

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

BETWEEN:

**THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE,
AND
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

APPELLANTS

AND:

OMAR AHMED KHADR

RESPONDENT

APPELLANTS' FACTUM
(Rule 35 of the Rules of the Supreme Court of Canada)

Counsel for the Appellants

Department of Justice Canada
Room 1161, Bank of Canada
234 Wellington Street
Ottawa, ON K1A 0H8

**Per: Robert J. Frater/Doreen C. Mueller/
Jeffrey G. Johnston**

Tel: (613) 957-4763

Fax: (613) 954-1920

Email: robert.frater@justice.gc.ca
doreen.mueller@justice.gc.ca
jeffrey.johnston@justice.gc.ca

Counsel for the Respondent

Parlee McLaws LLP
Barristers and Solicitors
1500 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 4K1

Per: Nathan J. Whitling and Dennis Edney

Tel: (780) 423-8658

Fax: (780) 423-2870

Email: nwhitling@parlee.com
dedney@shaw.ca

Agent for the Appellants

Department of Justice Canada
Room 1161, Bank of Canada
234 Wellington Street
Ottawa, ON K1A 0H8

Per: Robert J. Frater

Tel: (613) 957-4763

Fax: (613) 954-1920

Email: robert.frater@justice.gc.ca

Agent for the Respondent

Lang Michner LLP
Lawyers
300, 50 O'Connor Street
Ottawa, ON K1P 6L2

Per: Marie-France Major

Tel: (613) 232-7171

Fax: (613) 231-3191

Email: mmajor@langmichner.ca

PART I – STATEMENT OF FACTS	1
A. OVERVIEW	1
B. FACTUAL BACKGROUND.....	2
(i) Canadian Intelligence Interviews.....	2
(ii) Canadian Monitoring of Respondent’s Welfare at Guantánamo Bay.....	3
(iii) <i>Habeas Corpus</i> Review of Respondent’s Detention	4
(iv) Injunction Restraining Further Interviews	4
(v) Disclosure by Canada.....	5
(vi) Military Commission Prosecution.....	6
(vii) Repatriation.....	7
(viii) Judgments in the Courts Below	7
PART II - ISSUES.....	10
PART III - ARGUMENT	11
A. The Respondent is Due No New Remedy	11
B. There Was No New Breach of Section 7 of the <i>Charter</i>	13
(i) The Courts Below Failed to Appreciate the Limited Justiciability of the Issues.....	13
(ii) The Absence of a s. 7 <i>Charter</i> “Deprivation”	15
(a) Any Deprivation Cannot Be Attributed to Canadian State Action.....	15
(b) What the Respondent Seeks is a Positive Rights Claim.....	16
(iii) The “Duty to Protect” is Not a Principle of Fundamental Justice	17
(a) The Need for a Cautious and Incremental Approach	17
(b) The Erroneous Incorporation of Canada’s International Obligations	18
(c) The “Duty to Protect” is Not a Legal Principle.....	20
(d) The Absence of International Recognition of a “Duty to Protect” as a Legal Principle.....	21
(e) The “Duty to Protect” is neither Vital nor Fundamental to Our Societal Notion of Justice	27
(f) The “Duty to Protect” Cannot Be Gauged With Any Precision	28
C. If There is a “Duty to Protect” it Has Been Satisfied in this Case.....	29
D. The Remedy Imposed Was an Inappropriate One	35
(i) The Remedy Exceeds the Proper Role of the Courts.....	35
(ii) The Remedy is Not Responsive to the <i>Charter</i> Breach.....	38
(iii) The Remedy is Ineffective	39
PART IV - COSTS	40
PART V – ORDER SOUGHT	40
PART VI - TABLE OF AUTHORITIES	41
PART VII – RELEVANT LEGISLATIVE PROVISIONS	47

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

BETWEEN:

**THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE,
AND
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

APPELLANTS

AND:

OMAR AHMED KHADR

RESPONDENT

APPELLANTS' FACTUM
(Rule 35 of the Rules of the Supreme Court of Canada)

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Federal Court of Appeal has endeavoured to settle the political controversy surrounding the Respondent, Omar Khadr's, continued pre-trial detention by the United States ("U.S.") with an order requiring the Government of Canada ("Government") to request his repatriation. There is no legal basis for such an order, which fails to respect the institutional roles of the executive and the courts under our constitution.

