

**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  
FOR AN INTERLOCUTORY INJUNCTION**

**PART I – FACTS**

**Overview**

1. By the present application for judicial review, 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 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 argue that this practice exposes detainees to a substantial risk of torture, and as such it offends the Charter.

2. At law, there are few principles as absolute as the prohibition against torture, and no justification can excuse its exercise. The leading treaty against torture, the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, says it cannot be derogated from in any circumstances—including war. Canada's obligation includes the duty to avoid being complicit in torture in any way, which would include transferring an individual into the hands of those who are likely to commit torture. The principles of this treaty inform the interpretation and application of the Charter.

3. Numerous very reputable bodies have concluded that torture is "common" and "routine" in Afghanistan. This includes the United Nations (UN) Commission on Human Rights, the UN High Commissioner for Human Rights, the Afghan Independent Human Rights Commission, and the U.S. State Department. A 2006 report by Canada's Department of Foreign Affairs reached similar conclusions about the situation in Afghanistan prisons: "Extrajudicial executions, disappearances, torture and detention without trial are all too common."

4. The Applicants are bringing this motion for interlocutory relief based on their concern that individual detainees may be subject to torture before this application is heard. According to recent reports in Canada's leading national newspaper, *The Globe and Mail*, thirty individuals have provided graphic and disturbing accounts of being tortured after the CF transferred them to Afghan custody. These claims credibly raise serious doubts about the safety of detainees transferred to Afghan custody, particularly as the allegations are consistent with other reports of widespread torture in Afghan prisons. Several of those cases were verified by the Afghan Independent Human Rights Commission.

5. The CF continues to capture, detain and transfer detainees to Afghan authorities. The Respondents maintain that adequate safeguards are in place to prevent torture. The Applicants disagree, and which position is correct is a matter for the Applications Judge. Given the undeniably serious and irreparable harm

caused by torture, the Applicants are asking as a necessary precautionary measure that this Court order the Respondents to halt all transfers immediately until the application can be heard. The balance of convenience favours the fundamental right of individuals to be free from torture.

## **The Parties**

6. 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. It has been awarded a Nobel Peace Prize for its work, and approximately 60,000 Canadians are members.

Affidavit of Alex Neve, affirmed February 27, 2007, at paras. 2-3, 6 and 11-12 ["Neve Affidavit"]

7. The Applicant British Columbia Civil Liberties Association (BCCLA) is a group whose primary goals include promoting and defending civil liberties and human rights nationally and internationally. The BCCLA has been particularly concerned about issues surrounding civil liberties, human rights and national security. The BCCLA is currently working with Canadian government officials and Members of Parliament to pass a statute that directs the Government of Canada and its agents to conduct their affairs in a manner that keeps both Canadians and foreign nationals free from torture in any matter in which Canada has jurisdiction or influence.

Affidavit of Murray Mollard, affirmed February 22, 2007, at paras. 2, 4 and 10-12 ["Mollard Affidavit"]

8. 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.

Neve Affidavit, paras. 19-25  
Mollard Affidavit, paras. 6-8

9. Under section 18 of the *National Defence Act*, the Chief of Defence Staff for the Canadian Forces (CDS) is responsible for the command and control of CF. The current CDS, General Rick Hillier, signed an Arrangement in December 2005, establishing the practice of transferring detainees to Afghan authorities.

*National Defence Act*, R.S. 1985, c. N-5, section 18

Affidavit of Yavar Hameed, affirmed March 7, 2007, at para. 36 ["Hameed Affidavit"]

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. The current Minister, the Honourable Gordon O'Connor, has repeatedly affirmed his view that CF should continue with its current practices in respect of CF detainees.

*National Defence Act*, *supra*, section 4

Hameed Affidavit, at para. 107

11. This case concerns *Charter* relief on behalf of unnamed detainees in Afghanistan. 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:

... there is no requirement to offer detained persons access to legal counsel prior to transferring to Afghan authorities.

... 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.

Hameed Affidavit, paras. 41-43 and Exhibit "BB"

12. It is not publicly known how many persons the CF have detained. The number is substantial, but probably not large. A detainee transfer log from 2002 to May 2006 disclosed under the *Access to Information Act* (ATI) shows that the CF detained and transferred 40 persons to other countries' custody during that period.

