

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
THE ATTORNEY GENERAL OF CANADA**

Respondents

AFFIDAVIT OF COLLEEN SWORDS

I, Colleen Swords, Assistant Deputy Minister in the Department of Foreign Affairs and International Trade, of the City of Ottawa, in the Province of Ontario, SWEAR THAT:

1. I am the Assistant Deputy Minister, International Security Branch and Political Director with the Department of Foreign Affairs and International Trade. In that position I am responsible for the foreign policy aspects of Canada's defence and international security relations, including NATO, as well as for DFAIT's programming for increased security, stabilization, reconstruction and strengthened governance in countries at risk of instability, including Afghanistan, and as such have knowledge of the matters hereinafter deposed except where otherwise stated on information and belief.

2. I have received a copy of the Notice of Application which was served on the Attorney General of Canada on February 21, 2007 and understand that the Applicants are asking the Federal Court of Canada to review an Arrangement concerning the transfer of individuals captured or detained by the Canadian Forces in Afghanistan.

I. THE BASIS FOR CANADA'S PRESENCE IN AFGHANISTAN

3. Afghanistan faces myriad challenges before stability is assured. A 2004 report by the United Nations (the *Common Country Assessment for the Islamic Republic of Afghanistan*, accessible on the internet at [http://www.unama-afg.org/docs/ UN-Docs/ planning&dev/October%202004-CCA%20Afghanistan.pdf](http://www.unama-afg.org/docs/UN-Docs/planning&dev/October%202004-CCA%20Afghanistan.pdf)) 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.
4. 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.
5. The Security Council, which is the primary organ of the United Nations charged with the maintenance of international peace and security, has been actively seized of the situation in Afghanistan for many years prior to the present. In a series of resolutions commencing in 1998 the Security Council noted the threat to international peace and security posed by

the support for international terrorism, including through the role of the then-Taliban regime in Afghanistan. Attached to my affidavit as exhibits A, B, C and D, respectively, are copies of Resolutions 1189 (1998); 1193 (1998); 1214 (1998) 1998; and 1267 (1999) of 15 October 1999).

6. 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).
7. On May 17, 2006, Parliament voted to extend our military mission in Afghanistan to February 2009. At that time, the Prime Minister undertook to have the Ministers with primary responsibility for the Afghanistan file return to Parliament with an annual evaluation of progress. Attached to my affidavit as Exhibit E is a copy of the February 2007 Report to Parliament concerning Afghanistan, entitled "Canada's Mission in Afghanistan: Measuring Progress".
8. I am informed by Wendy Gilmour, Director of the Peacekeeping and Peace Operations Division in the Department of Foreign Affairs, that since August 2005, a Canadian Provincial Reconstruction Team (PRT) has operated in Kandahar City. The PRT brings together elements from the Canadian Forces (CF), Foreign Affairs and International Trade Canada, the Canadian International Development Agency (CIDA), Correctional Services Canada, and civilian police led by the Royal Canadian Mounted Police (RCMP) in an integrated Canadian effort. Approximately 350 personnel, of whom over 300 are engaged in critical support and administrative services and security protection, are based at the PRT site at Camp Nathan Smith in Kandahar City. The PRT assists the Afghan government to develop the capacity necessary to extend its authority throughout Kandahar Province, through assisting in the stabilization and development of the region.

It helps to monitor security, promotes Afghan government policies and priorities with local authorities, and facilitates security sector reforms. In addition, the Canadian Government maintains an embassy in Kabul with currently 24 Canada-based staff. At Kandahar Air Field, 3 civilian staff (CIDA and DFAIT) are providing development and political advice to the Force Commanders.

9. Canada is a major participant in the 2006 *Afghanistan Compact*, which is a five year commitment on the part of the Government of Afghanistan and the international community. The *Compact* commits the international community (more than 60 countries as well as international organizations), along with the Government of Afghanistan and the UN, to achieve progress in three critical and interrelated areas of activity: security; governance, including the rule of law, human rights and tackling corruption; and economic and social development. Attached to my affidavit as Exhibit F is a copy of the *Afghanistan Compact*.

A) Security

10. The United Nations Security Council (the Security Council) in Resolution 1746, of March 23, 2007, reiterated "its concern about the security situation in Afghanistan, in particular the increased violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups and those involved in the narcotics trade, and the links between terrorism activities and illicit drugs, resulting in threats to the local population..." A copy of Security Council Resolution 1746 (2007) is attached to this affidavit as Exhibit G. The role of Canada and its allies is critical to addressing such security threats and thus enabling the economic development of Afghan society.

