Court File No. T-324-07

FEDERAL COURT

BETWEEN:

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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS IN RESPECT OF RESPONDENTS' MOTION TO STRIKE APPLICATION

Overview

1. This application for judicial review should be struck as it is clearly improper and bereft of any possibility of success.

2. The Applicants do not have standing to bring the application. They are not directly affected by the matters in issue and do not meet the criteria for public interest standing. The application as framed does not raise an issue that may be resolved in the applicants' favour. There are other reasonable and effective ways to bring before this Court such serious issues as may arise in the future.

3. The Applicants do not challenge the validity of any specific administrative or executive action that may properly be the subject matter of judicial review. Instead, they ask this Court to make new policy governing the handling of detainees by the Canadian Forces.

4. There is an insufficient factual foundation for determination of the constitutional issues raised. The Applicants neither allege, nor adduce evidence to establish, that the rights of any specific, identifiable person under the *Canadian Charter of Rights and*

Freedoms have been or are likely to be infringed by the conduct of the Canadian Forces in Afghanistan. The application is, for that reason, speculative and premature.

5. Further, the *Charter* does not apply to the conduct at issue and the substantive rights invoked are not engaged on the facts alleged.

6. The Applicants err in equating the detention of persons by the Canadian Forces in the course of military operations in the sovereign state of Afghanistan with the detention of persons under Canadian law in Canada. The situations are not comparable. The legal regime underlying detention by the CF outside Canada is governed by international law, including the law of armed conflict and United Nations (U.N.) Security Council resolutions, and by the domestic law of Afghanistan.

7. The recent decision of the majority of the Supreme Court of Canada in *R. v. Hape* directly and completely forecloses the within application for Judicial Review. Since there is no evidence that Afghanistan consents to the application Canadian *Charter of Rights and Freedoms* to the detention and transfer of persons within its borders there is no Canadian authority to enforce the same.

8. Finally, the Applicants raise their *Charter* claims in respect of matters that are otherwise not justiciable and are, in any event, now moot in light of the Supplementary Arrangement between Canada and Afghanistan.

PART I – STATEMENT OF FACT

9. By Notice of Application issued on 21 February 2007, the Applicants, Amnesty International Canada and the British Columbia Civil Liberties Association, commenced this application.

10. The application is for judicial review in respect of "actions or potential actions of the Canadian Forces deployed in the Islamic Republic of Afghanistan". These "actions or potential actions" are not specified.

11. The Notice refers to an *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan* (the "*Arrangement*") to which those "Participants" consented on 18 December 2005. The Applicants allege that the *Arrangement* does not provide adequate safeguards to ensure that detainees transferred by the Canadian Forces to the custody of Afghanistan will not be tortured. They further allege that the Canadian Forces continue to detain and transfer individuals to the custody of Afghan authorities, "despite the substantial risk that these individuals shall be subject to torture".

12. The Applicants seek the following remedies:

(a) a declaration that the "Canada-Afghanistan Agreement" violates sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* because it provides for the transfer of detainees without adequate substantive and procedural safeguards against a substantial risk of torture;

(b) a writ of prohibition preventing the Canadian Forces from transferring detainees to Afghanistan or other countries without such safeguards; and

(c) a writ of mandamus requiring the Respondents to inquire into the condition of all detainees transferred by the Canadian Forces to the custody of other countries since December 2001 and to request that the detainees be returned to the custody of Canada.

PART II – POINTS IN ISSUE

13. Should this application be struck out as being so clearly improper as to be bereft of any possibility of success?

14. The application is clearly improper and cannot succeed because the Applicants have neither direct nor public interest standing, their application is inappropriate for judicial review, it is not supported by a sufficient factual foundation and the *Charter* does

not apply to the conduct at issue. In any event, the application is moot and not otherwise justiciable apart from the unsupported *Charter* claims.

PART III - ARGUMENT

A. Preliminary Motions to Strike

15. This Court has jurisdiction to dismiss in a summary manner an application that is so clearly improper as to be bereft of any possibility of success.[1]

16. Although the material facts in a pleading are to be taken as true on a motion to strike, the Applicants cannot rely upon allegations that are based on assumptions and speculation or other allegations that are incapable of proof[2].

B. The Applicants Do Not Have Standing

17. The Applicants lack standing to bring this application. They are not directly affected by the matters in issue and they do not meet the test for public interest standing. There is therefore no basis upon which this Court may exercise its discretion to grant public interest standing.

i) Standing Can be Decided As a Preliminary Matter

18. The Court may properly determine the question of standing on a motion to strike.[3]

19. The nature of the Applicants' interest in the substantive issues raised by this application is clearly established in the allegations and grounds set out in the Notice of Application, in the affidavits of Alex Neve and Murray Mollard and in the transcript of

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[1] *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc*, [1995] 1 F.C. 588
[2] *Operation Dismantle Inc. v. the Queen*, [1985] 1 S.C.R. 441 at pars 25-27
[3] *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at par. 16
Canadian Bar Association v. British Columbia, [2007] 1W.W.R. 331 (B.C.S.C.) at pars. 28 to 32

cross-examination. There is no need for additional evidence or for full argument on the merits of the application to decide the question of standing.[4]

ii) The Applicants Are Not Directly Affected

20. An application for judicial review may be made by anyone "directly affected" by the matter in respect of which relief is sought.[5]

21. The matter at issue in the application may be described generally as the constitutionality of the *Arrangement* governing the transfer of detainees by Canadian Forces to the Government of Afghanistan.

22. Although the Applicants may be genuinely interested in this issue they are not directly affected by it. Their legal rights or position are not affected nor are they subject to any additional legal obligation. They do not experience differential treatment or special prejudice. In short, they neither benefit nor suffer any direct adverse impact from the conduct at issue.[6]

23. The Applicants invoke the *Canadian Charter of Rights and Freedoms* in support of their application but they do not assert that their own *Charter* rights have been violated. Where a party does not claim a breach of its own rights under the *Charter,* the question of standing falls to be decided under the test for public interest standing.[7]

iii) The Test for Public Interest Standing

24. The words "directly affected" in subsection 18.1(1) of the *Federal Courts Act* are to be given a broad meaning so as to provide the Court discretion to grant public interest

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[4] *Canadian Bar Association v. British Columbia, supra* (B.C.S.C.) at par. 32
[5] Subsection18.1(1), *Federal Courts Act, supra*
[6] *Independent Contractors and Business Association et al. v. Canada (Minister of Labour) et al.*, (1998), 225 N.R. 19 (C.A.) at 27
[7] *Hy and Zel's Inc. v. Ontario (Attorney General), supra*

standing where an applicant meets the criteria therefore established by the Supreme Court of Canada.[8]

