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Canadians Abroad

A Policy and Legislative Agenda

Gar Pardy

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Gar Pardy retired from the Foreign Service in 2003 and since has written extensively on foreign policy issues and especially on those relating to consular services. Before retirement he was Director and Director General of Consular Services. Recently, he published *Afterwords: From a Foreign Service Odyssey*, which contains numerous commentaries on the issues discussed in this paper. The book is available from Amazon or Chapters.

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Executive Summary and Recommendations

- Over the almost ten years of government by the Conservative Party of Canada numerous policy decisions, including amendments to various laws, were taken that initiated substantial change to Canada's historical approach in assisting Canadians in foreign countries — known collectively as consular services. Many of these changes played out in Parliament and in the press and often were challenged in the courts. More often than not the challenges were successful.
- The historical approach of the universality of consular services for all Canadians was undermined and there was no assurance that all Canadians were treated with equity, fairness and consistency.
- Omar Khadr, his brothers and other affected Canadians, strongly supported by lawyers, were central to many of these cases; more than fifty were filed with the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada and various provincial courts. The decisions in these cases continue to be cited by others in similar appeals to the courts.
- These changes to long-standing laws and practices gave rise to charges of discrimination in the delivery of consular services. Some Canadians were helped; others were not.

- Many cases involved issues associated with actions by the RCMP and CSIS; two Commissions of Inquiry were established and in turn they examined some of the associated consular issues. Their reports and recommendations have received little attention in the years since, yet the reasons for their establishment are stronger today than ever.
- Little to no attention was paid to these issues either during the recent election or in the mandate letters provided to the ministers appointed to manage Canada's international affairs. This paper offers a review of the issues and provides specific recommendations for improvements.
- The issues involved, in addition to that of discrimination in the provision of consular services using Crown Prerogative, include clemency and the death penalty, dual citizenship, transfer of offenders, Consular Service Fee, voting abroad in Canadian elections, Mandela rules on the treatment of prisoners, Canadian legal representation, commissions of inquiry involving consular issues, consular cases involving national security, privacy and the media, the revocation of Canadian citizenship, oversight of consular policy and cases, and an international conference on consular relations.

In summary, the recommendations for action by the Government of Canada are as follows:

Crown Prerogative: Introduce a parliamentary resolution stating consular services to Canadians will be provided without discrimination and the government will disavow the use of the Crown Prerogative in such matters. In the longer term, establish in law the obligation to provide consular service to all Canadians and in doing so eliminate the use of the Crown Prerogative in this area.

Clemency and the Death Penalty: Change existing policy so that clemency would be sought for all Canadians sentenced to death in foreign countries.

Dual Citizenship: Seek agreements with countries where recognition of Canadian citizenship is a problem in providing consular services and establish the obligation of Canada to extend such services to its dual citizens. In the longer term seek international agreement on a set of norms on the issue.

Transfer of Offenders: Through amendments to the International Transfer of Offenders Act, curtail the discretion available to Minister of Public Safety in considering applications for transfer by Canadian citizens.

Consular Service Fee: Establish a review of the use of the Consular Service Fee and the appropriateness of its current level. The review should be presented to Parliament.

Voting Abroad. Remove the present five-year limitation on the right of a Canadian citizen resident abroad to vote in Canadian elections.

Mandela Rules on the Treatment of Prisoners: Clearly state that Canada accepts the Mandela Rules on the Treatment of Prisoners and ensure they are reflected in Canadian prison policy**.**

Canadian Legal Representation: Establish a review of the rules governing Canadian legal representation of Canadians in difficulty abroad and provide new norms to ensure there is appropriate cooperation by officials in Global Affairs Canada on the matter.

Commissions of Inquiry Involving Consular Issues: Review the recommendations of the O'Connor and Iacobucci Commissions of Inquiry as they relate to consular policy and actions and ensure that appropriate action is taken if it is found that current policy and practices are inconsistent with them.

Consular Cases Involving National Security: Establish the primacy of the rights of the Canadian citizen when information on national security is passed to foreign governments. Consular cases with national security concerns should be included in the development of new oversight procedures and organizations for national security.

Privacy and the Media: Establish with the Privacy Commissioner guidelines for the release of privacy information concerning consular cases when issues of public safety and interest are involved. Equally, the Privacy Commissioner should provide guidelines for the use of information covered by the Privacy Act for policy analysis.

Revocation of Canadian Citizenship: Remove from law the revocation of citizenship of citizens with a second citizenship when convicted of certain crimes. Dual citizens should not be discriminated against on the basis of a second citizenship. *[Update: Amendments introduced in late February to this effect.]*

Oversight of Consular Policy and Cases: Initially ensure the House of Commons Committee on Foreign Affairs or a sub-committee assume formal responsibility in matters of consular policy and cases. In the longer term explore the establishment of an independent authority reporting to Parliament to deal with consular policy and cases and to receive from the public complaints on consular services.

International Conference on Consular Relations: Canada should play an active role in seeking international review of consular relations, including the Vienna Convention on Consular Relations. To that end Canada should host an international conference on the matter in 2017, the 50th anniversary of the coming into effect of the Convention.

Introduction

CONSULAR PROTECTION, OR services to Canadians in difficulty in foreign countries, has never loomed large in the activities of the department of Foreign Affairs or in its current iteration, Global Affairs Canada. There have been efforts to provide the resources and skilled people to deliver such services and today, despite public complaints to the contrary, the ability of the department to provide consular services is probably better than at any time in its history. However, over the past decade, there have been a number of significant changes in the policies governing such services. These have seriously undermined the universality of the services and do not ensure Canadians are treated by their own government with equity, fairness and consistency.

The government elected on October 19 has not made any specific reference to these issues either in its election platform or in the letters of instructions to newly appointed ministers within the Global Affairs Canada portfolio. Equally, during the election campaign itself, there were few, if any, references to the needs of Canadians in foreign countries, nor an interest in examining the matter in the post election period.

Daily stories in the media of these difficulties remind us of the importance of the matter to a large number of citizens. Recently six Canadians died in a murderous attack on a hotel in Ouagadougou, while a few days earlier another died on the streets of Jakarta. Hundreds languish in foreign prisons on specious charges while others need urgent medical attention or evacuation from the world's trouble spots.

In the past few years an insidious doctrine has been introduced governing such services. This doctrine suggests that first and foremost Canadians are primarily responsible for solving their own problems. This is akin to emergency room medical personnel screening patients on the basis of their life styles or the accidents they may encounter on life's perilous journey. Equally, the previous government was quick to suggest that the problems of Canadians overseas were due to the actions of foreign governments, seeking to limit the responsibility of the Canadian government to provide appropriate assistance. While this is a significant element in some cases, the Government of Canada must accept full legal responsibility in ensuring that everything possible is done to assist such Canadians.

A few weeks ago Amnesty International in association with the Fahmy Foundation released a "Protection Charter." The Charter provides "principles to guide Canadian law and policy reform" in order to strengthen and make more effective "Canadian government action to defend the rights of Canadian citizens and individuals with close Canadian connections." The Fahmy Foundation was created by Mohamed Fahmy, a Canadian journalist, who was wrongfully imprisoned in Egypt for his work during the recent but unfortunately short Arab spring of political change. Mr Fahmy was released and permitted to return to Canada, and he has made it his work to bring into "sharp focus the urgent need to reform and strengthen the laws, policies and practices that guide Canadian government action in such cases." This report, which was undertaken simultaneously with the development of the Amnesty International Protection Charter, has some of the same objectives.

This report brings together various issues associated with assistance to Canadians overseas and suggests various corrective actions that could be taken by the new government. The corrective actions include both policy and legislative initiatives and in their collectivity would create greater equity, fairness and consistency in the treatment of Canadians who go beyond our borders for a wide range of reasons.

In all of this it is important to emphasize that the consular function does not carry with it the need to pass judgement on the activities of consular clients. Rather it operates independently of such judgements. Instead, it seeks to establish and require standards of conduct by governments in how individuals are treated. In the international arena the rule of law in this area remains a fragile flower and there is a reluctance by some governments to see it flower further. Canadian policy and actions on behalf of Canadians outside of Canada should recognize this and ensure nothing is done to make

matters worse. Rather there is a need for Canadian policy to recognize the need for urgent action.

Explanatory Note: The terms Consular Protection, Consular Relations, and Consular Services are used interchangeably to describe the range of services that countries provide in support of their citizens in foreign countries. In general, these terms largely refer to the same issues. Occasionally the term "diplomatic protection" is used in the consular context but it also has a larger meaning and is not used in this paper.

Background

CANADIANS TRAVEL. FOR millions each year the travel is far beyond the borders of Canada, and it is a rare part of the world that never feels the tread of a Canadian shoe. There are no precise figures but it is the conclusion of many that more than five million Canadians are outside the country at any one time. That represents one seventh of the population. Entry records for Mexico and Cuba register more than a million Canadians arriving in each country each year, representing a significant element in the economic well-being of these two countries. It also reflects the vagaries of the Canadian climate, where February needs leavening by a warm sun, sea and sand. There are also hundreds of thousands of Canadians who reside in foreign countries for education, work, family connections or retirement. It is estimated that there are approximately one million Canadians in the United States, over 300,000 in Hong Kong, and tens of thousands in the United Kingdom, France, Germany, Italy, India, the Philippines, Lebanon and Mexico.

Canadians are not exceptional in embracing international travel. For each of the past three years more than a billion people travelled internationally. Forecasts suggests that in another decade or so the number of international travellers will exceed two billion, in excess of 25 percent of the world's population. This travel and its associated industries — aviation, ocean cruising, insurance, banking, tourist support services and accommodation — is a seven-trillion-dollar element in the global economy. For many countries it is the foundation of economic well-being. And for those who travel, it pro-

vides the hopeful foundation for bridges that cross the great chasms of ethnic, religious, economic, political, and increasingly, climatic strife.

The success of the postwar aviation industry provided the foundation for this travel. Technological advances produced aircraft with speeds ranging from 150 knots to those pushing the speed of sound - and for a short while, in excess of that. Equally the range of such aircraft is now pushing ten thousand nautical miles. Today it is possible to travel to any point on the earth's surface in less than twenty-four hours (although some would say your luggage will take a little longer). Ships are not far behind in relative size and speed. A few years ago there was a proposal for a cruise ship large enough for a Boeing 747 to land on its top deck. The ship did not get built, but technologically it remains feasible.

During the postwar period the world made consistent progress in lessening barriers in the movement of goods and services. World-wide, multilateral and bilateral trade and economic agreements have proliferated, ensuring that for the first time in history there is a global economic system, and the term globalization became part of our daily conversations. A few years ago it would have been considered fanciful that an economic "cold" in China would affect us all. Today it is daily fare in our news.

It is accepted that this lowering of economic barriers was and is an essential element in improving the lives of billions in all parts of the world. But during the same period some of the early initiatives in support of international travel have largely withered and died. Visa-free travel, facilitation by governments of entry and departure procedures, and the idea that the International Civil Aviation Organization (ICAO) had a role to play in easing international travel have all disappeared from the international agenda. In western Europe the countries of the Schengen Agreement providing for borderless travel, reeling under the mass influx of refugees from periphery countries, are slowly re-instituting historic border control measures.

Governments the world over have decided the threat to security and safety, as represented by a variety of non-state actors and individuals from all parts of the world, needed collective action, including significant controls on international travel. It has long been recognized that aircraft represent a vulnerable and available target for those seeking to make large public statements or achieve narrow political or criminal objectives. The first hijackings and bombings of aircraft date to the early days of passenger air travel and have remained a constant danger ever since. The 1960s and 1970s saw a proliferation of such acts, where to board an aircraft gave promise of a stopover in Havana or Algiers. The international community through

common action gave such acts universal criminal status, and the screening of passengers, luggage and freight have restored a high level of security to commercial aviation. But as the destruction of Air India Flight 182 over the North Atlantic on June 23, 1985, or Metrojet 9268 over Sinai, Egypt, in late October 2015 demonstrate, there will always be tragic gaps in the ability of governments to protect all.

Ships have not had the same attraction for those wishing to inflict harm, although there have been occasional attempts to do so. But as recent incidents have shown, the increasing size of the ships with thousands of passengers brings with it the possibility of health hazards that turn such travel into nightmares for many.

Moreover, as this is being written, the world is now recovering from the Ebola health emergency and is at the leading edge of one associated with the Zika virus, which first emerged in 1947 in the Zika Forest a few miles west of downtown Kampala, the capital of Uganda. In 2009 the H1N1 avian influenza virus was identified as a global pandemic, and some 17,000 died. Since then there have been H5N1, H7N9 and H10N8, also all avian influenza viruses, which kill some 30 to 60 percent of their reported human victims. In 2002–03 it was SARS, and then MERS.

These, with more to come, bring home to everyone that international travel promotes the spread of diseases that a few years ago were footnotes in our daily lives. The speed of the spread of such diseases is at least equal to that of the modern traveller. As with generals always re-fighting yesterday's war, little attention is expended on dealing with international health emergencies and pandemics; instead security measures by governments continue to dominate international travel. Not surprisingly, deaths from diseases outnumber those from political violence by enormous factors.

