Court File No. A-149-08

FEDERAL COURT OF APPEAL

BETWEEN:

AMNESTY INTERNATIONAL CANADA
and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellants

- and -

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

Respondents

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400, Box 95
Toronto, ON M5H 3P5

Earl A. Cherniak, Q.C. LSUC #09113C
Jasmine T. Akbarali LSUC #39348M
Shannon M. Puddister LSUC #55944G

Tel: 416.601.2380
Fax: 416.867.2401

Solicitors for the Intervener,
Canadian Civil Liberties Association

TO: **RAVEN, CAMERON, BALLANTYNE & YAZBECK LLP**
Barristers & Solicitors
220 Laurier Avenue West
Suite 1600
Ottawa, ON K1P 5Z9

Paul Champ

Tel: 613.567.2901
Fax: 613.567.2921

Solicitors for the Appellants

AND TO: **DEPARTMENT OF JUSTICE**
Room 1262/1252, East Tower
234 Wellington Street
Ottawa, ON K1A 0H8

John H. Sims
Deputy Attorney General of Canada
Per: R. Jeff Anderson
J. Sanderson Graham

Tel: 613.957.4851/613.952.7898
Fax: 613.954.1920

Solicitors for the Respondents

TABLE OF CONTENTS

PART I – FACTS

Overview

1. On this appeal, the court is asked to decide two questions: (i) whether the *Charter* applies during the armed conflict in Afghanistan to the detention of non-Canadians by Canadian Forces or their transfer to Afghan Forces; and (ii) if the answer to (i) is no, whether the *Charter* would apply if it could be established that the transfer of the detainees in question would expose them to a substantial risk of torture.

2. The CCLA limits its submissions on this appeal to the second question. It notes that the matter at issue – torture – is a violation of one of the most fundamental human rights. The CCLA recognizes the complexity and novelty of the legal issues raised in this appeal, and its submissions should be read exclusively within the context of this particular question and the fundamental human rights exception to the limits on the extra-territorial application of the *Charter* , as discussed below.

3. The CCLA's position can be summarized as follows:

(a) In *Hape* and again in *Khadr,* the Supreme Court of Canada recognized that the *Charter* will apply extra-territorially where there is a fundamental human rights violation. Without taking a position on this jurisprudence, CCLA relies on it as settled law. The fundamental human rights exception to the territorial limits of the *Charter* is the basis for its application to Canadian Forces dealing with Afghan detainees where torture is reasonably anticipated;

(b) This extra-territorial application of the *Charter* is supported by settled principles of jurisdiction. The exercise of prescriptive jurisdiction to prohibit violations of fundamental human rights is permitted by the nationality principle;

(c) Even if Afghan detainees do not enjoy *Charter* rights (and CCLA takes no position on this), the *Charter* still imposes fundamental human rights obligations on Canadian state actors abroad. The application of the *Charter* is governed by s. 32(1), which does not speak of rights at all, but of application to government. Recognizing *Charter* responsibilities even absent *Charter* rights is consistent with fundamental Canadian values, such that the *Charter* operate to provide a domestic prospective prohibition against Canadian Forces participating in, or facilitating, torture. No member of the Canadian Forces ought to wonder whether he or she will be ordered to act in

violation of the *Charter's* fundamental human rights protections, and certainly not to facilitate torture. Nor should the Canadian public be left wondering whether violations of the fundamental human rights protected by the *Charter* are being committed on their behalf.

Statement of Facts

4. The CCLA accepts the appellants' statement of facts. For purposes of its argument, it draws particular attention to the following facts:

(a) The Canadian Forces have sole discretion to determine whether an Afghan detainee is retained in custody, transferred to the Afghan National Security Forces, or released. These determinations are made on a case by case basis by the Canadian Commander of the Task Force Afghanistan at regular review meetings.

Reasons of Mactavish J. at para. 63

(b) The Canadian commander of Task Force Afghanistan reports nationally to the Commander of the Canadian Forces, Expeditionary Forces Command. Thus, the command structure in Afghanistan leads "up the chain" to superiors in Canada.

