Court file No. T-324-07

FEDERAL COURT

BETWEEN:

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants / Moving parties

and

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

Respondents / Responding parties

RESPONDENTS' MEMORANDUM OF FACT AND LAW ON APPLICANTS' MOTION FOR INJUNCTION

OVERVIEW

1. The Applicants seek judicial intervention in the conduct of military operations and of Canada's international relations half-way around the world in Afghanistan. The stated basis for this extraordinary intervention is a concern generated by a series of newspaper articles that, contrary to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms,* individuals not yet detained by Canadian Forces in that country may be tortured if they are turned over to local authorities or Canada's allies without appropriate safeguards

2. The circumstances do not warrant an interlocutory injunction. The Applicants seek to obtain the ultimate remedy they seek without subjecting their evidence and arguments to the rigour of a full hearing on the merits. The courts discourage such an approach in cases

involving government policy because it disrupts the status quo and reduces the scope for executive action.

3. Here, the Applicants seek judicial review of the policy or practice of transferring detainees. However, judicial review in the Federal Court requires a "decision" that directly affects someone. Here the Applicants are not directly affected by any decision and they lack standing to speak for individuals who have yet to be identified. Furthermore, even if an application for judicial review is appropriate, the evidence offered by the Applicants in support of this motion falls short of establishing that torture will occur or that the application will be rendered moot if an order is not granted.

4. Finally, the situation in Afghanistan remains fluid and the concerns raised by the Applicants are being addressed as a matter of high policy by the government in collaboration with its allies and the Afghan government. The status quo which the Applicants seek to change has changed since the motion was filed and continues to change. Consequently, the concerns of the Applicants are being addressed through appropriate mechanisms and this court should not employ the blunt instrument of an injunction to compromise the ability of the CF to perform its mandate or to limit the options available to he government in its relations with other states.

PART I – FACTS

A) Background to the Application

5. The Applicants, Amnesty International Canada (Amnesty) and British Columbia Civil Liberties Association (BCCLA) filed a Notice of Application on February 21, 2007 for judicial review of the "actions or potential actions of Canadian Forces" (CF) deployed in Afghanistan in relation to the *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*

(Arrangement) signed by the Chief of Defence Staff of the CF and the Minister of Defence for Afghanistan in December 2005.

6. The Applicants allege that the Arrangement does not provide adequate safeguards to ensure that detainees will not be tortured by Afghanistan or a third country to whom Afghanistan may subsequently transfer the detainees to. The Applicants allege that there are substantial grounds to believe that Afghan Forces torture detainees.

7. The Respondents filed a Notice of motion to strike the Application on April 20, 2007. On April 23, 2007, the Applicants filed a Notice of Motion requesting an order prohibiting the CF from transferring detainees to local authorities or to its allies in Afghanistan, pending the final determination of the Application.

B) The basis for Canadian participation in Afghanistan

8. Afghanistan faces myriad challenges before stability is assured. A 2004 report by the United Nations indicated that it was the seventh poorest nation in the world and had suffered from its recent history of civil war, Soviet occupation, mujahedeen resistance, fragmentation of power and the rise of Islamic extremism. According to the information contained in the report, poverty in Afghanistan is deeply entrenched. Low incomes, socio-cultural traditions that severely restrict women's opportunities, poor quality of education, continued threats from the burgeoning drug economy and criminality are all challenges to security and stability in Afghanistan.

Affidavit of Colleen Swords, para 3, Respondents Motion Record, Tab 1

9. Since the fall of the Taliban in December 2001, the international community has been helping to rebuild Afghanistan's infrastructure, institutions, government, and security forces as security sector reform remains paramount to consolidating Afghanistan's transition. Canada works within the multinational context, including working in support

of efforts in Afghanistan at NATO, the G8 and United Nations Assistance Mission in Afghanistan (UNAMA).

Affidavit of Colleen Swords, para 6, Respondents Motion Record, Tab 1

10. At present, the activities of members and supporters of the Taliban and al-Qaeda constitute the greatest threat to the reconstruction and development of the economy and institutions of Afghanistan. These individuals (referred to after this as the "enemy") do not conduct themselves as conventional military forces. They do not wear a distinctive uniform and their principal mission is to cause indiscriminate civilian casualties through bombings, executions, extortion and other activities. By these means they seek to disrupt the lives of the Afghan people and the activities of humanitarian agencies, local and national government and military forces.

Affidavit of Col. Steven Noonan, para 12, Respondents' Motion Record, Tab 2

11. Canada plays a vital role in the security and development of Afghanistan. With approximately 2500 members of the Canadian Forces ("CF"), concentrated primarily in Kandahar, and numerous Canadian Government officials serving in both Kabul and Kandahar, Canada is bringing about real changes in a society long ravaged by strife. The role of Canada and its allies is critical to addressing such security threats and thus enabling the economic development of Afghan society.