25. A court must consider three criteria in deciding whether to exercise its discretion to grant public interest standing to an applicant:

(i) whether there is a serious issue raised as to the invalidity of the legislation or conduct in question;

(ii) whether the applicant is directly affected by the legislation or conduct or, if not, has a genuine interest in its validity; and

(iii) whether there is another reasonable and effective way to bring the issue before the court.[9]

a) No Serious Issue

26. The requirement that an applicant for public interest standing raise a "serious issue" calls for consideration of both the importance of the issue and the likelihood of it being resolved in favour of the applicant. It is appropriate to consider the merits of the claim given the discretionary nature of public interest standing and its concern to ensure that scarce judicial resources are not squandered.[10]

27. The threshold question is whether the Applicants have fairly arguable case or, in other words, a reasonable cause of action.[11]

28. The issues raised by the Applicants cannot be resolved in their favour:

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[8] *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201 (Fed. C.A.)
Sierra Club of Canada v. Canada (Minister of Finance), [1999] 2 F.C. 211 (T.D.)

[9] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at par. 37

[10] *Sierra Club of Canada v. Canada (Minister of Finance), supra*, at par. 38
Rowell v. Manitoba, (2006), 265 D.L.R. (4th) 173 (Man. C.A.) at par. 50

[11] *Sierra Club of Canada v. Canada (Minister of Finance), supra*, at par. 39

(i) The application does not raise a serious issue as to the validity of any specific decision, order, act or proceeding. Instead, the Applicants ask this Court to make a new constitutionally-compliant policy for the handling of detainees by the Canadian Forces, an inquiry that is inconsistent with the nature of judicial review.

(ii) The application is not supported by a factual foundation sufficient to decide the *Charter* issues raised. There is no evidence that the *Charter* rights of any identifiable persons have been or will be infringed.

(iii) The *Canadian Charter of Rights and Freedoms* does not apply on the facts alleged by the Applicants.

(iv) The application is moot and not justiciable apart from the Charter claims.

29. These arguments are addressed in detail below. In summary, the Applicants do not have an arguable case and do not therefore raise a "serious issue" within the meaning of the test for public interest standing.

b) Genuine Interest

30. The Respondents concede that the Applicants have a genuine interest in the matters in issue in this application.

c) The Matters Can be Brought to Court in Other Ways

31. There are reasonable and effective ways for these matters to be brought to Court for adjudication by those persons directly affected by any alleged violations of their rights.

32. Persons in Afghanistan may initiate legal proceedings in a Canadian court in an attempt to obtain an appropriate remedy. Indeed, while not accepting the viability of the claim, it is noted that residents of Kandahar, Afghanistan, recently sued the government

of Canada in the Ontario Superior Court of Justice for actions of the Canadian Forces (the "CF") in Afghanistan – *The Estate of Nasrat Ali Hassan et al. v. Her Majesty The Queen et al.*, 06-CV-318619PDI.

33. The Respondents do not assert that abuse or torture must have occurred before this Court may consider a *Charter* claim brought by or on behalf of a detainee. However, a claim must be supported by evidence of the specific circumstances said to establish a likely violation of the *Charter*. In other words, there must be an identifiable individual whose rights are likely to be infringed as a consequence of particular government conduct.

C. No Basis For Judicial Review Under the Federal Courts Act

34. The application does not raise a matter in respect of which a remedy is available under section 18 of the *Federal Courts Act*.[12]

35. The application does not identify any administrative or executive action that violates or is likely to violate the *Charter* rights of any specific individual or individuals; the facts adduced do not establish that a violation of the *Charter* has occurred or is likely to occur; and the Applicants are therefore not entitled to the prerogative remedies they seek.

36. Furthermore, an application for judicial review may only be brought in respect of a decision, order, act or proceeding of a federal board, commission or other tribunal.[13]

37. The Notice of Application does not impugn any specific administrative or executive action.

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[12] Section 18, *Federal Courts Act*, R.S.C. 1985, c. F-7 & *Krause v. Canada*, [1999] F.C.J. No. 179 (C.A.) at par. 21

[13] Subsection 18.1(1), (3), *Federal Courts Act*

(a) No Decision or Order

38. Insofar as the application may be said to concern a decision or order, the Notice of Application is deficient and does not conform to the requirements of the *Federal Courts Rules*. The Notice does not specify any decision or order in respect of which the application is made, or the tribunal alleged to have made any such decision or order.[14]

39. To the extent that the Applicants challenge the decision of the Chief of Defence Staff to enter into the *Arrangement* the application is out of time and must be dismissed. An application for judicial review of a decision or order must be brought within 30 days after the time the decision or order was first communicated to party directly affected thereby. The *Arrangement* was made on 18 December 2005 and the Applicants were aware of it at least as early as April 2006.

(b) No Reviewable Act or Proceedings

40. The Applicants purport to challenge certain "actions or potential actions" of the Respondents but the Notice does not specify them with the required particularity.

41. The *Arrangement* is not an "act or proceeding" and does not provide for any act or proceeding that may be reviewed by this Court. In particular, the *Arrangement* does not authorize or compel the Canadian Forces to transfer detainees to the custody of Afghanistan or any other country. Instead, the *Arrangement* merely establishes procedures "in the event of a transfer....".

42. Moreover, the *Arrangement* contains explicit terms designed to prevent the abuse or torture of detainees. The Participants to the *Arrangement* (the Canadian Forces and the Afghanistan Minister of Defence) are required to treat detainees in accordance with the standards set out in the Third Geneva Convention; the Afghan authorities undertake to maintain and safeguard detainees and to ensure the protections provided by that Convention; the Participants undertake to maintain written records for all detainees; the Participants undertake to notify the International Committee of the Red Cross of all

[14] Rule 301(c), *Federal Courts Rules*

transfers, confirm the right of the ICRC to visit detainees at any time while in the custody of the Canadian Forces or Afghanistan and to inspect the records maintained; the Participants recognize the legitimate role of, and undertake to cooperate with, the Afghan Independent Human Rights Commission in exercising its role; and the Participants undertake that no person transferred from the Canadian Forces to Afghan authorities will be subject to application of the death penalty.

43. By its terms the *Arrangement* does not violate or provide for the violation of the *Charter* rights of any person. As such, the *Arrangement* does not affect the rights or interests of any person. It is therefore not reviewable.[15]

44. To the extent that the Applicants challenge a policy or practice of transferring of detainees without additional substantive and procedural safeguards, they do not adduce evidence to show that existing safeguards are inadequate or violate *Charter* standards. In particular, they do not allege or prove that any individual transferred by the Canadian Forces into the custody of Afghanistan has suffered or is likely to suffer any abuse or torture including as a result of the *Arrangement*, or that Afghanistan is unwilling or unable to comply with the standards of the Third Geneva Convention.

