Respondents to establish the test is not satisfied —a very different matter. The decision of the Federal Court in *Sierra Club v. Canada* is binding in this regard:

> [Normally] when the issue of standing is raised in response to an application for judicial review, the burden is on the applicant to establish that she or he has standing to institute the proceedings. However, in this case, the issue of standing is raised in a preliminary motion to strike the applicant's originating notice of motion. In such motions the onus is normally on the moving party to establish on the balance of probabilities that the application lacks merit. It would therefore seem to follow that on a motion to strike an application on the ground that the applicant lacks standing, the burden is on the moving party to satisfy the Court that the applicant does not have standing.[33]

38. Courts should be very reluctant to terminate an application for judicial review on a preliminary motion attacking standing.[34]

39. The Respondents concede that the Applicants have a genuine interest in the matters at issue in this application. Further, whether there is a serious issue to be tried is fully addressed in other parts of this submission, and the Applicants adopt those arguments for the purposes of standing. Accordingly, the final question to be asked is whether the Respondents have established that there is another reasonable and effective way to bring this issue before the Court.

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32 *Canadian Council of Churches v. Canada(Minister of Employment and Immigration),* [1992]1 S.C.R. 236

33 *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), [1999] 2 F.C. 211 (T.D.) at paras. 24, 39.

34 *Sierra Club of Canada, supra,* para. 25. See also: *Iron v. Saskatchewan (Minister of Environment & Public Safety)* (1993), 10 C.E.L.R. (N.S.) 165 (Sask. Q.B.), at pp. 166-168.

40. The Respondents contend that directly-affected detainees could appear in this Court if they truly wanted. They lead no evidence in that regard but cite a single pending Ontario case which apparently involves a man shot dead by Canadian soldiers in Afghanistan. The family sued in Canada.

41. The plaintiffs in the above case were evidently at liberty to retain and instruct a Canadian lawyer, and thus the facts are distinguishable. Here, the Respondents are holding detainees incommunicado, unnamed and without access to legal counsel. The Respondents fail to explain how individual detainees can initiate legal proceedings in Canada in these circumstances.[35]

42. Even if the detainees were not held incommunicado, there is no "reasonable likelihood" that they would bring the matter to Court.[36] They are held in detention in a desperately poor country on the other side of the world. There is little infrastructure and they do not speak the languages of their captors. It is hard to imagine that a person so disadvantaged could muster the logistical, financial, and technological capacity to launch a court application in Canada.

43. The mere existence of directly-affected persons does not discharge the Respondents' burden to show there is another practicable way for these matters to come into court. The Federal Court has previously accorded public interest standing to groups that seek to judicially review actions that the Crown carries out in distant countries, where the directly-affected persons are unlikely to litigate. The English courts have also accorded public interest standing for such cases.[37]

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35 Neve Affidavit, Exhibit "F": Ministerial Answers to Questions on the Order Paper, question and answer (j) [AMR, Vol. I, Tab 1, p. 93 and 96] Letters from General Rick J. Hillier to Y. Hameed, dated July 17, 2006[AMR, Vol. I, Tab 4, pp. 197-198]

36 *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 (Ont.S.C.J.) at para. 114.

37 *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), [1999] 2 F.C. 211 (T.D.) at 249, para. 89 (Concerning the financing and building of Canadian nuclear reactors in China.) *R v Secretary of State for Foreign Affairs ex p. The World Development Movement Ltd* [1995] 1 All ER 611 (Concerning the financing and building of a dam in Malaysia.)

Applicants have standing for s. 24(1) Charter remedies

44. The Respondents submit that since the Applicants are not individuals whose own Charter rights have been breached, they are unable to obtain a remedy under s. 24(1) of the Charter.

45. It is correct that the Applicants' own rights are not violated. However, the Applicants seek standing in the interests of those whose are directly affected and who, denied legal counsel, have no foreseeable means of accessing this Court.

46. The Supreme Court has stated, "It now appears to be settled law that a party cannot generally rely upon the violation of a third party's Charter rights".[38] The Applicants submit that the Supreme Court has left the door open for an exception to the general rule. The facts of the case at bar are extreme and justify such an exception.

47. Failure to allow an exception to the general rule would lead to an absurd result that is inconsistent with the purpose of the Charter. It would mean the government is entitled to immunize its actions from constitutional scrutiny by imprisoning individuals, holding them incommunicado, and denying them access to counsel and the Courts.