2. The nature of the *s. 7 Charter* breach found by the majority is unclear. If the breach rests on the interviewing of the Respondent by a Canadian official and transmission of the answers to the U.S., that breach has already been remedied - twice - by Canadian courts. If, on the other hand, the breach consists of the failure to observe a new "duty to protect" Canadian citizens abroad, as the courts below held, no such duty exists. The duty does not exist under domestic law, has no support under international

law and is not accepted by other common law countries. It can scarcely be said to be “fundamental to the way in which our legal system operates.”

3. The unprecedented and unprincipled remedy imposed ought to raise further doubts about the existence of the infringement it purports to address. Ordering that a specific diplomatic representation of this nature be made to a foreign government fails to respect the institutional competence of the courts and the prerogative powers of the Crown in foreign relations. These are matters of the utmost importance to our constitutional order, as they are in other countries where the courts have shown much more restraint than the courts below in matters affecting foreign relations. Furthermore, the remedy is unresponsive to the nature of the conduct at issue, and is ineffective because its efficacy depends on compliance by a foreign country over which Canadian courts have no control. For that reason, it over-reaches the court’s authority.

B. FACTUAL BACKGROUND

4. The Respondent was apprehended by the U.S. military following a battlefield confrontation in Afghanistan in July 2002. The Government of Canada immediately sought consular access to the Respondent and asked the U.S. not to transfer him to Guantánamo Bay, Cuba, particularly given his young age. Notwithstanding Canada’s request, the U.S. transferred the Respondent to Guantánamo Bay in October 2002.¹

(i) Canadian Intelligence Interviews

5. In February 2003, the U.S. authorized officials from the Canadian Security Intelligence Service (“CSIS”) and the Department of Foreign Affairs and International Trade (“DFAIT”) to conduct intelligence interviews of the Respondent at Guantánamo Bay. These interviews took place over four days. In September 2003, CSIS officials returned to conduct further intelligence interviews over two days.²

6. In March 2004, the U.S. authorized a further intelligence interview of the Respondent by a DFAIT official. The DFAIT official reported that he was told by a U.S.

¹ Joint Record (“JR”) at pp. 135 and 164-168 (Kuebler Affidavit at paras. 7-10 and Exhibits F-G)

² JR at pp. 138, 271-276, 280-283, 301-302 and 490 (Kuebler Affidavit at paras. 22 and 23 and Exhibits S, U and EE; and Robertson Affidavit at para. 17)

official that they had subjected the Respondent to a sleep deprivation program prior to the intended Canadian interview. The Respondent refused to answer any questions at this interview.³

(ii) Canadian Monitoring of Respondent's Welfare at Guantánamo Bay

7. Since 2002, Canada has maintained communications with U.S. officials at various levels to monitor the Respondent's treatment and well-being.⁴ In July 2003, Canada repeated its request for consular access to the Respondent and asked the U.S. to consider having him transferred to a facility for juvenile enemy combatants given his age.⁵

8. In November 2003, Canada sought assurances that the Respondent was receiving adequate medical attention. The U.S. advised that the Respondent was being treated humanely and in a manner consistent with the principles of the *Third Geneva Convention*.⁶

9. On June 7, 2004, Canada sent a diplomatic note to the U.S. seeking assurances that treatment of detainees in Afghanistan and Guantánamo Bay would accord with international humanitarian law and human rights law.⁷

