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File No.:________

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Applicants
(Respondents)

- and -

OMAR AHMED KHADR

Respondent
(Appellant)

APPLICATION FOR LEAVE TO APPEAL FILED BY THE APPLICANT, ATTORNEY GENEAL OF CANADA

(pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c. S-26)

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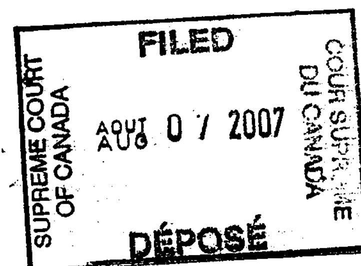

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PART I - STATEMENT OF FACTS

A. OVERVIEW

1. This Court's decision in *R. v. Stinchcombe* provides important fair trial protections for anyone facing a criminal trial in Canada. It does not, however, confer authority to access government-held information without regard to the nature of the information sought and the nature of the legal proceeding for which it is sought.

2. The Federal Court of Appeal's decision in this case stretches the authority of *Stinchcombe* beyond reasonable limits by using it to require Canadian officials to provide information to a Canadian facing a military prosecution in the United States of America.

3. The decision fails to properly consider the unique context in which the claim is made, is based on an inadequate factual record, is inconsistent with principles established by this Court in analogous situations, and may have a detrimental impact on Canada's ability to share information with foreign states.

4. Leave should be granted so that this Court can articulate a more principled approach to the important issues raised in this case.

B. THE FACTS

5. The Appellant (Khadr) was captured in Afghanistan in July 2002 by the U.S. military. He was later transported to Guantanamo Bay, Cuba, and has been detained there since.[1]

6. In 2005 and again in 2007, non-capital charges were referred to a U.S. Military Commission against Khadr for murder in violation of the law of war,

[1] Affidavit of Richard Wilson dated January 20, 2006, paras. 6, 8, 9 [Tab E]

attempted murder in violation of the law of war, conspiracy, and providing material support for terrorism and spying.[2]

7. The Military Commission prosecution procedure provided, among other things, for the appointment of military defence and civilian counsel, as well as a process for disclosure by the U.S. prosecutor. Preliminary steps were taken in Khadr's prosecution before the Military Commission, but the extent of disclosure by the U.S. prosecutor was not yet known.[3]

8. In late 2005, Khadr made *Access to Information Act*[4] requests seeking documents in the possession of the Respondents (Canada) that may be relevant to the charges he faced before the U.S. Military Commission. These requests were processed, except to the extent requests for further information were not responded to by Khadr's counsel.[5] Khadr made a similar request in 2004, in response to which over 3,000 pages of documents were provided by Canada.[6]

9. Concurrent with the *Access to Information Act* requests made in 2005, Khadr initiated a judicial review application in Federal Court seeking an Order for *mandamus* directing Canada to provide *Stinchcombe* disclosure of documents in Canada's possession that may be relevant to the charges he faced before the U.S. Military Commission (essentially duplicating the Access to Information request referred to in paragraph 7).[7]

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[2] Affidavit of Richard Wilson dated January 20, 2006 [Tab E], Exhibit M [Tab F]; Affidavit of Michelle Gascon dated March 9, 2007, Exhibit B [Tab N]
[3] Cross-examination of Richard Wilson dated March 27, 2006, page 1, line 3 to page 5, line 27, page 14, line 4 to page 18, line 19; Response to Undertaking 3 [Tab M]
[4] *Access to Information Act*, R.S.C. 1985, c.A-1, s.6 [see Part VII]
[5] Affidavit of April Bedard dated February 6, 2006, Exhibit Y [Tab G]; Affidavit of Andre Chartrand dated February 27, 2006, paras. 1, 2 [Tab I]; Affidavit of Brenda Freeland dated February 27, 2006, paras, 2, 3, 4 [Tab J]; Affidavit of William Johnston dated February 24, 2006, paras. 2, 3 [Tab K]; Affidavit of Brian McDivitt dated February 24, 2006, paras. 2, 3 [Tab H]
[6] Affidavit of Andre Chartrand dated February 27, 2006, para. 3 [Tab I]
[7] Notice of Application dated January 3, 2006 [Tab D]

10. On April 25, 2006, the Applications Judge dismissed the judicial review application on the ground that the criteria for *mandamus* had not been met.[8] He found no duty under section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*) to provide the disclosure sought, stating at paragraph 18:

> *Purdy*, above, stands for the exceptional case where disclosure can be justified if peculiar factual circumstances arise. *Purdy*, above does not stand for the proposition that whenever there is a foreign prosecution against a Canadian citizen and the Canadian government has some documents, that the accused is entitled to disclosure. This proposition would not be desirable or useful as it might lead to interference with foreign legal proceedings which Justice Iacobucci warned against in *Cook*, above. It could also act as an impediment to the providing of consular services by Canada, which is ironically the very thing the Applicant is seeking from the Respondents.