48. The present case pleads the Charter in a context reminiscent of earlier jurisprudence concerning the writ of *habeas corpus*. The historic remedy of *habeas corpus* has long stood as the principal legal safeguard to arbitrary detention by the state. In some unfortunate cases, the individual held in detention was prevented from seeking the relief personally due to coercion or restraint that attended the confinement. Although direct standing was the general rule in *habeas* proceedings,

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[38] *Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358 at paras. 78-79, 78 for quote.

for centuries courts have held that there was an exception when there were grounds to believe the detainee was restrained from bringing the petition personally.[39]

49. In *Thaw (No 2)*, the Court reviewed historic jurisprudence and legal commentary regarding the right of a stranger to institute *habeas* proceedings on behalf of another. Notably, some of the cases involved anti-slavery organizations petitioning the courts for relief on behalf of individuals from foreign countries who had little knowledge or ability to assert the rights personally. The Court found this was good law, and confirmed that the applicant did not have to be a relative:

> These persons may apply for the writ of habeas corpus in certain cases, without authority, without the consent, and even without the knowledge of the person or persons imprisoned. It is true that generally it is required that the petitioner should produce an affidavit of the prisoner, but if reasons are shewn, or it appears from the record that this affidavit cannot be had, it is dispensed with.
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> The English law goes further, and in 10 Halsbury's Laws of England 57, it is stated by the learned author, who was for many years Lord Chancellor of Great Britain, that
>
> any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from an illegal imprisonment.[40]

50. The Supreme Court of Canada has had occasion to consider the writ of *habeas corpus* in the Charter era. In *R. v. Gamble*, the lower courts dismissed the applicant's writ on the ground it was inconsistent with a common law technical requirement for such relief. The Court allowed the appeal and observed that, under the Charter, the historic *habeas* remedy should be broadened and technical rules dispensed with. On behalf of the majority, Wilson, J., said the following[41]:

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39 *Hottentot Venus* (1810), 13 East 195; *Boudreau v. Thaw (No. 2)* (1913), 13 D.L.R. 712 (Que.S.C.), at 714.; and *Ex Parte John Doe* (1974), 46 D.L.R. (3d) 547 (B.C.C.A.) at 558-559 and 561-563, per McIntyre J.A., application denied on other grounds.

40 *Thaw (No. 2),* pp. 713-714, 713 for quote.

41 *R. v. Gamble*, [1988] 2 S.C.R. 595, at 641.

> A purposive approach should, in my view, be applied to the administration of Charter remedies as well as to the interpretation of Charter rights and, in particular, should be adopted when *habeas corpus* is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen's fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice...I agree with the general proposition reflected in these cases that Charter relief should not be denied or "displaced by overly rigid rules": see Swan, at p. 148.

51. The Applicants submit that, consistent with *Gamble*, a purposive approach should be applied to the interpretation of Charter remedies. The Charter should be presumed to expand, rather than restrict, ancient common law protections of individual rights. Ironically, the *habeas* jurisprudence cited above would suggest the historic writ affords greater protection than the Charter. This would be inconsistent with the reasoning in *Gamble* and a purposive understanding of the Charter as a whole.

52. Courts interpreting s. 24(1) of the Charter have yet to consider a situation such as this, likely because modern governments no longer resort to draconian measures such as incommunicado detention and denial of legal counsel. Courts of an earlier day had little difficulty in adapting the rules on standing to circumvent such oppressive conduct by the state. Where the directly-affected party is unable or prevented from complaining about the denial of the Charter right, and the applicant can establish that fact, standing should be allowed to ensure there is judicial review of the offending conduct.

53. Finally, the Applicants also make a claim for declaratory relief. According to Rule 64 of the *Federal Courts Rules*, a party may make a claim for a binding declaration "whether or not any consequential relief is or can be claimed." In light of this Rule, the Applicants' application for declaratory relief cannot be struck.[42]

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[42] *Federal Courts Rules*, Rule 64; and *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at para. 80.

C. The Application is Valid Under the Federal Courts Act

54. It is well established that the time limit in subsection 18.1(2) of the *Federal Courts Act* does not apply to applications for relief under section 18 in respect of ongoing unlawful acts. This means there is no particular "decision" that the Applicants are challenging. Rather, it is a recurring unlawful practice that constitutes a "matter" under subsection 18.1(1).[43]

55. The Respondents suggest the application is invalid because there is an absence of concrete facts and the Applicants do not "adduce evidence" about any specific identifiable individual. Yet the Respondents fully acknowledge that individuals are being detained and transferred. Furthermore, the Applicants plead in the Notice of Application that these individuals are being subjected to an unnacceptable risk of torture.

