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Chair

Mr. Rick Casson

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● (1555)

[*English*]

The Chair (Mr. Rick Casson (Lethbridge, CPC)): Order.

Today we're dealing with...well, I'll just read it. Pursuant to the Order of Reference of Tuesday, February 10, 2009, and the two motions adopted by the committee on Wednesday, October 28, 2009, the committee commenced its study of the transfer of Afghan detainees from the Canadian Forces to Afghan authorities as part of its consideration of the Canadian mission in Afghanistan.

Today we have a panel of three witnesses. We have with us, from the Department of National Defence, Brigadier-General Ken Watkin, Judge Advocate General. Welcome, sir.

From the Department of Justice we have Douglas Briethaupt, director....

Is that how you say that, sir? Is that close enough?

Mr. Douglas Breithaupt (Director and General Counsel, Criminal Law Policy Section, Department of Justice): That's fine, yes. Thank you.

The Chair: Okay. He's director and general counsel with the criminal law policy section.

And from the House of Commons, we have someone who looks very familiar to a lot of us, Rob Walsh, the law clerk and parliamentary counsel.

General, go ahead and make your opening statement, sir.

Brigadier-General Kenneth W. Watkin (Judge Advocate General, Department of National Defence): Mr. Chairman, members of the committee, colleagues....

[*Translation*]

good afternoon. I would like to thank the members of the committee for inviting me to briefly describe the legal framework for the transfer of detainees to the Government of Afghanistan. I will first briefly describe the role of the Judge Advocate General, the JAG, and I will then discuss the legal framework.

[*English*]

The National Defence Act provides for the appointment of the Judge Advocate General by Governor in Council. I am legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces, in matters relating to military law.

Military law means all international and domestic law relating to the Canadian Forces, including its governance, administration, and activities. This includes operational law, which is the domestic and international law applicable to all domestic and international Canadian Forces operations.

I also superintend the administration of military justice in the Canadian Forces. As former Chief Justice Lamer recognized in his 2003 report on the military justice system, the JAG has attorney general-like responsibilities. I exercise command over all legal officers working in the office of the Judge Advocate General, including those deployed to Afghanistan to advise commanders regarding Canadian Forces operations.

[*Translation*]

We are here today to discuss a fundamental question, the law governing the transfer of detainees to the Afghan authorities and concerns about the possibility that some detainees will be transferred to a risk of torture.

In spite of the factual and legal complexity of this issue, there are certain fundamental legal principles that are clearly settled. I am going to review them briefly.

[*English*]

Torture is abhorrent and can never be tolerated. The prohibition against torture is a peremptory and non-derogable norm of international law. The transfer of detainees to a real risk of torture or ill-treatment is contrary to international humanitarian law, also known as the law of war or the law of armed conflict. It is a specialized body of law that governs the conduct of Canada, its officials, and its military forces during the armed conflict in Afghanistan. The policies and procedures put in place by the Canadian Forces in Afghanistan and the legal test that must be satisfied before detainees can be transferred are all meant to ensure compliance with these international legal obligations.

The question of the transfer of detainees was recently addressed by Canadian courts. The case of Amnesty International Canada and the British Columbia Civil Liberties Association v. the Chief of Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada, which I will refer to as the Amnesty case, dealt with the issue of the extraterritorial application of the Canadian Charter of Rights and Freedoms. Justice Mactavish of the Federal Court held that the charter does not provide rights to non-Canadians detained by the Canadian Forces in Afghanistan. She held that the detainees have the rights conferred upon them by the Afghan constitution, along with those conferred on them by international law and in particular international humanitarian law. The Federal Court of Appeal upheld her judgment on 17 December 2008, and the Supreme Court of Canada denied leave to appeal on 21 May 2009. This is the law of Canada.

In its judgment, the Federal Court reviewed the legal bases for Canada's involvement in Afghanistan. It confirmed that the authority for Canada's presence and the operations of the Canadian Forces in Afghanistan rest upon three interrelated bases in international law: the right to individual and collective self-defence, the authority granted by the resolutions of the United Nations Security Council, and the consent of the Government of Afghanistan.

In UN Security Council Resolution 1386 of 2001, the Security Council authorized the establishment of the International Security Assistance Force, ISAF. In succeeding resolutions, the Security Council has renewed ISAF's mandate to “assist” and “support” the Afghan government in the “maintenance of security” within Afghanistan, and it authorized states participating in ISAF to take “all necessary measures” to fulfill this mandate.

The Government of Afghanistan's consent to the Canadian Forces' presence and operations in Afghanistan is made explicit by its participation in the Afghanistan Compact of 2006, its support and acceptance of the Security Council resolutions authorizing ISAF and, more particularly, in the technical arrangements made between Canada and Afghanistan on 18 December 2005. The technical arrangements assert that,

> the overall purpose of the Canadian assistance to the Government of Afghanistan includes the operational objectives of assisting the Government of Afghanistan in providing security and stability in the country.

They affirm the understanding of the Government of Afghanistan that Canadian personnel may take such measures as considered necessary, including the use of deadly force and the detention of persons, to accomplish their operational objectives. The technical arrangements expressly state that,

> [d]etainees would be afforded the same treatment as prisoners of war. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.

The reference to detainees being afforded the same treatment as prisoners of war does not mean they have the status of prisoners of war. Rather, it demonstrates that we are extending well-established and comprehensive international law protection for such detainees.

The UN Security Council resolutions, the Afghanistan Compact, and the technical arrangements all reaffirm the international community and Canada's respect for and commitment to Afghan sovereignty and independence. They reflect the common understanding that it is the Government of Afghanistan that bears responsibility for providing Afghans with security, the rule of law, and the protection of their human rights and fundamental freedoms. The role of the international community, including Canada, is to assist and support the Government of Afghanistan in fulfilling those responsibilities.

● (1600)

The operations and activities of the Canadian Forces in Afghanistan take place in the context of an armed conflict involving the Government of Afghanistan; ISAF; and the Operation Enduring Freedom, OEF, coalition against elements of the Taliban, Al-Qaeda, and other organized armed groups. The characterization of the armed conflict is the subject of considerable international debate. However, for the purposes of the litigation in the Amnesty case, the Government of Canada accepted the applicants' characterization of the conflict as a non-international armed conflict.

[*Translation*]

More specifically, the Court found that Canada is not an occupying power in Afghanistan. The Canadian Forces do not exercise effective control of Afghan territory. The Government of Afghanistan, not the Government of Canada, exercises state powers. With one exception, the Government of Afghanistan has not consented to the application of Canadian law or the exercise of Canadian jurisdiction in Afghanistan. The exception involves offences committed by "Canadian personnel".

[*English*]

The court found that under the technical arrangements the detention of persons adverse in interest or providing support in respect of acts harmful to the Canadian Forces and coalition forces, and the transfer to Afghan custody of such persons, is to be carried out in accordance with international law. Prior to transfer, detainees are held in a temporary Canadian facility on a multinational base. The decision to transfer such persons rests with the Canadian commander of Joint Task Force Afghanistan and is made on a case-by-case basis.

The court noted that the governments of Canada and Afghanistan have set out their shared understanding of their international legal obligations in a series of documents relating to the transfer of detainees. On December 18, 2005, the Afghan Minister of Defence and the Chief of the Defence Staff for the Canadian Forces signed an arrangement that establishes procedures for the transfer of a detainee from the custody of the Canadian Forces to a detention facility operated by Afghan authorities.

The arrangement reflects Canada's commitment to work with the Afghan government to ensure the humane treatment of detainees, while recognizing that Afghanistan has the primary responsibility to maintain and safeguard detainees in their custody. Among other things, this arrangement provides that the International Committee of the Red Cross, the ICRC, has the right to visit detainees at any time while the detainees are being held in either Canadian or Afghan custody.

In February 2007 the Canadian Forces signed an exchange of letters with the Afghan Independent Human Rights Commission, AIHRC, to emphasize the role of the AIHRC in monitoring detainees. These letters further provide that the AIHRC is to provide immediate notice to the Canadian Forces should it become aware of the mistreatment of a detainee who has been transferred from Canadian custody.

On May 3, 2007, Canada and Afghanistan concluded a second arrangement governing the transfer of detainees held by the Canadian Forces. This arrangement supplements the first detainee arrangement, which continues to remain in effect. The second arrangement requires that detainees transferred by the Canadian Forces be held in a limited number of detention facilities to assist in keeping track of the individual detainees.

It further provides that members of the AIHRC, the ICRC, and Canadian government personnel all have access to persons transferred from Canadian to Afghan custody.

It also requires that approval be given by Canadian officials before any detainee who had previously been transferred from Canadian to Afghan custody is transferred on to a third country.

Finally, the second detainee arrangement provides that any allegation of abuse or mistreatment of detainees held in Afghan custody is to be investigated by the Government of Afghanistan, and that individuals responsible for mistreating prisoners are to be prosecuted in accordance with Afghan law and internationally applicable legal standards.