11. As the North Atlantic Treaty Organization (NATO) Heads of Government declared at the close of the 2006 Riga Summit:

We stand with the Government of President Karzai and the people of Afghanistan who seek to build a stable, democratic and prosperous society, free from terrorism, narcotics and fear, providing for its own security and at peace with its neighbours. Afghans have accomplished much in the last five years. Democratically elected institutions are in place, and the implementation of national reconstruction and development strategies is improving the lives of millions. We are committed to an enduring role to support the Afghan authorities, in cooperation with other international actors.

Attached to my affidavit as Exhibit H is a copy of the Declaration from the Riga Summit.

12. The Riga Summit Declaration further noted that

There can be no security in Afghanistan without development, and no development without security. The Afghan people have set out their security, governance, and development goals in the Afghanistan Compact, concluded with the international community at the beginning of the year. Provincial Reconstruction Teams are increasingly at the leading edge of NATO's effort, supported by military forces capable of providing the security and stability needed to foster civilian activity. Guided by the principle of local ownership, our nations will support the Afghan Government's National Development Strategy and its efforts to build civilian capacity and develop its institutions.

This statement reflects the international community's commitment to the sovereignty of Afghanistan and to that country's ultimate responsibility for providing security and law and order throughout the country.

B) Governance

13. Canada's initiatives are set within the larger multi-donor strategy, and designed to achieve the specific sectoral benchmarks and time lines outlined such documents as the *Afghanistan Compact*.

14. Ms Gilmour has advised me, and I verily believe, that Canada's security and justice sector reform efforts are focussing on critical infrastructure and equipment; along with civilian oversight and professionalization of police, correctional and judicial systems to ensure accountability. Canada's initiatives at the national level are focussed on promoting Ministry of Interior and Ministry of Justice Reform, alongside specific efforts focussed on Kandahar province, all undertaken with a view to strengthening Afghan sovereignty and encouraging local responsibility. A September, 2006 compilation of background information on Canada's activities prepared for the media on the occasion of the visit to Canada by Afghanistan's President, Hamid Karzai, and entitled "Canada – Making a Difference in Afghanistan", sets out more specifically a number of activities in respect of training and capacity building of Afghan police, governance, rule of law, human rights, economic and social development. The September 2006 paper is attached to this affidavit as Exhibit I.

15. With respect to corrections specifically, the Canadian Government in February 2007 deployed Correctional Services Canada (CSC) experts to Afghanistan to help the Afghan Government develop the necessary capabilities to manage detention facilities to promote the safe and humane treatment of detainees. The CSC officers are working to train and mentor Afghan prison and judicial officials, while also assisting to develop projects to address essential infrastructure and equipment needs to improve the conditions of detention in Kandahar based facilities.

16. In the 2007 Report to Parliament, the efforts of Canadians in assisting with development of governance within Afghanistan were summarized. Canadian ongoing and completed governance projects within Afghanistan have focused on institution building, as well as access to justice and human rights. As noted above, the Report to Parliament is attached to my affidavit as Exhibit E.

C) Economic and Social Development

17. Canada's approach – in support of the Afghanistan Compact -- is focused on Afghan-led programs that promote local responsibility, accountability, and community-based engagement. As the 2007 Report to Parliament confirms, Canada and the international community have focussed on the reduction of hunger, poverty and unemployment, promotion and development of the country's human, social and physical capital in addressing issues of development. For example, in support of an initiative led by the Afghan Ministry of Education, Canada is helping to implement a girls' education project, establishing up to 4,000 community-based schools and training 9,000 new female school teachers; 120,000 schoolchildren (85% are girls) are already benefiting from these programs.
18. Microfinance programs have allowed more than 300,000 Afghans (72% women) to start their own businesses such as tailor shops, grocery stores, or to buy land and animals to better support themselves and their families. Canada is the leading donor country to this initiative, having contributed \$40 million since the program began in 2003.

II. THE THREE LEGAL BASES FOR CANADA'S MILITARY ENGAGEMENT

19. Canada's military engagement in Afghanistan has rested upon three distinct but interrelated legal bases; individual and collective self-defence, Security Council Resolutions and consent from the sovereign state of Afghanistan.

A) Individual and collective self-defence

20. The right of self-defence is recognized in Article 51 of the United Nations Charter. In response to the tragic events of 11 September, 2001, in which Canadian lives were also lost, the Security Council issued Security Council Resolutions 1368 and 1373 which

“recognized” and “reaffirmed” the inherent right of individual and collective self-defence. Article 5 of the North Atlantic Treaty, to which Canada is a party, recognizes that an armed attack against one or more members of the Alliance in Europe or North America shall be considered an attack against them all. NATO Secretary General Lord Robertson announced that it had been determined that the attacks on the World Trade Center had been directed from abroad and they were regarded, therefore, as an action covered by Article 5 of the Washington Treaty. Attached to my affidavit as Exhibits J and K are copies of Resolutions 1368 and 1373.