45. In effect, the Applicants ask this Court to review a policy or practice in the absence of concrete facts demonstrating that any right or interest has been or is likely to be infringed. This is not permissible on judicial review.[16]

(c) No Serious Issue

46. An applicant for public interest standing must raise a "serious issue" relating to the invalidity of legislation or to a public act undertaken without or in excess of statutory authority or constitutional limits.[17]

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[15] *Markevich v. Canada*, [1999] F.C.J. No. 250 at par. 13 (appeal allowed without reference to this point, [2001] 3 F.C. 449 (C.A.) and [2003] 1 S.C.R. 94).

[16] *Alberta v. Canada (Canadian Wheat Board)*, [1998] 2 F.C. 156 (T.D.), affirmed (1998), 234 N.R. 74 (C.A.).
The Professional Institute of the Public Service of Canada v. Canada Customs and Revenue Agency, 2004 FC 507.

[17] *Canadian Bar Association v. British Columbia*, *supra*, at pars. 44 & 45.

47. As discussed, the application does not focus on any specific act or decision. It is said to be brought in respect of unspecified "acts or potential acts of the Canadian Forces." Reference is made to the *Arrangement* but that *Arrangement* does not, by itself, have any legal consequences. Moreover, it has been supplemented by a second *Arrangement*. The application does not raise for determination the legality of any particular transfer decision.

48. Instead, the application is cast more broadly. It alleges that existing transfer practices are insufficient because they do not provide adequate "substantive and procedural safeguards" against a substantial risk of torture.

49. The application does not say what is meant by adequate safeguards. It does not show how specific individual rights are infringed by existing practices that allegedly fail to meet a discernible constitutional standard. In the absence of concrete facts, it is hypothetical in nature.

50. The application seeks to compel the Respondents to implement unspecified additional measures. It will require this Court to embark upon the inappropriate exercise of inquiring into transfer practices and defining a constitutionally compliant scheme for the handling of detainees.[18]

51. An inquiry of this sort is inconsistent with the nature of judicial review. It is a political submission not a cognizable legal challenge.[19]

D. No *Charter* Application

(i) The *Charter* Does Not Apply In The Circumstances of This Case

52. The Supreme Court of Canada's June 2007 decision in *R.* v. *Hape* stands for the general proposition that the *Charter* cannot be applied extraterritorially without host state

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[18] *Canadian Bar Association v. British Columbia, supra*, at par. 49

[19] *Canadian Council of Churches, supra.* See also, Transcript of cross-examination of Alex Neve, dated September 12, 2007 at Qs 39-47, 87-92, & 160-164 Respondents' Motion Record at 252-254, 264-267, 286-287 & Exs, "B", "D" & "E" to the Affidavit of Alex Neve, illustrating the underlying nature of this dispute as broadly political and policy oriented

consent. There is no allegation in the case at bar that the sovereign Republic of Afghanistan has consented to the application of the Canadian *Charter* in this way on its territory[20]:

> Canadian law cannot be enforced in another state's territory without that state's consent. Since extraterritorial enforcement is not possible, and **enforcement is necessary for the *Charter* to apply, extraterritorial application of the Charter is impossible.**
> (Emphasis added.)

53. The Supreme Court in *Hape* recognized that Canada cannot enforce its law (exercise enforcement jurisdiction) on the territory of another state unless that state consents to the same[21].

54. Furthermore, *Hape* makes it clear that the inquiry into the extra-territorial application of the *Charter* "begins and ends with s.32(1) of the *Charter.*" The wording of s. 32(1) defines *to whom* the *Charter* applies as well as the circumstances the *Charter* applies to those actors. The fact that a state actor is involved is not in itself sufficient to ground *Charter* application. Two threshold questions must be asked in order to determine whether the *Charter* applies[22]:

> i) Is the actor an official or other agent of the government purporting to exercise statutory authority or a public function?
>
> ii) Even if the actor is *prima facie* a state actor, are the impugned acts within the authority of the Parliament of Canada (or Provincial Legislatures)?

55. The challenged transfer activities of the CF in Afghanistan cannot be said to be "within the authority of Parliament" as that phrase in s.32(1) of the *Charter* has been interpreted by the Supreme Court in *Hape*. The detention and transfer of detainees by CF in Afghanistan takes place pursuant to Afghan and international law, including the law of

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[20] *R.* v. *Hape*, [2007] S.C.J. No. 26 at par 85.
[21] *R. v. Hape,* [2007] S.C.J. No. 26, par 69 & 106
[22] *R. v. Hape,* [2007] S.C.J. No. 26, pars 94 & 103 (cite)

armed conflict, to which the *Charter* does not apply.[23] The application of the *Charter* to CF detention and transfer activities pursuant to Afghan and international law as challenged in this case would be an impermissible exercise of Canadian jurisdiction as understood under international law and would be an impermissible interference into the sphere of Afghan sovereignty.

56. The Supreme Court of Canada clearly recognized the absurdity of attempting to impose a particular country's laws on a multi-national, international effort[24]:

> The investigation and policing of such criminal activities requires cooperation between states. In a cooperative investigation, Canada cannot simply walk away when another country insists on following its own investigation and enforcement procedures rather than ours. That would fall short not only of Canada's commitment to other states and the international community to provide assistance in combating transnational crime, but also of Canada's obligation to Canadians to ensure that crimes having a connection with Canada are investigated and prosecuted. As McLachlin J. wrote in *Harrer*, at para. 55:
>
> > It is not reasonable to expect [police forces abroad] to comply with details of Canadian law. To insist on conformity to Canadian law would be to insist on external application of the *Charter* in preference to the local law. It would render prosecution of offences with international aspects difficult if not impossible. And it would undermine the ethic of reciprocity which underlies international efforts to control trans-border crime…

57. The Applicants assert that Canada possesses the jurisdiction to grant *Charter* rights to persons otherwise under the sovereign territorial jurisdiction of Afghanistan simply by virtue of the fact that Canadian Forces, as opposed to ISAF or Afghan forces, have engaged and temporarily detained these persons. This surprising proposition is unsupported in both domestic and international law.

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[23] The *Charter* does not apply to foreign laws: *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Canada v. Schmidt*, [1987] 1 S.C.R. 500

[24] *R. v. Hape*, [2007] S.C. J. No. 26 at pars 88, 97 & 98 (quote).

58. The issue of whether activity that takes place outside Canada is "within the jurisdiction of Parliament," as those words are used in s. 32(1) of the *Charter*, must be considered within the relevant international law framework[25]:

> Where the question of application [of the *Charter*] involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations.