56. Assuming these facts are true, as the Court must on a motion to strike[44], there is a sufficient fact situation upon which the application can be determined. Unlike the jurisprudence cited by the Respondents, the present application is not about some abstract government policy; it concerns Charter infringements of real individuals.

D. Extraterritorial Application of the Charter

57. The Respondents make extensive submissions that "the Charter does not apply in the circumstances of this case", arguing "the absurdity of attempting to impose a particular country's laws on a multi-national, international effort" such as the CF war

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43 *Federal Courts Act, supra*, sections 18(1), (3) and 18.1(1)-(2); *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)* (1998), [1999] 1 F.C. 483 (C.A.) at paras. 15-16; and *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.) at paras. 23-24.

44 *Addison & Leyen Ltd. v. Canada,* supra, at para. 6.

effort in Afghanistan. The Respondents cite only one legal authority for their proposition that the *Charter* does not apply: the SCC judgment in *R. v. Hape*.[45]

58. *Hape* is not nearly as clear-cut as the Respondents portray. It was in *Hape* that Justice Binnie commented specifically on the present case, saying that it raises "the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the Charter."[46] The Respondents cannot rely on *Hape* for a summary motion to strike, where that judgment affirms the very matters raised by this case as calling for "extensive and scholarly argument".

Exception for Fundamental Human Rights

59. The Respondents misrepresent the *ratio decidendi* in *Hape*. The majority ruled that extraterritorial enforcement of the *Charter* will usually—**but not always**—be limited to circumstances in which the foreign country consents to the application of Canadian law. Consent has as its *raison d'être* the maintenance of comity between Canada and the foreign state as sovereign equals. But the deference Canada shows to another country out of respect for sovereign equality and the preservation of comity is not absolute. Writing for the majority, Justice LeBel described one very specific exception:[47]

> The principle of comity reinforces sovereign equality and contributes to the functioning of the international legal system. Acts of comity are justified on the basis that they facilitate interstate relations and global cooperation; however, comity ceases to be appropriate where it would undermine peaceable interstate relations and the international order.
>
> The principle of comity does not offer a rationale for condoning another state's breach of international law. Indeed, the need to uphold international law may

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45 *R. v. Hape, supra.*

46 *R. v. Hape, supra*, at para. 184.

47 *R. v. Hape*, *supra*, per LeBel J. at paras 50-52, and see 101.

> trump the principle of comity (see for example the English Court of Appeal's decision in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598, in respect of a British national captured by U.S. forces in Afghanistan who was transferred to Guantanamo Bay and detained for several months without access to a lawyer or a court).
>
> ... Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. **That deference ends where clear violations of international law and fundamental human rights begin**...

60. It cannot be disputed that the right to be free from torture is a fundamental human right. It is not only codified in the *Geneva Conventions*, the *International Covenant on Civil and Political Rights*, and the *Convention against Torture*, it a *jus cogens* rule of international law. Torture is a crime against humanity that admits no derogations or exceptions.[48]

61. Courts in other countries have held that the home state has legal jurisdiction over armies acting in foreign territories. In *Al Skeini*, the House of Lords were satisfied that domestic human rights legislation applied to individuals detained by British forces in Iraq. Surely the same proposition in Canada cannot be regarded as "bereft of any chance of success".[49]

Consent

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[48] *Geneva Conventions*, Common Article 3; *International Covenant on Civil and Political Rights*, Article 7; *Convention against Torture and Other Cruel, Inhumanor Degrading Treatement or Punishment*, Article 2; Crimes Against Humanity Act, S.C. 2000, c. 24, sections 4 and 6; and *Suresh v. Canada*, [2002] 1 S.C.R. 3 at paras. 61-65.

[49] *Al Skeini et al v. Secretary of State for Defence,* [2007] UKHL 26 ; and *Omar et al v. Secretary of the United States Army et al.* (2007), U.S.C.A. for the District of Columbia (No. 05cv02374)

62. The Applicants submit that Afghanistan has effectively consented to the operation of Canadian jurisdiction within its territory. In that regard, Afghanistan has surrendered significant powers to Canada, including and most strikingly the state monopoly over the use of coercive power within its territory. Indeed, the CF is expressly authorized to exercise force over Afghan citizens, including the use of deadly force or detention, anywhere throughout the country.