Affidavit of Colleen Swords, para 4, Respondents Motion Record, Tab 1

12. On May 17, 2006, Parliament voted to extend our military mission in Afghanistan to February 2009.

C) Role of the CF in Afghanistan

13. Under its mandate, CF operations in Afghanistan include: establishing the level of security necessary to promote development and an environment conducive to the improvement of Afghan life; assisting local law enforcement authorities; training the Afghan military; participating in the stabilization and reconstruction activities of provincial reconstruction teams; and, conducting air and ground combat operations as and when required.

Affidavit of Col. Steven Noonan, para 16, Respondents' Motion Record, Tab 2

14. The vast majority of the CF personnel in Afghanistan form part of a UN-mandated multinational force called the International Security Assistance Force (ISAF). The North Atlantic Treaty Organization (NATO) – of which Canada is a long-standing member -- leads ISAF. The range of operations conducted by the CF in collaboration with its coalition allies and Afghan forces occurs in the context of an ongoing armed conflict.

Affidavit of Col. Steven Noonan, para 18, Respondents' Motion Record, Tab 2

15. The Canadian Commander of Joint Task Force-Afghanistan reports both to the Commander of ISAF and the CEFCOM Commander. Canada retains operational command over CF personnel with ISAF. NATO has operational control over these forces and, accordingly, NATO can assign duties to CF ISAF personnel so long as such duties are consistent with Canadian direction.

Affidavit of Col. Steven Noonan, para, Respondents' Motion Record, Tab 2

16. The nature of the threat in Afghanistan can be geographically characterized as a North/South operation. The preponderance of enemy contact occurs in southern Afghanistan where the majority of CF personnel are located.While conducting operations in Afghanistan, members of the CF have been attacked by groups of armed enemy fighters

seeking to kill them. Fifty-four Canadian soldiers and one Canadian diplomat have been killed in Afghanistan, and the majority of these deaths have been caused through enemy action.

Affidavit of Col. Steven Noonan, para 25, Respondents' Motion Record, Tab 2

D) Detention and policy on treatment of detainees

17. The international community has repeatedly reaffirmed the sovereignty of Afghanistan, and recognised that country's responsibility for providing security and law and order within its territory. The international community's efforts, including those of Canada and of NATO allies, aim precisely at strengthening that indigenous capacity. Canada's Arrangement with Afghanistan regarding detainee transfers relates to this belief that Afghan authorities exercising sovereignty within their territory, should bear ultimate responsibility for detainees transferred and held in that country. This is consistent with Canada's objective of supporting Afghan authorities in strengthening local capacity and good governance and is consistent with Afghanistan's obligations as a state and as a state party to various international conventions including the Convention on Torture.

Affidavit of Colleen Swords, para 24 Respondents Motion Record, Tab 1

18. Given the objectives of Canada's military engagement in Afghanistan and the prevailing security environment of the mission, it is inevitable that from time to time persons suspected of engaging in insurgent or criminal/terrorist activities are detained by members of the Canadian Forces. CF soldiers operate within the Law of Armed Conflict and, accordingly, follow international humanitarian law principles including the use of minimum force. Under this regime, capture and detention are often the preferred means of neutralizing threats.

Affidavit of Colleen Swords, para 25Respondents Motion Record, Tab 1

19. CF soldiers are operating under ISAF operational control and comply with ISAF policy which permits detention for a maximum of 96 hours after which time an individual must be released or transferred to Afghan authorities.

Affidavit of Col. Steven Noonan, para 42, Respondents' Motion Record, Tab 2

20. The detainee transfer Arrangement between the Governments of Canada and Afghanistan is consistent with this approach. It establishes basic policy on the treatment and transfer of detainees and notification procedures. Specifically, this Arrangement provides that the Afghan authorities will accept detainees who have been detained by the Canadian Forces and will be responsible for maintaining and safeguarding them.

Affidavit of Col. Steven Noonan, para 42-43, Respondents' Motion Record, Tab 2

21. The CF operates a transfer facility at Kandahar Airfield. A transfer facility differs significantly from a detention facility. All individuals detained by the CF follow the same process. The process can be completed either on the site of initial contact or at Kandahar Airfield. The process begins with a decision to detain. The decision to detain is made at the lowest level in accordance with the soldier's assessment of the threat posed by an individual.

Affidavit of Col. Steven Noonan, para 46, Respondents' Motion Record, Tab 2

22. Once an individual is detained, further threat reducing activities are initiated (including restraint and search if required). Tactical questioning by qualified personnel occurs to obtain further information from the detainee. This information will assist in further refinement of the threat or potentially result in determination that the individual no longer poses a threat and can then be released.

Affidavit of Col. Steven Noonan, para47, Respondents' Motion Record, Tab 2

23. Once the individual is detained, further threat reducing activities are initiated (including restraint and search if required). Tactical questioning by qualified personnel occurs to obtain further information from the detainee. This information will assist in further refinement of the threat or potentially result in determination that the individual no longer poses a threat and can then be released.