Hameed Affidavit, paras. 23, 51-52 and Exhibits "P", "GG" and "HH"

### **The Canadian Mission in Afghanistan**

13. Since 2002, the CF have been deployed in Afghanistan in a frequently shifting mosaic of command structures. Currently, a total of 2,500 CF personnel are deployed in three missions:

- i. "Operation ATHENA": the largest and best known, is based in Kandahar under the command of NATO's International Security Assistance Force (ISAF).
- ii. "Operation ARCHER": based in Kabul and Bagram Airfield, is "the Canadian contribution to the U.S. led Operation ENDURING FREEDOM".
- iii. "Operation ARGUS": in Kabul, comprises a high-level strategic advisory team under Canadian command.

Thus the CF may serve under NATO, U.S. or Canadian command, depending on the operation to which they are assigned.

Hameed Affidavit, para. 5, Exhibit "A"

14. These various command structures do not affect Canadian sovereign control over the CF. Even when the CF are under the command of NATO (a command that

involves over 30 countries), NATO states that sovereign responsibility remains Canada's alone:

Without depriving member countries of their right and duty to assume their sovereign responsibilities in the field of defence, the Alliance [i.e. NATO] enables them through collective efforts to meet their essential national security objectives.

Hameed Affidavit, Exhibit "I": Nato Handbook, p. 18

Hameed Affidavit, paras. 13 and 35

15. The purpose of Canada's mission in Afghanistan is outlined in an agreement signed with the Afghanistan government on December 18, 2005. According to this agreement, Canada's objectives include providing security and stability to the country as well as eliminating Al Qaida, the Taliban and other groups that threaten international peace and security.

Hameed Affidavit, Exhibit "L": Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, paras. 4 and 9.

16. The Canadian government also signed an agreement with the Afghanistan government regarding the status of Canadian personnel. 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."

Hameed Affidavit, Exhibit "M": Arrangement Regarding the Status of Canadian Personnel in Afghanistan, paras. 1.1, 1.3, 4.1 and 6.1.

### **Canadian Forces' Detention of Individuals in Afghanistan**

17. The Respondent Minister 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:

It is Canada's intent to transfer persons detained by the Canadian Forces in Afghanistan to the Afghan authorities...

The Arrangement applies to all Canadian Forces in Afghanistan ... regardless of the command structure in which they are deployed."

Neve Affidavit, Exhibit "F": Ministerial Answers to Questions on the Order Paper, answers (a) and (b)

18. 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".

Hameed Affidavit, Exhibit "Y": 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

19. 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".

Hameed Affidavit, Exhibit "T": TSO 321A, paras. 13, 19-20

20. 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.

Hameed Affidavit, Exhibit "T": TSO 321A, paras. 35-37, Annex D

Hameed Affidavit, paras 30-31; Exhibits "U", "BB"

Hameed Affidavit, Exhibit "Q": Canadian Forces' Joint Doctrine Manual, *Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations*, August 1, 2004, at pages 4-1 through 4A-1 ["Detainee Doctrine Manual"]

21. The CF have sole discretion to transfer or not transfer a detainee. Even in the jointly run Canadian-U.S. mission of Operation ARCHER, 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 [i.e. Afghan National Security Forces] or released...

Hameed Affidavit, Exhibit "T": TSO 321A, at para. 32

22. The CF have transferred at least 21 persons since signing the Detainee Agreement. Of those whose transfer destination is known through ATI disclosures, the Afghan National Police (ANP) and National Directorate of Security (NDS or NSD) received the vast majority.

Hameed Affidavit, paras. 23, 31 and Exhibits "P" and "V"

### **Risk of Torture and Abuse in Afghan custody**

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

Hameed Affidavit, Exhibit "T": TSO 321A, at para. 7

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...

Hameed Affidavit, para. 84 and Exhibit "ZZ": 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 ["Report of the High Commissioner for Human Rights"]

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." Torture is part and parcel of atrocious prison conditions, and a security system that countenances extrajudicial detention and killing:

Prison conditions remained poor; prisons were decrepit, severely overcrowded, and unsanitary. Prisoners shared collective cells and were not sheltered adequately from severe winter conditions. Living conditions did not meet international standards. Some prisons held more than twice their capacity. In district prisons, shipping containers were frequently used when other structures were unavailable. Prisoners were reportedly beaten, tortured, and denied adequate food.

[. . .]

There continued to be instances in which security and factional forces committed extrajudicial killings and torture...

Hameed Affidavit, Exhibit "AAA": U.S. State Department Afghanistan Country Report on Human Rights Practices, dated March 6, 2007, at p. 1, 3-4

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 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.