Reasons of Mactavish J. at para. 34

(c) Canadian personnel in Afghanistan are subject to the exclusive jurisdiction of Canadian authorities in relation to criminal and disciplinary offences that may be committed in Afghanistan.

Reasons of Mactavish J. at para. 49

PART II – ISSUES

5. The stated questions on this application can be distilled into one fundamental issue: to what extent does the *Charter* apply to the actions of the Canadian Forces abroad? The CCLA submits that, consistent with Canada's international obligations, the *Charter* applies to the actions of Canadian Forces in Afghanistan, at least insofar as their conduct involves them in a process where fundamental human rights violations are reasonably anticipated, so as to ensure that no such violation can occur.

PART III –ARGUMENT

The Fundamental Human Rights Exception to the Limits Against the Extra-territorial Application of the *Charter*

6. The jurisprudence dealing with the fundamental human rights exception to the limits against the extra-territorial application of the *Charter* raises difficult questions, many of which have yet to be resolved. As noted above, the CCLA takes no position on the existing jurisprudence, but relies on it for purposes of these submissions in their limited context.

7. In *R. v. Hape* and again in *Canada v. Khadr*, the Supreme Court of Canada concluded that wholesale extra-territorial application of the *Charter* was problematic, but it left room for the permissible extra-territorial application of the *Charter* where fundamental human rights are at stake. The respondent tries to dismiss the fundamental human rights exception as applying only to the invocation of comity. However, the reasons of the court in *Hape* and *Khadr* make it clear that it is not just comity that has to give way in cases of fundamental human rights violations, but the limits against the extra-territorial application of the *Charter* itself.

R. v. Hape, [2007] 2 S.C.R. 292; *Canada v. Khadr*, 2008 S.C.C 28.

8. In *Hape*, the court noted that a state cannot act to enforce its laws within the territory of another state except in certain circumstances, such as the consent of the other state or, in exceptional cases, some other basis under international law. The Court left open the possibility that a *Charter* remedy might flow from participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations, but was not called upon in that case to go further.

Hape, supra at paras. 65, 101

9. In *Khadr*, the court did have to consider whether the application of the *Charter* extra-territorially was permissible in the case of a fundamental human rights violation. The court noted that the scope and the application of the *Charter* should be interpreted in accordance with Canada's binding obligations under international law. The court then wrote:

> If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

Khadr, supra at paras. 18-19

10. The court in *Khadr* went on:

> We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay. Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations.

Khadr, supra at para. 26.

11. The above paragraph is key to understanding what the court actually did in *Khadr*. It did not simply say "where there is a violation of fundamental human rights, comity does not apply". It said that since comity would not apply, no deference to foreign law would accrue, and *as a result*, to the extent that Canadian officials violated Canada's international obligations, the *Charter* applied. In making this ruling, the court extended the extra-territorial application of the *Charter* because Canada's international human rights obligations were violated.

12. The respondent argues that this conflates the breach of the *Charter* with its application. But it is important to remember that not every rights violation will be found to justify the extra-territorial application of the *Charter*. In *Hape*, a warrantless perimeter search was not found to justify an extra-territorial application of the *Charter*. The answer to the extra-territorial application of the *Charter* lies in the fact that the *Charter* must be interpreted in accordance with Canada's international human rights obligations. Whatever one may say about the limits of those obligations, it is clear that some things (such as a warrantless perimeter search in *Hape*) have been left outside of the box: they have not been found to be fundamental human rights violations that will trigger extra-territorial application of the *Charter*. Where the boundaries lie exactly need not be determined in this case. Indeed, it may prove practical to allow the boundaries to develop over time as new facts present themselves to the courts. However, as the respondent has conceded, the prohibition against torture is a *jus cogens* of international law. If any violation fits within the fundamental human rights exception, conduct which permits, facilitates or involves collaboration or participation in torture, does.

13. This exception to the limits on extra-territorial application of the *Charter* is grounded in the decision of the Supreme Court of Canada in *Hape* and then again in *Khadr*. On that basis alone, Canadian Forces have an obligation to comply with the *Charter* and its restraints where torture is reasonably anticipated. Specific facts or future cases may engage the question of the application and interpretation of s. 1 in these contexts.