Of particular concern in the Amnesty case was the suggestion that detainees transferred by the Canadian Forces to Afghan authorities might be subject to torture by the Afghan authorities. There is a common aspect to all definitions of torture under international law. The definition provided in article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the CAT, to which Canada is a state party, is the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate, or coerce the victim or a third person, or for any reason based on discrimination of any kind. This is also the essence of the offence of torture provided for in section 269.1 of the Criminal Code.

Both conventional and customary international humanitarian law prohibit torture under all circumstances. It is accepted that the meaning of torture under IHL is essentially the same as the meaning of torture under the convention against torture.

● (1605)

In addition to torture, other forms of ill-treatment, such as cruel treatment and outrages upon human dignity, are also prohibited under IHL. The Canadian Forces have been and remain alert to this issue.

The transfer of detainees is a state responsibility and a whole-of-government issue. On the ground in Afghanistan, in addition to the Canadian Forces, DFAIT, CSC, and the RCMP all play a role in detainee-related matters. The Office of the JAG has operated as part of a broader Government of Canada legal team, including the Department of Justice, PCO, and DFAIT.

The legal test that must be met before a detainee can be transferred by the Canadian Forces to Afghan authorities, and this was confirmed by the Federal Court of Canada and the Federal Court of Appeal in the Amnesty case, is clear: the commander of Joint Task Force Afghanistan must be satisfied that there are no substantial grounds for believing that there exists a real risk that a detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities. In applying this test, the commander considers information from a variety of sources, including DFAIT and other government departments. For example, in November 2007, transfers were suspended as a result of a credible allegation of ill treatment that arose during a monitoring visit by a DFAIT official. Transfers resumed in February 2008.

It bears repeating that Canada has not operated alone in its engagement in Afghanistan. We are there as part of a UN-sanctioned, NATO-led team of 42 states in the International Security Assistance Force, ISAF, and we also operate closely with the United States armed forces as part of Operation Enduring Freedom, OEF. Like Canada, other ISAF partners transfer detainees to the Government of Afghanistan.

● (1610)

[*Translation*]

To summarize, Mr. Chair, it must be noted, as Justice Mactavish said in the Amnesty case, and as affirmed by the Federal Court of Appeal, that there is no "legal no-man's land" concerning the transfer of detainees to the Government of Afghanistan. International humanitarian law applies. Canada has "applied" the words of that code by making arrangements and establishing procedures to guarantee that detainees transferred by the Canadian Forces are protected.

[*English*]

While this concludes my remarks on the legal framework applicable to the transfer of detainees, I would highlight for the committee that much of my work is covered by solicitor-client privilege. As the Supreme Court of Canada has noted:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system.
>
> Solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.

I would therefore ask for the committee's understanding with respect to this issue.

Finally, it is clear that contemporary armed conflict, and in particular the complex security situation in Afghanistan, presents both operational and legal challenges. However, I want to emphasize that both I and the courageous men and women who serve under my command are committed to ensuring the Canadian Forces are able to meet our international legal obligations. I know that our fellow members of the Canadian Forces have demonstrated tremendous professionalism in their handling and treatment of detainees. Respect for the rule of law is an essential aspect of Canadian Forces operations. Fostering respect for the rule of law is a key reason why we are in Afghanistan.

[*Translation*]

This concludes my opening remarks. If committee members have questions on this subject, I will be happy to answer.

Thank you.

[*English*]

The Chair: Thank you very much for that.

Mr. Breithaupt, do you have a submission to make?

Mr. Douglas Breithaupt: Yes, thank you.

[*Translation*]

Mr. Claude Bachand (Saint-Jean, BQ): I have a point of order, Mr. Chair.

[*English*]

The Chair: Go ahead, Monsieur Bachand.

[*Translation*]

Mr. Claude Bachand: I would like to know about how long it will take for the witnesses to give their presentations. Because I would remind you that we are here to get to the bottom of this matter. If the witnesses speak for an hour and the members have only 45 minutes left to question them, I will not be well pleased. If that happens, I am going to ask the witnesses to come back.

[*English*]

The Chair: I understand that. I understand Mr. Walsh does not have a presentation.

Mr. Breithaupt, how long do you think yours is? It looks like it's about 8 or 10 minutes?

Mr. Douglas Breithaupt: That's what I believe, Chair.

The Chair: That'll give us enough time to go through two rounds.

Please go ahead, sir.

Mr. Douglas Breithaupt: Thank you.

I'm pleased to appear before you today to provide an overview of sections 37 and 38 of the Canada Evidence Act. These sections address the judicial balancing of interests when the disclosure of information in proceedings would encroach on a specified public interest or be injurious to international relations, national defence, or national security.

Under section 37 of the act, a minister of the crown or an official may object to the disclosure of information on the grounds of a specified public interest before a court, person, or body with jurisdiction to compel the production of information. Once an objection is made, the court, person, or body shall ensure that the information is not disclosed, other than in accordance with the Canada Evidence Act. The Federal Court and the Superior Court, as the case may be, will determine the objection. The section sets out in some detail how the determination by the court is to take place and for the judicial balancing of interest.

Section 37 can be used to protect such matters as the identity of police informers, police methodologies, ongoing investigations, and confidential relationships with foreign law enforcement agencies.

I will turn to section 38 of the Canada Evidence Act. The need to protect national security information has long been understood and recognized as the common law. Canada codified the crown privilege in the Federal Courts Act in 1970. In 1982 the precursor to the current section 38 was enacted, and in 2001 further amendments were made.

Section 38 sets out a code of procedure to assist all parties and persons involved in proceedings in which there's a possibility that information injurious to international relations or national defence or national security would be disclosed.

New elements were added in 2001 and they included the requirement to provide notice to the Attorney General of Canada in circumstances where it is foreseeable that the disclosure of information in the course of or in connection with proceedings could be injurious to international relations or national defence or national security. Various options for judges that could be employed to promote the public interest in disclosing and protecting such information were also added as an element.

Another element was providing for the possibility of the Attorney General of Canada personally to issue a certificate to prohibit the disclosure of information, but only after an order or decision that would result in its disclosure.

Finally, another element was the power of the Attorney General of Canada to assume the carriage of a prosecution in connection with which sensitive or potentially injurious information may be disclosed.

While new elements were added, the reforms were built on the former Canada Evidence Act scheme. The information at issue and the interests to be protected remained the same. These matters continue to be heard by the chief justice of the Federal Court or by a judge of that court designated by the chief justice for that purpose. The judicial balancing test of the public interests and disclosure versus non-disclosure was unaltered.

The amendments to section 38 of the Canada Evidence Act were intended to improve the scheme relating to the use and protection of information under section 38. They were designed to introduce greater flexibility into the system, offer the opportunity for evidentiary issues to be resolved early on in the proceedings, and improve the federal government's ability to protect from disclosure and for parties to use information relating to international relations, national defence, or national security in proceedings.

The Canada Evidence Act provides that any participant in connection with or in the course of a proceeding is required to notify in writing, as soon as possible, the Attorney General of Canada of the possibility of the disclosure of information that the participant believes is sensitive or potentially injurious information. Disclosure of the information, which is the subject of a notice, is prohibited unless such disclosure has been authorized in writing by the Attorney General of Canada.

The Attorney General of Canada may, subject to any conditions he or she considers appropriate, authorize the disclosure of all or part of the information. In making that determination, the Attorney General of Canada applies the same test as the Federal Court, namely, the Attorney General determines whether the disclosure of the information would be injurious to international relations, national defence, or national security, and if so, the Attorney General then considers whether the public interest in disclosure outweighs in importance the public interests in non-disclosure.

If the Attorney General has not authorized the disclosure of all the information about which notice was given, authorized its disclosure, subject to conditions, or not made a decision, then the Federal Court may be seized of the matter.

● (1615)

The Attorney General of Canada may, and at times must, also apply to the Federal Court for an order with respect to the disclosure of sensitive or potentially injurious information, and the participant or person who seeks disclosure may make a similar application. But the onus rests with the Attorney General of Canada to prove the probable injury to international relations, national defence, or national security.

Upon a finding that disclosure of the information would result in injury, the court must then determine whether the public interest in disclosing the information is greater than the public interest in not disclosing it. This is the same test that had applied before the 2001 amendments.

If the balance favours disclosure, the court may order disclosure, but it must do it in the manner most likely to limit injury to international relations, national defence, or national security, subject to any appropriate conditions. For instance, the judge could order the disclosure of a summary of the information or a written admission of facts relating to the information. This option is not open to the Attorney General of Canada when making his or her decision.

The intention here is to be able to have this information available for use in proceedings in ways that would serve, as far as possible, both the public interest in disclosure and the public interest in non-disclosure. If the balance favours the public interest in not disclosing the information, the court will confirm the prohibition of disclosure.

An appeal of the Federal Court order may be made to the Federal Court of Appeal and an application for leave to appeal may thereafter be made to the Supreme Court of Canada.