Hameed Affidavit, Exhibit "YY": Afghan Independent Human Rights Commission 2004-2005 Annual Report, Section 4.7

Hameed Affidavit, paras. 79-82

24. Canada's Department of Foreign the Department of Foreign Affairs conducted its own review of the human rights situation in Afghanistan. In a 2006 report, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are all too common."

Supplementary Affidavit of Alex Neve, affirmed April 26, 2007, Exhibit "L": "What Ottawa doesn't want you to know", *Globe and Mail*, April 25, 2007, p. 1 [Applicants' Motion Record, Tab 2-L, p. 86]

25. In addition to torture, the CF have observed Afghan officials threatening to kill detainees extrajudicially. In June 2006, a Canadian television news team recorded an incident in which the CF decided at the last moment not to transfer an individual because the Afghan authorities in question expressed their intention to execute him summarily. The CF delayed for one day, but ultimately transferred the detainee to Afghan authorities.

Hameed Affidavit, Exhibit "BBB"

26. On April 23, 2007, the *Globe and Mail* newspaper published a story on its own lengthy investigation into the treatment of individuals transferred by the CF to Afghan custody. The reporter spoke to thirty individuals who described their experiences in detail:

Most of those held by the NDS for an extended time said they were whipped with electrical cables, usually a bundle of wires about the length of an arm. Some said the whipping was so painful that they fell unconscious.

Interrogators also jammed cloth between the teeth of some detainees, who described hearing the sound of a hand-crank generator and feeling the hot flush of electricity coursing through their muscles, seizing them with spasms.

Another man said the police hung him by his ankles for eight days of beating. Still another said he panicked as interrogators put a plastic bag over his head and squeezed his windpipe.

Torturers also used cold as a weapon, according to detainees who complained of being stripped half-naked and forced to stand through winter nights when temperatures in Kandahar drop below freezing.

Supplementary Neve Affidavit, Exhibit I: "From Canadian custody into cruel hands", *Globe and Mail*, April 23, 2007 [Applicants' Motion Record, Tab 3-I, p. 74]

## **PART II – ISSUES**

27. In exercising its discretion to grant an interlocutory injunction, the Court must consider three issues:

- (a) Is there a serious question to be tried?
- (b) Will a party suffer irreparable harm if the relief is not granted?
- (c) Does the balance of convenience favour allowing the injunction?

### **PART III – ARGUMENTS**

28. Parties to an application in the Federal Court may seek interlocutory relief in the form of an injunction. The Supreme Court of Canada adopted a three-part test for the exercise of judicial discretion in granting an interlocutory injunction. The Applicants submit the circumstances of the present case fully meet these conditions, and an interlocutory injunction should issue prohibiting further transfers of detainees by CF to Afghan authorities or any other third country.

*Federal Courts Act*, R.S.C. 1985, c. F-7, section 18.2

*Federal Courts Rules*, S.O.R./98-106, Rule 373

*RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, at 334

29. Interlocutory or interim relief is available to prevent governmental action that may violate the *Canadian Charter of Rights and Freedoms*.

*Federal Courts Act*, *supra*, section 18.2

*Khadr v. Canada* (2005), [2006] 2 F.C. 505 (F.C.) at paras. 19-20

#### **A. SERIOUS ISSUE TO BE TRIED**

30. At the first stage, the moving party must demonstrate there is a serious question to be tried. However, the threshold to be met is very low. Furthermore, this question must be determined on the basis of an extremely limited review of the merits of the case. Generally, a motion will not fail at this stage unless the case is frivolous or vexatious.

*RJR Macdonald*, *supra*, at 335-338

## **Nature of the Application and Standing**

31. The Applicants bring the present application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*. The primary relief sought by the Applicants under subsection 18(1) of the Act is a writ of prohibition halting any future transfers of detainees in Afghanistan unless there is compliance with the Charter. As such, the application is directed at future and ongoing actions of the Respondents, and, as a "matter" within the meaning of subsection 18.1(1), the time limit in subsection 18.1(2) of the Act does not apply.

*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.

*Krause v. Canada*, [1999] 2 F.C. 476 (C.A.) at paras. 23-24.

32. AIC and the BCCLA are well-known organizations committed to the protection of human rights. The Federal Court has previously held that groups of concerned citizens may exercise public interest standing to judicially review actions that the Crown carries out in distant countries, and which therefore are unlikely to be litigated by directly affected persons. The issue of whether public interest standing may be invoked by the Applicants in this matter is arguable, and is accordingly to be dealt with on hearing the merits of this application.