63. The CF power to kill or detain Afghan citizens – or transfer them directly to the custody of a third country - does not appear to be restricted in any way by the Technical Arrangements. The Detainee Agreement itself merely provides for a protocol or procedure for the transfer of detainees to Afghan custody; it does not require it. According to the CF Theatre Standing Order, the CF Commander in Afghanistan is

> the **sole authority** empowered to make the determination whether a temporarily detained person shall be retained in custody, transferred to ANSF or released.[50]

64. The unfettered discretion described above is surely inconsistent with the application of any Afghan law. Indeed, it would appear that the CF retains the power to detain indefinitely. Notably, the Detainee Agreement merely provides for a protocol or procedure for the transfer of detainees to Afghan custody; it does not require it. In this legal vacuum, and given the exceptional powers exercised by the CF, there is nothing objectionable about the application of the Charter to CF detention and transfer activities.

65. The law regarding extraterritorial application of the Charter continues to grow and needs to evolve to address the increased complexity of inter-state relations. Public interest and the administration of justice would be poorly served if this matter were struck at a preliminary stage.

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[50] Task Force Afghanistan Theatre Standing Order 321A, para. 32 [RR, Vol. 1, Tab 6, at 212]

E. Charter Rights Are Engaged

66. The Respondents argue that the application is made in a "factual vacuum", is based on "speculation and hypothesis", and fails because it is not "pleaded for particular individuals in particular circumstances".

67. There is no speculation or hypothesis that the CF continue to detain persons in Afghanistan and transfer them to Afghan officials. Moreover, reports by the UN, the AIHRC, the US State Department, and Canada's own Department of Foreign Affairs, confirm that is widespread and systemic in Afghan custody.

68. In countries with such a serious record of torture, the Federal Court has accepted that individual-specific evidence is unnecessary. For example, in deportation or extradition cases, one does not have to prove that a specific person will be tortured, but merely that a substantial risk of torture exists in the destination country.[51]

69. The standard of proof in such matters cannot and must not be too onerous. Canadian officials have a record of closing their eyes to torture, often by demanding a standard of proof that is unreasonable and unlawful given the gravity and nature of the risk. Justice O'Connor of the Arar Inquiry confirmed the law on this issue as well as the regrettable attitude of Canadian officials in that regard:

> Whenever there is a reasonable basis for questioning a country's human rights record, officers should err on the side caution. According to Article 3, paragraph (2) [of the Convention against Torture], relevant considerations for determining whether there are grounds for believing in a danger of torture include the existence of a "pattern of gross, flagrant or mass

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[51] *Lai Cheong Sing and Tsang Ming Na v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, at paras. 138-141. Also see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, at para. 73.

> violations of human rights." **Reliable public reports of patterns of human rights violations in a country must be considered when assessing whether there are is or was a credible risk of torture. Canadian officials should not wait for "verification" or unequivocal evidence of torture in a specific case before arriving at a conclusion of a likelihood of torture.**[52]

70. For the purposes of this motion, it is enough to say that these are all justiciable facts that are eminently subject to proof, unlike the speculative assertion by the applicants in *Operation Dismantle* that cruise missile testing will cause a nuclear war. The Respondents' arguments are without merit.

Section 7: Right to Life, Liberty and Security of the Person

71. Deportation or extradition to torture deprives an individual of the right to life, liberty, and security of the person, as guaranteed by section 7 of the Charter. The Applicants submit that the surrender of individuals from the custody and control of CF to the custody of Afghan authorities is clearly analogous to deportation and extradition processes. The fundamental question is whether torture by another state is a foreseeable consequence of our government's actions. As the Supreme Court has observed,[53]

> [T]he guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least **where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.**

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[52] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006), pp. 346-347 (emphasis added).

[53] *Suresh v. Canada*, [2002] 1 S.C.R. 3, at para. 54 for quote (emphasis added); and *R. v. Burns*, [2001] 1 S.C.R. 283.

72. The Respondents argue that section 7 rights have to do with the administration of justice in Canada, and regulate relationships between individuals and the Canadian government. The Applicants accept this premise, with the exception that the right is not territorially limited.