Common action by the international community has reduced the attacks against aircraft, seemingly without affecting the willingness of millions to board flights to distant destinations. Still, it is apparent that some of the security measures now in place are in need of review, revision and possible elimination. Recent news stories in Canada illustrate the problem, revealing that "no fly lists" do not contain sufficient information to positively identify the intended target. A name in and of itself is insufficient for positive identification. The absence of a date of birth or other biographic identifiers has meant children or other innocent persons are identified as being potential risks to flight safety.

Other than the minimization of risks to travel in this age of the globalization of political issues, the treatment of foreigners by national govern-

ments throughout the world has seen little to no concerted international action. The norms as reflected in the 1963 Vienna Convention on Consular Relations (VCCR) are largely customary ones and recognizable by those attending the Congress of Vienna in 1815. The 1963 Convention overwhelmingly provides for the establishment of consular relations between states — as its title clearly states — and establishes few new ones providing protection for foreigners who encounter problems with local authorities or local conditions. The fundamental rule is that foreigners have no protections other than those that are available to citizens. As such, it denies to persons unfamiliar with language, laws, procedures and mores a more equitable standing before the laws and courts of a foreign country.

The one improvement in the 1963 Convention was the obligation of a government to notify a foreigner arrested or detained of their right to be in touch with the consular authorities of their country of citizenship. However, this treaty obligation did not include standards governing such contact, and today the ability to assist a citizen in trouble in a foreign country is governed by the vagaries of the local justice system, especially those associated with police and security authorities. Equally, the treaty does not establish an obligation for the country of citizenship to take any action at all on behalf of its vulnerable citizens. The VCCR only creates the environment of consent within which assertive consular protection is possible. However, two more recent UN conventions, on Migrant Workers and Disappearances, extend the right of consular notification and improved access.

Equally troubling, especially in an increasingly migratory world, is the lack of any meaningful norms for the treatment of persons with more than one citizenship, despite its prevalence[1]. Generally, the only international norm on the matter of dual citizenship, or as it was called at the time, dual nationality, is one that was codified in a still valid League of Nations 1930 treaty. That treaty denies to the government of a person with its citizenship the right to provide "diplomatic protection" in a second country of citizenship. While that "norm" has weakened over time, countries do provide (or attempt to provide) consular services to a citizen in their country of other citizenship. Today, there is little to no international law to provide norms in relation to this significant characteristic of our modern world.

These issues, among others, are the warp and woof of providing consular assistance to Canadians in difficulty in foreign countries. The media furnish daily testimony of these difficulties and more often than not, those affected, their families and Canadians generally do not quietly accept the current limitations in providing meaningful or acceptable assistance, or in

legal terms, *protection* of Canadians, in a foreign country. There have been low-level discussions of the possibility of convening a review conference for the 1963 Convention in the hope that additional protections might be negotiated and included in a new version. However, there is little enthusiasm from the 177 signatories to the Convention for such a conference and, as a result, the norms of 1963 and earlier, live on.

Beneath this gloomy larger picture there are glimmers of interest and action by a few countries concerned with this situation. In 1963, the source countries for the millions of Asians who are now international tourists were largely uninvolved in the negotiations for the VCCR; today they have become a large and constant feature of such travel and are a concern for their governments in the demand for consular service**s.** From Japan, Korea, and now especially China, millions travel to the far reaches of the world and collectively have a very significant impact.

This spring it is expected that some six million Chinese will travel overseas during the Spring Festival Holiday. China has signed visa-free agreements with 106 countries and already 53 countries allow Chinese tourists to travel without visas, or provide visas upon arrival. The Director of the Chinese Foreign Ministry's consular department recently stated that they were "facilitating visa applications on the basis of…common interests, mutual respect and mutual benefit." This would have been heresy a few years ago! He went on to say, "For those who have urgent need for work, study or family visits, we will offer favorable arrangements to help them realize their dreams."

There is some interest in global arrangements by these countries, but realizing the difficulties involved they have used bilateral and regional arrangements to solve some of their consular issues. Significantly, China in particular sees consular services for its citizens as a prime responsibility of government. It has been a participant in the Global Consular Forum (discussed below) and has used bilateral arrangements with Japan, Australia and Vietnam to assist nationals during large-scale natural disasters. China also recognizes sex tourism and medical tourism as problems requiring common action.

Of even greater import in the provision of consular services to Canadians are the changes, over the past decade, to some of the fundamentals in the consular policies of the Government of Canada. These changes have largely resulted from the difficulties specific Canadians have encountered in foreign countries. In a number of cases, decisions by courts (mainly the Federal Court) forced the government to assist a Canadian when clearly it was

not inclined to do so. As many of these cases involved new Canadians, there were legitimate fears of selective and discriminatory assistance.

The Canadians involved were subjects of considerable public comment and their names alone illustrate the basis on which charges of discrimination were made: Ahmed Said Khadr, Muayye**d** Nurredin, Omar Khadr, Abdullah Khadr, Maher Arar, Ahmad Elmaati, Abduraham Khadr, Abdullah Khadr, Abdullah Almalki, Aly Hindy, Abousufian Abdelrazik and Suaad Mohammed. In comparison, the press also reported closely on the case of Brenda Martin, who had been detained by the Mexican authorities on fraud charges. In that case the government provided extraordinary assistance, even providing for an aircraft to return her to Canada after she was ultimately freed. Unfortunately, the standard of service available to Ms Martin is not available to all.

The charge of discriminatory treatment by a government towards some of its citizens is one of the most serious that can be made. Prior to the start of the three Harper governments, in 2006, it was rare for a government to be charged with discrimination in providing a service to a Canadian citizen. There were often charges of incompetence, lack of interest or diffidence in such matters, but the idea that there was overt discrimination was not part of the public debate.

The legal right of the government to deny assistance to Canadians in difficulty in a foreign country is the most serious issue affecting those travelling. Since travel is a right recently sanctioned by the Supreme Court, ultimately it will require legislative action through statute to ensure all Canadians obtain consular assistance.

The Canadian government denies it has a legal duty to provide services to its citizens in a foreign country. This stands in sharp contrast to the many ways countries with diverse constitutional and legal regimes recognize the obligation to provide consular services. United States law provides a “clear and universal duty” to protect Americans abroad; such an obligation is a “primary obligation” for Mexican officials; Brazilian law requires “consuls to protect Brazilians abroad and to ensure compliance with rights under treaties, usage and principles of international law”; Hungary has written consular protection into its constitution as an entitlement of every citizen; and European Union law states that every citizen shall be “entitled to protection by the diplomatic or consular authorities of any Member State.” However, within the EU there is an ongoing debate as to the extent of this obligation or the need for it to be codified. The constitutions of at least twenty-eight other nations recognize the right to consular protection, while numerous

other countries have embedded this right in national laws or through judicial interpretation. (More details on Crown Prerogative can be found in Annexes B, C, D, E and F.)

Both Australia and the United Kingdom continue to emphasize that there is no obligation to provide consular services or a legal right for citizens to claim consular rights or services. The British, as with most "constitutional" issues, prefer the matter to be left undecided and let situational events decide the issues. However, it is rare for the British to deny consular services to citizens. They even went so far as to negotiate the return of British residents from the Guantanamo Bay prison. The Australian policy is much the same as that of Canada**.** Its "Consular Services Charter" states: "You do not have a legal right to consular assistance and you should not assume that assistance will be provided." It is worth noting, however, that it is a rare government in Australia that would deny consular services to a citizen or work against the interest of a citizen in difficulty in a foreign country.

A constant element in the delivery of consular services by the Government of Canada is the relative unimportance it has held within the work of Global Affairs Canada. Despite their fundamental importance to Canadians, consular affairs remain the ignored and perennial step-child of the work of Canada's foreign affairs. In the personnel and financial resources made available (even after the implementation of the Consular Service Fee), consular affairs do not have the significance they should have in the overall work of the department. Success and failure are measured by individual cases, and while this is ultimately the measure that should be used, they should also be supported by a larger effort to promote a domestic and international environment in which the consular obligations of governments are universally accepted and followed.

Earlier in the paper references were made to the Vienna Convention on Consular Relations. Negotiations for its completion ended in 1963 and sufficient signatures of ratification were in place by 1967 for it to come into effect. Since its ratification it has been defined by one over-riding concept: foreigners affected by the actions of the local government cannot expect to receive treatment that is better or different from that meted out to its local citizens. In some measure, the VCCR represented the granting of the right of countries to protect their citizens in foreign countries, but during the same period and with greater effect the international community re-affirmed the sovereignty of states and the right of non-interference in the domestic affairs of states.

In the fifty years since the ratification of the VCCR, the importance of sovereignty and non-interference has grown in importance, while the right or willingness of countries to protect their citizens overseas has diminished. While an ever-growing network of human rights treaties and the Responsibility to Protect (R2P) concept seek to undermine unbridled sovereignty and strict non-interference, there has not been a significant effort to see these rights reflected in national consular policy and law.

Article 5 of the VCCR gave countries the legal, moral and international authority to act with vigour in providing protection for persons outside of their countries of citizenship. It states:

> Consular functions consist in:
>
> (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

Some of these protections were included in such documents as the Universal Declaration of Human Rights, International Convention on Civil and Political Rights (ICCPR), Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child, and while it was only implied, these rights also applied to resident foreigners. Unfortunately, states did not seek to enforce this interpretation and this failure has limited progress on consular relations. All governments are guilty of an unwillingness to give the matter the importance it rightly deserves. As a consequence, the VCCR is no more than **a** musty and dusty tome in the legal libraries of foreign ministries around the world.

Others see more hope than the above comments suggest. In the latest version of their definitive work in this area, Luke T. Lee and John Quigley state:

> In the second half of the twentieth century, the international minimum standard came to prevail with the emergence of human rights law. Under this conception, a State owes obligations to all persons, whether nationals or aliens, under standards defined internationally and reflected both in customary law and in a network of widely ratified multilateral treaties. A consul protesting treatment of a Sending state national may rely on international standards as found in custom and treaties. As explained by Canada: "It is a basic principle of international law that whatever a State's treatment of its own subjects, aliens must be accorded an international minimum standard of treatment, including freedom from arbitrary arrest, due process in the determination of legal rights, and respect for human rights generally.[2]

The obligation a state owes to "all persons, whether nationals or aliens," is a hopeful sign but the practice often falls far short of the principle involved. Consular services continue to operate more on the basis of the willingness of a state to be helpful than any acceptance of this principle.

Unfortunately, this has been amply demonstrated by the specific actions of the previous Canadian government. Its willingness to discriminate against Canadians in difficulty overseas added to and supported the worldwide consensus that such matters were not important. Its actions, based more on ideological considerations than universal principles, reinforced the attitude of many countries where fingernail shortening, torture and executions were part of the norm. As the next section of this paper demonstrates, discrimination against specific citizens, giving national security dominance over the rights of citizens, refusal of support to some citizens facing execution, and an unwillingness to transfer Canadian prisoners all delivered a specific message to the international community about Canadian "values."

Of equal import, the policies of the previous government gave an overwhelmingly negative message to Canadian officials responsible for delivering consular services to citizens in foreign countries. If the government was willing to embed discrimination in its policies and actions, it was no surprise that officials were willing to adopt the view that "our hands are tied — all we can do is stand by and watch and let the local system play out" as part of the dominant policy. Government scientists were able to challenge restrictions on their ability to speak freely about their research, but consular officials were sufficiently few, and the issues so unknown outside of a select few, that they were unable to counter the government's errant policies. It was left to a few dedicated lawyers to bring such matters before the courts in order to obtain remedy for affected Canadians.

The Canadian policy changes that were made and accentuated over the last ten years fundamentally altered the basis on which consular services were provided to Canadians. The numerous successful applications to the courts for redress and relief strongly support the view that the changes were inimical to the well-being of Canadians, but there are few signs that officials then in charge of providing consular services argued against them. There is now an opportunity to redress this failure.

While eliminating the scope of government discretion under the Royal or Crown Prerogative for the provision of such services is of fundamental importance, there is a wide range of other matters that require urgent action to overcome previous policies and actions that affect Canadians in foreign

countries. These issues require either legislative or administrative action or both. The issues are dealt with in detail in the next section of this paper.

Apart from the Supreme Court decision in 2010 emphasizing the primacy of Crown Prerogative in consular matters, there have been a number of other court decisions critical of governmental decisions in this area. These decisions are discussed in greater detail in the next section of the paper and they clearly illustrate a wide gulf between the approach of the previous government on consular matters and the needs and expectations of Canadians.

Many of these court decisions are listed in Annex A. These decisions involve such issues as the following:

- Equality of Service
- Clemency and Protection from the Death Penalty
- Dual Citizenship
- Transfer of Offenders
- Consular Service Fee
- Voting Abroad in Canadian Elections
- Mandela Rules on the Treatment of Prisoners
- Canadian Legal Representation
- Commissions of Inquiry Involving Consular Issues
- Consular Cases Involving National Security
- Privacy and the Media
- Revocation of Canadian Citizenship
- Independent Oversight of Consular Policy and Cases
- International Conference on Consular Relations

Discussion of Specific Issues

Equality of Service

The fundamental principle in the provision of governmental services to citizens is that of equality. The absolute principle that all citizens are equal before the law must be applied when a government offers specific services to its citizens. There are often practical derogations from this principle (for example pensions for seniors are not paid to the young) but for a target group care must be taken to ensure that entitlement differences are not based on extraneous factors and are in accordance with the Charter of Rights and Freedoms. Such services are financed out of specific and general taxes and this reinforces the need for equality.