In closing, let me give you some examples of the kinds of information that the court has determined to be injurious under section 38. These include information that reveals or tends to reveal the identity of the human source, the targets of security investigations, the operating methods and techniques of security investigations, the identity of employees involved in covert intelligence activities, information provided in confidence by foreign agencies, the existence of a confidential relationship with a foreign agency, confidential diplomatic exchanges, military operations, military techniques, and information received in confidence from allies.

That's an overview of sections 37 and 38.

Thank you.

● (1620)

The Chair: Thank you.

Mr. Dosanjh.

Hon. Ujjal Dosanjh (Vancouver South, Lib.): Thank you, and my thanks to you gentlemen for being here. My questions are going to be very brief, and I would appreciate brief answers.

Judge Watkin, have you ever received or looked at the 2004-2008 DFAIT annual reports regarding Afghanistan?

BGen Kenneth W. Watkin: My involvement in this file has been exclusively in my capacity as a legal adviser to the government.

Hon. Ujjal Dosanjh: I didn't ask you that question, sir. Answer my question: have you seen those reports?

BGen Kenneth W. Watkin: My involvement in this file has been as a legal adviser to the Government of Canada, and that involvement is covered by solicitor-client privilege.

Hon. Ujjal Dosanjh: But, sir, you can answer whether or not you've seen those reports.

BGen Kenneth W. Watkin: As a legal counsel...I believe, sir, you may be a lawyer....

Hon. Ujjal Dosanjh: I am a lawyer. But we are talking about whether or not you've seen a public DFAIT report, 2004 to 2008. What in that would breach solicitor-client privilege?

BGen Kenneth W. Watkin: Again, my involvement in the file has been as a legal adviser to the Government of Canada, and as you can well appreciate, I have significant ethical and legal—

Hon. Ujjal Dosanjh: Let me ask you another question, then. Have you ever received instructions from PCO or PMO? Now that doesn't involve breach of solicitor-client privilege. As a former attorney general, I can tell you that.

BGen Kenneth W. Watkin: Mr. Dosanjh, in respect of my performance as a lawyer, instructions that I receive and advice that I give are covered by privilege.

Hon. Ujjal Dosanjh: Instructions, sir, are not covered by privilege. Who your client is and who gives you instructions are not matters covered by solicitor-client privilege. That's the law. So tell me, have you ever received instructions from PCO or PMO in this matter?

BGen Kenneth W. Watkin: The scope of solicitor-client privilege includes communications with clients. The government is my client.

Hon. Ujjal Dosanjh: I know your answer, then.

Let me ask you a third question. Did you ever see the Graham Smith article of April 2007 about the torture and abuse of detainees?

BGen Kenneth W. Watkin: If you're asking if I read the papers, the answer is yes, I do.

Hon. Ujjal Dosanjh: Did you see that article, sir?

BGen Kenneth W. Watkin: In terms of what I may have reviewed in my capacity as a lawyer, it would be covered by—

Hon. Ujjal Dosanjh: I'm asking you, did you read this article, sir, of April 23, 2007, by Graham Smith of the *Globe and Mail*?

BGen Kenneth W. Watkin: You would have to show it to me, sir, for me to know for sure what that article is and what it says.

● (1625)

Hon. Ujjal Dosanjh: I will show it to you at the end and you can then give me a written response.

My question is to Mr. Breithaupt.

Mr. Breithaupt, have you ever received instructions from PCO or PMO in this matter of detainee abuse?

Mr. Douglas Breithaupt: I'm here to deal with the overview of sections 37 and 38 of the Canada—

Hon. Ujjal Dosanjh: That's not the question, sir. Have you ever received instructions from PCO or PMO in this regard?

Mr. Douglas Breithaupt: Not to my knowledge; not as far as I can recall.

Hon. Ujjal Dosanjh: Do you know who has been instructing Alain Préfontaine, the lawyer before the Military Police Complaints Commission on behalf of the justice department?

Mr. Douglas Breithaupt: No, I'm not involved in those activities.

Hon. Ujjal Dosanjh: And you have never instructed him?

Mr. Douglas Breithaupt: No. I'm involved in the policy sector of the Department of Justice and I am involved in that sort of activity. I'm here to basically explain the policy behind sections 37 and 38 of the Canada Evidence Act.

Hon. Ujjal Dosanjh: Have you ever seen the annual reports of DFAIT, 2004-08 inclusive, on Afghanistan, or read them?

Mr. Douglas Breithaupt: I can't recall that I have.

Hon. Ujjal Dosanjh: Let me ask you another question. You're aware of Préfontaine's letter that went to potential witnesses that in fact indicated that if they testified before the Military Police Complaints Commission they may be jeopardizing their own reputations or other people's reputations. Do you believe, as a lawyer in the justice department, that it's ethical on behalf of any lawyer to actually interfere and tamper with witnesses who are to appear before a quasi-judicial hearing?

Mr. Douglas Breithaupt: As I said, I'm not involved in such matters, so I'm not aware of any particular letter. I can tell you that section 38 of the Canada Evidence Act creates the duty on all participants to give notice when certain conditions are met, as I've indicated in my opening remarks. So if they believe that sensitive or potentially injurious information would be revealed during the course of a proceeding, then they would bring that notice to the Attorney General of Canada and that would have to be addressed.

Hon. Ujjal Dosanjh: That's fine, sir.

Have either of you, Mr. Watkin or you, seen any of the famous or infamous Colvin reports, and when did you see them, if at all?

BGen Kenneth W. Watkin: Mr. Dosanjh, again, it's Brigadier-General Watkin, and the—

Hon. Ujjal Dosanjh: It could be Mr. Watkin too, sir. No disrespect.

BGen Kenneth W. Watkin: I'm certain, sir.

With respect to information I may or may not have seen, again, it would have been in my capacity as a legal adviser to the crown, and therefore I have to maintain both my professional ethical obligations and my legal obligations to protect that privilege, to claim that privilege.

Hon. Ujjal Dosanjh: And you, sir, Mr. Breithaupt?

Mr. Douglas Breithaupt: I'm sorry, the question was addressed to Brigadier-General—

Hon. Ujjal Dosanjh: No, to both of you.

Mr. Douglas Breithaupt: This is with relation to instructions from PCO?

Hon. Ujjal Dosanjh: No, seeing or not seeing all the famous or infamous Colvin reports, if at all, and when.

Mr. Douglas Breithaupt: I've never heard of the Calder report.

The Chair: I'm sorry, it's Colvin.

Mr. Douglas Breithaupt: The Colvin report, okay. I haven't been involved in....

Hon. Ujjal Dosanjh: That's not the question. Have you ever seen them?

Mr. Douglas Breithaupt: The Colvin report?

Hon. Ujjal Dosanjh: Yes.

Mr. Douglas Breithaupt: No.

Hon. Ujjal Dosanjh: Thank you.

The Chair: Good.

Mr. Bachand, right on schedule.

[*Translation*]

Mr. Claude Bachand: Mr. Chair, I think this is starting quite badly. I might also have to speak with my lawyer present, because I think this has got off on the wrong foot.

However, I would like to raise some questions with Mr. Watkin and Mr. Breithaupt that are actually important.

I would like for us to have an admission facts, as is done in court. I don't know whether you are familiar with that approach. As lawyers, you must be familiar with it. Please understand, and I am speaking to the witnesses, Mr. Chair, that the House of Commons has a traditional role to play, as the Grand Inquest. We, all of us who are members, are the protectors of the realm; I think that is a good way of starting off. And you are entitled to protect your realm, or the people behind you, who have instructed you, are entitled to protect their realm. As a part of that Grand Inquest, I did not see any openness in your presentation to having the Grand Inquest perform precisely that role.

I want to remind you of the important principles that must be put on the table. That is why I suggest an admission of facts.

If a law allows ministers or the government to conceal information from Parliament, that will mean that the government may invoke the law and avoid its obligation to account to the House. At this point, I am immersed in parliamentary rights and I want you to know that parliamentary rights will soon take priority over your own rights. We here carry the legitimacy of elected representatives. The government is entitled to defend its realm, but we are entitled to get to the bottom of an investigation, and that is what must be done.

There is a second principle. Where there is legislation whose words provide that it applies to parliamentary proceedings, the House and its committees have the authority to decide whether the legislation applies to its proceedings, and how it applies. That is very far-reaching. It means that you could not cite the legislation to say that you cannot answer our questions. It takes precedence. We are the ones who will take precedence here. You must account to us.

I do not want to back you into a corner, but that is not all. In the case of legislation and provisions relating to national security... And we are going to get to the bottom of national security, because we, the members here, are tired of being told that we can't be told something because of national security. You are soon going to have to justify it, this national security, and we are the ones who will demand that, as the elected representatives of the people and the holders of parliamentary rights, which are very important.

How, in what circumstances, will the provisions apply to the House and its committees, if they apply? That will be our decision to make. The decisions of the House or its committees in that regard cannot be reviewed by any court. That means that you could not even go out the door here and tell your principals that you are going to court because you don't want to answer questions from the Standing Committee on National Defence. You could not do that.