59. Central to the issue of extraterritorial application of the *Charter* is the rule that all states are sovereign and equal. Sovereign equality is the "linchpin of the whole body of international legal standards," and "the fundamental premise upon which all international relations rest". The principles of sovereign equality, territorial integrity and non-interference in the internal affairs of a state are central to the conduct of international relations and fundamental principles international law. As a matter of international and Canadian law, Canada is obliged to refrain from interfering with other states. A key manner in which Canada would interfere in the internal affairs of another state is by applying the *Charter* in its territory without that state's consent[26]:

> Were *Charter* standards to be applied in another state's territory without its consent, there would by that very fact always be interference with the other state's sovereignty.

60. As the Court also noted in *Hape*, the most contentious claims for jurisdiction arise when one state attempts to enforce its jurisdiction within another. "The fact that a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state's exercise of enforcement jurisdiction outside its borders". Attempts to enforce the *Charter* in another country, so as to give *Charter* rights those falling under the jurisdiction of that foreign

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[25] *R. v. Hape*, [2007] S.C. J. No. 26, pars 33, 34, 39

[26] *R. v. Hape,* [2007] S.C.J. No. 26, pars 40, 41, 43, 44, 45, 47, 48, 50, 68, 69, 84, 113.

state, must necessarily impinge upon that country's sovereignty as well as its prescriptive and enforcement jurisdiction.[27]

61. The Afghanistan Compact is a key document which outlines the nature and ambit of the involvement of Canada and indeed the international community in Afghanistan. The CF is engaged in Afghanistan with the consent of the Government of Afghanistan as reflected in the Afghanistan Compact as well as the "Technical Arrangements" entered into between Canada and Afghanistan. In particular, the Afghanistan Compact provides consent for ISAF operations based upon a fundamental recognition and respect for Afghan sovereignty[28]:

> **Full respect for Afghanistan's sovereignty and strengthening dialogue and cooperation between Afghanistan and its neighbours constitute an essential guarantee of stability in Afghanistan and the region.** The international community will support concrete confidence-building measures to this end.
> ***
> **Governance, Rule of Law and Human Rights**
> The **Afghan Government** and the international community reaffirm their commitment to the protection **and promotion of rights provided for in the Afghan constitution** and under international law…
> (Emphasis added)

62. Nothing in the Afghanistan Compact suggests that Afghanistan has consented to the application of Canadian or any other foreign law in Afghanistan. Rather, Canada and other members of the international community have pledged to respect and support the sovereignty of Afghanistan. Members of the CF are in Afghanistan to provide assistance and to play a supportive role in order to strengthen and bolster the sovereignty of Afghanistan. To hold that Canadian law, including the *Charter,* is consensually operable in this context is contrary to the fundamental basis of the Afghanistan Compact, and U.N. Security Counsel resolutions.[29]

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[27] *R. v. Hape,* [2007] S.C.J. No. 26, pars 63-64 & 85

[28] Afghanistan Compact, at 2 & 3 and see more generally at 1-5 & Annex 2,. The Afghanistan Compact has been supported by UN Security Council Resolution s 1659 (2006), 1701(2006) and 1746 (2007), Annex 1 to Greenwood Report, Respondent's Motion Record 67-111 & 113-130

[29] Afghanistan Compact, Annex 2 to Greenwood Report, Respondent's Motion Record at 113-130

63. Canada's acceptance and respect for the sovereign authority of the Government of Afghanistan has been repeatedly expressed.[30]

64. Canada and Afghanistan have agreed to the application of a limited range of Canadian laws in Afghanistan. The Technical Arrangements provide for the application of Canadian rather than Afghan law to any questions of a criminal or disciplinary matter involving Canadian personnel in Afghanistan. They reflect a standard practise of allowing a state deploying military personnel on the territory of another state to discipline them according to its own laws.[31] This consent for the exercise of Canadian jurisdiction in Afghanistan is very limited and distinct and does not cover CF detention and transfer activities in respect of non-Canadian detainees held in the course of military operations.

65. The applicants seek an order that would apply the *Charter* to the transfer of detainees by the CF in Afghanistan. This would be inconsistent with Afghan sovereignty, the law of armed conflict and relevant UN Security Council Resolutions authorizing ISAF operations. As the Supreme Court of Canada indicated in *Hape,* whenever possible, the court should "ensure consistency between its interpretation of the Charter, on the one hand and Canada's international obligations and the relevant principles of international law, on the other".[32]

ii) No Substantive *Charter* Rights/Guarantees are Engaged

a) General – The *Charter* Cannot Be Applied in a Vacuum

66. *Charter* decisions must only be made on the basis of a full factual record. The Supreme Court of Canada has stated that *Charter* decisions should not and must not be

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[30] See for example: Testimony of Ms. Colleen Swords, Assistant Deputy Minister, International Security Branch and Political Direct, Department of Foreign Affairs and International Trade House Standing Committee on National Defence before the Standing Committee on Defence , Transcript of Proceedings Before the House Standing Committee on Defence, December 11, 2005 at 10-11, Affidavit of Alex Neve, Sworn August 29, 2007, Ex. "E"

[31] Canada-Afghanistan, Technical Agreement, dated December 18, 2005 , Exhibit 5 to Cross Examination of Alex Neve, Respondents' Motion Record at 367-370.

[32] R. v. Hape, [2006] S.C. J. at par 55.

made in a factual vacuum. To do so would trivialize the *Charter* and inevitably result in ill-considered opinions.[33]

67. The Courts will not take remedial action where the occurrence of future harm is neither reasonably foreseeable nor probable. The *Charter* cannot reasonably be read as imposing a duty on the government to refrain from any acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person unless there is a basis in fact. A *Charter* duty cannot arise on the basis of speculation and hypothesis about possible effects of government action.[34]

68. Violations of *Charter* rights must be pleaded for particular individuals in particular circumstances. This is not merely a formal requirement arising from the wording of subsection 24(1) of the *Charter*: without a pleading of individual circumstances, there is no basis upon which to find either a reasonable foreseeability of harm to the particular individual or the causal connection between the government conduct under review and the alleged breach. In the absence of such particulars there is no reasonable claim.[35]

69. The reasons for pleading the particulars of a violation of the *Charter* are clear. First, the courts will not restrain conduct which is hypothetical or speculative: there must be a cognizable threat to a legal interest. Second, the courts require specific facts to ensure that they hear from those most directly affected and that *Charter* issues are decided in a proper factual context. Third, the failure of a diffuse challenge could prejudice subsequent challenges brought by parties with specific and factually established complaints.[36]

70. In the context of decisions regarding deportation, for example, the Supreme Court in applying section 7 of the *Charter* has engaged in a very specific factual inquiry into