Discretion in the delivery of consular services has been available to the government since such services were first provided through the use of the Crown or Royal Prerogative principle. This prerogative essentially states that a government retains the ability to act as it deems appropriate if the matter is not covered by statute. The conduct of foreign relations, of which consular services forms a part, is not detailed by statute and therefore the government retains the absolute right to act as it considers appropriate. For consular services this is reflected in the instruction to all involved officials in a manual (the full text is in Annex B) which states:

> Most consular services are provided as a matter of discretion by virtue of the royal prerogatives; except as provided by statute; no one is entitled to claim such services as a matter of legal right.

This prerogative was rarely, if ever, used by earlier governments, but was given renewed prominence in 2010 as a result of the government's appeal to the Supreme Court of Canada of earlier decisions by the Federal Court and the Federal Court of Appeal concerning Omar Khadr. In their decisions these courts stated that Mr Khadr's Charter rights had been breached by actions of officials of the federal government. The Supreme Court in its decision agreed that Mr Khadr's rights were "violated" and the conduct of officials "did not conform to the principles of fundamental justice." Unfortunately, the Court went on to state: "It would not be appropriate for the court to give direction as to the diplomatic steps necessary to address the breaches of Mr Khadr's Charter rights." In doing so the Court gave absolute precedence to the "powers under the royal prerogative" available to the federal government in the conduct of foreign affairs. As such, discretion is legally available to the government in deciding what service it provides to Canadians in difficulty in foreign countries. As we have seen, such discretion is the basis on which discrimination is constructed and exercised. (A more complete text of the decision can be found in Annex C.)

Consular services are part of several unique governmental services that are financed wholly by the users of the services. Each year the government collects around $100 million through the Consular Service Fee which is paid at the time a person applies for a passport. Over the past several years, efforts have been made to obtain greater transparency in accounting for this aspect of governmental finances, but so far complete accounting is not available. However, it can be stated with some certainty that the consular fees collected exceed by millions of dollars the cost of the services provided. This is contrary to the law establishing Consular Services Fees, which states that the monies collected are to be used exclusively for consular services.

The essential feature in considering the use of the Crown Prerogative in the delivery of consular services is whether it conflicts with the Charter of Rights and Freedoms. The 2010 Khadr decision by the Supreme Court made it clear that Khadr's rights under the Charter were violated. The Court, nevertheless, decided that an unwritten convention, the Crown Prerogative, took precedence over the basic written law governing the relationship between the state and its people. Both the Federal and Federal Appeal courts regarded the violation of Mr Khadr's rights as a significant event and did

not believe that Crown Prerogative trumped the effort for a remedy. The Supreme Court of Canada, however, appears to have made a political decision. At the time the Court was under fire for a series of decisions contrary to government policies and Mr Khadr's rights under the Charter were sacrificed.

The elimination of Crown Prerogative from the provision of consular services is relatively easy to obtain. It could be done by parliamentary resolution or, in the longer term, specific legislation that would provide the statutory basis for the delivery of consular services to all Canadians irrespective of how citizenship was obtained. Equally, the resolution or legislation could establish in law the services that would be provided and where they would be delivered. In the past few years there were attempts through private members' bills to have such a law enacted, but they did not succeed. The legislative route could be a lengthy process, and in the meantime, it is possible for the government to simply declare that consular services are not discretionary but available to all Canadians in accordance with the Charter.

The nature of consular services is such that, in addition to the Charter, there is a need for other standards such as procedural fairness and recognition of reasonable expectations when a citizen seeks assistance from government. In a significant way the Federal Court, in its decision of March 4, 2009, concerning the government's policy change on seeking clemency for Canadians sentenced to death abroad, highlighted these issues. Further details on the decision are in the next section of the paper.

Clemency and Protecting Canadians from the Death Penalty

The last executions in Canada occurred in December 1962, and in 1976 the Canadian Parliament eliminated the death penalty. In 1987 Parliament defeated a bill to restore the death penalty. There have been occasional suggestions for its restoration, but Canadians have been relatively comfortable with its removal from the Criminal Code. Consistent with this action in Canada, it became the policy of successive governments to seek clemency for Canadians sentenced to death in foreign countries.

There were several such cases in the United States, Saudi Arabia, Singapore, United Arab Emirates, Vietnam and elsewhere, where the government intervened and generally succeeded in having the death penalty commuted to a lesser penalty. Two unsuccessful efforts involved Stanley Faulder in the United States and Nguyen Thi Hiep in Vietnam. In most of these cases,

before a request for clemency became necessary, consular officials were engaged in a variety of actions in support of the accused Canadian. (Further details are available in the Affidavit by the author in the Ronald Allen Smith case before the Federal Court.)

The policy of seeking clemency in all cases continued until 2007, when the government decided it would alter the basis on which clemency would be sought on behalf of a Canadian sentenced to death. The case that prompted the change involved Ronald Smith, a Canadian sentenced to death in the state of Montana. The government announced that it would no longer support an application for clemency by Mr Smith, and subsequently his lawyers filed an action with the Federal Court requesting its intervention. In a decision dated March 4, 2009, the Court ruled that it was not questioning the right of the government to change its policy on such a matter. But as with several other cases that had gone to the Federal Court, the Court did insist that there was a need for procedural fairness in the process through which policy changes were made. The Court wrote:

> I have no hesitation whatsoever in finding that the reversal of the Government's position after more than 20 years of unqualified assistance to Mr Smith gave rise to a reasonable expectation that any decision to withdraw support would not be applied without a full consultation with him and with his legal advisors followed by a fair and objective consideration of the appropriateness of applying any new policy to the facts of his case. That determination would be required to consider the implications arising from the Government's midstream and very late reversal of the earlier decision to afford him full support. Fairness also requires that there be a clear articulation of any new clemency policy such that Mr Smith could understand it and an appropriate decision-maker could fairly apply it. Absent such clarity, any resulting decision will always be arbitrary and unlawful…
>
> [41] The failure by the Government to recognize any of these procedural rights represents a fundamental breach of the duty of fairness and the decision to withdraw support from Mr Smith for clemency must on that basis be set aside.

In the aftermath of the decision by the Federal Court, the government introduced a new policy on the procedures it would follow with respect to interventions for clemency following a death sentence. Essentially, the new procedures would allow the government to decide on interventions for clemency based on a variety of subjective factors, such as the degree of democ-

racy within a country and the legal procedures surrounding the death sentence. A decision by the Government of Canada as to whether or not it would seek clemency for a Canadian sentenced to death would then be based on the assessment of the information. For example, it would be unlikely that clemency would be sought for a Canadian under a death sentence in the United States but clemency would likely be sought for a Canadian under such a sentence in Saudi Arabia. These new rules by the previous government are still in effect, as they were renewed on November 30, 2015, on the Global Affairs Canada website.

These new rules have been criticized from the time they were implemented as being inimical to the well-being of a Canadian under a death sentence. Essentially the new rules require a subjective judgement as to the quality of justice in a specific country rather than being based on Canada's objection to the use of the death penalty. To suggest that the use of the death penalty is more legitimate in one country than in another would probably ensure that a Canadian would receive little to no help in such situations. Only the earlier policy of seeking clemency for all Canadians sentenced to death would provide equality of service. The new policy allows ministers and officials to discriminate between Canadians in difficulty overseas and in doing so contribute to their possible execution.

To change the existing rules is relatively easy in the short term. The government would only need to announce that clemency would be sought for all Canadians sentenced to death irrespective of where the sentence was imposed. The new policy would be in accordance with Canada as an abolitionist state and not based on the quality of justice in the sentencing state. In the longer term the new policy could be reflected in new legislation establishing the legal responsibility of the government to provide consular services.

[The above section was prepared before Foreign Minister Dion put an end to the policy of the previous government of not seeking clemency for some Canadians sentenced to death in a foreign country. On February 15, 2016, Mr Dion in the presence of Zeid Ra'ad Al Hussein, United National High Commissioner for Human Rights "affirmed that the Government of Canada opposes the use of the death penalty in all cases, everywhere, ending the selective approach followed since 2007. As of today, the government will undertake clemency intervention in all cases of Canadians facing execution. This change in policy is rooted in the Government of Canada's opposition to the death penalty as well as its commitment to providing the highest standard of consular assistance. In short, Canadian officials will now seek to determine how and

when to undertake clemency intervention, and not whether clemency intervention should be undertaken.]

Dual Citizenship

There are millions of Canadians who also hold the citizenship of another country. In some cases, they may hold the citizenship of two or more countries. This is a significant characteristic of our increasingly migratory world. Persons immigrating to Canada often carry with them the citizenship of their country of birth or that of another country in which they resided. There is nothing in Canadian law that prohibits the retention of a second citizenship, and for many it provides a useful and valuable attribute in managing their personal and public lives. There is no evidence to suggest that such persons are in any way "less" Canadian for doing so.

Many countries have adopted the same approach as Canada in permitting persons to have more than one citizenship. Others have not, and as a result there are often problems for Canada in providing consular assistance to Canadians who encounter difficulty when they are in their country of second citizenship. Some countries, including Canada, often require a citizen to present themselves as a citizen when they enter from another country. And it is often difficult, if not impossible, for a person to renounce a second citizenship.

International law has not provided any safeguards or norms for persons who have a second citizenship when they encounter difficulties in another country. The only treaty on the matter dates back to 1930 and it prohibits a country from seeking to provide "diplomatic protection" to a citizen when they are in a country of second citizenship. This treaty is still on the books but Canada, which was an original signatory, expressly denounced it in 1996. A number of other countries are still signatories and others follow its proscriptions.

Many Canadians are seriously affected by this situation. In recent years Canadians with the citizenship of Iran, Iraq, Syria, Egypt, Saudi Arabia and China have been arrested and imprisoned and Canada has not been able to provide effective consular assistance despite serious efforts to do so. In the case of China, Canada was able to negotiate a treaty in 1997 that provided some measure of protection. The treaty gave Canada the right to provide consular protection if a Canadian entered China using a Canadian passport. However, if the Canadian entered China using a Chinese passport,

then Canada did not have the right to provide consular protection. The relevant article of the treaty states:

> A national of the sending State [Canada] entering the receiving State [China] with valid travel documents of the sending State will, during the period for which his status has been accorded on a limited basis by visa or lawful visa-free entry, be considered a national of the sending State by the appropriate authorities of the receiving State with a view to ensuring consular access and protection by the sending State.

Over the years there have been efforts to obtain international agreement on determining the predominant citizenship and the provision of consular protection for persons with dual citizenship. So far nothing of consequence has emerged and today the provision of consular services for persons with dual citizenship when they are in the country of second citizenship is difficult, if not impossible. There is a need for the Canadian government to ensure that citizens are fully aware of the dangers they may encounter when they visit their country of second citizenship. In doing so the government should also make clear that it will make every effort to provide consular services in such situations.

The need for international agreement on issues associated with dual citizenship is urgent and is an appropriate matter for inclusion in any revisions to the Vienna Convention on Consular Relations or an associated protocol. The Government of Canada should make efforts to have the United Nations create a review conference for the Convention. The matter of a review conference is discussed below in the section "International Conference on Consular Relations."

The issue of consular services for dual nationals will remain a long-term one as there is little to no international consensus on the matter. While specific agreements similar to the one with China are possible, there is also a requirement for officials to develop practical measures that might be used to assist in specific situations. An obvious one is to argue humanitarian and compassionate grounds for access or support to a dual national on behalf of family resident in Canada.

Transfer of Offenders

More than forty years ago Canada, along with several other countries, sought international support for treaties that would permit the transfer of persons

convicted in a foreign country to their country of citizenship to serve their sentence. The idea found widespread support; before long there were bilateral treaties reflecting the principle, and since then the idea has flourished. Regional treaties by the Council of Europe, the Commonwealth and the Organization of American States have been negotiated, and today there is a network of treaties that permit the transfer of such prisoners. Canada now has prisoner transfer treaties with nearly one hundred countries. These treaties add to the extensive network of treaties such as mutual legal assistance and extradition that permit international cooperation on transnational crime.

The central element in the prisoner treaties was to permit the transfer of a convicted person to a prison in his/her country of citizenship to serve a sentence and to be assessed by national prison authorities before release. The treaties thus allowed persons to serve their sentences in an environment close to family and friends and in familiar institutions. Equally, the treaties allowed for the authorities of the country of citizenship to assess progress on rehabilitation and the appropriate time for release. This last point is of particular importance since a Canadian serving a sentence in a foreign prison to completion has the Charter right to return to Canada without the intervention of Canadian authorities. The treaties, by allowing for controlled transfers, overcame this potential threat to the safety and security of Canadians.

These treaties worked well (there is no evidence of subsequent crimes committed by such persons once released from a Canadian prison) and without serious problems for thirty or so years, with nearly all of the prisoners who applied for transfer accepted by Canada without judgement as to the nature of their crime in a foreign country. Between 1978, when Canada signed its first treaty with the United States, and 2005, more than 1400 Canadians were transferred from foreign prisons to become prisoners in Canada. The majority were from prisons in the United States, but there were significant numbers from Costa Rica, Mexico, Thailand, Trinidad and Tobago, and the United Kingdom.

