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Notice of Motion

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FEDERAL COURT

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

-and-

**MINISTER OF FOREIGN AFFAIRS
and THE ATTORNEY GENERAL OF CANADA**

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant will make a motion to the Court on NOVEMBER 26, 2008, at 9:30 a.m. or as soon thereafter as the motion can be heard, at Ottawa, Ontario.

THE MOTION IS FOR:

- (a) An Order compelling Sean Robertson, a deponent in support of the Respondents, to re-attend cross-examination on his affidavit and answer a number of questions put to him by the Applicant;
- (b) An Order admitting as part of the record for the application a document tendered to counsel to counsel for the Respondents and referenced in cross-examination, namely the Globe and Mail article by Paul Koring entitled "Ottawa withholding travel papers for Canadian" dated September 11, 2008 and the "Etihad Itinerary";

- (c) An Order compelling the production of documents listed at item 10 of the Amended Direction to Attend addressed to Sean Robertson;
- (d) A declaration that documents relating to the ongoing efforts from the Respondents to repatriate the Applicant Mr. Abdelrazik to Canada by any safe means at their disposal are relevant to the underlying Application; and,
- (e) An Order for all costs of this motion, forthwith and in any event of the cause, on a substantial indemnity scale.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Respondents filed four public affidavits in this application, sworn by Sean Robertson, Eric O'Connor, Michel Latouche and Geoffrey Everts;
- (b) The Applicant conducted an oral cross-examination of only one deponent for the Respondents, Sean Robertson, which took place on October 7, 2008;
- (c) The Respondents refused to provide to the Applicant documents relating to their efforts to repatriate him, including efforts made to facilitate Mr. Abdelrazik's passage on Etihad Airways flight, as set out in the "Etihad Itinerary", which was scheduled to depart from Khartoum on September 15, 2008. Such refusal was made on the grounds that these matters are irrelevant to the instant Application. Given that the question of repatriating Mr. Abdelrazik is clearly outlined in the Notice of Application in this matter and in view of the fact that this Application is made under Section 18 and 18.1 of the *Federal Courts Act*, the Application is in respect of a "matter" under Section 18.1 (1) of the *Federal Courts Act*. Accordingly, the issue of the means of Mr. Abdelrazik's repatriation is clearly

- (c) An Order compelling the production of documents listed at item 10 of the Amended Direction to Attend addressed to Sean Robertson;
- (d) A declaration that documents relating to the ongoing efforts from the Respondents to repatriate the Applicant Mr. Abdelrazik to Canada by any means reasonably possible are relevant to the underlying Application; and,
- (e) An Order for all costs of this motion, forthwith and in any event of the cause, on a substantial indemnity scale.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Respondents filed four public affidavits in this application, sworn by Sean Robertson, Eric O'Connor, Michel Latouche and Geoffrey Everts;
- (b) The Applicant conducted an oral cross-examination of only one deponent for the Respondents, Sean Robertson, which took place on October 7, 2008;
- (c) The Respondents refused to provide to the Applicant documents relating to their efforts to repatriate him, including efforts made to facilitate Mr. Abdelrazik's passage on Etihad Airways flight, as set out in the "Etihad Itinerary", which was scheduled to depart from Khartoum on September 15, 2008. Such refusal was made on the grounds that these matters are irrelevant to the instant Application. Given that the question of repatriating Mr. Abdelrazik is clearly outlined in the Notice of Application in this matter and in view of the fact that this Application is made under Section 18 and 18.1 of the *Federal Courts Act*, the Application is in respect of a "matter" under Section 18.1 (1) of the *Federal Courts Act*. Accordingly, the issue of the means of Mr. Abdelrazik's repatriation is clearly

relevant to the underlying Application and the Respondents' refusal in that regard is without legal basis;

- (d) The Respondents objected to Mr. Robertson answering certain questions, although the questions are relevant to the application. These questions include question 167 to 170 and related questions as well as questions 582 to 9586 and related questions of the transcript of the cross-examination of Sean Robertson;
- (e) In the context of questions 582 through 586 asked by the Applicant to Mr. Robertson, the Applicant requested that a document print out of an itinerary of travel for the Applicant from Khartoum to Montreal on September 15, 2008 via Eithad Airlines and a Globe and Mail article reporting on same be placed before the Respondent. The Respondents objected to Mr. Robertson identifying the documents for the purpose of the record, claiming that the itinerary and the Globe and Mail article were part of a settlement offer and were therefore privileged documents;
- (f) The Applicant asserts that there can be no settlement privilege in respect of a travel itinerary, that the document logically and practically speaking is a record that exists independently of any settlement. It was generated by a non-party to the instant application and is not the subject of litigation privilege. The proposed travel details of the Applicant constitute a material fact and that the reporting of this fact by the media renders the document a public matter of concern relating to the instant application, notwithstanding any settlement considerations that the Respondents may develop in consequence of the travel itinerary;
- (g) The Respondents' objections which form the basis for the present Motion are frivolous and without sound legal basis, and;
- (h) Rules 64, 83, 91(2)(c), 94, 95, 97 and 359 of the *Federal Courts Rules*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Affidavit of Kourosh Farrokhzad;
- (b) Portions of Transcript of the cross-examination of Sean Robertson upon which the Applicant (Moving Party to this Motion) will rely upon; and
- (c) Such further and other materials as counsel may advise and this Honourable Court may permit.

Ottawa, November 7, 2008

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