I don't know whether you are prepared to answer my questions, but I can give you time to reconsider things and go back to your principals and ask them whether what I have said is true. You will see that what I am saying is true.

Will you be prepared to answer all questions concerning national security? And do you agree with my interpretation? Do you agree to the facts, that the parliamentary principles I have just laid out supersede your rights, in legal terms? Do you acknowledge that? If you want to take it under reserve and answer later, I have no problem with that. However, I want this question to be settled from the start.

● (1630)

[*English*]

The Chair: Mr. Bachand, are you addressing that to someone or making a statement?

Mr. Claude Bachand: Both of them. That's what my lawyer tells me to do.

Voices: Oh, oh!

The Chair: Go ahead, General.

BGen Kenneth W. Watkin: I have the greatest respect for this committee and for the House of Commons. I am certainly here and, as I mentioned in my opening remarks, prepared.... I have outlined the legal framework, and I am fully prepared to answer questions with respect to the legal framework to assist this committee.

I am also a lawyer and a legal adviser. As I mentioned, the Supreme Court has ruled a number of times on the importance of solicitor-client protection, not only with respect to how absolute it is, but how essential it is to the proper running and the confidence that clients will have that they can have candid and frank discussions in order to get exactly candid and frank advice. Of course, the concern about the breach of that privilege is not only an ethical and legal one for a lawyer. It has broader public policy questions with respect to the provision of legal advice to government officials.

So I must respectfully again indicate that I am bound by privilege. I will certainly take away what Mr. Bachand has stated and discuss it with the appropriate officials, in particular with my client.

The Chair: Thank you.

Does anybody else want to comment on that?

Go ahead, sir.

Mr. Douglas Breithaupt: I will just note that:

> Public servants have a general duty, as well as a specific legal responsibility, to hold in confidence the information that may come into their possession in the course of their duties. This duty and responsibility are exercised within the framework of the law, including in particular any obligations of the Government to...protect [information] from disclosure under [certain] statutes such as the Privacy Act.
>
> And that:
>
> Officials must...respect their obligation as public servants not to disclose classified information or other confidences of the Government to those not authorized to receive them.

● (1635)

The Chair: Thank you.

I'm sorry, but that uses up your first slot, Mr. Bachand.

Go ahead, if you have a short one.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Mr. Chairman, I feel I must respond to what Brigadier-General Watkin was just saying about solicitor-client privilege. What he's saying relative to the obligation on lawyers as lawyers, in the usual context in which lawyers operate, is true.

Solicitor-client privilege, in my view, is an important privilege. It is one the committee obviously should respect but not necessarily be governed by. It is a principle that relates to the legal rights of people who are in that solicitor-client relationship. It's all designed for the benefit of the client, not the lawyer. It is to protect the client's rights from being prejudiced by the wrongful disclosure of information exchanged with a lawyer.

But that's in the context of legal rights, legal proceedings. There are no legal rights at issue here. These are not legal proceedings. These are parliamentary proceedings. It is, in my view, open to the committee to seek answers from a lawyer appearing as a witness, notwithstanding this principle, although I do believe that it is a principle of some importance and that the committee should not tread needlessly upon that principle in seeking information from a witness who is a lawyer.

The Chair: Thank you for that.

Mr. Hawn, you have seven minutes.

Mr. Laurie Hawn (Edmonton Centre, CPC): Thank you, Mr. Chair.

I'd like to start with Mr. Walsh.

Obviously we have troops in Afghanistan. There is a possibility that information revealed in committee would have consequences to that situation. You suggested I think in your letter to Mr. Dosanjh that it is the committee that should consider whether disclosure is harmful. Do you have any suggestions? I'd like a short answer, if you could, on any practical way the committee could do that. We have quite a long list that Mr. Breithaupt brought up of things that make a lot of sense to me as things that would be, or could be, injurious in a public forum.

Mr. Rob Walsh: I share the proposition that yes, there could well be information relevant to your mandate that could be injurious or sensitive as contemplated by the Canada Evidence Act.

All I can suggest for the committee, Mr. Chairman, is that it take steps it might be comfortable with that would limit the possibility of such information becoming public. The obvious suggestion is in camera sessions. Some people have reservations about the effectiveness of that mechanism, but you might go in camera with no transcript.

Well, there may be doubts there. In that case, while you are in camera, you might have no transcript and do it as a subcommittee. You go forward that way in terms of limiting the number of people who are exposed, or you seek information in a summary form, as Mr. Breithaupt mentioned. In some cases, summaries are made available or names are removed.

It seems to me—and I haven't examined the detailed cases he mentions—that what the courts are concerned about, in addition to the harm caused to the country in its international relations, is the harm it might cause to individuals, to informants and others who may have been identified and may suffer reprisals.

There may be steps you can take of a kind that could make the information still useful to you and useful for your report, but not identifiable as to its source or harmful to the international relations of the country.

Mr. Laurie Hawn: To your knowledge, has classified information or protected material such as this ever been circulated to a committee in the past? If so, was it redacted? Did the committee go in camera to review it? How was it handled? Was it returned to the government after the meeting?

Mr. Rob Walsh: I'd have to research that matter to see what the actual instances were, but what I've described to you is what the committees would typically have done. They would have tried to go in camera or they would have tried to limit the number of people who received the information or acted in some manner like that, or they would receive the information but not disclose it publicly in terms of a report. They would just keep it out of their report.

Mr. Laurie Hawn: In your letter you also state that Parliament has constitutional powers of investigation associated with privilege; however, the government and the crown also have a constitutional obligation to protect Canadian citizens, particularly their rights to life and freedom. There could be a conflict between those two.

Would it not be prudent for this committee to at least be obligated to show restraint and institute some measures to protect national security, to protect those interests that I just mentioned? As well, if the committee gets to decide what national security is, has the committee itself not taken on the prerogative of the crown and the government in that area?

Mr. Rob Walsh: To go to the last point, I think the committee is entitled to have a view as to what is the proper meaning of the term “national security”, since it is statutorily undefined. But what the government should or should not do in a particular situation might be going beyond what the competence of the committee enables.

To go back to your earlier question about the role of the committee and the government's duty to defend the nation, I can only suggest that you keep in mind what your constitutional function is. That is to hold the government to account. What does that mean? In my view, it doesn't mean holding the military to account. That may surprise you.

I mean that in this sense. I've heard the expression used, earlier in discussions before the committee started, about wanting to know what's going on “on the ground”. Well, I'm not sure it's the place of a parliamentary committee to look into what military operations are going on or how they're conducted or whether they're conducted well or whether...etc. It certainly is entitled to ask the government what its policies are relative to a military undertaking and what directions it may have given the military, etc. That's holding the government to account. There's a line there somewhere between holding the government to account and holding the military to account.

I just invite you to maybe maintain that distinction in mind as a way of indicating where your inquiry of the government is appropriate but your inquiry of the military—and I know you have some military witnesses coming up—may be inappropriate for a parliamentary committee.

● (1640)

Mr. Laurie Hawn: Not that we're bound by what other people do, but it should possibly be instructive. Do you have any advice on what other countries such as Australia, the U.K., or the U.S. do in circumstances like this? I know some of them have very rigid frameworks about how these kinds of meetings are conducted, the kinds of redactions that go on, whether it's in camera or in public. Do you have any comparison with what other countries do?

Mr. Rob Walsh: I think it would be more useful for the committee, Mr. Chairman, if I took that question under advisement and reported back to the committee on it, so that you have some comparisons to make, rather than speak off the top of my head.

Mr. Laurie Hawn: I appreciate that.

I have a quick question for General Watkin. I don't know if you know or not, but how many armed forces are transferring prisoners to Afghanistan authority, and how do our procedures and experience compare? Do you have any insight into that?

BGen Kenneth W. Watkin: Certainly as was outlined in the Amnesty case, it is the policy of both NATO and Canada, obviously, to transfer to Afghan authorities. With respect to the numbers, again I do not have that information, and again there would be witnesses who would be better situated to answer that question.

Mr. Laurie Hawn: You mentioned that the Afghan prisoners are not POWs, but we're treating them like POWs. That suggests to me that we are perhaps going above and beyond what would be our legal international obligations. Is that a fair statement or not?

BGen Kenneth W. Watkin: One of the challenges with respect to, particularly, contemporary armed conflicts is that so few are between states. The vast majority of the treaty law is with respect to one state fighting another state. With respect, for instance, to the four Geneva conventions, and in particular Geneva Convention III that deals with POWs and Geneva Convention IV that deals with civilians, there's a set treaty regime. There's Common Article 3 to the four conventions, which will provide for non-international armed conflicts.

There is a treaty—Additional Protocol II to the Geneva conventions—that specifically deals with non-international armed conflict. In terms of customary international law, which relies that assessment on the treaties themselves, that sets a well-established and a high standard of treatment. Certainly the approach of the Canadian Forces is a matter of doctrine: to apply that high standard in terms of anyone they detain, and in that are standards of humanity and care in treating them.