During that same period only five were denied transfer and these rejections related to questions as to whether or not a person was a Canadian citizen. All governments during that period, Liberal and Conservative, understood and accepted the value of such transfers for Canada and Canadians, and made decisions accordingly.

This approach changed with the election of the first Conservative government in 2006. The then Minister of Public Safety, Stockwell Day, rejected applications despite recommendations from officials that a prisoner be accepted for transfer. From January 2006 to January 2008, 117 Canadians were

accepted for transfer but 61 were rejected. Very few if any substantive reasons for the ministerial denial of transfer were offered except that a person might represent a threat to Canadians, despite the fact that a person upon transfer would be incarcerated in a Canadian prison. (Annex G has further details on the transfer of prisoners.)

Not surprisingly, these ministerial rejections were appealed to the Federal Court, and the first of several such decisions was released in August 2008 concerning Arend Getkate, a Canadian imprisoned in the United States. The Federal Court was scathing in its decision, stating that the minister was "wholly unreasonable," that the "evidence points in a wholly opposite direction" to the decision made by the minister, and that the minister "unreasonably disregarded this evidence." In subsequent years, other ministerial decisions were appealed to the Federal Court and in another decision in January 2012 the Court ruled that the minister of the day, Vic Toews, did not provide satisfactory reasons to explain why a person was rejected for transfer. The decision went on to cite twelve other cases where "this is the type of pro forma decision under the act [International Transfer of Offenders Act] that has been repeatedly found to be inadequate."

The previous government had a penchant for turning adverse judicial decisions to its advantage. So with the judicial decisions on prisoner transfer. In its 2014 Omnibus Crime bill the government amended the existing legislation to give the public safety minister more discretion, or in the view of many, absolute and arbitrary discretion, when dealing with transfer applications.

As the law now stands, the minister can consider the following factors in making a decision to consent to a transfer: the security of Canada; public safety; possible future criminal activity; possible abandonment of Canada as a place of permanent residence; possible injury to the offender's safety or security by a foreign prison system; social or family ties in Canada; health; refusal to participate in rehabilitation or reintegration; acceptance of responsibility for the offence leading to the conviction; the manner in which the offender will be supervised after transfer; and cooperation with law enforcement agencies.

These are large and subjective factors, but the minister is also given unlimited and arbitrary discretion to consider "any other factor…considered relevant" in determining whether to consent to the transfer of a Canadian offender. The effect of these provisions is to insulate future ministerial decisions on transfer from further judgement by the courts. As such, the law now gives the minister total discretion in deciding who is going to be trans-

ferred. The legislation itself has yet to be challenged in the courts, but there is no doubt that this level of discretion will undermine the purpose of the law and will give rise to charges of discrimination.

Quite aside from any Charter challenge in the courts, Parliament gave the minister this level of discretion and undoubtedly Parliament can take it away. This discretion is contrary to the intent of the transfer treaties and, when exercised, will simply postpone possible problems until after the final prisoner release date. It is difficult to find another area of law where a minister is given such open-ended discretion in affecting the well-being of Canadians. It would be appropriate for the new government, as part of its legislative program, to amend the International Transfer of Offenders Act so that ministerial discretion is restricted to a level consistent with the objectives for controlled transfer of Canadian prisoners serving sentences abroad.

Consular Service Fee

In 1996 the government of the day implemented a policy whereby those needing consular protection would pay for such services. The Consular Service Fee was created requiring adults applying for a Canadian passport to pay a fee of $25, which would be used to support the services needed as they travelled abroad. The level of the fee was based on the cost of delivering consular services at the time — approximately $35 million — and would grow as more Canadians purchased passports, now an almost universal requirement for travel outside of Canada. As well, fees are charged for such other consular services as notarial acts, financial transfers and several administrative functions.

Over the years since 1996, well over a billion dollars has been collected in Consular Service Fees, while the cost of providing services is considerably less. The Auditor General in a March 2008 report noted that in 2006–07 the government collected approximately $1.9 billion in service fees. In the section of the report devoted to the consular service fee, the Auditor General wrote that the department of Foreign Affairs collected more "in consular fees than the cost of providing the related services." The report went on to note that Foreign Affairs agreed that "its costing methodology for consular services fees needs to be reviewed."

Global Affairs Canada website Travel.gc.ca continues to proclaim that "All the fees collected are used to maintain and improve Canadian consular services around the world." Unfortunately, there is no annual test of the ac-

curacy of this statement. Recent reports have indicated that, in the last fiscal year $104 million was collected in consular fees, while the departmental performance reports to the Treasury Board stated Global Affairs Canada spent only $50 million on consular services in 2014–15. The performance report for 2015–16 states that expenditures were expected to be approximately $49 million. No detailed accounting is available for the fees collected in excess of the expenditures.

This situation has existed since the fee was implemented in the last years of the previous century. Over the four-year period from 2009 to 2012 the collected fees sequentially were $86.6 million, $95 million, $86 million, and $94.5 million. The sale of passports through that period remained relatively constant; however, no reasoning is given for the variances. During the same period expenditures for consular services ranged in the mid to low sixty-million-dollar range.

Apart from the Auditor General's request for better bookkeeping for the Consular Service Fee, nothing of any consequence appears to have been done. The government did not undertake a survey of the public to ensure that the fee and services were appropriate. However, on several occasions the government has asserted that the cost of providing consular services exceeds the fees collected. An equally troubling aspect of the delivery of consular services is the previous government's steadfast assertion that such services are discretionary, forming part of the Crown Prerogative. There is a touch of irony in this as the government is collecting fees for a service that it has no legal duty to provide.

It would be appropriate for the new government to review the amount Canadians are paying for consular services through the Consular Service Fee. Such a review has never been undertaken, and to do so would provide Canadians with a better understanding of why there is a discrepancy between the fees that are collected and the stated cost of providing consular services. The review should be submitted to Parliament.

Voting Abroad

The Canada Elections Act has provisions for Canadians who live outside Canada to vote in federal elections. These provisions are constrained by the requirement for Canadians to have resided abroad for less than five years. Canadians residing outside Canada who are employed by the federal public service or that of a province or by an international organization of which

Canada is a member and to which it contributes are exempted from the five-year restriction.

Special voting kits are sent to every person in the register of electors residing outside Canada (there is a process for individuals to register) and their votes are returned to Elections Canada, which distributes them to the appropriate electoral district. These arrangements have been in place since 1993 and a small number of Canadians who meet the five-year rule do vote. In the 2011 election approximately six thousand voted. The figures for the 2015 election are not yet available and there may be an increase from the 2011 numbers.

The Superior Court of Ontario ruled in 2014 that the five-year restriction on voting was unconstitutional. Its decision was appealed to the Court of Appeal for Ontario which ruled in 2015 that the restriction disenfranchising Canadians who lived abroad for more than five years was constitutional. The Court of Appeal majority decision hinged on preserving the nebulous concept of a Canadian "social contract" put forward by the Government of Canada where:

> "[t]he electorate submits to the laws because it has had a voice in making them." Because expatriates need not "submit" to the laws of Canada, it is fair to exclude them from participating in making them. Citizenship by itself is a guarantee (entrenched in the Canadian Charter of Rights and Freedoms) of some rights. However," [a]dding a layer to citizenship, residence and physical presence can have an important influence on rights and obligations of Canadians."
>
> (From Leonid Sirota, Why Disenfranchising Canadians Abroad is Wrong, July 26, 2015).

Mr Sirota goes on to argue that the Ontario Appeals Court was wrong and quotes extensively from dissenting Justice Laskin who argued that this denial of voting "...case raises the constitutionality of the last significant piece of federal legislation denying the right to vote to a group of Canadian citizens."

Section 3 of the Charter of Rights and Freedoms states, "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Section 6. (1) of the Charter states, "Every citizen of Canada has the right to enter, remain in and leave Canada." Some of these sections can be overridden by Section 33, the "Notwithstanding" clause, which states "33. (1) Parliament or the legislature of a province may expressly declare in

an Act of Parliament or of the legislature, as the case may be, that the act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." It is important to note that Section 3 of the Charter is excluded from the possible use of the "Notwithstanding" clause.

The Government of Canada's creation of the "Social Contract" concept in order to defend the denial of the right to vote to a Canadian citizen living outside of Canada for more than five years is without precedent in our laws. Intellectually, the idea of a social contract between citizens and governments was constructed by political and social philosophers from centuries long past. It might have had some value when journeys to the far corners of the world were lengthy, dangerous and mostly one-way. But in today's world of instant communications, where two-way journeys are easily and frequently undertaken, the idea that some citizens do not "submit" to the laws of Canada is an artificial construct without serious validity. Denying a Charter right to vote in such situations is to introduce a limitation that should be removed.

It is expected that the decision by the Ontario Appeals Court will be appealed to the Supreme Court of Canada. The government should ensure that when that happens, it abandons the argument of a "social contract" and announces that it will amend the Canada Elections Act so that all citizens of Canada are permitted to vote irrespective of their location.

Mandela Rules for the Treatment of Prisoners

In May 2015 the United Nations Commission on Crime Prevention and Criminal Justice approved by acclamation the Mandela Rules for the treatment of prisoners. The rules, named in honour of Nelson Mandela, significantly revise an earlier set of rules, the "United Nations Standard Minimum Rules for the Treatment of Prisoners." The earlier rules were drafted in 1955 but gained little acceptance internationally. Generally, countries were not willing to accept international "rules" for the management of their prison systems.

The new Mandela Rules include an absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. They also restrict the use of solitary confinement and provide new rules on the treatment of women prisoners and persons with disabilities, the provision of health care, independence for health workers and safeguards on the use of restraints. As well, the new rules call for July 18 to be designated as Mandela

Prisoner Rights Day with the hope of promoting humane conditions of confinement and raising awareness of prisoners as a continuing part of society.

It is not yet clear what role Canada played in developing the new rules, but their value for the hundreds of Canadians incarcerated in foreign prisons is immense. Even the earlier standards which set minimalist rules were seldom available to provide greater protection for Canadians jailed in inhumane conditions.

The treatment of Canadians in foreign prisons remains a difficult ongoing aspect of consular services. The new government should give immediate support to these new rules and ensure that they are firmly reflected in Canadian prison policy. As well, it is important that the new rules be used by consular officials in seeking better conditions for Canadians imprisoned abroad. The treatment of Canadians in foreign prisons can be a reflection of how persons are treated in Canadian prisons. Canadian support for the Mandela rules abroad will always be measured by others against how prisoners are treated in Canadian jails.

Canadian Legal Representation

Annex A provides details on some of the consular cases where Canadians resorted to the courts in order to obtain redress and relief from the actions of the Canadian government on consular matters. In other instances, Canadians have retained legal representation in Canada in order to assist with their problems in a foreign country. The retention of Canadian counsel in such instances is a relatively new development and there have been frequent complaints from counsel about their ability to obtain information from governments, both Canadian and foreign. Such information is often critical in providing advice and services to their clients.

For a variety of reasons many Canadians arrested overseas are unable to retain a Canadian lawyer to assist them in dealing with their legal problems. Recently the Foreign and Commonwealth Office (FCO) of the British government announced the establishment of a: "FCO Pro Bono Panel of Lawyers. The Panel will provide free legal advice to British prisoners overseas who are unable to afford a lawyer in the UK and cannot get legal aid. It will be available to assist a prisoner's overseas lawyer, particularly on human rights questions such as fair trials. It will also help the FCO implement its new proactive clemency policy by providing advice on miscarriages of justice and sentencing." (FCO Consular Manual, Paragraphs 23–29, (https://

www.gov.uk/government/publications/consular-services). Global Affairs Canada should investigate the establishment of a similar panel in Canada.

It does not appear there are any guidelines or instructions for officials on how to respond to such requests from Canadian counsel and there is often considerable confusion as a result. Global Affairs Canada should review this matter with a view to ensuring that there are published guidelines and instructions for officials in responding to requests from Canadian lawyers for information. Such instructions should, as a guiding principle, seek to assist and support such requests for information.

Commissions of Inquiry Involving Consular Issues

Ten years ago two commissions of inquiry were established to investigate the actions of Canadian officials in dealing with four Canadians who had been detained in Syria and, in the case of one, in Egypt as well. The first was the *Report on the Events Relating to Maher Arar* by Justice Dennis R. O'Connor[3]. The second was the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* by the Honourable Frank Iacobucci[4].

In their detailed reports both Commissioners provided numerous recommendations concerning consular services as well as recommendations for the RCMP and CSIS. The recommendations by Justice O'Connor relate to the policies and practices of the department of Foreign Affairs: he stated that there should be a "protocol to provide for coordination and coherence across government in addressing issues that arise when a Canadian is detained in another country in connection with terrorism-related activity."[5] Among others, Justice O'Connor also recommended the following:

> The Canadian government should develop specific policies and training to address the situation of Canadians detained in countries where there is a credible risk of torture or harsh treatment;
>
> If there is credible information that a Canadian detained abroad is being or has been tortured, the Minister of Foreign Affairs should be informed and involved in decisions relating to the Canadian response;
>
> Canadian officials should normally insist on respect of all of a detainee's consular rights;

> Consular officials should clearly advise detainees in foreign countries of the circumstances under which information obtained from the detainees may be shared with others outside the Consular Affairs Bureau, before any such information is obtained.[6]

Justice Iacobucci in his report made numerous observations concerning the delivery of consular services by Canadian officials to Mr Almalki, Mr Abou-Elmaati and Mr Nureddin.