11. The Applications Judge found that officials from the Canadian Security and Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) interviewed Khadr in Guantanamo Bay and shared summaries of those interviews with U.S. authorities, but found no causal connection between those activities and breach of Khadr's section 7 rights under the *Charter*.[9]

12. The evidence relating to the conduct of the CSIS interviews with Khadr, however, were documents merely authenticated by an RCMP Access to Information officer.[10] In the absence of evidence entered for the truth of its contents in the judicial review application, the Applications Judge referred to factual findings made by him on the basis of affidavit evidence led in an interlocutory motion in another proceeding; specifically a motion seeking an

[8] Reasons for Order and Order dated April 25, 2006, para. 18 [Tab A]
[9] Reasons for Order and Order dated April 25, 2006, paras. 19, 20 [Tab A]
[10] Cross-examination on Affidavit of William Johnston dated March 15, 2006, page 1, lines 10-26, page 15, line 3 to page 17, line 6, page 18, line 24 to page 19, line 21, Exhibit C [Tab L]

interim injunction in Federal Court action T-536-04.[11] With regard to the CSIS interviews of Khadr, he stated at paragraph 19

> ...
> iv) Canadian officials from CSIS and DFAIT, with the consent of US authorities, questioned him in detention at Guantanamo bay. The circumstances regarding that visit were examined in related proceedings, Khadr v. Canada 2005 FC 1076 (CanLII), (2005), 257 D.L.R. (4th) 577, 2005 FC 1076, where the Applicant sought a further injunction from interviews by CSIS and DFAIT. These proceedings were referred to in oral submissions by both sides. In those proceedings, this court, and this judge (who also acts as case-managing judge for the various proceedings of the Applicant against the Canadian government), found on the basis of affidavit evidence at paragraph 23:
> [...]
>
> c) The DFAIT/CSIS visits were not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement (DFAIT note of November 1, 2002, Applicant's Record Ahmad affidavit, Tab 2Q, p.148, para 7 and cross-examination of Serge Paquette, Respondent's Record, Tab 4, pp. 35 and 70)
> d) Summaries of information collected in the interviews were passed on to the RCMP (cross-examination of William Hooper, Respondent's Record, Tab 5, p.7);
> e) Canadian agents took a primary role in the interviews, were acting independently and were not under instructions of US authorities (cross-examination of William Hooper, Respondent's Record, Tab 5, p.22);
> f) Summaries of the information were passed on to US authorities (cross-examination of William Hooper, Respondent's Record, Tab 5, pp.14, 15); [emphasis added]

13. The Federal Court of Appeal applied these findings of the Applications Judge to come to the opposite conclusion:[12]

> In these circumstances, the participation of Canadian officials in gathering evidence against the appellant at the pre-charge level raises, in my view, a justiciable *Charter* issue (*Kwok* at paragraph 106; *Purdy* at paragraph 22

[11] Reasons for Order and Order dated April 25, 2006, para. 19, referring to *Khadr* v. *Canada* (2005), 257 D.L.R. (4th) 577 (F.T.D.) at para. 23 [Tab A]
[12] Reasons for Order and Order dated May 10, 2007, para. 34 [Tab B]

> (B.C.C.A.)). They took an active role in interviewing the appellant and in transmitting summaries of the information collected to U.S. authorities. In doing so, they assisted U.S. authorities in conducting the investigation against the appellant and in preparing a case against him. Canada's participation may have made it more likely that criminal charges would be laid against the appellant thereby increasing the likelihood that he would be deprived of his right to life, liberty and security of the person. I believe that in these circumstances the Charter applies. ... [emphasis added]

14. There is no evidence in this case to connect the sharing of intelligence with Khadr's prosecution by U.S. Military Commission.

15. The Federal Court of Appeal allowed Khadr's appeal on May 10, 2007, finding section 7 of the *Charter* did apply and that an order requiring disclosure would not interfere with the sovereign authority of the U.S. The Court of Appeal directed Canada to make disclosure of documents, for the purpose of allowing Khadr to make full answer and defence to the charges brought against him by the U.S. Military Commission, to a designated judge of the Federal Court. Any claim of privilege by Canada (including those made pursuant to section 38 of the *Canada Evidence Act*) would then be disposed of by that judge.[13]

16. Finally, it is a matter of public record[14] that, on June 4, 2007, the charges against Khadr were dismissed by the U.S. Military Commission Judge but without prejudice to being referred again in the future and that the Military Commission Prosecutor has appealed dismissal of the charges.