The Chair: That fills the spot just right on.

Mr. Harris from the NDP, you have seven minutes.

Mr. Jack Harris (St. John's East, NDP): Thank you, Mr. Chairman.

Welcome, General Watkin. It's nice to see you again after I think almost 30 years.

I take it that what you said a moment ago is correct, that international humanitarian law applies regardless, and whether they're prisoners of war or not is not really relevant in the application of law in this particular circumstance in terms of the prevention of torture. I'm assuming that's correct.

I'm going to try a little different tactic than Mr. Dosanjh and Mr. Bachand. In your presentation you indicate that in addition to being a legal advisor to the government in some of its various presentations—like the Governor General, etc.—you say you also superintend the administration of military justice in the Canadian Forces, and you also exercise command over all legal officers working in the office of the JAG, including those deployed to Afghanistan. You would have administrative and operational duties that I would assume would include the assurance that in the administration of military justice, if there were breaches of law, you would seek to have people prosecuted who had participated or done that.

In that context I want to refer you to an affidavit filed by Mr. Richard Colvin, a diplomat, to the Military Police Complaints Commission, specifically paragraphs 40 and following. He says he sent a number of memoranda, but he specifically intended that those memoranda reach the Provost Marshal in charge of the military police, and also the military and/or civilian legal advisors, which he calls LEGADs or JAGs, who are responsible for legal aspects of detainee management.

I also note that in the one report of Mr. Colvin's that has been made public, which was filed in the Federal Court, in the heading it says that it was to go to "NDHQ OTT ADM: For Vincent Rigby. Also please pass to JAG."

This affidavit talks about the visits by Mr. Colvin to prisons and witnessing or getting first-hand reports of torture and seeing wounds on individuals that they described as resulting from ill treatment.

In these circumstances, had you been aware of this, do you see it as your responsibility as the person responsible for military justice—and I'm assuming the compliance with international law by the people who you are responsible for—to do something about that? Were you aware of this information and did you do anything about it?

● (1645)

BGen Kenneth W. Watkin: Mr. Harris, it's good to see you as well after all this time.

I just want to clarify. You opened up in terms of the question of the importance of the prisoner of war status. As I mentioned in my opening remarks, it's clear that torture is prohibited across the board, whether it's POWs, whether it's civilians in custody, whether it's under international humanitarian law, the human rights law, the Afghan constitution, or the Canadian domestic law. It is important to establish that international humanitarian law clearly bans it under any number of treaties and customary international law.

With respect to my duties as the superintendent of the military justice system, I basically carry on what were, in effect, as Chief Justice Lamer said, the common law responsibilities of an attorney general. I clearly don't do the political aspects of it; I do the day-to-day aspects with respect to that.

In that capacity I superintend an independent director of military prosecutions, which is very common in the provinces and now federally with the DPP. I also have legal advisers who serve with the Canadian Forces, and those legal advisers include a number who are in Afghanistan. Presently there are six legal officers serving in Afghanistan under a variety of functions; that has ranged from six to nine over the course of various deployments.

With respect to the investigation of offences, I do not superintend the Provost Marshal or the military police. They are an independent organization. They perform a quasi-judicial duty, as do all police in terms of their determination of investigations and decisions to lay charges. They do get legal advice in the course of doing that. In particular, the NIS would get legal advice from the director of military prosecutions. What advice they get or don't get and what they seek would be covered by solicitor and client privilege.

Certainly with respect to—

Mr. Jack Harris: Perhaps I may interrupt you for one moment. Are you saying, then, that if this report, which was sent to NDHQ for passage to the JAG, had reached your attention, you would have no responsibilities? Is that what you're telling us?

BGen Kenneth W. Watkin: I am sorry, Mr. Harris, you did interrupt me, so if I could continue on....

Mr. Jack Harris: I did interrupt you. We're in a very tight timeline here and I won't get to ask that question if I don't get it in, so I'd like to specifically focus on that. I know you give legal advice, but my question is, are you telling this committee that had this come to your attention, as it was intended to, or to the attention of your folks...are you suggesting that you would have no responsibilities with respect to compliance with international law by the military?

● (1650)

BGen Kenneth W. Watkin: The next thing I was going to say was, in terms of providing legal advice with respect, generally, to matters, amongst that advice might be advice to the chain of command, or otherwise, to consider a police investigation, at which time it could be referred to the Provost Marshal. So it's certainly within the realm of the responsibilities of myself and my officers.

Mr. Jack Harris: Surely, if you have attorney general-like duties and responsibilities, the attorney general would be certain to suggest that if something came to his attention on which he or she ordered an investigation, or asked that it be looked into, or did something, that wouldn't be a breach of solicitor-client privilege for the attorney general to inform the public that certain matters came to his attention and he ordered an investigation, or asked that some procedure be followed. So what I'm asking you is, did this come to your attention, and if it did, did you order that anything be done? You are the boss of all these people; you have direct operational control over a whole series of people in the department and the responsibility for the administration of military justice. So I don't think that question, specifically, is beyond the solicitor-client privilege issue.

BGen Kenneth W. Watkin: I think there is a distinction with respect to.... For instance, if you were fulfilling the function of a director of public prosecutions, it's one thing to say the director of public prosecutions has made a decision, and make that public, but it would be another thing for the director of public prosecutions to give advice, and in the giving of advice, that would be covered by privilege. As I understand your question, you're asking me about something that would be in relation to giving advice.

Mr. Jack Harris: But that's not the question. The question—

The Chair: You're out of time for this spot.

We've finished the first round. We're into five-minute rounds. You know how fast that goes, committee.

We're going to start with Mr. Obhrai, then over to Mr. Rae.

Mr. Deepak Obhrai (Calgary East, CPC): Thank you, Mr. Chair.

My question is directed to Rob Walsh and to the Department of Justice.

Rob, in the exchanges that you saw here, there were a lot of privileges talked about—I have a privilege, they have a privilege. Mr. Bachand was talking about opening up everything. I want specifically to understand this from you: we have all taken the secrecy oath not to divulge sensitive information and everything under the secrecy oath and the public service oath. Can you confirm this, that the committee has the right to actually break this law, the laws of Canada, and that we would be compelled to do that? If so, if we are going to be compelled to do that, how are we going to protect ourselves from this thing so that we do not lose our privileges or break the law of Canada? Can you make this thing a very clear distinction?

I'll go to the justice guy for the second one, which is, can this scheme of the Canada Evidence Act be used to cover up information that is embarrassing to the government?

I ask those two questions here.

Mr. Rob Walsh: To go to Mr. Obhrai's question regarding oaths, I'm not sure to which oath he's referring or how many oaths he may be subject to.

Your first job, obviously, is as a member of Parliament, and you can say, in a broad public sense, there shouldn't be oaths at play here that put you in conflict. Leaving that issue aside, about the propriety of taking such oaths where you're not a member of cabinet, even if what you were to say here in this committee, this parliamentary proceeding, or in the House in a debate were, in the minds of some, to constitute a breach of your oath, there could be nothing that could be done about it in terms of using what you said in the House or in the committee as evidence to take steps against you for having breached your oath.

You have to ask yourself, where is your greater duty? Is it to the people to whom you swore the oath or to the people you represent in your function as a member of Parliament? There's a conflict there, potentially, where you have sensitive information. We all know that members of cabinet do have sensitive information, but they're recognized as ministers of the crown and they have crown confidences, cabinet confidences, which they will not disclose in the House because they're expected not to. But if they did, there couldn't be any legal proceedings brought against them. The Prime Minister may not be very happy, but there couldn't be any proceedings brought against them.

All I'm trying to stress here is that you don't have to—and this gentleman who's invoked solicitor-client privilege regarding his duties as a lawyer. There can't be anything done about it if he were, in the minds of some, to breach his duties to the law society or whatever and divulge information that otherwise would be protected. What happens here is here for this committee and it stays here. It can't be used elsewhere. That's the nub of the principle here. It can't be used elsewhere. You have an immunity, if you like.

Now, in your own conscience, you may say, yes, but still it's a breach. I swore an oath; I decided to give this information and I've breached my oath. Well, that's a matter for you to deal with in terms of your own sense of moral obligation. You might ask yourself why you've taken that oath and whether that oath has put you in conflict with your parliamentary duty, but that's another question.

● (1655)

Mr. Deepak Obhrai: If we look at the coin on the other side, if I cannot divulge this to the committee because of the oath I've taken, as you've said here, then the committee cannot do anything on that side on that, can they?

Mr. Rob Walsh: The committee can't do anything with regard to you?

Mr. Deepak Obhrai: Yes, if I say that. I'm just looking at the other side of the coin now.

Mr. Rob Walsh: You can say whatever you want to say or not say whatever you don't want to say.

Mr. Deepak Obhrai: Sir, let's get back to the question I asked you.

Mr. Douglas Breithaupt: Thank you, sir.