These two reports are the only comprehensive and detailed investigations by outsiders on the delivery of consular services. There is little evidence of the impact, if any, of their recommendations and observations on the delivery of consular services. It would be appropriate for their work to be reviewed — it is the tenth anniversary of the O'Connor report — and a public report made as to whether or not any specific changes have been implemented. Of particular importance would be the recommendations associated with evidence or suspicion of torture by the arresting authorities. It is an increasingly common feature of imprisonment in some countries and Canadians are often victims. If these recommendations have not been acted upon, then the government needs to either move forward expeditiously with appropriate action or provide an explanation for their failure to do so.

Consular Cases Involving National Security

As noted above, Justice O'Connor recommended that there be a protocol to "provide for coordination and coherence across government in addressing issues that arise when a Canadian is detained in another country in connection with terrorism-related activity." At one level this is an appropriate suggestion, but as such cases would involve both national security agencies and Global Affairs Canada; that is, government entities with different and potentially conflicting responsibilities for the well-being of Canadians abroad, great care should be exercised.

In the aftermath of 9/11, efforts were promoted for such a protocol but they foundered on these conflicting responsibilities. Often the lack of coordination has contributed to the dangers Canadians face overseas and, as recent history has demonstrated, even to the point of prompting their torture at the hands of foreign governments. The sharing of information about Canadians with foreign governments is already far in excess of what is either necessary or appropriate. If recent history is any indication, this will only increase in the coming years.

There is evidence the government in the near future will introduce legislation that will provide for independent oversight of the activities of the various national security organizations. As this legislation is developed and debated, it is essential that the protection of Canadians overseas be included as an important consideration. As we have seen, many citizens of Canada have been seriously affected by the exchange of information and cooperation between Canadian security organizations and those of other countries. Effective oversight must include accountability for such actions.

Privacy and the Media

The collection of personal information is an essential element in the provision of consular services. The safeguarding of this personal information is governed by the Privacy Act, and there have been few instances when such information was compromised or made public. Justice O'Connor in the 2006 report recommended (on page 368) that:

> Consular officials should clearly advise detainees in foreign countries of the circumstances under which information obtained from the detainees may be shared with others outside the Consular Affairs Bureau, before any such information is obtained.

It is not clear whether this recommendation has been acted upon by officials at Global Affairs Canada.

If there is a problem, it is that Global Affairs Canada has been too restrictive in releasing information of public interest or using the information to inform the public of existing or possible problems. Often, in the midst of a significant international crisis affecting the well-being of Canadians, the only comment from Global Affairs is that it cannot comment due to privacy concerns. Yet section 8(m) of the Privacy Act allows for the release of information in such situations. It states:

> Section 8(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> ...
>
> (m) for any purpose where, in the opinion of the head of the institution,

> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
>
> (ii) disclosure would clearly benefit the individual to whom the information relates.

Global Affairs Canada should discuss with the Privacy Commissioner for Canada appropriate measures that would permit the release of personal information as envisaged by Section 8(m) of the act. Equally, the Privacy Commissioner should provide guidelines for the use of information covered by the Privacy Act for policy analysis. This many encourage heretofore reluctant consular officials to use such information as a tool in improving consular services.

The Privacy Commissioner in a public bulletin has stated:

> ...we understand that there may be occasions when it is appropriate and reasonable to disclose personal information without consent—for health and safety, security, and other reasons related to the public interest. And Canada's privacy laws have taken this into account. Unfortunately, the provisions that allow such disclosures are not well understood and, on occasion, privacy laws are perceived as standing in the way of safety and security. This is simply not the case.[7]

It should be noted that the problem of using the Privacy Act to sidestep legitimate requests for information is one that is common to many parts of the government. The Privacy Commissioner is familiar with this use of the Privacy Act to rebuff transparency and has prepared a rebuttal, entitled *The Privacy Act and Public Interest Disclosures* which can be found at: https://www.priv.gc.ca/resource/fs-fi/02_05_d_29_e.asp.

Revocation of Canadian Citizenship

On June 19, 2014, the previous government received Royal Assent for the *Strengthening Canadian Citizenship Act*.[8] Despite its title, the new act does not strengthen Canadian citizenship but rather lessens it for many Canadians with dual citizenship; that is, with the citizenship of another country as well as Canada. The new act adds to the ground on which citizenship can be revoked. Previously, revocation was based on false representation, fraud, or knowingly concealing material circumstances relative to the application for citizenship. The grounds for revocation now include convic-

tion for terrorism, high treason, treason or spying offences (depending on the sentence received), and membership in an armed force or organized armed group engaged in armed conflict with Canada. Equally significant is that the new act allows for the Minister of Citizenship and Immigration, or his delegate, to decide on the majority of revocation cases. In some instances, the Federal Court would make the decision.

These changes are discriminatory in that they apply only to citizens with a second citizenship. The new law would not apply to citizens who were born in Canada, nor apparently to persons born outside of Canada who were fortunate in having a previous citizenship annulled by their country of birth. There are thousands of Canadian citizens who are not able to have a previous citizenship annulled, largely due to the laws and procedures of their country of birth. In effect, the changes to the Canadian Citizenship Act in 2014 established two categories of citizenship under law. This would appear to be contrary to Section 15 of the Charter of Rights and Freedoms, which states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It would be appropriate for the government to review these changes to the Citizenship Act and consider the removal of those elements that relate to persons with dual citizenship.

Update: The government introduced amendments to the Citizenship Act in late February that would eliminate the revocation of citizenships for Canadians with a second citizenship should they be convicted of various terrorism related offences.

Oversight of Consular Policy and Cases

As the single purveyor of official consular services, the Canadian government is frequently criticized for the quality of the services and often for the specific actions that have been taken. These criticisms are a regular feature of the reporting on such matters and seldom can there be an adequate response by the government due either to the requirements for privacy or the nature of the negotiations with a foreign government. As well, many consular matters involve obtaining the exceptional cooperation of a foreign government and it is a rare government, including our own, which is will-

ing to cooperate in the full glare of publicity. One case involving Brazil a few years ago was conducted with heavy news coverage and a climate of recriminations from Canadians which ensured that the Canadians directly involved spent more years in a Brazilian prison before transfer to a Canadian prison than was necessary. Although it was proven that Brazilian actions were correct and just, it has taken years to reset the relationship to anything nearing normal

In many areas where governmental actions and policies affect individual citizens, special offices, generally referred to as ombudsman, have been established that can intervene and seek redress on behalf of a citizen or support for the actions a government has taken. This is not the case with consular affairs. As matters now stand, short of the judicial system, there is no independent arbitrator available to investigate charges of governmental incompetence, inept actions or unjust policies in relation to consular affairs. As a result, in recent years many Canadians have resorted to the courts to compel more appropriate actions by government. It has proven time consuming, cumbersome, costly and procedurally challenging for individuals to obtain redress or for the government to demonstrate that its actions were appropriate. (A listing of some of these court cases can be found in Annex A.)

Consular services are unique in that citizens using and needing these services fully fund their costs. However, there is no mechanism apart from letters of complaint to the minister or media publicity, or resort to the courts, for a citizen to obtain a review of the actions of officials and ministers considered by Canadians to be insufficient, inadequate or even malicious.

There is a need to bridge this serious gap in the delivery of consular services. One possibility is the establishment of an independent office reporting to Parliament, authorized under law to investigate complaints from the public relating to consular services and the policies in place under which such services are provided. The record clearly demonstrates that the need for such an office is great and growing greater in this age of international travel in an increasingly troubled world.

In the absence of an independent office on consular services, it would be helpful for the House of Commons standing committee on Foreign Affairs, or a sub-committee specifically struck for this purpose, to be more involved in consular matters. One possibility would be for the committee to devote at least one of its regular meetings annually to a review and discussion of consular matters.

If a sub-committee were established, it could have ongoing overview of consular policy and case management. Expert opinion from within govern-

ment and without could be called to provide views on issues and problems along with recommendations for solutions. Equally, the committee could review prominent and current consular cases of concern to the public.

In recent years the practice has emerged for the government to appoint a Minister of State or a Parliamentary Secretary to assist the Minister of Global Affairs on consular matters. The idea is a good one, but its utility has been undermined by frequent changes in the person named, with the result that there is little consistency or knowledge developed on consular matters. The new government has now appointed a Parliamentary Secretary to the Minister of Global Affairs with responsibility for Consular Affairs. He is Omar Alghabra, the Member for Mississauga Centre, and, in the interim until a more permanent mechanism is found, he should be given the authority to investigate and report on the many issues relating to the delivery of consular services.

International Conference on Consular Relations

As mentioned earlier, existing international law and practice is deficient and dated with respect to a country's ability to provide consular services to its citizens. The existing Vienna Convention on Consular Relations is largely a reiteration of earlier customary international law, and there has been little effort to exploit the possibilities of its Article 5 in order to increase international consensus and new services. Article 5 states:

> Consular functions consist in:
>
> (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;...

Since then there have been additional treaties — The Hague Convention on the Civil Aspects of International Child Abduction is the most notable — but there has been no effort to try to write new international law that would see a broadening of the rules of consular services. There are also numerous bilateral consular agreements, but in the main they largely repeat and do not extend what is already in the 1963 Convention. Canada signed three bilateral agreements during the late 1990s in an effort to obtain additional protections for Canadians. One, with China, dealt with dual citizenship, and a second and a third were signed with Egypt and Lebanon respectively to

provide assistance in dealing with parental child abductions. All three remain in effect.

There have been occasional meetings of consular officials to discuss common problems. Canada has been meeting annually since 1994 with representatives from Australia, New Zealand, the United Kingdom and the United States to discuss consular matters and often to coordinate common actions and mutual assistance. These meetings continue and are useful for dealing with current issues. The scope for larger action on major consular relations is limited, however, due to the number or range of countries involved.

More recently a larger group, the Global Consular Forum, of some twenty-five countries, has met twice with the objective of greater coordination and support on consular matters. The first meeting was held in the United Kingdom (Wilton Park) in 2013 and a second was held in Mexico (Cuernavaca) in late May of 2015. Canada gave significant support to these meetings; the key points from the 2015 meeting are provided in Annex H. It is early days for this mechanism and it could be that several more meetings will be necessary in order for it to move on to specific consular issues needing international action. Canada should continue to provide support for this initiative in the hope that it can become a forum for coordinated international action on consular issues.

There have been occasional suggestions for a larger international effort to deal with the modern problems of consular services. One suggestion is for the Secretary- General of the United Nations to obtain from the General Assembly a resolution calling for a review conference for the Vienna Convention on Consular Relations. This procedure is fairly normal in international law and several treaties include provision for review at appropriate times. In the past there has not been much enthusiasm for such a conference based on the view that the little that was achieved in 1963 could come under threat.

Such a review conference could be predicated on the following:

- Identifying and managing consular issues that have become problematic over the past fifty years. These could include dual citizenship, access procedures for detained persons, emergency evacuations, prison conditions, and access to legal services for arrested foreigners.
- Application of multilateral human and civil rights agreements to foreigners

- Highlighting best practices and model agreements and understandings that could form the basis of a new or modified agreement on consular relations
- Identifying the role of technology in the delivery of consular services
- Identifying links to other organizations within the UN system and NGOs in the delivery of consular services
- Identifying the role of the private sector in the delivery of consular services.

Another possibility is for Canada to take ownership of the matter and actively support the idea of a review conference within the context of the United Nations. The fiftieth anniversary of the coming into effect of the VCCR will occur in 2017. It provides a convenient date for Canada to host an initiating conference on reforms to international law on consular relations. The support of the United Nations Secretary-General should be sought at the outset and a temporary secretariat would need to be established so that appropriate materials could be prepared and foreign experts identified.

Conclusions and Recommendations

THIS REPORT HAS been prepared to assist the government elected on October 19 to deal with the range of issues associated with Canadians who travel and reside beyond the borders of Canada. There has been very little systematic examination of these issues and it has been left to the media and occasionally the courts to highlight the problems. Equally, it is a matter that receives little attention from our universities or from human rights organizations, except for the recent initiative by Amnesty International calling for a Protection Charter. Yet it is clear from the large number of stories in the media and cases before the courts that there is a need for a systematic review of the issues involved.

The new government has an opportunity, early in its mandate, to address consular services in a comprehensive and forward looking manner. As a first step it could appoint a member of Parliament with a mandate to investigate the myriad issues involved and to provide recommendations for action. To do so would provide hope for the thousands in need of consular services.

To assist in this systematic and comprehensive review, this report makes the following recommendation for consideration by the Government of Canada.

Crown Prerogative: Introduce a parliamentary resolution stating consular services to Canadians will be provided without discrimination and the government will disavow the use of the Crown Prerogative in such mat-

ters. In the longer term, establish in law the obligation to provide consular service to all Canadians and in doing so eliminate the use of the Crown Prerogative in this area.