73. Individuals apprehended by the CF in Afghanistan are subjected to a process, the end result of which is an independent decision by the CF Commander to either transfer, release or continue the detention of that individual. This process starts at the point of contact with an individual, when the responsible CF officer must determine whether the person is suspect and worthy of apprehension.[54]

74. On detention, the individual is subjected to interrogation, photographs and fingerprinting. Shortly thereafter, the CF Commander determines whether to transfer or release the detainee. In the event the Commander decides to transfer the detainee, reports about the detainee's capture and interrogation, as well as fingerprints and other records, are handed over to Afghan authorities.[55]

75. From the above, it is clear that the fate of the detainee is in the Commander's hands. Transfer to Afghan custody is not the necessary result. Yet, the CF's Theatre Standing Orders give no right to these individuals to make any submissions throughout this process. Nor is there any limitation or conditions on the use of the evidence which is given to Afghan authorities.

76. The process and procedures described in the CF's TSO have all the hallmarks of the administration of justice. The TSO regulates the relationship between the individual and the Canadian government, from the point of contact to the time of

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[54] Task Force Afghanistan Theatre Standing Order 321A, para. 20 [RR, Vol. 1, Tab 6, at 210]

[55] Task Force Afghanistan Theatre Standing Order 321A, para. 37 [RR, Vol. 1, Tab 6, at 213]

transfer, yet it affords no procedural rights. Most seriously, the end result of that process may have severe consequences for the individual.

77. This process cannot accord with the principles of fundamental justice. There is an utter lack of procedural rights, and, most seriously, the outcome of the process places an individual at risk of torture.[56]

78. The Respondents' blanket submission that the *Charter* cannot apply in the context of war detainees and/or torture is inconsistent with the reality that other acts of Parliament apply in just that context. Numerous Canadian statutes and regulations provide extraterritorial jurisdiction over detainees and/or torture.[57] How can it be that ordinary statutes can apply but not the supreme law of Canada?

Section 10: Rights on Arrest or Detention

79. The Respondents submit that there is no right to counsel engaged because "detention" in section 10 of the Charter does not include detention within the context of an armed conflict. The Respondents cite no authority for this assertion.

80. International legal instruments confirm that the right to counsel should not be suspended in the context of armed conflict. Moreover, Canada's own *Prisoner-of-War Status Determination Regulations* afford the right to counsel. These authorities clearly refute the Respondents' contention.[58]

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[56] *Charkaoui v. Canada (Citizenship and Immigration Canada),* [2007] S.C.J. No. 9, at paras. 12-18, 29 and 53.

[57] *Geneva Conventions Act*, R.S.C., 1985, c. G-3, ss. 7-8; *Prisoner-of-War Status Determination Regulations* (SOR/91-134); *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. 24, s. 6; *Criminal Code*, ss. 269.1(2) and 7(5); and *National Defence Act*, R.S.C. 1985, c. N-5, ss.68, 93 and 99.

[58] *Prisoner-of-War Status Determination Regulations*, *supra*, s. 10; and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* adopted by UN General Assembly resolution 43/173 of 9 December 1988, Principles 17-18 and 33.

81. It may be that section 10 rights should be interpreted differently in the context of an armed conflict. The Respondents may seek to argue that infringement of section 10 rights in these circumstances is justified by section 1. But it cannot be the case that the right simply does not exist owing to a convenient and unsupported interpretation of the meaning of "detention".

Section 12: Right to Be Free From Cruel Treatment or Punishment

82. The Respondents rely on the authorities of *Suresh* and *Burns* as rebutting any possibility that section 12 is engaged on the transfer of a detainee. The Applicants submit that, while the circumstances of deportation and extradition are analogous, they are not identical, and this issue cannot properly be determined on a motion to strike.

83. The Supreme Court has found that the nexus between torture and an extradition or deportation order is too remote to engage section 12.[59] Here, the Afghan authorities are dealing with the individual at the instance of the CF, on the basis of evidence gathered by the CF. This reflects a very close nexus between CF actions and any treatment or punishment the individual may be subjected to by Afghan authorities. Thus, the matter is clearly distinguishable. At a minimum, the issue is not "plain and obvious".