The question was, can the scheme of the Canada Evidence Act be used to cover up information that's embarrassing to the government? This has been addressed by the Federal Court in various decisions. Mr. Justice Noël clearly stated that the court will not prohibit disclosure where the government's sole or primordial purpose for seeking the prohibition is to shield itself from criticism or embarrassment.

The court also quoted with approval the following statement:

> ...a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing....

In another case, Mr. Justice Mosley agreed with Mr. Justice Noël that information that is embarrassing to the government cannot be protected, but he added:

> Regrettably, in some cases protecting Canada's security and international relations interests may have the unintended and unwanted effect of protecting a government from embarrassment or exposure. However, if based on the court's examination of the evidence that is the sole or genuine reason the Attorney General seeks to withhold the information, the information must be disclosed.

The Chair: Thank you.

Mr. Rae.

Hon. Bob Rae (Toronto Centre, Lib.): Thank you.

Brigadier-General Watkin, the first agreement took effect on December 18, 2005. That is your evidence. The second and third agreements were in February 2007 and May 2007, which is a 14- or 17-month period. Do you agree with that?

BGen Kenneth W. Watkin: Yes.

Hon. Bob Rae: Is it reasonable to assume that something happened in the period between December 18, 2005, and February and May 2007 that led the government to decide that a further agreement with the Government of Afghanistan was required?

BGen Kenneth W. Watkin: A number of things will have happened during that term, one of which was litigation involving the Amnesty case. Indeed, the arrangement was presented before one of the hearings, which, as I recall, was in May 2007.

Hon. Bob Rae: The fact that Mr. Colvin wrote reports is now a matter of public record. It's well known. It's not exactly a state secret any longer. What's in them is not entirely clear because much of the information has been blacked out.

Mr. Colvin went to Afghanistan in April 2006 and stayed for a considerable period of time. Is it fair to assume that some reports must have been received by the government that led them to conclude that further steps were necessary to protect Canada's reputation and to protect the treatment of prisoners?

BGen Kenneth W. Watkin: Mr. Rae, I can't hypothesize. There will be other witnesses who I understand would likely be brought before you who are in a better position to discuss that issue.

Hon. Bob Rae: You can't tell us whether or not you saw his report. Is that right? Is that what you're telling me?

BGen Kenneth W. Watkin: What I can tell you is that the information I received on this file was in my capacity as a lawyer.

Hon. Bob Rae: For example, when you report at the bottom of one of your submissions, you say:

> For example, in November 2007, transfers were suspended as a result of a credible allegation of ill treatment that arose during a monitoring visit by a DFAIT official. Transfers resumed in February 2008.

You can tell us that. You just did.

BGen Kenneth W. Watkin: It's because that is in fact part of the litigation and that was part of the decision of the court that came out in March 2008.

Hon. Bob Rae: You could tell us that because of the court case, but you can't tell us what evidence, or what information, or what considerations the Government of Canada had in mind that led it to change its policy or to further advance its policy in that critical 14- to 17-month period.

BGen Kenneth W. Watkin: Again, Mr. Rae, the information I would have is a result of me being a lawyer. Your question is very general, and even in that statement the question would be whether there are other witnesses who would be better positioned to answer that.

● (1700)

Hon. Bob Rae: Let's be fair. You told us that you're not going to tell us whether or not you saw the Colvin reports. I can be as specific as you'd like, but if I'm going to get the same answer, which I appreciate you feel you have to give.... I'm trying to get at the information that led the Government of Canada to change its policy. Can you tell us?

BGen Kenneth W. Watkin: There are certainly other witnesses, available or not, who would be able to pass that on to you, subject to other issues that might arise with respect to national security or international relations, about which there's been much discussion today. But as to the information that I have, it is covered by solicitor and client privilege.

Hon. Bob Rae: I'm a lawyer, and I think we all recognize the importance of the privilege you're claiming. But you're in a slightly different role. You describe yourself as having attorney general-like responsibilities. This means that while in a sense your client is the Government of Canada, you also have a responsibility to be free from partisan considerations in the presentation of your work. Would you not agree? That's part of what attorney general-like responsibility means.

BGen Kenneth W. Watkin: I have that independence, which anyone superintending a justice system would have. It has to do with making decisions with respect to the operation and the justice system.

Hon. Bob Rae: But you're not just a lawyer. You're not just advising a client. You're also administering a department.

BGen Kenneth W. Watkin: Right.

Hon. Bob Rae: You're also in charge of a department. You're receiving information from lawyers on the ground, the six lawyers you talked about in Afghanistan. You're getting information from them.

BGen Kenneth W. Watkin: In respect of the administration and operation of my office, my carrying out of those duties and responsibilities is subject to solicitor and client privilege. I train lawyers going to Afghanistan and other parts of the world. I administer an office. But the communications and information that I receive with respect to the performance of my duties as a lawyer are covered by privilege.

The Chair: Thank you.

Mr. Abbott.

Hon. Jim Abbott (Kootenay—Columbia, CPC): I'll be sharing my time with Mr. Kerr.

But I don't understand what my friend Mr. Rae doesn't understand.

Hon. Bob Rae: That's probably true. In fact, I think it's almost certain.

● (1705)

Hon. Jim Abbott: The information to which he's referring was announced in the House, and there was a discussion on it in committee. What the government advised the general to do or not to do, or the advice that he gave the government, falls under solicitor-client privilege. Even as a non-lawyer, I can see that. That's why I don't understand Mr. Rae's question.

Mr. Walsh, I thought I heard you say that we could get this information by asking for it, extracting it. I thought you said that this was fine and that we were covered. We live in a democracy and we have freedom of information, freedom of the press, freedom of expression. We have people in the room who are exercising this freedom, and that's wonderful because that's what our work is all about. We've extracted information and it is in the public domain. It may or may not be able to be used in a legal way, but it is in the public domain. Yet there isn't a person in this room who would want to have anything in the public domain that would compromise our military efforts. So I don't understand the distinction.

Mr. Rob Walsh: I'm not sure what distinction you are referring to. But I understand the problem that you and all members of this committee face regarding information and the need, in some cases, to keep it from becoming public. We answered Mr. Hawn's questions about what we could do to try to avoid having certain information become public. The more basic question is, what information? If you don't get the information, you don't have a problem, because you don't have anything to talk about.

Hon. Jim Abbott: The problem is that we don't know what we don't know.

Mr. Rob Walsh: That's exactly right. It's in the nature of ignorance that you don't know what you're ignorant of. The problem for the committee is to consider what it can do to ensure that the national interest, as opposed to the government's interest, is not compromised by making public what really shouldn't be made public. That's a difficult question in some circumstances. But you don't have the information to know what you ought to be concerned about.

The Chair: Mr. Kerr.

Mr. Greg Kerr (West Nova, CPC): Thank you very much, Mr. Chair.

Thank you, gentlemen, for joining us.

This is becoming clearer by the moment. Putting that aside, I'm going to go to the general.

I know and I agree with the point that we can't get into the military directorate about what government does, but one of the questions I've always been concerned about is what kind of training the soldiers get. They're the ones who deal with these issues first-hand. What kinds of briefings and training do they have, what kinds of obligations do they undertake before they actually are on the ground, regarding the transfer of prisoners?

BGen Kenneth W. Watkin: In terms of prisoner handling, again there are certainly the other witnesses who are going to be called to go into great detail, but from a legal perspective it's a significant part of their training. Training before deployment includes prisoner handling. It includes the issue of a card, released as part of the litigation—not the one at the time—that specifically advises them on the appropriate treatment of detainees and includes not to torture or ill treat but to treat properly.

For anyone who has been watching the news over the last couple of years, on the news they've had pictures of Canadian Forces personnel handling detainees and doing it in a humane manner. The most recent example was with an IED, where a CBC film crew was directly behind, and when the IED went off, they were still taking the wounded CF members out of the armoured vehicle. The commentator was discussing the fact that they were detaining someone who they thought was involved in the incident, and again showing admirable professionalism in terms of their handling of a potential suspect.

The Chair: Thank you very much.

Over to Madame Lalonde, and then we're back to the government.

[*Translation*]

Ms. Francine Lalonde (La Pointe-de-l'Île, BQ): Thank you, Mr. Chair.

I was the foreign affairs critic during that period and I remember very well reading the agreement signed by General Hillier, and comparing it with other agreements signed at that point, and thinking it was very weak. At that time, I said in the House of Commons, during question period, that it was weak.

Mr. Rae, if you read the second agreement, it includes provisions to ensure that Canada will be able to check at all times and consider the detainees' conditions, when that is not the case at all in the first agreement. There is even a provision in the first one that says: "No person transferred from the Canadian Forces to Afghan authorities will be subject to the application of the death penalty." They may tickle them to death or abuse them to death with no problem.

So in the House of Commons there were several members who pressured the government to sign a new agreement. At that time, Mr. O'Connor was the minister and I recall that I was not very nice to him. I told him that it made no sense. In fact, my concern was that Canadian soldiers could be prosecuted under international law, because they were the ones doing it.