Clemency and the Death Penalty: Change existing policy so that clemency would be sought for all Canadians sentenced to death in foreign countries.

Dual Citizenship: Seek agreements with countries where recognition of Canadian citizenship is a problem in providing consular services and establish the obligation of Canada to extend such services to its dual citizens. In the longer term seek international agreement on a set of norms on the issue.

Transfer of Offenders: Through amendments to the International Transfer of Offenders Act, curtail the discretion available to Minister of Public Safety in considering applications for transfer by Canadian citizens.

Consular Service Fee: Establish a review of the use of the Consular Service Fee and the appropriateness of its current level. The review should be presented to Parliament.

Voting Abroad. Remove the present five-year limitation on the right of a Canadian citizen resident abroad to vote in Canadian elections.

Mandela Rules on the Treatment of Prisoners: Clearly state that Canada accepts the Mandela Rules on the Treatment of Prisoners and ensure they are reflected in Canadian prison policy**.**

Canadian Legal Representation: Establish a review of the rules governing Canadian legal representation of Canadians in difficulty abroad and provide new norms to ensure there is appropriate cooperation by officials in Global Affairs Canada on the matter.

Commissions of Inquiry Involving Consular Issues: Review the recommendations of the O'Connor and Iacobucci Commissions of Inquiry as they relate to consular policy and actions and ensure that appropriate action is taken if it is found that current policy and practices are inconsistent with them.

Consular Cases Involving National Security: Establish the primacy of the rights of the Canadian citizen when information on national security is passed to foreign governments. Consular cases with national security concerns should be included in the development of new oversight procedures and organizations for national security.

Privacy and the Media: Establish with the Privacy Commissioner guidelines for the release of privacy information concerning consular cases when issues of public safety and interest are involved. Equally, the Privacy Commissioner should provide guidelines for the use of information covered by the Privacy Act for policy analysis.

Revocation of Canadian Citizenship: Remove from law the revocation of citizenship of citizens with a second citizenship when convicted of certain crimes. Dual citizens should not be discriminated against on the basis of a second citizenship. *[Update: Amendments introduced in late February to this effect.]*

Oversight of Consular Policy and Cases: Initially ensure the House of Commons Committee on Foreign Affairs or a sub-committee assume formal responsibility in matters of consular policy and cases. In the longer term explore the establishment of an independent authority reporting to Parliament to deal with consular policy and cases and to receive from the public complaints on consular services.

International Conference on Consular Relations: Canada should play an active role in seeking international review of consular relations, including the Vienna Convention on Consular Relations. To that end Canada should host an international conference on the matter in 2017, the 50th anniversary of the coming into effect of the Convention.

Annex A

Consular Issues: Canadian Court Cases

July 23, 2004. Federal Court. Charkaoui. Khadr situation noted in decision.

August 18, 2004. Federal Court. Khadr v. Canada. Conditions of imprisonment at Guantanamo.

October 13, 2004. Federal Court. Khadr v. Canada. Interrogation of Mr Khadr by Canadian officials at Guantanamo.

December 9, 2004. Federal Court. Khadr v. Canada. Issuance of passport to Mr Abduraham Khadr, brother of Omar.

January 28, 2005. Federal Court. Khadr v. Canada. Status of Mr Khadr at Guantanamo.

May 5, 2005. Federal Court. Khadr v. Canada. Interrogation of Mr Khadr by Canadian officials at Guantanamo.

August 5, 2005. Federal Court. Khadr v. Canada. Khadr's Charter rights.

April 25, 2006. Federal Court. Khadr v. Canada. Interrogation at Guantanamo.

June 8, 2006. Federal Court. Khadr v. Canada. Issuance of passport to Mr Abduraham Khadr, brother of Omar.

May 10, 2007. Federal Court of Appeal. Omar Khadr v. Canada (Justice). Appeal by Mr Khadr of earlier decision (2006) by Federal Court.

October 25, 2007. Supreme Court of Canada. Minister of Justice v. Omar Khadr. Application for Leave.

January 15, 2008. Federal Court. Khadr v. Canada. Issuance of passport to Mr Abduraham Khadr, brother of Omar.

March 20, 2008. Supreme Court of Canada. Minister of Justice v. Omar Khadr.

April 29, 2008. Federal Court. Khadr v. Canada. Issuance of passport to Abduraham Khadr.

May 23, 2008. Supreme Court of Canada. Canada v. Omar Khadr. Court agreed that Mr Khadr's S. 7 Charter rights were violated by Canadian officials.

June 25, 2008. Federal Court. Khadr v. Canada. Information to be disclosed by federal officials.

August 25, 2008. Federal Court. Getkate v. Minister of Public Safety. Mr Getkate was denied transfer to a Canadian prison which the Court judged was "wholly unreasonable." The Court stated that the evidence "points in a wholly opposite direction" to the decision taken by the Minister who "unreasonably disregarded this evidence."

September 20, 2008. Supreme Court of Canada. Justice v. Omar Khadr.

December 17, 2008. Federal Court of Appeal. Amnesty International v. Canada. AI in support of release of documents to Omar Khadr.

February 16, 2009. Federal Court. Stahi v. Canada. Khadr case quoted in decision.

March 4, 2009. Federal Court. Smith v. Attorney General of Canada. Canadian government decision to withdraw support for clemency from a death penalty sentence.

April 23, 2009. Federal Court. Omar Khadr v. Prime Minister. Interrogation issues.

May 13, 2009. Federal Court. Khadr v. Canada. References to interrogations of Mr Khadr by Canadian officials at Guantanamo.

June 4, 2009. Federal Court. Abousfian Abdelrazik and Attorney General of Canada. Court orders government to issue Abdelrazik an emergency passport so that he can return to Canada. Judgement stated that the "applicant's right to enter Canada has been breached contrary to subsection 6. (1) of the Charter.

June 3, 2009. Federal Court of Appeal. Omar Khadr v. Prime Minister. Appeal of the April 23, 2009 Federal Court decision.

July 22, 2009. Federal Court. Suaad Hagi Mohamud v Attorney General of Canada. Government agreed to DNA testing for Ms Mohamud to prove Canadian identity only when her lawyer filed a motion before the Federal Court.

August 14, 2009. Federal Court of Appeal. Omar Khadr v Attorney General of Canada. Court affirmed an earlier Federal Court decision that Canadian officials, when they interviewed Khadr in the Guantanamo Bay prison, participated "in a process that was illegal under the laws of the United States and contrary to Canada's international human rights obligations."

September 4, 2009. Supreme Court of Canada. Prime Minister v. Omar Khadr. Application for Leave.

January 29, 2010. Supreme Court of Canada. Omar Ahmed Khadr v Canada (Prime Minister). Court found that "Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person." However, Court declined to order the Canadian government to assist in the release of Mr Khadr from Guantanamo using the Crown Prerogative doctrine.

May 25, 2010. Federal Court. Khadr v. Canada. Release of documents by the federal government.

May 20, 2010. Federal Court. Khadr v. Canada. Status of Supreme Court decision of January 29, 2010.

June 11, 2010. Supreme Court of Canada. R. v. Conway. Relating to earlier decision on Mr Khadr.

July 5, 2010. Federal Court. Khadr v. Canada. Federal government actions with the United States taken without knowledge of Mr Khadr.

July 22, 2010. Federal Court of Appeal. Omar Khadr v. Prime Minister.

September 24, 2010. Federal Court. Dwayne Grant v. Minister of Public Safety and Emergency Preparedness. Court ordered the Minister to re-determine his earlier decision to deny the application by Mr Grant for a transfer to a Canadian prison. The Court held that the reasons provided by the Minister were "entirely insufficient," rendering the decision unreasonable as it lacked transparency and intelligibility.

September 27, 2010. Federal Court of Appeal. Omar Khadr v. Prime Minister. Request for expedited hearing by Mr Khadr.

November 8, 2010. Federal Court. Canada v. Almalki. Khadr case cited in case.

February 10, 2011. Federal Court of Appeal. Canada v. Abdullah Almalki.

March 9, 2011. Federal Court of Appeal. Omar Khadr v. Prime Minister. Violation of Mr Khadr's Charter rights.

November 3, 2011. Supreme Court. Attorney General of Canada on behalf of the United States v. Abdullah Khadr. Supreme Court denies American request for extradition of Abdullah Khadr, the brother of Omar.

March 22, 2011. Supreme Court of Canada. Dore v. Quebec Bar. Relating to earlier decisions on Mr Khadr.

January 31, 2013. Federal Court. Zeng v. Canada. Crown's prerogative power over foreign affairs as cited in Khadr cited in this case.

August 1, 2013. Supreme Court of Canada. Ontario v. Criminal Lawyers' Association of Ontario. Related to earlier Supreme Court decision on Omar Khadr.

October 18, 2013. Court of Queen's Bench, Alberta. Omar Ahmed Khadr and Attorney General of Canada. Khadr is denied transfer to a provincial correctional facility.

December 20, 2013. Supreme Court of Canada. Canada v. Bedford Institution. Appeal of earlier Court decision on Mr Khadr.

July 8, 2014. Court of Appeal of Alberta. Omar Ahmed Khadr and Attorney General of Canada. Appeal of the October 18, 2013 decision. October 18 decision overturned and his transfer to a provincial correctional facility is approved.

October 10, 2010. Supreme Court of Canada. Kazemi Estate v. Islamic Republic of Iran. Khadr case cited.

May 14, 2014. Supreme Court of Canada. Canada v. Harkat. Khadr case cited.

November 4, 2014. Federal Court. Khadr v. Canada. References to Khadr cases in cases involving Rasul, Hamdan, Boumediene.

December 11, 2014. Supreme Court of Canada. Warden of Edmonton Prison v. Omar Khadr. Media interviews by Mr Khadr.

February 13, 2015. Federal Court. CBC v. Bowden Institution. Access for interview with Mr Khadr.

April 29, 2015. Federal Court. Abousfian Abdelrazik and Crown. Court granted disclosure of investigation reports and any corrective measures taken by the government of interest to Mr Abdelrazik.

May 14, 2015. Supreme Court of Canada. Bowden Institution v. Omar Khadr. Clarity on Mr Khadr's American sentence.

May 21, 2015. Supreme Court of Canada. R. v. Kokopenace. Khadr case cited.

Annex B

Extracts from the most recent Global Affairs Canada, Manual of Consular Instructions, Volume 1 (1993 edition)

Crown Prerogative: Consular Manual
Chapter 2
Protection and Assistance

2.0 Introduction

...

Extent of Protection. Most Consular services are provided as a matter of discretion by virtue of the royal prerogative; except as provided by statute, no one is entitled to claim such services as a matter of legal right. Strictly speaking, protection and assistance can therefore be withheld by the Secretary of State for External Affairs at his or her discretion (although this in fact is rarely done). The nature and extent of protection and assistance is governed by these instructions and by the judgment of consular officers exercised in the particular circumstances of each case.

Manual of Consular Instructions
Volume 1
1993 Edition

Annex C

Extracts from a Supreme Court of Canada decision relating to *Crown Prerogative*

Supreme Court of Canada, Canada (Prime Minister) v. Khadr — 2010 SCC 3 — [2010] SCR44 — 2010-01-29 Decision

[43]...Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

[44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's Charter rights.

[45] Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

[46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

[47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the Charter.

IV. Conclusion

[48] The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003–2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the Charter, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

Appeal allowed in part with costs to the respondent.

Annex D

Crown Prerogative

The Biggest "But" in Canadian Judicial History

Gar Pardy, *The Ottawa Citizen*, January 29, 2010

The Supreme Court has spoken its last words on Omar Khadr. Regrettably it is a political decision and one that has little to do with justice, fundamental or temporal. Surprisingly all nine justices joined in the decision which gave pre-eminence to the government's absolute power over foreign affairs. There is no joy for Khadr whatsoever in this decision and, equally important, there is no joy for any Canadians who encounter serious difficulty in foreign countries.

Khadr's future is now left to the mercies of the federal government which has not demonstrated either mercy or compassion.

Sadly his future is also now in the hands of the vicissitudes of the U.S. government which, since the Obama administration came into office, has talked the good talk for the inmates of Guantanamo; however, it has lost its way on its plans for corrective action. Fundamental justice for the victims of Guantanamo is part of the wreckage of America's ineffective strategies in correcting the horrors of previous American policies on terrorism.

Khadr has been no stranger to the Canadian courts, having now been the subject of four earlier cases in the Federal Court of Canada. In all of the

previous cases, the courts have risen above the narrow parochial security and foreign policy issues and have provided Khadr and Canadians with ringing endorsements of the rule of law and the importance of the person in our society.

As many have made clear since the Khadr family broke into Canadian consciousness in the mid-'90s, it is a family that has had a troublesome history and a troublesome impact on what most understand to be matters directly inimical to Canadian interests and to Canadians. It is lamentable, however, that the country's ire has descended onto the shoulders of a person who was a minor when his alleged crimes took place.

The Supreme Court in its decision did give recognition to the principle that was inherent in the earlier Federal Court decisions. It stated that Khadr's "Charter rights were violated" by federal officials. It also said, "We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice."