F. The Application is Justiciable

84. The Respondents argue that the present application raises foreign policy and political questions that are not justiciable. This position was rejected outright by the Supreme Court of Canada in *Operation Dismantle*, which found that the Court has a

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59 *Suresh, supra*, at para. 53.

duty under the Charter to consider whether any particular act of the executive, even in the discharge of matters of national defence, violates the Charter rights of an individual.[60]

85. Furthermore, this application does not challenge any aspect of "high policy". This is not a challenge to the Respondents' decision to deploy in Afghanistan. Rather, this application concerns real individuals, apprehended and held in custody, and decisions made in respect of their liberty and security of the person. Where a similar distinction arose in *Operation Dismantle*, Wilson J., wrote in a separate concurring opinion adopted on this point by the whole Court:[61]

> The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts... I do not think it is open to [the Court] to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question"

86. In any country that respects the rule of law, the legal rights of individuals held in custody or detention can never be dismissed as non-justiciable or beyond the reach of the courts.[62]

G. The Application is not Moot

87. The Respondents assert that, because they have concluded a new arrangement with Afghanistan, and commenced monitoring detainees in Afghan custody, the application is moot. This ignores the fact that the application was directed at the

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60 *Operation Dismantl*e, at para. 38; and *Canadian Charter of Rights and Freedoms*, section 32.

61 *Operation Dismantle, supra*, at para. 63.

62 *Hamdan* v. Rumsfeld, Secretary of Defense, et al (2006), 126 S. Ct. 2749 (U.S.S.C.), (concerning a Yemeni detainee named Hamdan, arrested in Afghanistan, and detained by the US in Guantanamo Bay, Cuba.) And *Al-Skeini*, *supra*.

practice of transfers, and not simply the Arrangement itself. Moreover, the Supplementary Arrangement, by its very terms, states that it supplements the original arrangement, which thus remains in force.

88. The Respondents also cannot properly argue that the monitoring has eliminated the risk of torture to detainees. Indeed, the very fact that the monitoring is required concedes that some risk exists. More seriously, Canadian officials have received at least six first-hand reports of torture.

89. The Respondents contend that there has been some sort of "shifting of the legal goal in this matter". This is false. The Applicants have asked for a remedy that protects individuals from the risk of torture, and that goal has not changed. Under cross examination, Alex Neve from AIC readily agreed that the Supplementary Arrangement is an improvement. But the AIC has always been very clear that monitoring is not enough when dealing with a country that has such a flagrant record of human rights abuses. More than two months before this application was commenced, Mr. Neve said the following to the Standing Committee on National Defence:

> [W]e do, of course, appreciate the monitoring role played by the International Committee of the Red Cross, as we do around the world, and also by the Afghan Independent Human Rights Commission. **But the abuses continue despite the monitoring. The fact that monitoring exists cannot justify or excuse turning over a prisoner to a substantial risk of torture or ill treatment.**[63]

90. The onus of establishing that an issue is moot lies with the moving party.[64] The Respondents chose not to lead any evidence to indicate why the international and DFAIT reports of widespread torture should be disregarded. Similarly, the Respondent

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63 Neve Affidavit, Exhibit E: Standing Committee on National Defence, Evidence, December 11, 2006[AMR, Vol. I, Tab 1, p. 80]

64 *Saskatchewan (Minister of Agriculture, Food and Rural Revitalization), supra*, at para. 15.

led no evidence to suggest why the recent allegations of abuse, received directly by Canadian officials and described by Minister Peter Mackay as "serious", cannot be believed.

H. International Law Not Dispositive

91. The Respondents rely on an opinion from Professor Greenwood for numerous propositions at international law. In their submissions, the Respondents suggest that Professor Greenwood's views are wholly dispositive of this case on a motion to strike. With respect, what the professor thinks about the application of international law is both irrelevant and inadmissible on this motion.

92. With respect to irrelevance, Professor Greenwood himself concedes that nothing in his report is germane to the application of Canadian laws, for example the above-mentioned statutes or the *Charter*.[65] His report is therefore not probative of the merit of the Applicants' pleadings on Canadian law, and lends no support to the Respondents' motion to strike.

93. Furthermore, generally no evidence may be led on a motion to strike. The Applicants are not asking the Court to directly apply international law, thus there is no question of jurisdiction. Accordingly Professor Greenwood's affidavit is totally inadmissible on this motion.

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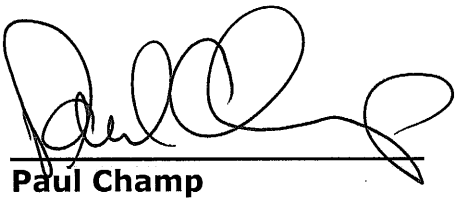
[65] Affidavit of Christopher Greenwood sworn August 14, 2007, Report, footnote 1 [RR, Vol. 1, Tab 4, p. 35]

PART IV – ORDER REQUESTED

94. The Applicants request that the motion be dismissed with costs on a substantial indemnity basis. The Courts have repeatedly discouraged parties from bringing a motion to strike against an application for judicial review.[66] Greater disincentives, by way of costs, are appropriate.