Applying the *Charter* to the actions of Canadian Forces abroad in this context is supported by settled principles of jurisdiction.

14. In this case, applying the fundamental human rights exception to the limits on extra-territorial application of the *Charter* is made simpler by the fact that this situation involves prescriptive jurisdiction, not enforcement or adjudicative jurisdiction, as will be discussed below. However, it is important to note that the CCLA does not suggest that the fundamental human rights exception is *limited* to prescriptive jurisdiction. The fundamental human rights exception could equally apply to fundamental human rights violations involving enforcement or adjudicative jurisdiction. These questions are not, however, at issue here.

15. The application of the *Charter* is governed by s. 32(1), which provides:

> This Charter applies
>
> a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including matters relating to the Yukon Territory and Northwest Territories; and
>
> b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
>
> Section 32(1) *Charter of Rights and Freedoms*

16. Section 32(1) was discussed by the Supreme Court of Canada in *Hape*. In that case, the majority reviewed the three forms that jurisdiction takes and the distinctions between them. First, there is prescriptive jurisdiction, which refers to the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. Second, there is enforcement jurisdiction, which is the power to use coercive means to ensure that rules are followed. Last, there is adjudicative jurisdiction, which is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force.

Hape, supra at para. 58

17. The primary basis for jurisdiction is territoriality. Because a state has territorial sovereignty, it has the authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising, and people residing, within its borders. Another common basis for jurisdiction is the nationality principle. States may assert jurisdiction over acts occurring in the territory of a foreign state on the basis that their nationals are involved. Prescriptive jurisdiction exercised over nationals is not often problematic. In fact, there are many examples of permissible extra-territorial prescriptive jurisdiction, such as the *Criminal Code* prohibition against sex tourism offences in s. 7(4.1); the bigamy offence in s. 290(1); the terrorism offences, including ss. 83.01 and 83.20; and the crimes against humanity offences in ss. 6(1) and 7 of the *Crimes Against Humanity and War Crimes Act*.

Hape, supra at paras. 59-60

18. Also relevant are two bases for jurisdiction related to the principle of territoriality. First, the "objective territorial principle" allows a state to claim jurisdiction over an act that commences or occurs outside the state if it is completed, or if a constituent element takes place, within the state. Subjective territoriality allows the exercise of jurisdiction over an act that occurs or has begun within a state's territory even though it has consequences in another state. Thus, on the straight exercise of territorial jurisdiction a state may exercise all types of jurisdiction over acts that have a link to the state's own territory, even if the act also had links or consequences in other states.

Hape, supra at paras. 59, 65

19. These well settled principles can be applied in a straightforward way to the situation confronting the court in this appeal.

20. The *Charter* imposes prescriptive obligations on the Canadian Forces abroad where violations of fundamental human rights are at stake. This is the effect of the rulings of the Supreme Court of Canada in *Hape* and *Khadr* as discussed above.

21. The members of the Canadian Forces are Canadian. They may legitimately be the subject of prescriptive jurisdiction exercised by Canada on the basis of the nationality principle, even where that prescriptive jurisdiction has extra-territorial consequences.

22. In this case, the enforcement and adjudication of those prescriptive rules takes place in Canada, making the extra-territorial application of enforcement and adjudicative jurisdiction unnecessary to consider in this case. Here, the efforts to enforce and adjudicate upon the rules laid out in the *Charter* occur within Canada (in this case, in the very application before Justice Mactavish in the court below).

23. The adjudication and enforcement of those prescriptive rules are exercises of territorial jurisdiction because of the objective and subjective territorial principles. Even if part of the conduct at issue occurs in Afghanistan, part occurs in Canada. Because Canada has retained sole discretion to decide whether to continue to detain the Afghan detainees, release them, or deliver them into the custody of Afghan Forces, at issue is an exercise of purely Canadian discretion. Although the decision is in practice made by the Joint Task Force Commander in Afghanistan, he reports up the chain to his superiors in Canada. The policy and ultimately the orders and the direction with respect to how to exercise Canada's discretion *vis-à-vis* the Afghan detainees is, or could be, made in Canada. It is the courts of Canada that can bind the Canadian commanders, and so the adjudicative and enforcement jurisdiction here is territorial.