Affidavit of Col. Steven Noonan, para47, Respondents' Motion Record, Tab 2

24. All transfers require completion of an administrative process. This process includes completion of transfer paperwork involving personal information, family information, physical condition and details of the transfer.

Affidavit of Col. Steven Noonan, para 48, Respondents' Motion Record, Tab 2

25. The CF informs the ICRC in every instance in which a detainee is captured and transferred. The information flow is from the CF individual in theatre who detained/transferred the person, to Joint Task Force – Afghanistan (JTF-A). JTF-A reports to CEFCOM. CEFCOM passes the information to the Directorate of NATO Policy. The Directorate of NATO Policy passes it to the DFAIT mission in Geneva ("Geneva") as well as the Canadian Embassy in Kabul. Geneva provides the ICRC with the information, and the Embassy informs the local office of the ICRC in Kabul.

Affidavit of Col. Steven Noonan, para 49, Respondents' Motion Record, Tab 2

26. The information passed through this process includes, as applicable and to the extent it can be collected: detainee's name, father's name, grandfather's name, age, place of capture, nationality, tribe, serial number, date of capture, date of transfer, organization receiving transferee, condition of transferee, and any other comments.

Affidavit of Col. Steven Noonan, para 50, Respondents' Motion Record, Tab 2

27. Canadian detention handling procedures meet or exceed ISAF requirements. There is no evidence of mistreatment of detainees by CF members in the record before the Court.

E) Newspaper allegations of mistreatment and torture of Canadian detainees

28. Prior to the complaints detailed in the recent newspaper articles beginning with the Globe and Mail article published 23 April 2007 the CF was not aware of any complaints regarding the treatment of detainees transferred to Afghan authorities by Canada

Affidavit of Col. Steven Noonan, para 62, Respondents' Motion Record, Tab 2

29. Since those articles appeared, the Canadian Government has actively engaged Afghan officials concerning allegations of detainee abuse and mistreatment at the hands of Afghan law enforcement agencies. Canadian officials have been involved in a number of meetings and phone calls with Afghan officials and officials with the AIHRC regarding these recent allegations.

Affidavit of Colleen Swords, para 36, Respondents Motion Record, Tab 1

30. In those discussions Canada has expressed its view that such practices such as those described in the newspaper articles would constitute a violation of Afghanistan's international obligations as well as domestic law, that such allegations must be investigated by the Government of Afghanistan, that, if they occurred, such conduct would constitute a violation of paragraph 11 of our Arrangement and that barring the AIHRC access would run counter to fundamental principles which the government of Afghanistan and the international partners are working together to uphold.

Affidavit of Colleen Swords, para 36,Respondents Motion Record, Tab 1

31. Canada has initiated negotiations with Afghanistan for an arrangement that would supplement that of December 18, 2005. The objectives of this negotiation are, *inter alia,*

to clarify and make express Canada's and the AIHRC's right of access to and monitoring of detainees. Canada is also discussing with NATO allies and ISAF partners options for multilateral cooperation on the detainee issue, including monitoring.,

Affidavit of Colleen Swords, para 37, Respondents Motion Record, Tab 1

32. The Afghan Government has initiated investigations concerning claims of detainee mistreatment that have appeared in the Canadian media. The Embassy of Afghanistan issued a press release on April 26, 2007, noting that the Afghan government will continue to provide access to the AIHRC and ICRC for monitoring purposes. Canada has offered its assistance in enhancing Afghanistan's capacity to carry out such investigations in a transparent and impartial manner.

Affidavit of Colleen Swords, para 39, Respondents Motion Record, Tab 1

33. In addition, Canada has raised the situation of detainees in Afghanistan with NATO allies and has raised concerns surrounding the alleged mistreatment of detainees in Afghanistan. Recently the Secretary General of the NATO commented on these recent events and stated that it was his personal view that there was no basis to suspend transfers and that he was pleased that the Afghan authorities had commenced an investigation of these allegations. Canada will continue to discuss options for cooperation with NATO and ISAF partners.

Affidavit of Colleen Swords, para 40, Respondents Motion Record, Tab 1

PART II – ISSUES

34. There are three issues to this Motion:

a) Do the Applicants have sufficient interest to bring an Application for judicial review under s. 18.1 of the *Federal Courts Act*?

b) Is relief by way of an injunction against the Respondents available to the Applicants?

c) Do the Applicants meet the threefold conjunctive test to be granted an injunction?

PART III – RESPONDENTS' SUBMISSIONS

A. The Applicants Lack Standing To Bring an Application for Judicial Review

35. The Applicants are not directly affected by the matter in respect of which relief is sought and have no standing to bring an application for judicial review before this Court.

36. No person may seek judicial review under subsection 18.1 of the *Federal Courts Act* unless that person is "directly affected by the matter in respect of which relief is sought". Plainly, the rationale for this requirement has at least two elements: (a) to ensure that appropriate parties are brought before the Court, and (b) to ensure that no matter is brought before the Court until it actually has an effect to be examined.

s. 18.1(1), *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended
Respondent's Book of Authorities, Tab x

37. For the Applicants to be considered "directly affected", the matter must be one which adversely affects their legal rights, imposes legal obligations on them, or prejudicially affects them directly.