In the biggest "but" in Canadian judicial history, the Court went on to state that "It would not be appropriate for the court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's Charter rights." Cynically, the Court's decision even reminds us of what Section 7 of the Charter of Rights and Freedom has to say:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Only four months ago, the Chief Justice, Beverley McLachlan, speaking outside the Court was much more perceptive and open on the issues surrounding cases such as that of Khadr. Addressing an Ottawa audience, the Chief Justice forthrightly detailed the serious injustices inherent in government actions dealing with terrorism. Then she said: "The fear and anger that terrorism produces may cause leaders to make war on targets that may or may not be connected with the terrorist incident."

Even more fundamental was her observation: "Or perhaps it may lead governments to curtail civil liberties and seek recourse in tactics they might otherwise deplore...that may not, in the clearer light of retrospect, be necessary or defensible."

It is unfortunate that the Chief Justice and her colleagues did not apply her wisdom of last September to the matter of Omar Khadr. Instead she and her colleagues gave absolute precedence to the "powers under the royal prerogative" available to the federal government in the conduct of foreign affairs.

The Court in its decision stated "it is for the executive and not the courts to decide whether and how to exercise its power" and then in words that the most hidebound bureaucrat would accept went on to say that "the government must have flexibility in deciding how its duties under the power (foreign affairs) are to be discharged."

This judicial gerrymandering means that while the Court has agreed that Khadr's Charter rights have been violated by the government, it refuses to provide him with a remedy. In this curious world that the Supreme Court has constructed, a violation of the most central element in our written constitution — the right to life, liberty and security of the person — is trumped by a hoary tradition of the Royal prerogative over foreign affairs.

Curiously, the decision of the Supreme Court complains of the inadequacy of the information available to it with respect to Khadr. However, it then observes that while Khadr "has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve."

This is a sad comment by our supreme jurists.

The only option now available to Khadr is to have a trial under a U.S. Military Commission which can be compared to courts in Iran. Friday was a sad day in the history of the Supreme Court of Canada, and we can only hope that, in the earlier words of the Chief Justice, "the clearer light of retrospect" will correct this injustice.

Annex E

Crown Prerogative:
National Defence and the Canadian Armed Forces

DND Legal Paper:
Introduction and The Law of the Crown Prerogative

1. Introduction

The Crown prerogative is a source of executive power and privilege. It is a well-established part of Canada's constitution, and fits comfortably into Canada's system of responsible government. The Crown prerogative plays a vital role in Canada's system of government, enabling the executive to perform its important duties in furtherance of Canadian political interests. The powers and privileges found in the Crown prerogative give the government the necessary flexibility to react quickly to complex situations. The purpose of this paper is to outline the law of the Crown prerogative as it applies to the activities of the Department of National Defence and the Canadian Forces (CF). It addresses two separate but related topics. First, the paper sets out, in a general fashion, the Canadian law of the Crown prerogative. Given the overall purpose of the paper, the emphasis is on the federal, as opposed to provincial, Crown prerogative. The examples given to illustrate points are taken from the military context where possible. Second, the paper discusses the application of the general law of the Crown prerogative to the deployment of the CF on military operations outside of Canada.

2. The Law of the Crown Prerogative

2.1 Crown Prerogative: "The Powers and Privileges Accorded by the Common Law to the Crown"

There is no widely accepted single definition for the term "Crown prerogative."[1] In *Black v. Chrétien et al.*,[2] the Ontario Court of Appeal accepted Professor Peter Hogg's definition of "Crown prerogative" as:

> the powers and privileges accorded by the common law to the Crown.[3]

It is this definition of Crown prerogative that is used in this paper.

Another commonly used definition for the term "Crown prerogative" is provided by Professor Dicey, who states that the term refers to:

the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown.[4]

In addition to citing Professor Hogg's definition as noted above, the Court in the *Black* case[5] adopted Professor Dicey's definition.[6] Academics, however, have criticized the Dicey definition on the ground that it is too narrow: while the definition captures the idea that the Crown has a certain *authority* ahead of other entities, it makes no mention of the Crown's special *privileges* and *immunities* that are properly classed with that authority.[7] It can be argued that Professor Hogg's definition of Crown prerogative is preferable to that of Professor Dicey since it captures those special privileges and immunities discussed above.

As is made clear in Professor Hogg's definition, it is the common law, or judge-made law, that determines the extent of the Crown prerogative. As will be discussed below, the courts may find a basis for a particular power or privilege in legislation, and such a finding may have the effect of limiting or displacing the Crown prerogative in that area. Ultimately, and importantly, the content of the Crown prerogative is not static, nor absolutely defined.

2.2 History of the Crown Prerogative in Canada

As noted, the law of the Crown prerogative is judge-made. A brief review of the history of the Crown prerogative in Canada is helpful in understanding the Crown prerogative law's starting point in this country and its early development. Such a review helps situate later developments of the law of the Crown prerogative and can assist in the identification of the initial applicable principles.

Canada inherited its legal systems from its former imperial powers, namely the United Kingdom, and, to a certain extent, France.[8] As the Eng-

lish King acquired territory in what is now Canada, he acquired the right to use the Crown prerogative in respect of that territory. At that time, the British common law had already begun to define and shape the Crown prerogative. Due to the *Prohibition del Roy*[9] case of 1607, the King lost the right to administer justice, this power being reserved by the courts to themselves. The Bill of Rights of 1688 resulted in the King losing his right to *suspend* or *dispense* with a law, and to tax.[10] According to Professor Hogg, these developments and others "confined the prerogative to executive governmental powers."[11] Finally, "the prerogative was further limited by the doctrine that most executive action which infringed the liberty of the subject required the authority of a statute."[12]

The laws of the United Kingdom allowed for a conquered colony to be subject to legislation adopted by the imperial Parliament. It was also subject to the prerogative right of the King to legislate until such time as the colony was granted its own legislative assembly.[13] This broad prerogative power was used several times in what would become Canada. For example, Great Britain obtained New France (now Ontario and Quebec) by conquest in the Seven Years' War.[14] By the *Royal Proclamation of 1763*,[15] a prerogative act, the King, amongst other things, established an assembly in Quebec.[16] Further, the constitutions of Nova Scotia, New Brunswick and Prince Edward Island are creatures of prerogative instruments, as is the office of the Governor General.[17]

With the *British North America Act, 1867*, now the *Constitution Act, 1867*,[18] and the union of Canada (after confederation, the provinces of Ontario and Quebec), Nova Scotia, and New Brunswick as the Dominion of Canada, the constitution was born.[19] The *British North America Act, 1867* did not displace the Crown prerogative. Section 9 of the *Constitution Act, 1867*, reads:

> The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.[20]

The Crown prerogative thus survived Confederation but the entity with the power to exercise or take advantage of the Crown prerogative has changed. At the time of Confederation, the Crown prerogative was exercised from England. As a result of Canada's evolution to statehood,[21] the Crown prerogative now rests with the Canadian government.[22]

2.3 Determination of the Contents of the Crown Prerogative in Common Law

The courts actually determine the contents of the Crown prerogative through decisions in cases interpreting legislation. The issues of when a statute acts to bind the Crown, and the effect of a statute on the Crown's authority, are the subjects of common law and legislative rules.

The Crown is, generally speaking, subject to the laws of Parliament and the legislatures: the Crown is a legal person, and benefits from no constitutional rule that would provide a shield to the application of valid statute law.[23] This rule applies to the Crown in right of Canada, as well as in right of a province. Furthermore, and of direct interest to the subject matter of this paper, a Crown prerogative can, in certain circumstances, be limited or even displaced by legislation.[24]

In a given inquiry into whether or not a particular Crown prerogative has been limited or displaced by a particular statute, the court will engage in a two-step process. First, an investigation will be made into whether or not the statute at issue in fact binds the Crown. This investigation yields a "yes" or "no" answer: either the statute is binding on the relevant authority of the Crown, or it isn't. Second, if the statute is binding on the Crown, an inquiry will be made into whether the statute acts to limit or displace the Crown prerogative at issue.[25]

With respect to the first step, i.e. whether a statute binds the Crown, the Crown benefits from an associated immunity, the effect of which is to create a presumption against applicability of the statute to the Crown.[26] The *Interpretation Act*[27] confirms this immunity federally.[28] It reads:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.[29]

While there is an exception to this immunity, it is limited. In the federal *Interpretation Act*, cited above, the exception is phrased "except as mentioned or referred to in the enactment." The common law provides guidance on the scope of the immunity. It is clear that express words in the statute will compromise the immunity.[30] What is less clear is whether the doctrine of *necessary implication* is law in Canada. Briefly put, this doctrine states that if a statute does not expressly bind the Crown, but as a matter of fact such intention to bind the Crown is necessarily implied, the statute will be

held binding on the Crown. Lordon has the following to say on the status of the doctrine:

> Whether the prerogative may be affected by a statute by necessary implication is not clear, since judicial pronouncements on the applicability of the necessary implication doctrine are inconsistent.[31]

In summary, the Crown benefits from a prerogative immunity against the application of legislation. This immunity is subject to exception. It is clear that the scope of the exception includes statutes that expressly bind the Crown on their terms. What is less clear is whether the courts will apply the doctrine of necessary implication to an analysis of whether or not a statute binds the Crown.

There are two other matters related to the issue of whether a statute binds the Crown. First, the finding of a mere express reference in the statute to the Crown may not end the inquiry: it may be the case that the reference was meant to include the Crown in right of the legislating government only. For example, it may be possible for the federal Crown to argue that an express reference to the Crown in an Ontario statute includes only the Crown in right of Ontario.[32] Second, this inquiry necessarily involves federalism concerns. In addition to the often difficult issue of whether the statute deals with matters in the class of subjects properly within the legislating body's powers, there is some general uncertainty in the law as to whether a provincial legislature can bind the federal Crown; whether Parliament can bind the Crown in right of a province; and whether the legislature of one province can bind the Crown in right of another.[33] For example, it is by no means certain that the province of Alberta can bind the federal Crown by statute, even if the statute concerns a matter in the class of subjects listed at section 92 of the *Constitution Act, 1867*.[34]

Only in the event that a statute is held to bind the Crown will it be necessary to inquire as to whether that statute has the effect of limiting or displacing a Crown prerogative. This issue concerns what has been referred to as the "interplay of royal prerogative and statute."[35]

A statute can *limit* a prerogative. As was stated in *Attorney-General v. De Keyser's Royal Hotel, Ltd.*:[36]

> ...when the Act deals with something which before the Act would be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.[37]

De Keyser's Hotel concerned a situation in which, during the First World War, the Army Council commandeered a hotel as a location for the Royal Flying Corps headquarters. The authority for seizing the hotel was based in a statute and in the Crown prerogative to take property in times of danger for defence of the realm. The court accepted this legal basis, and had that been the end of the matter, no compensation would be legally payable. However, in this case, the court found that the *Defence Act, 1842*, which provided for compensation in the event of property seizures, applied to the Crown. The statute acted to abridge the existing the [sic] Crown prerogative and extended it to include legally payable compensation.

The Supreme Court of Canada was divided on a similar issue in the *Ross River* case. The Crown prerogative at issue was the power to create a reserve for aboriginal peoples. The majority held that this power was limited by the *Indian Act and the Territorial Lands Act*.[38] The minority judgment, of three dissented on this point, adopted the position that the Crown prerogative power was not constrained by either statute.[39]

In *Vancouver Island Peace Society v. Canada*[40], the applicants sought to quash two Orders in Council approving visits of nuclear-powered and nuclear-armed vessels to Canadian ports. One argument presented by the applicants was that certain statutes[41] had the effect of displacing the Crown prerogative used by the government as a basis to the Orders. The court rejected this argument and held that the relevant Crown prerogative remained whole. That conclusion was based on a finding that the purposes of the statutes did not include the regulation of the actions at issue, nor did Parliament intended to do so.[42] Nothing in the provisions of the statutes "and nothing in the historic conditions of mischief they were enacted to deal with" persuaded the court that Parliament "intended to withdraw or to fetter the prerogative of the Crown to provide for the visit" of the ships at issue to Canadian ports.[43]

While a statute might limit a Crown prerogative, it might also, in certain very limited circumstances, act to *displace* such a prerogative wholly. From *De Keyser's Royal Hotel*:

> if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules.[44]

Perhaps the clearest example of where a statute has completely displaced a prerogative in Canada is in relation to the traditional Crown prerogative rule exempting the Crown from vicarious liability in tort. Under the federal *Crown Liability and Proceedings Act*,[45] the federal Crown "is liable for the

damages for which, if it were a person, it would be liable," in certain cases including that of "a tort committed by a servant of the Crown."[46]

Accordingly, only if a statute, as a matter of law, binds the Crown, does it become necessary to examine the interplay of the statute and the Crown's prerogatives. A statute binding on the Crown can, in certain instances, have the effect of limiting or displacing the Crown's prerogatives. While the issue has been examined from the negative side, it can also be looked at from the positive side. There are many instances in which the courts have held that a Crown prerogative remains whole and unfettered. For example, and as will be discussed in Section 3.3 of this paper, neither the *National Defence Act*[47] (NDA) nor any other statute, works to limit or displace the Crown prerogative to deploy the CF on international operations. The Crown prerogative remains the source of authority for these deployments.[48]

2.4 Contents of the Crown Prerogative

So far, this paper has discussed the concept of the Crown prerogative and the process by which its content has been and is developed. It is appropriate at this stage to survey modern law on the subject with an objective to define the contents of the Crown prerogative by subject area.