24. There is nothing objectionable in our domestic law requiring Canadian Forces to conform to certain fundamental *Charter* values when they perform state duties in another state. No one is asking the Afghan Forces to be bound by the *Charter*, or asking the Afghan courts to enforce the *Charter*. Nor is there any suggestion that there is any contrary Afghani law. Recognizing the application of the *Charter* in these circumstances serves only to restrict Canadian Forces from acting contrary to Canada's fundamental human rights obligations.

25. Indeed, looking at the matter purely practically, holding Canadian Forces abroad to the *Charter*'s fundamental human rights responsibilities is consistent with the Forces' *international* human rights law obligations. The difference, and the reason why the international law obligations are not sufficient, is that the application of the *Charter* allows *domestic* adjudication and enforcement of those obligations and *domestically* prohibits breaches of those obligations, whereas courts have not always recognized all international law obligations. Moreover, absent the *Charter*, the only domestic laws that apply or could apply to Canadian Forces if they facilitate or participate in torture are retrospective. In other words, a violation must first occur and then punishment or a remedy can be ordered. Yet it is consistent with Canada's international obligations and consistent with the primary purpose of the *Charter* to prohibit such fundamental

human rights violations *before* they occur. As the court said in *Hape*: "The *Charter*'s primary role is to limit the exercise of government and legislative authority *in advance*, so that breaches are stopped before they occur" (emphasis added). The *Charter* thus supplements international human rights law and is not inconsistent with it.

Hape, supra at para. 91

Charter responsibilities can exist even without a corresponding _Charter_ right

26. Even if the Afghan detainees do not enjoy *Charter* rights (and the intervener takes no position on this before this court) the Canadian Forces abroad can still have *Charter* responsibilities, at least when fundamental human rights are at stake. There are several reasons for this.

27. First, although much of the *Charter* speaks in terms of rights, it is the application of the *Charter* which must be determined here. Section 32(1) speaks in terms of *application* and follows a heading which reads "*Application of Charter*". By the terms of s. 32(1), the *Charter* applies to the actions of government. This is consistent with the expectation that Canadian authorities conduct themselves in accordance with the values enshrined in the *Charter*, and not violate fundamental human rights.

28. Second, as discussed above, the court in *Khadr* found that the *Charter* bound Canada extra-territorially to the extent its officials participated in a process that violated Canada's *international* human rights obligations. This result flows from the requirement that the *Charter* be interpreted consistently with those obligations.

29. Third, as noted above, the court in *Hape* recognized that the primary role of the *Charter* is to limit state power. When fundamental human rights, like the right to be free from torture, are threatened, it is reasonable to impose a prescriptive and prospective obligation on Canadian Forces under the *Charter*. Canada's international human rights obligations prohibit Canadian Forces from being engaged in or facilitating torture. Our *Charter* must be interpreted in accordance with those fundamental human rights obligations. It would be absurd if there is no domestic prospective prohibition against Canadian Forces engaging in torture. It would be a gross violation of Canadian values. The *Charter* serves to ensure that will not be the case.

30. Fourth, ordering or directing a member of the Canadian Forces to conduct himself or herself in a way that violates the fundamental human rights contained in the *Charter* would demean the dignity of each member. Our government should not be able to compel a member of the Canadian Forces to act in violation of those *Charter* limits on government. No person should have to wonder, when enlisting, whether they will at any point be ordered to act in non-conformity with the *Charter*, at least insofar as fundamental human rights are concerned. Similarly, Canadians at home should not have to wonder whether conduct that violates the fundamental human rights protected by the *Charter* is being engaged in on their behalf.

31. The respondent argues that this leads to an unworkable patchwork on the ground in Afghanistan because there will be pockets of the country where Dutch law applies, and pockets of the country where Danish law applies, and so on. However, this is no different than the current situation on the ground in Afghanistan. Canada has reserved its jurisdiction over Canadian personnel with respect to criminal and disciplinary offences. Canadian law applies to those Canadians serving in Afghanistan. There is no principled reason why the *Charter* ought not to apply to them as well.