21. On 24 October, 2001, Canada informed the Security Council by letter that it would be deploying military forces into Afghanistan “in exercise of the inherent right of individual and collective self defence, in accordance with Article 51 of the Charter of the United Nations”. Attached to my affidavit as Exhibit L is copy of that letter.

B) United Nations Mandate – International Security Assistance Force (ISAF)

22. Canada’s military presence and activities in Afghanistan also rely upon the legal basis provided by a series of United Nations Security Council Resolutions authorising the use of force in accordance with Chapter VII of the United Nations Charter. On December 20, 2001, in Resolution 1386, the Security Council called for the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim authority in the maintenance of security in Kabul and its surrounding areas. Successive Security Council resolutions have extended the authority for the mandate, most recently in Resolution 1707 (2006), of September 12, 2006. The Security Council has determined that the situation in Afghanistan constitutes a threat to international peace and security. Further all Member States participating in the ISAF have been authorized to take all necessary measures to fulfil its mandate, thereby authorizing the use of all necessary force by the ISAF military forces to carry out their mission. Attached to my affidavit as Exhibits M and N are copies of Resolution 1386 (2001) and 1707 (2006).

C) Consent of the State of Afghanistan

23. In addition to UN Security Council resolutions, the engagement of Canada and its allies in Afghanistan is based on the consent of the legitimate, internationally recognized and democratically elected Government of Afghanistan. As noted in Security Council Resolution 1386, on December 19, 2001, Dr. Abdullah Abdullah, then Acting-Minister for Foreign Affairs of the Islamic State of Afghanistan wrote to the President of the Security Council referring to Afghanistan's agreement to the deployment of multinational security forces in Afghanistan and reiterating to the Council the need for coordination of the terms of such deployments "including the modalities of their role on the ground". Furthermore, on September 22, 2006 in an address to the Parliament of Canada, President Karzai confirmed that Canada's presence in his country was consistent with the wishes of the Afghan people. Attached as Exhibit O to my affidavit is a copy of Dr. Abdullah's letter of December 19, 2001 (annexed to a letter dated December 19, 2001 from the Permanent Representative of Afghanistan to the United Nations). Also attached as Exhibit P to my affidavit is a copy of President Karzai's speech dated September 22, 2006.

III. PROTECTION MEASURES IN CANADA'S AFGHANISTAN DETAINEE POLICY

24. 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. The Arrangement which Canada has with Afghanistan regarding detainee transfers relates to this belief that Afghan authorities in exercising sovereignty over their territory, should have the ultimate responsibility for detainees transferred and held within Afghanistan. This is consistent with Canada's objective of supporting Afghan authorities in

strengthening local capacity and good governance.

25. 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. I understand that the nature and purpose of such detentions will be discussed in an affidavit made by an official of the Department of National Defence. Accordingly, this affidavit will address only the framework of protection measures that my Department considers as relevant to such detentions.
26. On December 18, 2005, Canada concluded an Arrangement for the transfer of detainees from Canadian Forces in Afghanistan to Afghan authorities. This Arrangement is an expression of Canada's commitment to detainee protection and is a recognition by Canada and Afghanistan of their existing obligations to treat detainees "humanely, at all times and under all circumstances, in a manner consistent with the standards of the Third Geneva Convention even if subsequently transferred to the custody of an Accepting Power." Attached to my affidavit as Exhibit Q is a copy of that Arrangement.
27. Furthermore, the Arrangement is situated within existing international legal obligations to which both Afghanistan and Canada are bound. For example, both states are States Party to such international human rights instruments as the United Nations Convention against Torture and the International Covenant on Civil and Political Rights.
28. The Arrangement is intended to set out the modalities of detainee transfers by providing commanders on the ground with clarity on what to do in the event of a transfer. Specifically the Arrangement includes:
 - a. A commitment to treat detainees humanely;