*Sierra Club of Canada v. Canada (Minister of Finance)* (1998), [1999] 2 F.C. 211 (T.D.) at 249, para. 89

## **Extraterritorial Application of the Charter**

33. The *Canadian Charter of Rights and Freedoms* applies to the government of Canada "in respect of all matters". There is no mention of territorial limitations in the Charter, and the Supreme Court of Canada has confirmed that the Charter's

reach extends to government agents acting in foreign countries, provided they are exercising power derived from Canadian law.

*Canadian Charter of Rights and Freedoms*, section 32(1)

*R. v. Cook*, [1998] 2 S.C.R. 597 at 625-627

*National Defence Act*, *supra*

*Geneva Conventions Act*, R.S.C. 1985, c. G-3, sections 1-2, Schedules I-III, Common Article 3

34. The Supreme Court of Canada found that the Charter applied to Canadian police detectives questioning an individual held by American authorities in the United States. More recently, the Federal Court ruled that the Charter may apply to Canadian Security Intelligence Service (CSIS) agents interviewing an individual detained at Guantanamo Bay, Cuba. These precedents support the Applicant's position that, at the very least, the issue is not frivolous or vexatious.

*R. v. Cook*, *supra*

*Khadr v. Canada*, *supra*

35. The Charter already applies to the CF operating in foreign countries. In that regard, the Supreme Court of Canada in *R. v. Généreux* confirmed that Canadian soldiers enjoy *Charter* rights in the event they are investigated or tried for a crime or service offence. For example, the Charter applies in the event a CF soldier is charged with torturing a foreign national detained by the CF in another country. While there is currently no jurisprudence on whether the Charter also applies to the foreign individuals detained in such circumstances, it is merely the other side of the same coin, and surely is a serious issue to be tried.

*R. v. Généreux*, [1992] 1 S.C.R. 259

*R. v. Brown*, [1995] C.M.A.J. No. 1

36. The Respondent Minister O'Connor has acknowledged in writing that, "As a matter of law, it is not clear whether and to what extent the Canadian *Charter of Rights and Freedoms* extends to the operations of Canadian Forces in Afghanistan, but Canadian Forces personnel are provided pre-deployment briefings and training to ensure they act in a manner that is considered to be consistent with the Charter." The Applicants adopt Mr. O'Connor's position that whether the Charter applies, and to what extent, is an open issue at law. Axiomatically, it must be regarded as a serious issue to be tried.

Neve Affidavit, Exhibit "F": Ministerial Answers, answer (k)

### **The Charter, Torture and Sufficiency of Evidence**

37. Deportation or extradition to torture may deprive 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 transfer or 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,

[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.

*Suresh v. Canada*, [2002] 1 S.C.R. 3, at para. 54 for quote.

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



38. In the Applicants' submission, the key issue in the application will be whether the evidence establishes a substantial risk of torture upon transfer. The Applicants have tendered serious evidence from a variety of sources regarding the risk of torture in Afghan custody. This includes specific allegations of individuals being tortured. These accounts, while only allegations at this stage, must be given considerable weight as they are consistent with the numerous independent reports of widespread torture by Afghan authorities. Indeed, the Canadian government itself has found that torture and even extrajudicial execution are "all too common" in Afghan custody.

39. In previous cases before the Federal Court, it has satisfied the evidentiary burden that the applicant show there is a reasonable chance or serious risk that he or she would be tortured in the receiving country; it has never been a requirement that the applicant show with certainty that he or she will be tortured. In this regard, the Federal Court has often cited and relied on reports of human rights organizations (e.g. Amnesty International) or the UN as credible evidence that a risk of torture exists, and has noted that the credibility of such reports "has been affirmed by Canadian courts at all levels."

*Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, at para. 73.

40. Whether all of this evidence meets the requisite test or threshold for establishing a substantial risk of torture is an ultimate issue for the application. For the purposes of this motion, the Applicants have clearly established that the application is "neither vexatious nor frivolous".

*RJR MacDonald Inc.*, *supra*, at 337-338

## **B. IRREPARABLE HARM**

41. Torture engages both physical and psychological forms of damage in its victims. Acute trauma (e.g. a severe beating) can cause tissue damage that heals imperfectly and which is therefore irreversible. Emotional trauma (e.g. sexual humiliation) can cause post-traumatic disorders which affect social functioning or the individual's psyche and which are therefore irreparable.

42. The Supreme Court of Canada has observed that the consequences of torture "may be devastating, irreversible, indeed, fatal". This finding was made in the context of a case (*Suresh*) where that Honourable Court quashed the decision of the Crown to return a person in the face of a substantial risk of torture.