Dated: September 28, 2007



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66 *David Bull, supra*; and *Assn. of Canadian Distillers v. Canada (Minister of Health)*, [1998] F.C.J. No. 753 (F.C.) at para. 7. Also see *Placer Dome Inc. v. United Steelworkers of America, Loc. 8533*, [1994] O.J. No. 522 (Ont.Div.Ct.) at para. 3.

PART V
LIST OF AUTHORITIES

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly resolution 43/173 of 9 December 1988.

Canadian Charter of Rights and Freedoms, sections 7, 10, 12, 24, 32 and 52

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entry into force 26 June 1987

Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c. 24, section 6

Criminal Code, ss. 269.1(2) and 7(5)

Federal Courts Act, R.S.C. 1985, c. F-7, sections 18, 18.1, 18.2 and 18.4

Federal Courts Rules, S.O.R./98-106, Rule 64

Geneva Conventions Act, R.S.C., 1985, c. G-3, sections 7-8

National Defence Act, R.S. 1985, c. N-5, sections 4, 18, 67, 68, 93 and 99

Prisoner-of-War Status Determination Regulations (SOR/91-134), section 10

CASES

Addison & Leyen Ltd. v. Canada, [2006] F.C.J. No. 489 (F.C.A; rev'd on other grounds, [2007] S.C.J. No. 489

Al Skeini et al v. Secretary of State for Defence, [2007] UKHL 26

Assn. of Canadian Distillers v. Canada (Minister of Health), [1998] F.C.J. No. 753 (F.C.)

Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans) (1998), [1999] 1 F.C. 483 (C.A.)

Bast v. Canada (Attorney General), [1998] F.C.J. No. 1250 (F.C.)

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358

Boudreau v. Thaw (No. 2) (1913), 13 D.L.R. 712 (Que.S.C.)

Canadian Council of Churches v. Canada(Minister of Employment and Immigration), [1992]1 S.C.R. 236

Charkaoui v. Canada (Citizenship and Immigration Canada), [2007] S.C.J. No. 9

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006), pp.

David Bull Laboratories (Canada) v. Pharmacia Inc., [1994] F.C.J. No. 1629 (F.C.A.)

Dutt v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1518 (F.C.)

Ex Parte John Doe (1974), 46 D.L.R. (3d) 547 (B.C.C.A.)

Fraser v. Canada (Attorney General), [2005] O.J. No. 5580 (Ont.S.C.J.)

Hamdan v. Rumsfeld, Secretary of Defense, et al (2006), 126 S. Ct. 2749 (U.S.S.C.)

Hottentot Venus (1810), 13 East 195

Hunt v. Carey Canada Inc.,[1990] 2 S.C.R. 959

Iron v. Saskatchewan (Minister of Environment & Public Safety) (1993), 10 C.E.L.R. (N.S.) 165 (Sask. Q.B.)

Krause v. Canada, [1999] 2 F.C. 476 (C.A.)

Lai Cheong Sing and Tsang Ming Na v. Canada (Minister of Citizenship and Immigration), 2007 FC 361

Mahjoub v. Canada (Minister of Citizenship and Immigration), 2006 FC 1503

Omar et al v. Secretary of the United States Army et al. (2007), U.S.C.A. for the District of Columbia (No. 05cv02374)

Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441

Placer Dome Inc. v. United Steelworkers of America, Loc. 8533, [1994] O.J. No. 522 (Ont.Div.Ct.)

R. v. Burns, [2001] 1 S.C.R. 283

R. v. Cook, [1998] 2 S.C.R. 597

R. v. Gamble, [1988] 2 S.C.R. 595

R. v. Hape, 2007 SCC 26

R v Secretary of State for Foreign Affairs ex p. The World Development Movement Ltd [1995] 1 All ER 611

Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v. Canada (Attorney General), [2005] F.C.J. No. 1266 (F.C.)

Sierra Club of Canada v. Canada (Minister of Finance) (1998), [1999] 2 F.C. 211 (T.D.)

Suresh v. Canada, [2002] 1 S.C.R. 3.

Vulcan Equipment Co. v. Coats Co., [1982] 2 F.C. 77 (F.C.A.)