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[13] Reasons for Order and Order dated May 10, 2007 [Tab B]; Order dated June 19, 2007 [Tab C]
[14] http://www.defenselink.mil/news/courtofmilitarycommissionreview.html

PART II – POINTS IN ISSUE

17. The proposed appeal raises the following question of law which is of public importance:

> i When does the *Charter* require disclosure by Canadian officials to assist a Canadian accused in a foreign prosecution?

PART III -- ARGUMENT

1) *Stinchcombe* Obligations in the Context of Foreign Prosecutions

18. This is a case of first impression. Although this Court has revisited its decision in *R. v. Stinchcombe*[15] numerous times[16], it has always done so in contexts involving domestic prosecutions and/or legal proceedings. Moreover, the Court has been careful both to avoid pronouncing on the Crown's *Stinchcombe* obligations where the record was inadequate,[17] and applying *Stinchcombe* in inappropriate contexts.[18]

19. The Federal Court of Appeal's judgment in this case avoids neither of the pitfalls this Court has steadfastly avoided. The judgment fails to appreciate that *Stinchcombe* obligations are context-driven, and fails to give appropriate consideration to two key factors: the prosecution was being conducted in a foreign country, and there was no evidence that Canadian officials played a role in that prosecution or that Canadian proceedings were necessary to supplement disclosure available in that foreign prosecution.

20. Although Khadr's prosecution was before a U.S. Military Commission, the decision of the Federal Court of Appeal could be applied to any foreign prosecution where Canadian officials simply shared information which may hypothetically be relevant to the foreign trial. Canadian officials require clarity with regard to the circumstances in which the sharing of information will trigger disclosure obligations under section 7 of the *Charter* so that they can properly inform the foreign officials with whom they may wish to share information.

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[15] [1991] 3 S.C.R. 326 [Tab 15]
[16] See, for example *R.* v. *La*, [1997] 2 S.C.R. 680 [Tab 14]; *R.* v. *Egger* [1993] 2 SCR 451 at 465-467 [Tab 12]; *R.* v. *Chaplin*, [1995] 1 S.C.R. 727 [Tab 11]
[17] *Blank* v. *Canada (Minister of Justice),* [2006] 2 S.C.R. 319 at para.14 [Tab 3]
[18] *May* v. *Ferndale*, [2005] 3 S.C.R. 809 at para.91 (administrative law context) [Tab 8]

21. The Court of Appeal's erroneous holding that the sharing of intelligence by CSIS officers constitutes assisting the investigation of a foreign prosecution misconstrue the statutory mandate of CSIS to gather intelligence[19] and its importance in protecting national security interests. The object of the *Canadian Security Intelligence Service A*ct is not law enforcement and the Federal Court of Appeal failed to take into consideration the different context of intelligence gathering when applying jurisprudence developed in the domestic criminal context. [20]

22. Canada has a number of legal and political obligations under United Nations' Security Council Resolutions and with other international organizations to cooperate in the fight against terrorism, including the prevention, investigation and prosecution of terrorist activities. These obligations include the sharing of information with allies and other organizations on a confidential basis.[21]

23. In *Charkaoui* v. *Canada (Citizenship and Immigration)*[22] this Court recognized the importance of intelligence activities to national security:

> The protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. ... Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality: ...

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[19] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c.C-23, s. 12 [see Part VII]
[20] *Atwal* v. *Canada,* [1988] F.C.J. No. 714 (C.A.) at paras. 35, 36 [Tab 2]
[21] United Nations Security Council Resolution 1373, UN SCOR, 2001, 4385th Mtg., S/RES/1373 (2001) [Tab 26]; United Nations Security Council Resolution 1456, UNSCOR, 2003, 4688th Mtg., S/RES/1456 (2003) [Tab 27]; *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 275 [Tab 25]; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 229, Can.T.S. 2002 No.9 [Tab 24]; and *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284 Can.T.S. 2002 No.8 [Tab 23].
[22] [2007] S.C.J. No. 9 at para. 68 [Tab 7]

24. The decision by the Federal Court of Appeal to impose section 7 *Stinchcombe* disclosure obligations on statutorily authorized intelligence activities by CSIS may negatively impact national security investigational interests and relationships with foreign allies. Foreign allies can be expected to be reluctant to share information with CSIS and other Canadian officials if that information is exposed to *Stinchcombe* disclosure obligations in respect of foreign prosecutions which are difficult to predict and over which they and Canada have no control.