*Suresh, supra*, at para. 51.

43. The Federal Court of Appeal has ruled that where the transfer of a person is contemplated by Canadian authorities to a country where the "potential harm" of torture exists, this "risk of harm [is] not compensable in damages" and meets the irreversible harm branch of the tri-partite injunction test.

*Sivakumar v. Canada (Minister of Citizenship & Immigration)*, [1996] F.C.J. No. 707, at paras. 11 and 13.

44. In the present case, the U.S. State Department reports that the methods of torture used in Afghanistan include "pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy". The *Globe and Mail* reports additional methods, which include simulated asphyxiation, electric shocks, and crude methods such as hanging upside down for up to 8 days. These methods are severe and the physical and/or psychological harm they cause would be long-lasting or permanent.

Hameed Affidavit, Exhibit "AAA": U.S. State Department Afghanistan Country Report on Human Rights Practices, dated March 6, 2007, at p. 3

Supplementary Neve Affidavit, Exhibit I: "From Canadian custody into cruel hands", *Globe and Mail*, April 23, 2007 [Applicants' Motion Record, Tab 3-I, pp 73-74]

45. The *Globe and Mail* also reports that the alleged victims of torture they interviewed were profoundly affected—just "husks" of human beings. As the *Globe and Mail* wrote:

The men who survived these ordeals often seem like broken husks. They tell their stories with quiet voices and trembling hands. They can't sleep, they complain of chronic pain and they forget the simplest things, such as remembering to pull down their pants when they use the toilet.

Supplementary Neve Affidavit, Exhibit I: "From Canadian custody into cruel hands", *Globe and Mail*, April 23, 2007 [Applicants' Motion Record, Tab 3-I, p. 74]

46. Based on the reports by the UN, the AIHRC, the US State Department, and Canada's own Department of Foreign Affairs, it is undeniable that torture is systemic in Afghan custody. In countries with such a serious record of torture, the Federal Court has accepted that individual-specific evidence may be unnecessary and diplomatic assurances or monitoring often serve as no protection at all.

*Lai Cheong Sing and Tsang Ming Na v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, at paras. 138-141.

*Suresh, supra*

47. While reports of systemic torture are enough to establish a serious risk to a particular individual, this case is also supported by the detailed and gripping accounts from the individuals interviewed by the *Globe and Mail*. Generally, the Courts approach evidence in the form of newspaper articles with great caution. However, the Courts are more willing to accept such evidence in cases involving the constitutional validity of state action, or where it is unreasonable to collect the evidence directly. The weight to be given to evidence such as newspaper articles

depends upon their internal consistency, their consistency and inconsistency with the balance of the evidence and the quality of the articles themselves.

*Chamberlain v. School District #36, Surrey* (1998), 168 D.L.R. (4<sup>th</sup>) 222 (B.C.C.A.) at paras. 19-23

*Suresh v. Canada*, (1998) 38 O.R. (3d) 267 (Ont.Ct.(Gen.Div.)) at para. 9

48. No payment of money can adequately compensate for these effects. The Applicants submit that, were this Court to deny an injunction, the consequences would be irreversible for many individuals detained by the CF.

### **C. BALANCE OF CONVENIENCE**

49. For the last branch of the injunction test, the Court must assess the balance of convenience. In that regard, the Court must consider the damage that each party alleges it may suffer if the injunction is or is not allowed. In certain circumstances, the public interest may also be taken into account.

50. The Applicants have presented grim and disturbing evidence of torture in Afghanistan. These allegations include beatings, pulling out fingernails, burning with hot oil, electrocution, whipping, starvation, and choking. As the Department of Foreign Affairs notes, even extrajudicial execution is "all too common" in Afghan custody.

51. Torture has as its end the denial of a person's humanity. It destroys physical and psychological integrity and leaves individuals with permanent scars – both physical and mental – for the rest of their lives. In the submission of the Applicants, as a matter of law there is absolutely no interest that can displace or outweigh such a profound harm. In this regard, the UN *Convention against Torture*, a treaty to which Canada is a party, is perfectly clear that the prohibition against torture is absolute and not at all derogable:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.2*

52. While international treaty law is not directly binding on Canada's courts, it informs the Court's interpretation of the Charter. The Applicants submit that Article 2 of the Convention Against Torture should confirm that Canada has a non-derogable duty under section 7 of the Charter to avoid complicity in torture. Additionally, the prohibition on torture and on returning or transferring individuals to face a serious risk of torture is recognized to be a customary international law principle. It has been recognized as a *jus cogens* principle, the strongest and most authoritative principle within customary international law. As such, it is part of Canadian common law and can be enforced in Canadian courts.