The common law has determined the contents of the Crown prerogative. It is now possible to propose a current non-exhaustive contents list:[49]

1. Foreign affairs,
2. War and peace,
3. Treaty-making,
4. Other acts of state in matters of foreign affairs, and
5. Defence and the armed forces.[50]

Other powers and privileges considered Crown prerogatives include those respecting passports, power of mercy, diplomatic appointments, public inquires, hiring and dismissal of public servants, administration and disposal of public lands, copyright, armorial bearings, and honours and titles.[51]

It should be noted that the above list does not include reference to the prerogatives styled *personal prerogatives* of the Governor General. Such *personal prerogatives* relate to matters such as the appointment or dismissal of the Prime Minister or the dissolution of Parliament. These powers are theoretically exercised upon the Governor General's own discretion, but in prac-

tice follow directly from election results, parliamentary votes, or as directed by the Prime Minister.

(*http://www.forces.gc.ca/en/about-reports-pubs-military-law-strategic-legal-paper/crown-prerogative-introduction.page)*

Annex F

Crown Prerogative

At the Mercy of the Government

Amir Attaran and Gar Pardy, *The Globe and Mail*, June 17, 2009

Canada's legal system is said to respect peace, order and good government. Not always. Buried within the law books is an atavistic power unfamiliar to most Canadians, the Royal (or Crown) Prerogative, or the residue of power untouched by Parliament. Most Canadian governments have used the prerogative sensitively, so that it attracts little attention. But since 2006, the government is using it arbitrarily, even discriminatorily, to deny some Canadians the usual protections when travelling abroad.

The prerogative's dark side appeared most recently in the Abousfian Abdelrazik case. The government argued in the Federal Court of Canada that it could lawfully refuse Mr. Abdelrazik, a Canadian who went to Sudan to visit his mother, a passport to return home to his children in Montreal.

Passports are a "matter of discretion falling within Crown prerogative," and the government argued that it has no "legal obligation in international law to even provide consular protection."

To translate: If you are in trouble overseas and go to a Canadian embassy, Canada's government believes that it has the option, but not the obligation, to help. If the government is fond of you, like Brenda Martin, it may help with

papers or a private jet home, but if it scorns you, like Mr. Abdelrazik, it may revoke your passport and exile you. The choice is the government's alone.

No laws govern this relationship, the government says. As then-Mr. Justice Konrad von Finckenstein of the Federal Court wrote in an earlier case, "Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the minister." Except for the Charter of Rights and Freedoms, the minister's exercise of the prerogative is absolute.

What this means is that Canadian citizenship is less than it appears.

Other governments long ago passed laws that bind their discretion and make it mandatory to help their citizens abroad. For example, the German Constitutional Court has written that the German state has "a constitutional duty to provide protection for German nationals and their interests in relation to foreign states." In the United States, a similar obligation is included in statutes requiring the government to provide consular services.

But in Canada, Parliament has never passed such a law, and consular officers have long been instructed that consular services are discretionary. That posed no problem when the prerogative was exercised sparingly, but today a litany of unresolved cases — not just that of Mr. Abdelrazik, but of Omar Khadr, Amanda Lindhout, Beverly Giesbrecht, Ronald Smith and others — shows that the current government is taking arbitrary and capricious licence with the prerogative.

Currently, the only remedy these Canadians have is an expensive, slow appeal to the courts to assert their Charter rights. In Mr. Khadr's case, Mr. Justice James O'Reilly of the Federal Court ordered the Prime Minister to request Mr. Khadr's return from Guantanamo Bay. In Mr. Abdelrazik's case, Mr. Justice Russel Zinn of the Federal Court ordered the government to issue an emergency passport and bring him home. The turn is revolutionary: Until a few weeks ago, Canadian courts had never overridden the Crown's Prerogative.

Rather than proceed with a haphazard judicial erosion of the prerogative, Parliament should pass a Protection of Canadians Act with rules to guarantee consular services for all Canadians, irrespective of background or circumstance. The statute should require consular services to be non-discriminatory; should place a clear, positive duty on consular officers to assist Canadians in distress; should give Canadians denied consular services access to a lawyer and a highly expedited appeal to court; and should permit them in a closed courtroom to see all personal information, including intelligence reports or diplomatic *démarches* that the government now hides as secret.

If a Protection of Canadians Act were already law, many of the most recent spectacles would have been avoided. The government could not hide behind secret evidence to justify its neglect of Mr. Abdelrazik or Mr. Khadr — evidence that, when finally revealed, demonstrated that the Canadian Security and Intelligence Service was knowingly complicit in their detention and torture.

The government also could not play favourites, and when it negotiated with al-Qaeda to release elite Canadians such as Robert Fowler and Louis Guay, it also would have to negotiate with other hostage-takers to release ordinary Canadians such as Beverly Giesbrecht or Amanda Lindhout.

Perhaps it is not surprising for a government that attacks the Leader of the Opposition for having spent too much time outside Canada to be indifferent or hostile to the millions of Canadians who travel internationally for work or pleasure. But the freedom to travel is every Canadian's right, and when Canadians abroad land in trouble for whatever reason, they should not be subject to the whims of the government of the day.

For Parliament to extend statutory protection to the millions of Canadians who venture internationally would be a major milestone, and it would mean that Canadians are finally protected as Americans or Germans already are. To do otherwise leaves Canadians not only to the vagaries of foreign governments, but to the sometimes tyrannical vagaries of the Canadian government as well.

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Annex G

The Real Reason to Bring Canadian Prisoners Home

Gar Pardy, *Embassy*, September 3, 2008

It is extremely rare for a Federal Court judge to be highly critical of a ministerial decision. It is normal for judges to give "significant deference" to such decisions. But in a decision (Getkate v. the Minister of Public Safety) released on August 25, Justice Michael Kelen pulled no punches and paid no "deference" to the minister.

The decision was rendered in response to a judicial-review request made by a Canadian imprisoned in the United States whose application for transfer to a Canadian prison had been rejected twice by Public Safety Minister Stockwell Day.

Justice Kelen, in his decision in favour of Arend Getkate, stated that the minister was "wholly unreasonable," that the "evidence points in a wholly opposite direction" to the decision and that the minister "unreasonably disregarded this evidence."

Over 30 years ago, Canadian officials were successful in promoting at INTERPOL and the International Law Commission a concept for a new international agreement. The concept was for bilateral and multilateral treaties that would permit convicted prisoners to transfer to their country of citizenship and serve out their sentences within a familiar environment close to family and friends.

The concept met an obvious need as, within a few years, there were numerous bilateral treaties and a multilateral one. The United States and Mexico were the first with a bilateral and Canada followed within a few months with its own treaty with the United States. The Council of Europe saw considerable merit in the concept and within a few years, in 1983, its member states agreed to a multilateral treaty in which all of its members could participate without needing to negotiate bilateral agreements.

The concept has stood the test of time and today there is an extensive network of such treaties and new bilaterals are signed every year. In the intervening years, in addition to the Council of Europe, both the Commonwealth and the Organization of American States have put in place their own treaties for the use of their members.

The concept and the treaties were not based on wide-eyed humanitarianism, although there is such an element in the results. Rather, they were based on the reality that Canadian citizens convicted in foreign countries had an absolute right to return to Canada following the completion of their sentences. More often than not, such persons would be deported directly to Canada. In those situations, once returned, there was no criminal record registered in Canada. Sometimes there was not even knowledge of the crimes committed, nor was there any ability by Canadian authorities to assess the individual's likelihood of re-offending or of being some measure of risk to Canadians.

The transfer treaties overcame these problems and, in the assessment of most countries, provided a valuable addition to international cooperation on criminal matters. Transferred prisoners were incarcerated upon return and, in doing so, there was an opportunity for correctional officials to assess the individual and come to first-hand conclusions on the individual and the danger he or she might pose once released.

In the intervening years, Canada negotiated treaty arrangements with countries in all parts of the world, with an emphasis on those where Canadians are frequently arrested and imprisoned. Today there are arrangements with 76 countries, ranging from Albania to Zimbabwe.

Between 1978, when Canada signed its first treaty with the United States, and 2005, more than 1,400 Canadians were transferred from foreign prisons to become inmates in Canada. The vast majority were from prisons in the United States, but there were significant numbers from Costa Rica, Mexico, Thailand, Trinidad and Tobago and the United Kingdom.

During those 27 years, only five were rejected for transfer by the then Canadian solicitors general/ministers of public safety — a rejection rate of

less than one-half of one per cent. While precise information is not available, these rejections were based largely on an inability to prove Canadian citizenship by the applicant. All governments during that period, Liberal and Conservative, understood and accepted the value of such transfers for Canada and Canadians and made decisions accordingly.

It became apparent with the arrival of the Harper government that Mr. Day had little understanding or sympathy for the well-tried concept of prisoner transfers. From January 2006 to January 2008, 117 Canadians were accepted for transfer by Mr. Day, but he rejected 61.

In the cases for which information is available, Mr. Day used various reasons, such as the return of the Canadian threatened the safety of Canadians and the security of Canada, there was no evidence that the individual could be rehabilitated, or that there was an "abandonment" of Canada by the applicant.

In the case of Mr. Getkate, who at the age of 12 in 1996 was taken to the United States by his mother and in 2002 was convicted of child molestation in Georgia, Justice Kelen summarily dismissed all three reasons for refusal, as given by the minister. The judge forcibly stated that the minister's decisions were inconsistent with the evidence presented to him by his officials, who on two occasions recommended that Mr. Getkate be transferred.

Justice Kelen's decision only has specific application to the case of Mr. Getkate, but there are many other Canadians who have been refused transfers by Mr. Day based on the same specious reasoning.

Some commentators have suggested that ideological reasons underpin Mr. Day's approach and form part of the "tough-on-crime" approach of the current government. It is equally apparent that the toughness of the approach is more illusory than real.

Certainly, in refusing to transfer Canadians from foreign prisons, the government is increasing the risk to Canadians when such persons return to Canada at the completion of their foreign sentences. We can hope that the clarity and reasonableness of Justice Kelen's decision will lead the government to change its approach. Unfortunately, the present fevered electoral atmosphere is not one where clarity and reasonableness prevail.

Annex H

Report from Global Consular Forum

May 26–28, 2015, Mexico

The second meeting of the Global Consular Forum (GCF), building on the inaugural GCF meeting held at Wilton Park in 2013, brought together 55 senior consular officials from 25 countries along with the European Union (EU) to consider ways in which to enhance or improve international consular policy and practice.

The purpose of the expert forum was to: promote and deepen understanding of the current issues facing consular services; facilitate an expert exchange of experience, best practice and lessons learned; identify areas of potential consensus with particular regard to future working; consider creative opportunities and innovative approaches to maximise expertise and resources; explore potential mechanisms to promote further development, co-operation and networking; assess ways in which the GCF can assist developing and/or small countries to improve their consular services; and investigate the potential for future work with the private sector and non-governmental bodies.

The meeting was framed around 7 key themes, identified as priority topics by the Steering Committee (SC) countries, with the support and drive from the Secretariat provided by the Government of Canada. In the preceding months, the SC led Working Groups developed discussion papers on 6

of the themes: partnering and technology in emergency management; vulnerable clients; international legal and policy framework; migrant workers; safe travel culture; and family services. The 7th theme, improving consular services, was discussed during the Forum.

"Social media presents opportunities and challenges"
Key points

- The unique nature and importance of consular work presents a particular challenge at a time when demands on services are growing and resources are constrained. The profile of consular in ministries should reflect the high value of this work.
- Further partnerships with the private sector and non-governmental bodies could do much to expand the capacity of consular services in responding to the needs of citizens, maximising resources and building on expertise.
- There is scope to build on existing frameworks and conventions to further collaboration between governments and expand common platforms for joint working.
- Social media presents opportunities and challenges and more can be done to maximise its use, particularly in crisis and emergency response. There is no one size fits all and multiple forms of communication should continue to be deployed.
- Practical collaboration on e.g. information exchange, pooling of research findings and shared training will strengthen the capacity of individual countries in responding to the needs of citizens.
- Further research on some of the more complex areas identified in the body of this report would do much to enhance understanding of the issues and assist consular officials in responding to challenges

Notes

1 There are no reliable statistics on the number of Canadians with a second citizenship. It is not a matter that needs to be disclosed and in many cases, Canadians may not be aware that they have a second citizenship. Given Canadian immigration patterns since World War II, it is generally accepted that they are millions of Canadians with a second citizenship or who are entitled to claim one.

2 See Luke T. Lee and John Quigley, Consular Law and Practice — Edition 3, Oxford University Press, USA, 2008; Chapter 8, "Protection of Nationals, Consular Law and Practice, page 138.

3 Report of the Events Relating to Maher Arar, Analysis and Recommendations." Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Public Works and Government Services Canada, Ottawa. 2006.

4 Report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, Public Works and Government Services Canada, Ottawa, 2008.

5 Arar Report, op cit., page 368

6 Ibid, Page 368.

7 The Privacy Act and Public Interest Disclosures, https://www.priv.gc.ca/resource/fs-fi/02_05_d_29_e.asp.

8 An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22: http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2014_22/page-1.html.

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