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[33] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 360 & *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at par.28

[34] *Operation Dismantle Inc. v. the Queen*, *supra*, at pars. 29, 36

[35] *Canadian Bar Association v. British Columbia*, [2007] 1W.W.R. 331 (B.C.S.C.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

[36] *Operation Dismantle Inc. v. the Queen*, *supra; Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1093; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at 693-694

whether a particular individual faces a substantial risk of torture if returned to his or her country of nationality. In *Suresh v. Canada*,[37] the Supreme Court observed that the factual inquiry will require, inter alia, consideration of the human rights record of the country of nationality, the personal risk faced by the claimant, any assurances by the government of the country of nationality that the claimant will not be tortured and the value of such assurances, the ability of the country of nationality to control its own security forces.[38]

71. Decisions such as *Suresh*, in the immigration context, and *United States v. Burns*,[39] in the extradition context, illustrate the need for a particular factual context in *Charter* cases focused on the personal circumstances of individuals whose *Charter* rights are claimed to be at risk. That context is absent in this application.

72. The application lacks a sufficient evidentiary basis for *Charter* review and therefore must be dismissed for this reason alone.

b) Section 7 is Not Engaged

73. Section 7 protects the individual's rights to life, liberty and security of the person. These rights are individual in nature; they cannot be advanced by individuals, organizations, corporations, estates or by others, such as the Applicant, whose rights are not directly affected. This is the case regardless of whether such entities seek to advance litigation in what they perceive to be matters of public interest.[40]

74. There are no individual Applicants in this case. In fact, no evidence of any particular individual impact on any individual's life, liberty, or security of person has been proffered. Mr. Neve, the Secretary General of Amnesty International Canada ("Amnesty") admitted during cross-examination that neither he nor any employees from

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[37] *Suresh v. Canada (Minister of Citizenship and Immigration,* [2002] 1 S.C.R. 3

[38] *Suresh v. Canada (Minister of Citizenship and Immigration), supra*

[39] [2001] 1 S.C.R. 283

[40] *Irwin Toy v. Quebec (A.G.),* [1989] S.C.R. 927; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Canada (Attorney General) v. Hislop*, 2007 SCC 10 See also: *Canada (Attorney General) v. Central Cartage*, [1990] 2 F.C. 641 (C.A.).

Amnesty had ever been to or directly investigated allegations of torture in Afghanistan. Further, he admitted in letters attached to his supporting affidavit in this motion that the most up to date information Amnesty had on conditions in Afghan detention facilities was derived from second and third hand reports dating from 2005.[41]

75. The challenged CF transfer activities in Afghanistan arise in the context of armed conflict involving multi-national, U.N. sanctioned military operations in a foreign state. Broadly speaking, sections 7 to 14 of the *Charter* have as their purpose the regulation of the relationship between the Canadian government and individuals in respect of the administration of justice in Canada. Consequently, there is a strong presumption that s. 7 has no application to CF detention and transfer activities in the context of multi-national military operations in a foreign state.[42]

76. The challenged CF transfer activities in Afghanistan cannot be compared to questions of deportation or extradition of individuals from Canada to another state where there are allegations that the particular individuals may face a substantial risk of torture or the death penalty at the hands of officials of a foreign state. In the circumstances at issue, the individuals are not being removed from Canada, and more importantly, the transfers to Afghanistan are made in accordance with Afghan and international law and not Canadian law.

77. Recently, in *Thailand v. Saxena*, an extradition case, Saxena opposed his extradition on similar grounds to those raised by the Applicants in the case at bar. In particular, Saxena argued that Thailand was widely reported, including detailed reports by Amnesty International, to mistreat criminals, that he would be subjected to a "substantial risk" of torture, that he would be forced to live in poor and inhumane conditions and that he might even be killed. Consequently, he argued that Canada's agreement to send him to Thailand would breach his s. 7 rights. The Court rejected the

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[41] See Transcript of Cross-Examination of Alex Neve, September 12, 2007 at Qs 52-57 &144-148, Respondents' Motion Record at 255-257 & 281-283.

[42] *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 07 at pars 45-46. See also: *Prentice v. Canada (R.C.M.P)*, [2005] F.C.J. No. 1954 (2005 FCA 395) at pars 41-45.

notion that generic country reports or other information were sufficient to establish a substantial risk.[43]

78. Finally, the courts will not take remedial action where the occurrence of future harm is not probable, where, in other words, it cannot be shown that the impugned action will cause of a violation of rights.[44]

c) Section 10 is Not Engaged.

79. While the Applicants make the bald assertion that individuals detained by CF in Afghanistan in the course of military operations have the *Charter* right to retain and instruct counsel, they seek no relief in relation to s. 10(b). Moreover, nothing in their materials establishes how the alleged failure to afford counsel results in a breach of the detainees alleged ss. 7 and 12 rights. Consequently, the question of the application of s.10(b) is not a real issue before the Court and requires no further consideration.[45]

80. In the alternative and in any event, s. 10 of the *Charter* has no application to detentions carried out by members of the CF as part of their ongoing mission in Afghanistan. As noted above in relation to the non-application of s.7, CF detentions in the course of military operations in a foreign state arise in a completely different context and fall outside the purposes underlying ss.7-14 of the *Charter*.

81. The impugned transfers occur in the context of an armed conflict on foreign territory in which the CF is participating in multi-national operations, including ISAF operations conducted under the authority of UN Security Council Resolutions. The challenged detentions and transfers are governed by the Afghan law and international law (Law of Armed Conflict and relevant UNSCRs) and consequently do not come within the meaning of "detention" under s.10 of the *Charter*.

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[43] *Thailand v. Saxena*, [2006] B.C.J. No. 446 (C.A.) at pars 41-58. See also Greenwood Report at par 71, Respondents' Motion Record at 62-63.
[44] *Operation Dismantle, supra* at pars. 29, 36
[45] See Request for Relief, Notice of Application, Respondents' Motion Record, at 4-6.