2) The Federal Court of Appeal's Judgment is Inconsistent with Decisions of this Court.

a) The Court of Appeal Applied an Inappropriate Test

25. To the extent previous decisions of this Court bear on the issues in this case, the judgment of the Federal Court of Appeal is inconsistent with principles developed in three different lines of cases.

26. First, in holding that the actions of Canadian officials may have increased the likelihood that Khadr would be deprived of his rights to life, liberty, and security of the person in a foreign prosecution,[23] it applied an inappropriate test.

27. This Court has established as a general principle that the section 7 *Charter* guarantee of fundamental justice applies to deprivations of life, liberty or security caused by foreign actors if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected.[24]

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[23] Reasons for Order and Order dated May 10, 2007, para. 34 [Tab B]

[24] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [Tab 17]; *United States* v. *Burns*, [2001] 1 S.C.R. 283 [Tab 18]

28. In *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[25], this Court considered whether section 7 applied to the Minister's decision to deport an applicant for landed immigrant status where there was evidence of a substantial risk of torture upon deportation. This Court held that section 7 applied where there was a sufficient causal connection between the torture inflicted abroad and the Canadian government's actions. In defining what a sufficient causal connection would be, the Court stated that there would be a sufficient causal connection "at least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation".

29. The question of connection between Canadian conduct and deprivation of section 7 rights abroad arose again in *Application under s.83.28 of the Criminal Code (Re)*.[26] This Court found sufficient causal connection between the use of compelled testimony taken by Canadian officials pursuant to section 83.28(10) of the *Criminal Code* in extradition or deportation hearings to effect deprivations of liberty such as torture or death.

30. The British Columbia Court of Appeal[27], the Ontario Court of Appeal [28] and the Federal Court of Appeal[29] prior to the decision in this matter applied the test established by this Court in *Suresh* and *Application under s.83.28 of the Criminal Code (Re)* for sufficient causal connection in varying factual circumstances.

31. In this case, however, the Federal Court of Appeal found a sufficient causal connection between the activities of CSIS officials and a potential deprivation of liberty through facing charges by Military Commission because

[25] *Suresh, supra.* at para. 54 [Tab 17]
[26] [2004] 2 S.C.R. 248 at para. 76 [Tab 1]
[27] *Purdy* v. *Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.) [Tab 10]
[28] *Bouzari* v. *Iran* (2004), 243, D.L.R. (4th) 406 (Ont.C.A.) [Tab 5]
[29] *Zhang* v. *Canada (Attorney General)*, [2007] F.C.J. No. 736 (C.A.) [Tab 21]

Canada's participation may have made it more likely that criminal charges would be laid.[30]

32. The test for sufficient causal connection to engage section 7 of the *Charter* employed in the decision below replaced the requirement for a "necessary" and "entirely foreseeable" connection with a "possible" connection. As such, it is a marked departure from the jurisprudence to date, creating confusion and uncertainty in an important area of the law.

33. Furthermore, the test employed by the Federal Court of Appeal ignores a key component of the "causal connection" jurisprudence: there must be a causal connection between the actions of the Canadian officials and the deprivation of liberty. In this case, at most there is a causal connection between the actions of Canadian officials and the decision to institute criminal proceedings. The mere institution of proceedings by a foreign state that observes procedural fairness does not engage section 7 of the *Charter*.

34. In addition, factual findings made by the Applications Judge and relied upon by the Federal Court of Appeal in this case to find a causal connection raise a collateral issue. Whether the imposition of disclosure obligations under the *Charter* should be premised on anything less than a strong evidentiary foundation is an issue of importance to *Charter* litigation.

b) Potential Interference with a Foreign Prosecution

35. Second, the decision fails to take into account principles developed in the case law concerning the extraterritorial application of the *Charter*.

36. The Federal Court of Appeal concluded that its Order requiring disclosure by Canadian officials of any documents that may assist Khadr in

[30] Reasons for Order and Order dated May 10, 2007, para. 34 [Tab B]

defending his prosecution by U.S. Military Commission would not interfere with U.S. sovereignty because the Court was not making any direction to the Military Commission.

37. This decision fails to take into account the principle of non-intervention referred to in *R.* v. *Hape*[31]:

> In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention. Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law. ...