*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1056-57

*Suresh, supra*, paras. 46, 61-65

53. At the time of writing, the Respondents have not expressed any particular hardship in holding detainees for an interim period. CF records indicate that approximately 40 detainees were detained and transferred to Afghanistan or other countries from 2002 to May 2006. It is therefore reasonable to infer that the CF will not be responsible for detaining more than a few dozen individuals, at most, in the course of the next six to eight months before the application may be heard.

Hameed Affidavit, Exhibit "P": Campaign Against Terrorism Detainee Transfer Log

54. Moreover, the Respondents already have blueprints for establishing long-term detainee holding facilities and can construct one quite quickly. While a larger

detention camp or facility may involve cost and inconvenience, such concerns cannot outweigh the potential harm to individuals who may otherwise be tortured.

Hameed Affidavit, Exhibit "Q": CF Detainee Doctrine Manual, pp. 3E-1 to 3E3-1

55. Canada's participation in the war in Afghanistan, which started in 2001, has now continued for more than five years. The Respondents have had years to make arrangements for interning detainees safely, and have been forewarned by the Applicants about the possibility of this injunction application since February 2007. Further, the Applicants have been pressing the particular recommendation to develop Canadian detention capacity in Afghanistan with the Respondents for more than four years.

Neve Affidavit, paras. 19-25

57. Finally, there is a strong public interest in stopping transfers immediately. In that regard, the Canadian public expects its Canadian Forces to respect international legal obligations, including and in particular those that protect fundamental human rights. The standards a nation sets for the treatment of those whom it detains is a benchmark of that nation's culture and humanity. Canada's complicity in torture would shock the conscience of the Canadian public, and therefore this injunction should issue as a precaution to the serious damage that may befall the conscience of our country.

Hameed Affidavit, Exhibit "Q": CF Detainee Doctrine Manual, p. 1-1

*Suresh v. Canada*, (1998) 38 O.R. (3d) 267 (Ont.Ct.(Gen.Div.)) at para. 30

58. The Assistant Deputy Minister of Foreign Affairs for International Security recently testified before the Parliamentary Standing Committee of National Defence, saying, "I think there is never any excuse for something as serious as human rights violations that rise to the level of torture or something like that." The Applicants

wholeheartedly agree. The present injunction is "required to prevent a potential grave injustice" and is a necessary precautionary measure to preserve the fundamental right to be free from torture.

Neve Affidavit, Exhibit "E": Evidence of Colleen Swords, Standing Committee on National Defence, December 11, 2006, at p. 29

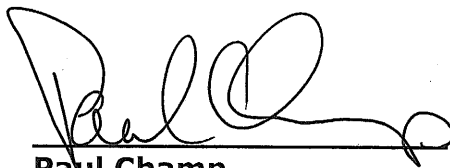
*Khadr, supra*, at para. 46

#### **PART IV – ORDER REQUESTED**

59. The Applicants request that the motion be allowed with costs and the Respondents be ordered to stop all transfers of detainees held by CF in Afghanistan until the application is heard by the Federal Court. The Applicants also ask the Court to order that any evidence submitted for the present motion be considered as evidence for the application.

*Federal Courts Rules, supra*, Rule 373(4)

Dated: April 30, 2007

A handwritten signature in black ink, appearing to read 'Paul Champ', written over a horizontal line.

**Paul Champ**

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**Solicitors for the Applicants**

**PART V**  
**LIST OF AUTHORITIES**

*Canadian Charter of Rights and Freedoms*, sections 7, 12, and 32

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

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

*Federal Courts Rules*, S.O.R./98-106, Rule 373

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

**CASES**

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

*Chamberlain v. School District #36, Surrey* (1998), 168 D.L.R. (4<sup>th</sup>) 222 (B.C.C.A.)

*Khadr v. Canada* (2005), [2006] 2 F.C. 505 (F.C.)

*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

*R. v. Brown*, [1995] C.M.A.J. No. 1

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

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

*R. v. Généreux*, [1992] 1 S.C.R. 259

*RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311

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



*Sivakumar v. Canada (Minister of Citizenship & Immigration)*, [1996] F.C.J. No. 707 (C.A.)

*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

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

*Suresh v. Canada*, (1998) 38 O.R. (3d) 267 (Ont.Ct.(Gen.Div.))