82. Additionally, the application of s. 10(b) in the context of this case would lead to an unacceptably absurd and ineffective result.[46] The absurdity and ineffectiveness of attempting to afford detainees in foreign states subject to the jurisdiction and laws of the foreign state with rights under s.10(b) of the *Charter* was highlighted by an *obiter* discussion of Justice LeBel for the majority of the Supreme Court in *Hape*:

> ...For example, s. 10(b) guarantees to everyone the right on arrest or detention *to be informed of* the right to retain and instruct counsel without delay; however, it also includes the right *to retain and instruct* counsel without delay. Consequently, while imposing an obligation on Canadian officers conducting an interrogation abroad to inform the accused of a right would not significantly interfere with the territorial sovereignty of the foreign state, interference would occur if the accused were to claim that right. **At that point, Canadian officers would no longer be able to comply with their *Charter* obligations independently**...
> (Emphasis added)[47]

d) Section 12 is Not Engaged

83. Section 12 of the *Charter*, which guarantees the right not to be subjected to any cruel and unusual treatment or punishment, does not apply in this case. Section 12 has no application when the impugned treatment or punishment is alleged to be carried out by foreign officials in foreign states acting under the authority of foreign laws. Even if the *Charter* could be said to apply to the detention and transfer of individuals by CF in the course of military operations in Afghanistan, which is denied, the appropriate *Charter* provision to apply would be s.7 and not s.12.

84. In *Kindler v. Canada (Minister of Justice),* a challenge to a decision of the Minister of Justice to extradite an individual from Canada to the United States without seeking assurances that he would not be subjected to the death penalty, McLachlin J. stated[48]:

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[46] See *R. v. M.(M.R.),* [1998] 3 S.C.R. 393.
[47] *R. v. Hape* , [2007] S.C.C. 26 at pars 91-92(cite).
[48] *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779 at pars 168-169. See also: *United States of Mexico et al. v. Hurley* (1997), 35 O.R. (3d) 481 (C.A.) at 13-14. See in a similar vein but in relation to s. 7 issues: *Thailand v. Saxena*, [2006] B.C.J. No. 446 *supra. Rodriquez v. British Columbia*, [1993] 3 S.C.R. 519 at par 182

> In my view, the guarantee against cruel and unusual punishment found in s. 12 of the *Charter* does not apply to s. 25 of the *Extradition Act* or to ministerial acts done pursuant to s. 25. **The *Charter*'s reach is confined to the legislative and executive acts of Canadian governments**. ....
>
> The fact that the Minister may seek assurances that the death penalty will not be demanded or enforced in the foreign jurisdiction does not change this situation. **The punishment, if any, to which the fugitive is ultimately subject will be punishment imposed, not by the Government of Canada, but by the foreign state. To put it another way, the effect of any Canadian law or government act is too remote from the possible imposition of the penalty complained of to attract the attention of s. 12. ...**
> (Emphasis added)

85. Justice McLachlin's approach to the application of s.12 in *Kindler* has since been adopted by the Supreme Court as a whole in its decision in another extradition case: *United States v. Burns*.[49] The proper place, if any, for a discussion of "state responsibility" under the *Charter* in respect of the removal of individuals to face a risk of serious harm at the hands of a foreign state is not under s.12. The transfer of individuals by CF within Afghanistan according to Afghan and international law does not engage a discussion of "state responsibility" under the *Charter* at all, and particularly does not engage s.12.

iii) No s. 24(1) Charter Remedy is Available to the Applicants

86. The Applicants do not challenge any Canadian statute or regulation for consistency with the *Charter*. As such a declaration of inconsistency under s.52 of the *Constitution Act, 1982* is neither sought nor available in the circumstances of this case. The only remedial provision that could have application to a challenge to CF detention and transfer activities in the course of military operations in Afghanistan would be s.24(1) of the *Charter*.

87. While section 24(1) of the *Charter* offers a broad remedial base, a remedy under s.24(1) is only available to those whose rights have actually been infringed. An

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[49] *United States v. Burns*, [2001] S.C.J. No. 8 at pars 50-57.

individual or organization that alleges violations of the rights of other individuals has no standing to seek and therefore cannot obtain a s.24(1) remedy on their behalf[50]:

> Section 24(1) sets out a **remedy for individuals** (whether real persons or artificial ones such as corporations) **whose rights under the *Charter* have been infringed**. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.
>
> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.
> (Emphasis added)

88. In the case at bar the Applicants' seek relief only pursuant to s 24(1) of the *Charter*. This provision has no application since the Applicants themselves have not demonstrated, nor do they allege, that their own rights have been breached.

E. PAST CHALLENGE NOW MOOT

89. To determine whether a matter is moot the Court first looks to see whether there is a "live controversy" i.e., a "tangible and concrete dispute has disappeared and the issues have become academic". In the absence of a concrete dispute, the Court will consider whether, in its discretion, the matter should proceed.[51]

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[50] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at pars 37-38(39). See also: *R. v. Borowski*, [1989] 1 S.C.R. 342 at pars 53- 54 & *Canadian Bar Association v. British Columbia*, [2006] B.C.J. No. 2015 at pars 50-54 and Hogg, *Constitutional Law of Canada* - Loose Leaf, Vol. 2 (5 Ed). Thompson/Carswell: Toronto, 2007). , (40-3) Also see 40-27 to 40-28

[51] *R. v. Borowski*, [1989] 1 S.C.R . 342 at pars 15-16 (see also the discussion that follows in pars 17 - 28).

90. In *R. v. Borowski* (# 2) the Supreme Court directed that any consideration of mootness must take into account the proper role of the Court in respect of the issues sought to be raised. That is, the Court should not, as it being urged to do in this case, be used as a private reference or a private and ongoing arbiter of multi-layered, politically laden dialogues regarding broad government policies. In this regard, Sopinka J. wrote[52]:

> 40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

91. Applying the above consideration to the case at bar, it is plain and obvious that the controversy that underpinned the within Application when it was issued in February 2007 no longer exists. That is, both the Notice of Application and the Applicants own evidence in response to this motion, establish that the Applicants' sole challenge was to the perceived insufficiency of the *Arrangement* between Canada and Afghanistan regarding the transfer of detainees. Furthermore the applicants seek to have this Court pronounce on multi-layered, evolving and complicated political and international issues better left to the Crown and Parliament.[53]

92. It is clear that both the Applicants and their own supporting international law expert advocated, at the time immediately leading up to the issuance of this application and contemporaneously thereafter, an arrangement in the nature of that entered into by Canada and Afghanistan in May 2007.[54]

93. More importantly, the Applicants' own and sole expert on international law and its purported requirements regarding Canadian transfers of Afghan detainees, expressly

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[52] *R. v. Borowski, supra* at par 40.

[53] See Transcript of Cross-Examination of Alex Neve, September 12, 2007 at Qs: 60-71, 74-79, 125-134, 176-186, 189-205 , Respondents' Motion Record at 257- 262, 276-278, & 290-303. See also: Affidavit of Alex Neve, Exs. "B", "D" "E"

[54] See Transcript of Cross-Examination of Alex Neve, September 12, 2007 at Qs:157, 158, 174 & 186 , Respondents' Motion Record at 286, 289, & 293-294. See also: Affidavit of Alex Neve, Exs. "B", "D" & "E"

claimed that, from an international law perspective, Canada would meet its obligations if it implemented an arrangement containing (i) similar provisions to those contained in the Memorandum of Understanding between the Netherlands and Afghanistan; and (ii) an additional provision giving Canada the right to veto any transfer of its former detainees to another country.