38. In this case, the Federal Court of Appeal imposed *Stinchcombe* disclosure obligations on Canadian officials to assist Khadr in defending his foreign military prosecution. It did so without any evidence that the requested material was not obtainable from the foreign prosecutor or production had been refused, and that the material was necessary to make full answer and defence. On its face, the decision seems merely an attempt to impose Canadian *Charter* law without regard to the context and potential impact on foreign judicial proceedings.

c) Conflict with the Extradition Jurisprudence

39. Third, this decision contradicts established principles in extradition proceedings. This Court has considered the applicability of *Stinchcombe*

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[31] 2007 SCC 26 at para. 45 [Tab 13]

obligations to foreign proceedings in the extradition context. In two cases[32] this Court has firmly rejected any broadly based obligation to provide disclosure for the purpose of making full answer and defence in the foreign state should a person be extradited. In *Dynar*, the Court stated[33]:

> ... Any requirement for disclosure that is read into the [Extradition]Act as a matter of fundamental justice under s. 7 of the Charter will therefore necessarily be constrained by the limited function of the extradition judge under the Act, <u>and by the need to avoid imposing Canadian notions of procedural fairness on foreign authorities</u>.[emphasis added]

40. What is crucial to remember about the extradition cases is that there were domestic legal proceedings to which the obligation to disclose could attach, namely, the extradition hearing. In this case there is only a domestic proceeding created for the specific purpose of obtaining disclosure for the foreign trial; the claim for *Stinchcombe*-inspired disclosure standards ought to be even weaker.

3) The Multiplicity of Proceedings

41. The absence of clarity in the law has also had a detrimental impact on the administration of justice in this case. As noted above, Khadr commenced his attempts to obtain disclosure (quite properly) through a request under the *Access to Information Act*. Before, those proceedings were completed, he launched the application in this case. There is no public interest in providing disclosure on two procedural tracks. Granting leave will permit an opportunity to consider the appropriate procedural vehicle for claims of this type.

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[32] *United States* v. *Dynar*, [1997] 2 S.C.R. 462 (SCC) at paras. 132-135 [Tab 19]; *USA* v. *Kwok*, [2001] 1 S.C.R. 532 (SCC) at paras. 97-101 [Tab 20]

[33] *Dynar, supra.* at para.133 [Tab 19]

4) Conclusion

42. This Court has stated that when individuals choose to engage in criminal activities outside Canada's territorial limits, they can have no guarantee that they carry *Charter* rights with them out of the country. [34] This case presents an opportunity to clarify the law with respect to what disclosure obligations Canadian officials may have, if any, with respect to trials of Canadians abroad.

43. The circumstances of this case also provide an opportunity to consider important *Charter* issues that may otherwise be evasive of review. Where, as in this case, there are related foreign proceedings ongoing, the timing of the foreign proceedings are necessarily independent of the Canadian proceedings. Both sides may be reluctant to pursue appeals. For the person accused abroad, failing at first instance may cause him or her to abandon appellate review due to the need to concentrate resources on the impending trial abroad. The government may also be hesitant to prolong domestic proceedings if they may result in delay abroad.

44. The charges against Khadr have recently been dismissed and are the subject of an appeal. This fact may provide this Court with a rare window of opportunity to review important issues without impacting pending foreign proceedings. Even if the charges against Khadr are not reinstated, the importance of the public law issues raised by the proposed appeal warrant this Court's exercise of discretion to hear the case in any event.[35]

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[34] *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500 (SCC) at para 48 [Tab 6]; *R.* v. *Terry*, [1996] 2 S.C.R. 207 (SCC) at paras. 16, 17 [Tab 16]; *Hape, supra.* at para. 99 [Tab 13]

[35] *Borowski* v. *A.G. (Can.)*, [1989] 1 S.C.R. 342 [Tab 4]; *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46 [Tab 9]

PART IV – COSTS

45. The Applicants do not seek costs.

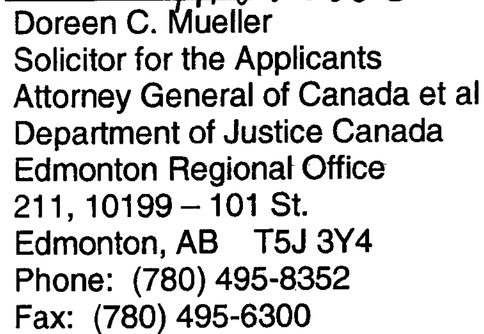
PART V – ORDER SOUGHT

46. The Applicants request that this application for leave to appeal from the Judgment of the Federal Court of Appeal, dated May 10, 2007, be granted.

ALL OF WHICH is respectfully submitted this 3rd day of August, 2007.

SIGNED BY:

JOHN H. SIMS, Q.C.
DEPUTY ATTORNEY GENERAL OF CANADA



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PART VI – TABLE OF AUTHORITIES

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