> ***Rothmans of Pall Mall Can. Ltd.* v. *M.N.R.*, [1976] 2 F.C. 500 (C.A.)**
> **Respondent's Book of Authorities, Tab x**

38. The Supreme Court of Canada has confirmed that the principle that only persons being directly affected should have standing ". . . mirrors the Court's vigilance in ensuring that it hears the arguments of the parties most directly affected by a matter. In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised."

> ***Hy and Zel's Inc.* v. *Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at para. 20,.**
> **Respondent's Book of Authorities, Tab 12.**

39. The Applicants' have not made any submissions on whether they have public interest standing. They have failed to show that there is no other reasonable and effective way to bring the issue before the courts. This criterion has been described by the Supreme Court as being "at the heart of the discretion to grant public interest standing", because "a court should have the benefit of the contending views of the persons most directly affected by the issue" (emphasis added).

> **Hy and Zel's Inc. v. Ontario (Attorney General), supra, at para. 16, Respondent's Book of Authorities, Tab 12**

40. The Applicants do not have sufficient interest within which to bring an application for judicial review, either as private litigants or as litigants that represent the public interest. Here, the Applicants are not parties directly affected within the meaning of section 18.1 of the *Federal Courts Act* nor have they sought public interest standing within which to make representations on behalf of persons that may be affected by a government policy. Accordingly, it can and should be concluded at this time that the application is

bereft of any possibility of success and that this Court must not allow it to proceed any further.

> ***David Bull Laboratories (Inc.)*** **v. *Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.)**
> **Respondents' Book of Authorities, Tab x.**

B. The Applicants Are Not Entitled to Injunctive Relief

(i) General Crown Immunity From Injunctive Relief

41. At common law, injunctive relief is not available against the Crown. The common law remains a viable aspect of Canadian law.

> **Sharpe, *Injunctions and Specific Performance* (2nd ed., 1992), at para. 3.1040,**
>
> ***Centre d'information et d'animation communautaire (C.I.A.C.) v. The Queen*, [1984] 2 F.C. 866, at 869-870 (C.A.)**

42. The Crown's common law immunity from injunctive relief has been codified. Section 22 of the *Crown Liability and Proceedings Act* ("CLPA") reads as follows:

> 22. (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.
>
> (2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.
>
> **Section 22 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended by S.C. 1990, c. 8.,**

43. The wording of section 22 of the *CLPA* precludes this Court from issuing an injunction against the Crown or from issuing any order against a Crown servant that it is not competent to make directly as against Her Majesty the Queen.

44. The Crown's immunity may, on occasion, be circumvented by seeking injunctive relief against a servant or Minister of the Crown if that person acts beyond the scope of statutory authority or in breach of the Charter.

45. An interim injunction will only issue to restrain the acts of a Crown servant or Minister if the proposed act would constitute a violation of the plaintiff's rights and if the Court is able to determine the merits of the alleged violation at the interim stage. Sharpe in *Injunctions and Specific Performance* states as follows (at para. 351):

> The basic principle which emerges is that an injunction will be granted to restrain a Crown servant from exceeding the lawful limits of his authority or from acting without any authority where his acts constitute a violation of the plaintiff's rights.
>
> **Sharpe, Robert. *Injunctions and Specific Performance*, (Canada Law Book Limited: Toronto, 1983) at para 351.**
>
> ***Paul* v *Canada*, [2002] FCJ No. 824 at para 81.**

46. There has been no allegation in this case that the Minister of National Defence or the Chief of Defence Staff acted outside of the scope of their respective authorities.

47. The Applicants have not sought to prove their Charter allegations at this stage and rest solely on the argument that they have raised an "arguable issue" regarding the claims. Furthermore, in respect of the alleged Charter violations, the Applicants acknowledge that they will not be harmed by government policy and that the beneficiaries of the proposed injunction will be third parties in a foreign land. The Applicants are not entitled to rely on the alleged violation of another person's *Charter* rights to seek an injunction against the Crown.

> ***Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342,**
>
> ***Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para 78.**

48. The Applicants seek an order enjoining the Minister of Defence and the Chief of Defence staff from authorizing the transfer of Canadian detainees to the custody of Afghanistan authorities or any other country without properly addressing the merits of these alleged *Charter* breaches. They have failed, therefore, to meet the stringent requirements for the granting of an interim injunction in the circumstances of alleged violations of the Charter.

***Paul* v *Canada*, supra at para 81,.**

(ii) Applicant not entitled to ultimate the relief sought in the Application on an interim application

49. The proper purpose of interim relief is to maintain the *status quo*. Where it would effectively give the Applicants the ultimate remedy sought, it should not be granted:

> It [the order] was a determination that the respondent, without having had his action tried, is entitled to act and be treated as though he had already won. The order implies and is based on a finding that the respondent has, in fact, the right he claims and that s. 14(4)(e) [of the Canada Elections Act] is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional. The proper purpose of an interlocutory injunction is to preserve or restore the status quo, and not to give the plaintiff his remedy until trial.