94. Not only have those conditions been met, one of the Applicants' directing minds, Alex Neve, the Secretary General of Amnesty International expressly and unequivocally agreed that the current Supplemental Arrangement between Canada and Afghanistan provides even more safeguards than the request. These are the only conditions which grounded the B.C. Civil Liberties Association's participation in Application.[55]

95. During the recent cross-examination, Mr. Neve attempted, for the first time, to distance himself from Amnesty's own expert, saying now that these safeguards are just a good start and but not enough, the fact of the matter is that nothing in the Notice of Application, nor the actual record of the impetus behind the same supports this sort of revisionist, shifting of the legal goal in this matter.[56]

96. The tangible and concrete dispute having disappeared, this Honourable Court should refuse to exercise its discretion to allow this moot application to proceed given the host of other insufficiencies discussed herein.

F. ISSUES ARE NOT JUSTICIABLE IN CIRCUMSTANCES

97. The conduct at issue in this application involves the exercise of prerogative powers and matters of "high policy" that are not justiciable, except for compliance with the *Charter*.

98. Justiciability refers to the appropriateness of judicial review of an issue. The specific inquiry is whether it is appropriate or obligatory as a matter of constitutional

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[55] See Transcript of Cross-Examination of Alex Neve, September 12, 2007 at Qs: 189-205 and Exhibits "4" & "8" thereto, Respondents' Motion Record at 295-303. See also: Affidavit of Alex Neve, Ex "E"

[56] See Affidavit of Alex Neve, Ex "E". See also, Affidavit of Murray Mollard, sworn Feb 22, 2007 at par 6 & Ex. "A".

judicial policy for the courts to decide an issue or, instead, to defer to other decision-making institutions. The question is whether the courts *should* or *must* decide it, not whether they *can* decide it.[57]

99. In general, matters that lack a sufficient legal component or require striking a balance among competing policy, ideological, social, moral and historical factors will not be justiciable. Such matters include executive decisions to sign a treaty, to conduct international relations, to declare war and to deploy troops.[58]

100. The propriety of military strategy and operational decisions are non-justiciable because they involve moral, political and tactical operational considerations not within the province of the courts to assess. It is not appropriate for the courts to express an opinion on the wisdom of the Executive's exercise of its defence powers.[59]

101. The Government of Canada has the authority over the conduct of all foreign affairs. This is a prerogative power not subject to review.[60] These prerogative powers in the field of foreign affairs include the power to do all acts of an international character, such as the conclusion of bilateral or multilateral treaties or arrangements, or declaration of war and the conclusion of peace.[61]

102. 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 which engages both issues of the conduct of foreign relations and defence or military operational decisions and, as such, is not reviewable in this Court.

103. 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

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[57] *Operation Dismantle, supra*, at pars. 53-544. See also: *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 48 at 49*

[58] *Black v. Canada (Prime Minister)*, (2001), 54 O.R. (3d) 215 (Ont. C.A.)

[59] *Operation Dismantle,, supra*, at pars. 52, 64

[60] *Council of Civil Service Unions v. Minister of Civil Service Unions* at 417-418

[61] *Re Amendment of Constitution of Canada*, [1981] 1 S.C.R. 753 at 876-877

chance of success because a decision to deploy the Canadian Forces is one of "high policy" and not therefore justiciable.[62]

104. 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.[63]

105. The same principle applies in this case. Neither the *Arrangement* nor the practice of transferring detainees to the custody of the Government of Afghanistan is reviewable by this Court except for possible violation of the *Charter*.

106. Decisions made in the exercise of the Crown Prerogative are reviewable, but only under the *Charter*. Only if an individual claims that the exercise of a Prerogative power or a matter of high policy violates that individual's *Charter* rights can the court entertain the claim.[64]

G. MISAPPLICATION OF INTERNATIONAL LAW

107. As set out in the Expert Opinion Report of Christopher Greenwood, the foundation upon which the Applicants' advance this case, ie., the applicable principles of international law, is flawed.[65]

108. Neither the Applicants nor those for whom they purport to advocate can expect, at international law, any further safeguards than those currently provided by Canada. Indeed, the Canadian/Afghan Supplemental Arrangement provides additional safeguards than are required in the circumstances. Since the Applicants allege the *Charter* rights of

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[62] *Turp v. Canada (Prime Minister)*, [2003] F.C.J. No. 423; See also *Aleksic v. Canada (Attorney General)*, [2002] O.J. No. 2754 (Ont. S.C. – Div. Ct.) , *Blanco v. R.* , 2003 FCT 263

[63] *Turp et al. v. Chrétien et al.*, 2003 CarswellQue 872

[64] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441
Black v. Canada (Prime Minister), supra

Afghan detainees subsume and protect the alleged international obligations, it follows that their current treatment cannot offend any *Charter* provisions as alleged by the Applicants.

109. The Respondents rely entirely upon the expert international law opinion of Professor Greenwood in this area of the law. Professor Greenwood notes that the Applicants have misunderstood: the legal basis for Canada to conduct military operations in Afghanistan and, in particular the significance of the UNSC resolutions authorizing military operations; which rules of international law, and in particular international humanitarian law (the law of armed conflict), are applicable to those operations; the significance of the fact that any detention of persons and any transfer of such persons to the Afghan authorities occurs entirely within the territory of the state of Afghanistan; and the nature and effectiveness of the steps taken by Canada to comply with its international obligations. The key points established by Professor Greenwood's report are as follows:

i) the act of detaining and transferring to Afghan custody is an act attributable to the United Nations. Accordingly, the detainee is not within the separate jurisdiction of Canada;[66]

ii) Article 7 International Covenant on Civil and Political Rights (ICCPR) has been interpreted "as impliedly including a duty not to send someone to a State where there is a real risk that they will be tortured". Canada is not in breach of Article 7. The standard for transferring or not transferring "is whether there are *substantial grounds* for believing that there is *a real risk* that *this particular person* will be subjected to torture";[67]

iii) IHL is applicable to persons detained by CF. These detainees are not prisoners of war. Nothing in IHL supposes access to counsel for detainees or requires Canada to build prisons in Afghanistan or to transfer detainees to

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[65] Greenwood Report, Respondents' Motion Record, Tab 2 at 33-66.
[66], Greenwood Report at pars 26- 35 & 63-66 , Respondents' Motion Record at 43-47 & 59-60. See also: *Bhraemi v. France* (App. No. 71412/01) generally and in particular at par 149, (EC HR Grand Chamber) and *Saramati v. France, Germany & Norway*, (App No. 78166/01) (EC HR Grand Chamber)
[67] Greenwood Report at pars 67-72, Respondents' Motion Record at 61-62.