32. Nor does recognizing the *Charter's* application to the actions of Canadian Forces in Afghanistan undermine the certainty that international human rights law provides. Since *Charter* obligations must be interpreted consistently with Canada's international human rights obligations, the certainty of the obligations would not be undermined. Rather, the obligations themselves would be strengthened, because there would be a prospective prohibition against breaching those obligations in our domestic law, and domestic enforcement mechanisms would be available.

33. Finally, the possibility that there may be no *Charter* right holder need not be problematic for enforcement. The law of standing demonstrates that when an issue can come to the court no other way, a public interest group not directly affected may bring the issue to the court. Indeed, that is exactly what has happened in this case. The *Charter* obligations of Canadian forces abroad can be enforced regardless of whether Afghan detainees are *Charter* right holders.

Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575 at 598; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 248-53; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 FC 211 at paras 84-85; *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para. 35.

Conclusion

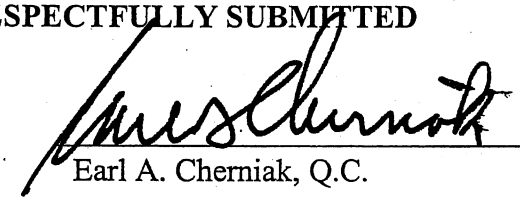
34. The *Charter* applies to the actions of the Canadian Forces abroad when fundamental human rights like the right to be free from torture are threatened. This application is justified on the basis of the fundamental human rights exception to the territorial limits of the *Charter* recognized by the Supreme Court of Canada in *Hape* and *Khadr*. The application is supported by settled jurisdictional principles, because it is a permissible application of prescriptive jurisdiction based on the nationality principle. Finally, whether the detainees have *Charter* rights, the Canadian Forces have *Charter* obligations to respect fundamental human rights. The *Charter* applies to government by virtue of s. 32(1), and no soldier or other Canadian should have to wonder whether Canadian Forces are being or will be ordered to commit or facilitate violations of fundamental human rights on behalf of the Canadian public.

PART IV – ORDER REQUESTED

35. The CCLA respectfully requests that this court allow the appeal and declare that the Canadian Forces abroad are subject to *Charter* obligations in respect of fundamental human rights. The CCLA, as a public interest litigant represented by counsel acting *pro bono publico*, does not ask for costs against any party and asks that no costs be awarded against it.

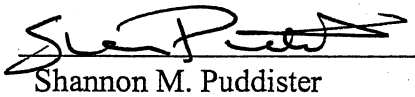
ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: November 27, 2008



Earl A. Cherniak, Q.C.

Jasmine T. Akbarali



Shannon M. Puddister
Lerners LLP

Solicitors for the Proposed Intervener,
Canadian Civil Liberties Association

PART V – AUTHORITIES

STATUTES

Canadian Charter of Rights and Freedoms, s. 32(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c. 24, ss. 6(1) and 7

Criminal Code, R.S.C. 1985, c. C-46, ss. 7(4.1), 83.01, 83.20 and 290(1)

CASES

Canada v. Khadr, 2008 S.C.C 28

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

Chaouilli v. Quebec (Attorney General), [2005] 1 S.C.R. 791

Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575

R. v. Hape, [2007] 2 S.C.R. 292

Sierra Club of Canada v. Canada (Minister of Finance), [1999] 2 FC 211

AMNESTY INTERNATIONAL CANADA et al	and	CHIEF OF THE DEFENCE STAFF FOR THE CANADIAN FORCES, et al	**Court File No: A-149-08**
Appellants		Respondents	

FEDERAL COURT OF APPEAL

Proceeding commenced at OTTAWA

MEMORANDUM OF LAW AND FACT OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400m Box 95
Toronto, ON M5H 3P5

Earl A. Cherniak, Q.C. (LSUC #09113C)
Jasmine T. Akbarali (LSUC #39342M)
Shannon M. Puddister LSUC #55944G

Tel: 416.867.2380
Fax: 416.867.2401

Solicitors for the Intervener,
Canadian Civil Liberties Association