***Attorney General of Canada v. Gould*, [1984] 1 F.C. 1133 at 1140.**

50. The Applicants seek the same remedy on this motion as they seek in the main application without a full hearing of the Charter allegations on their merits. In their Application for judicial review dated February 21, 2007, the Applicants requested relief identical to that sought in this motion. They requested a "writ of prohibition preventing the Canadian Forces from transferring further detainees to the custody of other countries until and unless adequate substantive and procedural safeguards exist against a substantial risk of torture".

51. The Applicants are not entitled to receive the ultimate remedy they seek without a full adjudication of the merits of their claims. Furthermore, the remedy which the Applicants seek would change the status quo in place in Afghanistan and detrimentally affect the operations of the Canadian Forces. It would also interfere in the state-to-state negotiations currently underway to address the allegations made in recent press report. Such weighty and important matters ought not to be determined on a short notice interim application.

(iii) The Applicants Do Not Meet the Tripartite Test for granting an injunction

52. The test for granting an injunction has been conclusively established in *RJR-MacDonald Inc. v. Canada* (A.G.). The following three requirements must be met:

a) there must be a serious question to be tried;

b) that the Applicants must show that they will suffer irreparable harm if the interlocutory injunction is not granted; and

c) that the balance of convenience favours the applicants.

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

(a) *There is No Serious Issue to be Tried*

53. The Applicants bear the onus of proving to this Court that the underlying application is raises a serious issue on a much more stringent basis then frivolous or vexatious standard as suggested by the Applicants. The Applicants seek an interim injunction based on alleged *Charter* violations and must, therefore, convince the court on a

balance of probabilities that violations have occurred. In the alternative, the Applicants seek an injunction altering the status quo and must demonstrate that the application discloses a prima facie case. They have failed to meet either standard and do not attempt to do so.

Paul v _Canada_, supra at para 81,

RJR-MacDonald Inc. v. Canada (A.G.), supra at para 51, 55 and 78.

(i) No Impugned Decision of a Federal Board or Tribunal to Judicially Review

54. The Applicants have failed to identify a decision of a federal board, commission or other tribunal in their application for judicial review and have therefore failed to meet the basic requirements of subsection 18.1 of the *Federal Courts Act*.

55. An application for judicial review under subsection 18.1 of the *Federal Courts Act* may only be brought in respect of a "decision, order, act or proceeding of a federal board, commission or other tribunal". A bare challenge to the constitutionality of legislation or government policy cannot be brought by way of judicial review.

Subsection 18.1(1), (3), _Federal Courts Act_, R.S.C. 1985, c. F-7

Arthur v. _Canada_ (Attorney General), [1999] F.C.J. No. 1917 at para 11,

Tremblay v. Canada, [2004] F.C.J. No. 787, at paras 16-30 (C.A.).

56. The Applicants in this case have failed to refer to a decision, order, act or proceeding of a federal board, commission or other tribunal. On its face, the Notice of Application does not meet the requirement of subsection 18.1 of the *Federal Courts Act*.

57. To the extent that the Applicants challenge the decision of the Chief of Defence Staff to enter into the *Arrangement*, which is unclear from a reading of the Notice of Application, the application for judicial review was not filed within the required 30 days.

The *Arrangement* was made on 18 December 2005 and the Applicants were aware of it at least as early as April 2006.

58. In effect, the Applicants are attempting to use the judicial review process to challenge policy. In this matter, the case law provides that an applicant is not entitled to challenge government policy where there is no decision and in the absence of concrete facts demonstrating that any rights or interests have been or are likely to be infringed.

> ***The Professional Institute of the Public Service of Canada* v. *Canada Customs and Revenue Agency*, 2004 FC 507 at paras 66-77 (T.D.),**

(ii)Cannot Use Judicial Review to Impugn High Level Government Policy

59. Furthermore, the Applicants are not entitled to challenge a high level government policy which is part of the Crown's prerogative by way of judicial review. The executive conduct identified by the Applicants involves the exercise of prerogative powers and matters of "high policy" that are not justiciable, except for compliance with the *Charter*.

> ***Operation Dismantle Inc.* v. *the Queen*, [1985] 1 S.C.R. 441, at paras. 53-54.**

60. The propriety of military strategy and operational decisions are non-justiciable because they involve moral, political and tactical operational considerations. It is not appropriate for the courts to express an opinion on the wisdom of the Executive's exercise of its defence powers.

> ***Operation Dismantle Inc.* v. *the Queen*, *supra*, at paras. 52, 64.**

61. The decision of the Government of Canada to enter into the *Arrangement* with the Minister of Defence of the Republic of Afghanistan constitutes an exercise of Crown prerogative over the conduct of foreign relations and defence or military operational decisions and, as such, is not reviewable in this Court.