Canadian soil. Canada is not breaching any international legal obligations when transferring detainees to Afghanistan;[68]

iv) the standard for the treatment of detainees is found at Article 3, common to all four Geneva Conventions. The current arrangements provide appropriate assurances to meet the provisions of Article 3 and the CAT; [69] and

v) the transfer to Afghans from within Afghanistan does not engage the Article 3 of the CAT – this article only applies to "refoulement" between separate states across an international frontier.[70]

110. Greenwood concludes that the Canada / Afghanistan arrangements are some of the most extensive ever created and, together with the other considerations, make clear that Canada is not in breach of any of its international legal obligations in transferring detainees to the Afghan authorities in accordance with their terms.

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[68] Greenwood Report at pars 36-39 & 53-78, Respondents' Motion Record at 47, 48 & 54-66
[69] Greenwood Report at pars 43-47 & 75, Respondents' Motion Record at 43-52 & 64-65.
[70] Greenwood Report at pars 63-70 , Respondents' Motion Record at 59-62.

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PART IV – RELIEF SOUGHT

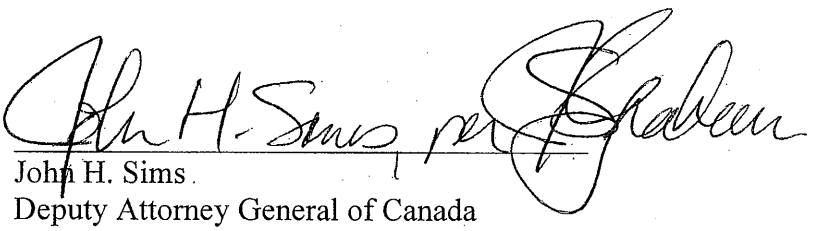
110. The Respondents respectfully request an Order striking out the Notice of Application and dismissing the application for judicial review with costs.

111. In the alternative, the Respondents request an Order striking out those grounds and prayers for relief that in the opinion of this Honourable Court do not disclose a reasonable cause of action and cannot be sustained.

112. In the further alternative, the Respondents request an Order extending the time for filing the Respondents' affidavits to a day that is 90 days from the date of the Order disposing of this motion.

All of which is respectfully submitted,

Dated: September 21, 2007.



John H. Sims
Deputy Attorney General of Canada
Per: J. Sanderson Graham
R. Jeff Anderson
Department of Justice
Room 1252/1262, East Tower
234 Wellington Street
Ottawa, ON K1A 0H8
Tel: (613) 952-7898/957-4851
Fax: (613) 954-1920

Solicitor for the Respondents

SCHEDULE A

1. *Federal Courts Act*, R.S.C. 1985, c. F-7, Sections 18, 18.1(1), (3)
2. *Federal Courts Rules,* Rule 301(c)

SCHEDULE B

1. *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc*, [1995] 1 F.C. 588
2. *Operation Dismantle Inc. v. the Queen*, [1985] 1 S.C.R. 441
3. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607
4. *Canadian Bar Association v. British Columbia*, [2007] 1W.W.R. 331 (B.C.S.C.)
5. *Independent Contractors and Business Association et al. v. Canada (Minister of Labour) et al.*, (1998), 225 N.R. 19 (C.A.)
6. *Hy and Zel's Inc. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675,
7. *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201 (Fed. C.A.)
8. *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.)
9. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236
10. *Rowell v. Manitoba*, (2006), 265 D.L.R. (4th) 173 (Man. C.A.)
11. *Krause v. Canada*, [1999] F.C.J. No. 179 (C.A.)
12. *Markevich v. Canada*, [1999] F.C.J. No. 250
13. *Alberta v. Canada (Canadian Wheat Board)*, [1998] 2 F.C. 156 (T.D.), affirmed (1998), 234 N.R. 74 (C.A.)
14. *The Professional Institute of the Public Service of Canada v. Canada Customs and Revenue Agency,* 2004 FC 507
15. *R.* v. *Hape*, [2007] S.C.J. No. 26
16. *Spencer v. The Queen*, [1985] 2 S.C.R. 278
17. *Canada v. Schmidt*, [1987] 1 S.C.R. 500
18. *MacKay v. Manitoba*, [1989] 2 S.C.R. 357
19. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21
20. *Suresh v. Canada (Minister of Citizenship and Immigration,* [2002] 1 S.C.R. 3
21. *Danson v. Ontario (Attorney General),* [1990] 2 S.C.R. 1086 at 1093
22. *United States v. Burns,* [2001] 1 S.C.R. 283
23. *Irwin Toy v. Quebec (A.G.),* [1989] S.C.R. 927
24. *R. v. Edwards*, [1996] 1 S.C.R. 128
25. *Canada (Attorney General) v. Hislop*, 2007 SCC 10
26. *Canada (Attorney General) v. Central Cartage*, [1990] 2 F.C. 641 (C.A.)
27. *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 07
28. *Prentice v. Canada (R.C.M.P),* [2005] F.C.J. No. 1954 (2005 FCA 395)
29. *Thailand v. Saxena*, [2006] B.C.J. No. 446 (C.A.)
30. *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393
31. *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779
32. *United States of Mexico et al. v. Hurley* (1997), 35 O.R. (3d) 481 (C.A.)

33. *Rodriquez v. British Columbia*, [1993] 3 S.C.R. 519
34. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295
35. *R. v. Borowski*, [1989] 1 S.C.R. 342
36. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 48
37. Reference re Canada Assistance Plan, [1991] 2 S.C.R. 525
38. *Black v. Canada (Prime Minister)*, (2001), 54 O.R. (3d) 215 (Ont. C.A.)
39. *Council of Civil Service Unions v. Minister of Civil Service Unions,* [1984] 3 All E.R. 935 (H.L.)
40. *Re Amendment of Constitution of Canada*, [1981] 1 S.C.R. 753
41. *Turp v. Canada (Prime Minister)*, [2003] F.C.J. No. 423
42. *Aleksic v. Canada (Attorney General)*, [2002] O.J. No. 2754 (Ont. S.C. – Div. Ct.)
43. *Blanco* (2003), 231 F.T.R. 3 (F.C.T.D.)
44. *Turp et al. v. Chrétien et al.*, 2003 CarswellQue 872
45. *Bhraemi v. France* (App. No. 71412/01) (EC HR Grand Chamber)
46. *Saramati v. France, Germany & Norway*, (App No. 78166/01) (EC HR Grand Chamber)