There is a military base in my riding, but everyone is concerned about this question. So could you tell us, yes or now, whether soldiers, not the upper echelons of the military, could or could have been convicted under international law for transferring detainees to the prisons?

At the time, there were articles saying that mistreatment was widespread. It was not as hard-hitting as in Richard Colvin's report, but there were a lot of articles. I recall that witnesses said that detainees were mistreated, tortured. Was that Mr. Colvin, at that time? I don't know.

Is that a question I may ask and you can answer? As an M.P., this subject concerns me.

● (1710)

[*English*]

BGen Kenneth W. Watkin: Madame Lalonde, you talked about the arrangements from December 2005. I might just start with that.

[*Translation*]

Ms. Francine Lalonde: Those were the first arrangements.

[*English*]

BGen Kenneth W. Watkin: Right. As I mentioned, the law that applies is international humanitarian law, and the provisions found in there, such as providing access to the ICRC and such, are patterned after what the law says with respect to Geneva Convention Common Article 3 for detainees.

For instance, for treatment in accordance with the standards of Geneva Convention Common Article 3, it's the receiving state that is responsible for the treatment of the persons who are transferred to them, care for the sick and wounded, the right of the ICRC to visit, all of that. Of the additional provisions found in the 2007 arrangement, some of those are additional to what is required in law.

[*Translation*]

Ms. Francine Lalonde: Can I say something to you, generally? I don't know whether this is in fact your rank. Where I come from, in my riding, the soldiers are used to it and don't hold it against me if I can't figure out their rank based on their insignia.

In the first agreement, Canada did not ensure that it had the capacity to do constant monitoring, either for itself or for the Red Cross, as was the case in other agreements. The agreement signed later says: "Representatives of the ... (AIHRC) and Canadian Government personnel ... will have full and unrestricted access to any persons transferred by the Canadian Forces ... ."

I could find the question I asked Mr. O'Connor about this, when I said that was what should have been included in that agreement.

I will repeat my question: could soldiers be convicted?

[*English*]

BGen Kenneth W. Watkin: If I could just take two seconds in response, the addition of Canadian authorities' monitoring is not something you will find under international humanitarian law. It's something additional that the government has put into place.

With respect to the question of the jurisdiction, it's clear that torture is a grave breach. It's clear that it is subject to potential penal sanctions. It's clear that it's prohibited and outlawed, and there is a jurisdiction under the National Defence Act that we incorporate—for instance, subsection 269(1)—in regard to torture. In fact, a Canadian Forces member has been prosecuted for torture in the past under the military justice system, and there's been a prosecution for torture under the civil justice system in Canada.

So the potential is there, but of course that would only happen after following all of the mechanisms that are in place with respect to a proper investigation, where appropriate, and where each functioning actor within the justice system carries out their responsibilities. And it's the same in the military justice system as the civilian criminal justice system, in that those actors are given independent roles to ensure there are checks and balances in the provision of those roles.

The Chair: Thank you, sir.

Mr. MacKenzie, and then Mr. Wilfert.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair. Thank you to the panel.

I'm not a lawyer, just an old policeman. Sitting here today, I am listening to a few truisms. Number one is that if you have two lawyers, you will get three opinions. I think we've heard that. Also, police officers tend to be kind and gentle people; they don't yell at you. And there is a difference between an investigation and an inquisition, and I think some of what we're trying to do here is almost an inquisition.

In looking at the material you've provided for us, I think Madame Lalonde has brought something forward that is important. If you go to the 2007 agreement, I think paragraph 10 puts the obligation on people who have an allegation to take it to the Government of Afghanistan. I think all of what we've seen—as reflected, I believe, in the brigadier-general's comments—reflects the common understanding that the Government of Afghanistan bears responsibility for providing Afghans with...and so on and so forth.

So when Madame Lalonde asked whether Canadians could have been charged, I would note that there's never been an allegation that I'm aware of in which Canadians have ever been accused of torturing detainees. In that regard, when we look at all of the things that are going on here—and I think you've illustrated that the Geneva Convention is between nations at war with uniformed forces—all of the agreements that we have are one-sided only. We appreciate that; we understand it and know it's important for us. But these agreements don't apply to the insurgents; they don't abide by any of these terms and conditions.

Certainly, when we look at all of the things that have come before us here today, and the questions you're being asked, I would ask—whether or not you can answer it—if there are any areas dealing with the transfer of Afghan detainees to Afghan authorities where Canadians would, ultimately, be held liable for what they do.

If people follow the rules that are here—and it seems to me that we have obligations—the ultimate obligation is that of the Afghan authorities for the handling of the detainees. I'm wondering if you can expand on that or give us your response.

● (1715)

BGen Kenneth W. Watkin: Yes, sir, I could.

The Amnesty case, in fact, reinforced that it is Afghanistan that's responsible. The case dealt with non-Canadians. They're responsible for the acts that take place in their country. The fact that it's characterized as a non-international armed conflict, in fact, reinforces that. It's the sovereignty of Afghanistan that governs, and they're responsible for the enforcement of their laws.

There is one point you mentioned, sir, that I would like to clarify. That is the question of whether the obligations under international and humanitarian law apply to all the actors on the battlefield. One of the unique characteristics, perhaps, of that law is that it applies to both sides, whether you're a state or non-state actor.

As you highlighted, one of the challenges in contemporary conflict is the “abiding by” issue. That is a challenge. The ICRC is doing tremendous work in terms of addressing that by trying to get better abiding by other state actors, as are other NGOs.

For the Canadian Forces, that's irrelevant. As I mentioned in my comments, we are, obviously, committed to the rule of law and Canadian values. We will apply the law regardless of whether our opponents do. This is a significant part for us in terms of maintaining discipline. It's a slippery slope in terms of not complying with the law.

The Chair: Thank you.

We'll go to Mr. Wilfert, then back to the government, and then the NDP finishes up.

Go ahead, sir.

Hon. Bryon Wilfert (Richmond Hill, Lib.): Thank you, Mr. Chairman.

Thank you, gentlemen, for being here.

General, I don't know if you'll be able to answer this, but during the period from November 7 to February 8, at a time when the opposition was raising these issues in the House, the government was denying that there was in fact any issue.

From a legal standpoint, in November 2007 the transfers stopped. What procedure was undertaken, and who was informed in the government? And with those lawyers on the ground in Afghanistan, how is it reviewed? How do you determine that it could in fact be resumed, in terms of the transfer of those prisoners? Who gets that information? Allegations were made. We know that Mr. Colvin sent reports in.

Colvin notwithstanding, from your standpoint, within your responsibilities, how is it communicated? What is the litmus test to say that this agreement is now being adhered to? The government obviously saw that there was a problem, and they had to make changes to the existing agreement.

From a legal standpoint, what and how is it reviewed? Who's informed during that period in order for it to be resumed?

● (1720)

BGen Kenneth W. Watkin: Mr. Wilfert, again, you're getting into asking questions that, because of my involvement in the file as legal counsel, are subject to solicitor-client privilege.

Hon. Bryon Wilfert: I'm having a hard time determining where your role as lawyer ends and the role of advocate general begins. I just want to know in terms of procedure, any procedure.

Let's not use this example, then. If in fact there was an agreement between two parties, and we decided, for whatever reason, that there was misuse or mistreatment, what would be the normal channels used? And how would that be communicated so we could determine whether there should be changes made and one could therefore allow the resumption of the transfer of prisoners?

BGen Kenneth W. Watkin: Mr. Wilfert, again, you're asking me to answer a hypothetical question. You've brought it back to the transfer of prisoners again. I can certainly tell you that in my capacity I provide advice on military law, and I have lawyers who provide advice at various levels in the chain of command. I also superintend the military justice system, which involves various roles with respect to when that justice system becomes engaged. In terms of a lawyer being asked for advice or providing advice in terms of knowing the issues, that's how legal advice would be engaged.

I also mentioned in my opening comments that this is a whole-of-government issue as well. I can certainly only speak with respect to my role in respect of the functions as Judge Advocate General.

Hon. Bryon Wilfert: Through you, Mr. Chairman, in terms of an illegal act committed in theatre, wherever that theatre is, what would be the procedure to communicate that concern to government?

BGen Kenneth W. Watkin: In general terms, keeping away from the specifics of this case, illegal acts can come to the attention of the chain of command in any variety of ways. The police may in fact learn of it on their own and commence an investigation. The chain of command may become aware and ask for an investigation. They may become aware of an incident and ask for legal advice as to what is the appropriate way to investigate anything that might arise. And depending upon the issue and depending upon the facts, there may be a recommendation of a police investigation or there may be a recommendation of a board of inquiry or other unit investigation. Where it's transferred to the military police, they may do an investigative assessment to see whether it is something that would fall into what they would investigate.

The process that's in place in the military is not that much different with respect to what might occur in the civilian side, particularly with respect to the role of the police and the role of prosecutors.

Hon. Bryon Wilfert: But ultimately that information has to wind up on the desk of the political masters in order for them to be able, from a policy standpoint, to make a decision as to whether we stay with what we have or whether we should make changes.