62. In *Turp v. Canada (Prime Minister)*, the Federal Court dismissed an application for judicial review brought to prohibit the Government of Canada from participating in military intervention in Iraq. The Court held that the application had no reasonable chance of success because a decision to deploy the Canadian Forces is one of "high policy" and not therefore justiciable.

> ***Turp* v. *Canada (Prime Minister)*, [2003] F.C.J. No. 423.**
> ***See also:***
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> ***Aleksic* v. *Canada (Attorney General)*, [2002] O.J. No. 2754 (Ont. S.C. – Div. Ct.).**

63. Similarly, the Quebec Superior Court allowed a motion to strike an application for a declaration that members of the Canadian Forces have violated the Geneva Conventions in the course of military action in Afghanistan by detaining persons and transferring them to the United States for transport to Guantanamo Bay. The Court held that the case concerned questions of state prerogative and international relations involving defence and relations between states, questions that are beyond the scope of judicial review.

> ***Turp et al.* v. *Chrétien et al.*, 2003 CarswellQue 872.**

(iii) The Charter is Not Engaged by the Applicants in this case

64. The *Charter* does not apply to the matters raised by the Applicants in their application for judicial review. The conduct at issue takes place outside Canada and within the territorial jurisdiction of Afghanistan. It also involves unidentified individuals who are already present in Afghanistan, subject to its jurisdiction, and have no connection to Canada.

65. The scope of the application of the *Charter* beyond Canadian territory cannot be determined merely by reference to s. 32(1), but must be viewed in light of the accepted

principle of international law that nation-states are sovereign and equal. Accordingly, the Court must be satisfied that application of *Charter* standards will not interfere with the concurrent territorial jurisdiction of the foreign State and thereby generate an objectionable extraterritorial effect. In this case, the remedy sought will directly interfere with the rights and obligations of the sovereign country of Afghanistan to apply and maintain the rule of law within its territory.

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

66. Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

67. The *Arrangement* does not, as the Applicants contend, contravene section 7. As discussed above, it does not require that detainees to be transferred. By its terms, it merely establishes procedures "in the event of a transfer" that are designed to protect the life, liberty and security of detainees. As such, the *Arrangement* does not itself deprive anyone of life, liberty or security of the person.

68. Second, there is no deprivation and no causal connection between any deprivation and the actions of the Canadian Forces. The Applicants neither allege nor prove that the transfer of any particular individual by the Canadian Forces to Afghanistan or any other country has resulted or is likely to result in a deprivation of that individual's life, liberty or security of the person.

69. The courts should not take remedial action where future harm is improbable and where it cannot be shown that the impugned action will cause of a violation of rights.

***Operation Dismantle* at paras. 29, 36.**

70. Third, the practice of transferring detainees is a matter of military strategy and international relations -- activities that was not intended to be caught by section 7. These are matters of high policy for determination by the executive in consideration of many practical, social, political and military factors. While the rights of individual detainees are among those factors, it is not appropriate for the court to second-guess the executive on such matters, in the absence of clear proof of a violation of section 7.

***Aleksic* v. *Canada (Attorney General)*, supra.**

71. Sections 7, 12 and 10(b) are not engaged on the facts adduced by the Applicant. As the Applicant is not entitled to relief under subsection 24(1) of the *Charter*, its motion for an injunction must be dismissed.

(b) *No Irreparable Harm Shown by Applicants*

72. The Applicants have failed to show that they would suffer irreparable harm if the injunction is not granted.

73. The second part of the *RJR-Macdonald* test involves deciding whether the applicant seeking interim relief would suffer irreparable harm. Irreparable harm refers to harm that would not be adequately compensated in damages or cured by the decision on the merits.

***RJR-Macdonald*, supra at 341.**

74. This necessarily limits the harm at issue to the harm that will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard.

***Lake Petitcodiac Preservation Assn. Inc.* v. *Canada (Minister of Environment)* (1998), 149 F.T.R. 218 at para. 23 per MacKay J. (F.C.T.D.)**

75. The Applicants seeking injunctive relief must demonstrate that they themselves will suffer irreparable harm. In *Morgantaler et al. v. Ackroyd et al.*, the Ontario High Court of Justice held that evidence of harm to female patients seeking abortions at the Applicant's clinics could not be considered for the purposes of an Application:

> The applicants rested their argument mainly on the irreparable loss to their potential women patients who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate an irreparable harm to these applicants which would warrant this court issuing an injunction at their behest.
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> ***Morgantaler* et al. v. *Ackroyd et al.* (1983) 42 O.R. (2d) 659 .**

76. Similarly, Justice Shore in *Qureshi v. The Minister of Public Safety and Emergency Preparedness,* 2007 FC 96, reiterated that the Applicant must be the victim of the irreparable harm:

> I am sympathetic to the argument that the break up of a family unit produces substantial hardship which, in some circumstances, but not all, approaches the level or reaches the level of irreparable harm to the family unit. That is not the test. The issue, of course, is irreparable harm to the applicant.
>
> ***Qureshi* v. *The Minister of Public Safety and Emergency Preparedness*, 2007 FC 96**

77. Here, the Applicants, have failed to allege any harm to themselves or to their membership. Their allegations of irreparable harm rest on broad hearsay statements in newspaper articles which have not been investigated or even corroborated. These allegations fall short of the stringent evidentiary requirements for the granting of interim injunctive relief.