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- b. An acknowledgement of the right of the International Committee for the Red Cross (ICRC) to visit detainees at any time during their custody;
 - c. An obligation for both participants to notify ICRC upon transfer;
 - d. A commitment that persons transferred from the CF to Afghan authorities will not be subject to the application of the death penalty; and,
 - e. A recognition by both participants of the legitimate role of the Afghan Independent Human Rights Commission (AIHRC) with regard to the treatment of the detainees.
29. The Arrangement is also a reflection of Canada's efforts to support the ICRC in fulfilling its mandate under international humanitarian law to strengthen protection for prisoners and detainees. The ICRC is one of our most trusted humanitarian partners. Canada notified the ICRC each time the Canadian Forces transferred or released a detainee.
30. Canada maintains a constructive dialogue with the ICRC in support of its role in promoting international humanitarian law. Officials are in regular contact with them in Ottawa, in Geneva and in the field. The ICRC has expressed appreciation for Canada's good cooperation. Exhibit R is a copy of an ICRC webpage entitled "Strengthening protection and respect for prisoners and detainees", wherein the ICRC's mandate and *modus operandi* are described.
31. The partnership between the Government of Canada and the AIHRC -- mandated by the Constitution of the Islamic Republic of Afghanistan to promote, protect and monitor human rights in Afghanistan -- was recently strengthened through letters exchanged on February 20, 2007. These letters provide for notifications by Canada of detainee transfers to the AIHRC. The AIHRC in turn undertakes to provide immediate notice to Canada

“should it learn that a Detainee transferred by the Canadian Forces to Afghan authorities has been mistreated”.

32. The choice of the AIHRC as a partner in promoting the protection of detainees is consistent with Canada's and the international community's efforts to reinforce Afghanistan's sovereignty, strengthen governance and the rule of law within Afghanistan, and to support local institution-building. Attached to my affidavit as Exhibits S and T are copies of the referenced letters. I am advised by Gavin Buchan, Political Director of the Canadian PRT in Kandahar, that regular meetings are taking place between the PRT and the AIHRC.
33. Canada's policy and practice to transfer detainees to the authorities of Afghanistan is consistent with that of NATO partners in the Afghan theatre. As a rule, Canada's Allies such as the United Kingdom, the Netherlands and Denmark hold detainees for up to 96 hours only, before transfer to the Afghan authorities who have jurisdiction over any offences they may have committed on Afghan territory. Attached to this affidavit as Exhibit U is a record of a press conference by NATO Spokesman, James Appathurai, dated December 8, 2005 in which he sets out ISAF policy on detainee transfers. The United States is the only state with a military presence in Afghanistan that maintains longer-term detention facilities of its own.

IV. POTENTIAL IMPACT OF RESTRICTIONS ON CANADIAN FORCE OPERATIONS

34. As indicated in the information above and confirmed by the NATO Riga Summit Declaration (cited in Paragraph 12 and attached as Exhibit H), there 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.

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

V. RECENT CANADIAN GOVERNMENT ACTIONS CONCERNING ALLEGATIONS OF DETAINEE ABUSE

36. 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. In these discussions Canada has expressed its view that such practices 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 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.
37. Canada has initiated negotiations with Afghanistan 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 by seeking additional provisions to:

- affirm more explicitly Afghanistan's existing obligations under international human rights law;
- limit the number of facilities in which detainees transferred by Canada are held, in order to facilitate tracking of detainees and follow-up;
- require notification to Canada of release, legal proceedings, or other change in circumstances of detainees transferred by Canada;
- enhance the ability of the AIHRC to monitor (including private access to Canadian- transferred detainees), and for Canadian officials to complement AIHRC monitoring.

Once finalized, the expanded Arrangement will be made public.

38. I am informed by Gavin Buchan, Political Director at the Kandahar PRT, and verily believe, that representatives of the Canadian Forces received a verbal commitment from the local head of the Afghan National Directorate of Security (NDS) for access to the NDS' Kandahar facilities on an ongoing basis, and that such access was in fact granted to members of the PRT on April 25, 2007. In addition, Canada brokered a verbal agreement between the AIHRC and the NDS on future co-operation in Kandahar.

39. 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. Attached to my affidavit as Exhibit V is a copy of the Embassy's press release. Canada has offered its assistance in enhancing Afghanistan's capacity to carry out such investigations in a transparent and impartial manner. DFAIT has instructed our Embassy in Kabul to contact

appropriate Afghan authorities to seek information on the status and current location all detainees transferred by Canada.

40. 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. Attached to my affidavit as Exhibit W is a copy of an article in the International Herald Tribune of April 27, 2007, reporting on this statement. Canada will continue to discuss options for cooperation with NATO and ISAF partners, including monitoring.

41. I make this affidavit in opposition to the motion for an interim injunction.

SWORN BEFORE ME at the City of)
Ottawa, in the Province of Ontario,)
This 1st day of May, 2007.)

Colleen Swords
Colleen Swords

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A COMMISSIONER FOR TAKING AFFIDAVITS
IN THE PROVINCE OF ONTARIO)

Alexander Gray