BGen Kenneth W. Watkin: The key question would be, sir, with respect to what we're talking about. With respect to the criminal side —and I just want to highlight this—as in the civilian justice system, there is a separation from a political aspect, and that's why there are independent actors in the system. That of course is the same in the military justice system.

So in terms of whether we're talking about policy or whether we're talking about action that is criminal, I think it's important to highlight the two....

Hon. Bryon Wilfert: I'm not sure whether it helps to be a lawyer or a fisherman at the moment. I'm not much on the fishing side, but I would suggest that in order for us to get the answers we need, Mr. Walsh.... Just a quick comment; you don't necessarily have to respond.

Parliament is supposed to be supreme. The question is where that fits in, in terms of what it is members of Parliament want to ask to get answers to legitimate questions.

I appreciate your position, General. But Mr. Walsh, it's obvious frustration will develop here, if it hasn't already, because of the fact that answers are not coming for whatever reason.

The Chair: Mr. Walsh, I'm afraid I'm going to have to move on. The time is up, but could you respond to that in written form to the committee?

Mr. Rob Walsh: You have the right to ask any questions. You have the right to get your questions answered. What you can do about someone not answering your questions is when the trouble begins, and there isn't that much you can do about it.

The Chair: Thank you.

Mr. Hawn, and then to the NDP.

● (1725)

Mr. Laurie Hawn: Thank you, Mr. Chair.

I'd like to pick up on something Mr. Wilfert was talking about, about transfers and who starts and stops agreements and so on. This is not information that's been withheld. It's been disclosed time after time after time in question period, about who has the authority to start or stop transfers, and that is the commander on the ground, based on the situation at the time and whatever case he's looking at, and based on advice from other people such as DFAIT, the Corrections Canada folks who are there, local police, and so on.

General, I guess I'm not even asking you a question. I'm just pointing out that the authority for starting and stopping transfers rests with the commander in the field. Is that correct?

BGen Kenneth W. Watkin: That is correct, sir.

Mr. Laurie Hawn: And when it comes to starting transfers again.... Obviously the commander will stop it if he has concerns, whether it's as a result of allegations or whether it's any other concern that decreases his comfort level. When his comfort level is back up because those concerns have been addressed in whatever way, then he will give the authority to start transfers again. Obviously that information is passed up the chain of command. Is that a fair statement?

BGen Kenneth W. Watkin: It's a fair statement in terms of the reporting. There is a reporting chain within the military in terms of advising on what is done. The commander will make a decision, as I mentioned in my opening remarks, based on the information from DFAIT and other government departments and other information he may have available.

Mr. Laurie Hawn: Now with respect to agreements, as you said, the agreement that was signed in 2005 was based on international humanitarian law and so on.

There were concerns expressed that may or may not have been legitimate, but they piqued people's attention, so that in 2007 the government decided to take what I would suggest was the prudent step of looking at the agreement and making it tighter, having it cover more things, which was not necessarily in response to any specific conviction or proof—because there never was any—but it was simply a prudent thing to do based on legitimate concerns. But it was basically more pre-emptive than anything else, to say, "Look, there may be things going on here that we would not be comfortable with"—or there may have been allegations, and allegations are cheap and easy—"but we should do something to tighten up the agreement." And that's in fact what was done in 2007. Is that not true?

BGen Kenneth W. Watkin: It is a fact that in May 2007 additional obligations were added to the agreement, a reinforcement, for instance, of access. That is a fact.

Mr. Laurie Hawn: That agreement holds today, and has been abided by, as far as we know, by the Afghans. We are working with them all the time. If something comes up, it is dealt with, but it is based on that agreement. If that agreement becomes insufficient, it would probably be reasonable to suggest that we look at that agreement again and try to improve it again.

BGen Kenneth W. Watkin: Mr. Hawn, I can't speculate—

Mr. Laurie Hawn: I know, but it's kind of logical, because that's the reason it happened in 2007 and 2005, so if we needed to do it again, obviously we'd look at it again.

A voice: [*Inaudible—Editor*]

Mr. Laurie Hawn: Not at all.

The Chair: You have one minute.

Mr. Laurie Hawn: Mr. Abbott, quickly.

Hon. Jim Abbott: General, in 30 seconds, it seems to me that what we've arrived at here is the difference between what the committee has a right to do and certainly, according to the instruction of Mr. Walsh, to ask what the government is doing and what is their position versus actually overseeing, making comment on, or doing an inquiry of what the military is actually doing.

It's a ridiculous question, I suppose, but is there any brief way for you to be able to describe to us how this committee can make that distinction? What are the questions that would lead us to the unanswerable versus the ones that are the responsibility of the committee?

BGen Kenneth W. Watkin: Sir, that would be way outside my line of—

Voices: Oh, oh!

The Chair: Thank you.

Mr. Harris.

Mr. Jack Harris: Thank you, Chairman.

General Watkin, I think we should be clear, after Mr. MacKenzie's comment. I don't think anyone, certainly from my party, has ever suggested that a Canadian soldier in Afghanistan has tortured somebody, but what we are concerned about is the following. I'll use your words:

> The transfer of detainees to a real risk of torture or ill-treatment is contrary to International Humanitarian Law (IHL), which is also known as the Law of War or the Law of Armed Conflict.

I will suggest to you that whatever agreement is in place, we understand that the Afghans were looking after these prisoners, well or badly. That obligation doesn't change our obligation not to transfer to a real risk of torture or ill treatment. We have, presumably, a duty to take steps to ensure that doesn't happen. So we are trying to protect (a) Canada's reputation, (b) our soldiers breaking international law, and (c) obviously reduction of torture of whoever happens to be the victim of torture. That is the whole purpose of this.

We do know that the International Committee of the Red Cross, after this, were held out as the people who were monitoring this and said, "We're not telling you guys anything about this; we're only going to tell the state", in other words, Afghanistan. "We're not going to tell Canada; we're just telling Afghanistan."

You can answer this for yourself. What I want to know is this. Do you have any responsibility for the Canadian military meeting its legal obligations under this international humanitarian law? In other words, do you have anything to do with the monitoring system, the reporting system, and the enforcement of that provision of international humanitarian law? And if you don't, who does?

● (1730)

BGen Kenneth W. Watkin: I certainly have responsibility to give advice, as I mentioned, with respect to advice to commanders on domestic and international laws respecting international operations, which clearly would include issues such as this with respect to the handling and treatment of the detainees. To address your issue in terms of this being a standard that applies, yes, it does, regardless of where we go and regardless of where we serve.

Mr. Jack Harris: I understand that part, but your responsibility is to give advice. The only report that we do have or that we have seen is one that talks about torture in Afghanistan's prisons, and we have an affidavit of Mr. Richard Colvin saying he had given several reports of this nature, starting in 2006. Where are the reports going now? Do they come to your attention, or is that a solicitor-client privilege thing? Where do they go? Is there a procedure whereby these reports go to somebody who takes responsibility for making sure that our international obligation is being complied with?

BGen Kenneth W. Watkin: Again, my involvement with this file is subject to solicitor-client privilege. I believe there are other witnesses who are better situated to give you a far more comprehensive answer to your general question about where these go.

Mr. Jack Harris: You're not even going to tell us whether they go to you. That's your answer.

If I have one more minute I would like to ask Mr. Breithaupt a question regarding certificates of the attorney general.

In 2001, when Bill C-36, the anti-terrorism bill, was brought in and we were dealing with security certificates, the parliamentary secretary to the Minister of Justice said the following about the Attorney General's certificate in connection with proceedings regarding section 38 of the Canada Evidence Act:

> The attorney general's certificate process is intended to apply in exceptional cases only as the ultimate guarantee that ensures the protection of very sensitive information by the Government of Canada. The protection of this information is of particular concern in relation to information obtained from our allies.

He went on to say a number of things, including that the certificate could only be issued personally by the attorney general and only when very sensitive information was threatened by disclosure in individual proceedings.

That seems to be a very exceptional intention of Parliament in relation to the use of these certificates. That does not seem to be in accord with the practice that's been undertaken by the Department of Justice since this legislation was passed.

Would you care to comment on that?

The Chair: You only have a few seconds, so it'll have to be short.

Mr. Douglas Breithaupt: Thank you.

I can assure you that the attorney general has never issued a prohibition certificate, because there is no need to issue one. I don't understand the comment with regard to the practice, since no certificate has been issued to date.

The Chair: Thank you very much.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: I have a point of order.

Earlier, I asserted that the committee was free to proceed as it agreed. In fact, we can disregard the section 38 arguments. I was clear on that point. I understood that General Watkin had to consult his client and then get back to us. I would like this to be done. Otherwise, we are going to end up with people who don't want to answer our questions. I think it is essential that the general come back and explain, on behalf of his client, how he sees the situation.

Do we have an understanding?

● (1735)

[*English*]

The Chair: I understand that, and I think Mr. Watkin understands it as well.

Thank you all very much.

The meeting is adjourned.

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