78. For example, the supplementary affidavit of Alex Neve, dated April 26, 2007, contains six newspaper articles from the *Globe & Mail*. Alex Neve is not the author of any of these articles. The authors, Paul Koring, Gloria Galloway, and Graeme Smith, did

not swear any affidavits, and cannot be cross-examined. In other words, the Applicants provide no direct evidence to support their allegations. The newspaper articles are hearsay are not evidence of the truth of the contents published.

79. In *Bembenek v. MEI*, Justice Campbell speaks to the reliability of newspapers articles and notes that they should be given little probative value.

> Newspaper articles as original evidence offend the hearsay rule and are not ordinarily receivable as evidence. The Supreme Court of Canada has recognized, however, that there may be some circumstances where newspaper reports are not wholly inadmissible and where a greater degree of latitude is appropriate to permit the court to consider them, subject to serious questions of their probative value and the weight they should be given. R.W.D.S.U. v. Saskatchewan, [1987] 1 S.C.R. 460 at pp. 490-492.
>
> Austin J. relied on newspaper articles in R. v. Shepherd, supra.
>
> Because of the difficulties faced by the applicant in obtaining direct evidence, I am prepared to consider the newspaper articles. But they are hardly the best evidence, and their weight and probative value is a subject of serious argument
>
> ***Bembenek* v. *MEI*, [1991] O.J. No. 2162.**

80. While exceptions to the hearsay rule may justify accepting newspaper clippings as evidence, the law is clear that they can never be introduced for the truth of their contents. Furthermore, the Applicants have failed to explain why the authors of the *Globe & Mail* articles could not swear an affidavit in support of their motion, thereby establishing a basis for exemption from the general exclusionary rule. To obtain the invasive remedy sought in this case the Applicants can and must obtain direct evidence. The newspaper articles in the *Globe & Mail* should not be admissible evidence and cannot be used to prove the truth of the allegations contained therein.

81. Furthermore, the irreparable harm claimed by the Applicants is speculative. A finding of irreparable harm requires the production of non-speculative evidence to establish irreparable harm to the Applicant.

82. In *Syntex Inc.* v. *Novopharm Ltd*, the Federal Court of Appeal held that the evidence as to irreparable harm must be clear and not speculative. A mere perception of harm is insufficient and a plaintiff must be held to a strict standard of irreparable harm.

***Syntex Inc.* v. *Novopharm Ltd* (1991), 36 C.P.R. (3d) 129 at 13.**

83. The Applicants allege potential future risk of torture to detainees transferred from Canadian custody. There is no evidence before this Court that there are currently any detainees in Canadian custody who are at risk of transfer. Furthermore, there is no evidence before the Court which meets the stringent standards mandated by the law.

84. In fact, the evidence presented by the Respondents demonstrates that Canadian officials have not received any notification of mistreatment or torture of detainees transferred from Canada to Afghan authorities. In one instance, a member of CF exercised his discretion not to transfer a detainee where he had concerns about the treatment he would receive. On another occasion, CF personnel observed detainees who had been transferred to Afghan authorities within weeks of their transfer. The detainees were in good health and no medical problems were noted.

85. At this time, many of our NATO allies transfer detainees to Afghan authorities. The government of Afghanistan is currently investigating the newspaper allegations referenced in the affidavit of Alex Neve and the AIHRC has confirmed that it now has access to the facilities mentioned in the article and has visited them.

Affidavit of Colleen Swords, para Respondents Motion Record, Tab 1

86. The uncontroverted evidence of the Respondents directly contradicts the Applicants assertion that there is a substantial risk of torture to Canadian detainees. Furthermore, at this time there are no detainees and the possibility of unnamed individuals be transferred at an unspecified and unascertainable future date does not rise above the standard of mere speculation and is not sufficient to meet the required test for granting of an injunction.

(c) *The balance of convenience lies with the Respondents*

87. The Court must consider the balance of convenience and determine which of the parties will suffer the "greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits". The balance of convenience in this case favours the Crown.

88. The factors to be considered in deciding whether the balance of convenience favours the Crown are: the nature of the relief sought, the harm the parties contend that they will suffer, the nature of the legislation under attack and where the public interest lies.

***RJR-MacDonald*, supra at 406-407.**

89. Furthermore, it has been held that where a public authority asserts harm to the public interest, as an aspect of irreparable harm, it is held to a lower standard of proof. In *RJR MacDonald* the Supreme Court of Canada held:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined.

***RJR- MacDonald,* supra at 346.**

90. Canada is playing a vital role in the security and development of Afghanistan. With approximately 2500 members of the Canadian Forces, concentrated primarily in Kandahar province, and numerous Canadian Government officials serving in both Kabul and Kandahar, Canada is bringing about real changes in a society long ravaged by strife. The role of Canada and its allies is critical to addressing such security threats and thus enabling the economic development of Afghan society

Affidavit of Colleen Swords, para Respondents Motion Record, Tab 1

91. There are currently 2500 CF members serving in Afghanistan with our NATO allies through the ISAF mission. The CF has been authorized to continue its mission in Afghanistan for a further 21 months, until February 2009.

Affidavit of Colleen Swords, para Respondents Motion Record, Tab 1

92. Canada is also a major participant in the January 2006 Afghanistan Compact which is a five year agreement between the Government of Afghanistan, the United Nations and the international community. This agreement commits the international community to achieve progress in Afghanistan in the areas of security, governance and economic and social development.

Affidavit of Colleen Swords, para Respondents Motion Record, Tab 1

93. In addition to the CF currently present in Afghanistan, there are Canadian officials from the Department of Foreign and International Affairs, Canadian International

Development Agency, Correctional Services Canada, Royal Canadian Mounted Police. Those officials rely on the CF to maintain their security and safety while in Afghanistan.

Affidavit of Colleen Swords, para Respondents Motion Record, Tab 1

94. The CF does not have the facilities or the authority to hold detainees for longer than 96 hours. ISAF partners operate under the policy that detainees will be released or transferred to Afghan authorities within 96 hours of detention. This policy is consistent with the commitment of the international community to the sovereignty of Afghanistan and to the country's responsibility for providing security and law and order throughout the country.

95. The transfer facility currently operated by the CF in Afghanistan contains 16 cots in four tents, its maximum capacity is actually 8 to 10 persons. That facility, and in fact any other like it, cannot be used as a long-term detention facility because they are operated in different ways, their infrastructure is different and they require personnel with skills and training different from that of personnel at a transfer facility.

96. The CF does not have the infrastructure, training or personnel to maintain a develop and maintain a detention facility in Afghanistan. Detainees held for a short time do not present the same escape risk as detainees held for more than four or five days. In the latter case, detainees will have a chance to plan an escape and work incrementally toward that goal.

97. A long-term facility must be on hard ground to reduce the risk of escape by tunneling. The current transfer facility is comprised of soft skinned tents in a standard

walled enclosure topped with concertina wire. A long-term facility requires more secure solid structures. This is inappropriate for a long-term facility which requires stronger, more durable structures, an ablutions area, messing facilities, provision for special religious activity, and an area to exercise, none of which exist in the processing facility.

98. Finally, soldiers tasked to the processing facility are not trained to work in a long-term detention facility. Furthermore, the requirement to staff a long term detention facility at Kandahar airfield removes soldiers from security operations. This could undermine the capacity of the CF to support other CF operations thereby increasing risks to CF members, their allies, international workers and Afghan civilians.

99. The ability to detain is vital to the safety and success of the CF in Afghanistan. CF personnel are often confronted by individuals or groups who pose of threat of death to themselves and others. The Law of Armed Conflict, also known as international humanitarian law, governs CF combat operations. When the enemy is captured, that law mandates humane treatment, including the provision of appropriate medical care of wounded detainees.Under this regime, capture and detention are the preferred means of neutralizing threats.

100. Tthere is a close interlinkage between security and development in Afghanistan. The dangerous security situation in Kandahar requires, as matter of practice, that civilian members of the PRT as well as those based at Kandahar Airfield not leave these bases to perform their functions without the physical protection provided by CF escort. This includes the travel by CSC officers to visit detention facilities as part of their capacity building project. This physical protection is therefore essential to the ability of the Canadian Government to conduct its operations related to programming of reconstruction, development, and training in support of the Afghan Government in Kandahar

Province. The requirement for physical protection by the CF during travel outside the PRT or Kandahar air field applies equally to any other Canadian government personnel visiting either from our embassy in Kabul or from Canada.

101. If Canada were to cease its development, reconstruction and diplomatic efforts in Kandahar province, the ability of Canada to fulfil its commitments to the Government of Afghanistan and the international community would be severely restricted.

102. The broader public interest rests with Canada abiding by its international obligations and commitments and with supporting and protecting the 2500 CF personnel and others serving in Afghanistan. The order sought will have a direct and detrimental impact on the CF's mission in Afghanistan and the balance of convenience weighs in favour of not granting the injunction.

PART IV – ORDER SOUGHT

103. The Respondents' request that this Motion be dismissed with costs.

OTTAWA, May 1, 2007

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PART V – LIST OF AUTHORITIES

INDEX

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7. *Paul v. Canada* [2002] FCJ No. 824
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23. *Bembenek v. MEI*, [1991] O.J. No. 2162

24. *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129

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