10. In January and February 2005, Canada sent diplomatic notes to the U.S. expressing concerns regarding allegations of abuse against the Respondent. In January and July 2005 and April 2006, Canada requested that the Respondent be provided with an independent medical assessment. These diplomatic notes also repeated prior requests for consular access to the Respondent and for assurances that the death penalty would not be sought or imposed against him.⁸

11. Although the U.S. continued to refuse consular access to the Respondent, in March 2005, DFAIT officials were permitted to conduct welfare visits with him. Welfare visits were conducted on numerous occasions between March 2005 and June 2008 and

³ JR at pp. 138, 296-300 and 490 (Robertson Affidavit at para. 17; and Kuebler Affidavit at para. 22 and Exhibit DD)

⁴ JR at pp. 486 and 489-490 (Robertson Affidavit at paras. 2 and 16)

⁵ JR at pp. 487 and 493-494 (Robertson Affidavit at para. 6 and Exhibit A)

⁶ JR at pp. 488 and 498 (Robertson Affidavit at para. 9 and Exhibit D)

⁷ JR at pp. 488 and 499 (Robertson Affidavit at para. 10 and Exhibit E)

⁸ JR at pp. 488-489 and 502-509 (Robertson Affidavit at paras. 12-14 and Exhibits G-I)

have continued regularly since then. The welfare visits allowed Canadian officials to follow up on medical issues for the Respondent, facilitate communication with his family members and provide him with educational materials, books, magazines, special food items, clothing and other personal items. Throughout the welfare visits, the Respondent was generally observed to be in good health.⁹

(iii) Habeas Corpus Review of Respondent's Detention

12. In 2004, the U.S. Deputy Secretary of Defence established the Combatant Status Review Tribunal ("CSRT") for the purpose of reviewing whether detainees at Guantánamo Bay were properly determined to be "enemy combatants."¹⁰ At that time, Canada advised the U.S. of its expectation that the Respondent would be provided with a judicial review of his detention by a regularly constituted court affording all judicial guarantees in accordance with due process and international law.¹¹ The Respondent's case was reviewed by the CSRT on September 7, 2004 and the tribunal concluded that he was an enemy combatant.¹²

13. In June 2004, the U.S. Supreme Court ruled that certain detainees in Guantánamo Bay were entitled under U.S. law to seek *habeas corpus* review in the courts¹³, a right reconfirmed by the same court in 2008.¹⁴

14. The Respondent initiated a *habeas corpus* petition in the U.S. District Court for the District of Columbia in 2004. On November 24, 2008, the Court ruled that the Respondent's petition should be held in abeyance pending the completion of his Military Commission prosecution.¹⁵

(iv) Injunction Restraining Further Interviews

15. On August 8, 2005, the Federal Court of Canada granted the Respondent's application for an interim injunction prohibiting Canadian officials from conducting

⁹ JR at pp. 490-491 and 512-588 (Robertson Affidavit at paras. 17-21 and Exhibits K-U)

¹⁰ JR at pp. 140 and 320-323 (Kuebler Affidavit at para. 28 and Exhibit HH)

¹¹ JR at pp. 488 and 500- 501 (Robertson Affidavit at para. 11 and Exhibit F)

¹² JR at p. 140 (Kuebler Affidavit at para. 29)

¹³ *Rasul v. Bush*, 542 U.S. 466 (2004)

¹⁴ *Boumediene v. Bush*, 553 U.S. (2008)

¹⁵ *Khadr v. Bush*, Civil Action No. 04-1136 (JDB), United States District Courts, 24 November 2008

further intelligence interviews of the Respondent while still permitting welfare visits.¹⁶ In that action, the Respondent seeks \$10,000,000.00 in damages based on allegations that the interviews conducted by CSIS and DFAIT officials in 2003 and 2004 violated ss. 7, 10(a) and (b) and 12 of the *Charter*. The Respondent alleges, *inter alia*, that Canadian officials were aware, or ought to have been aware, that the Respondent was tortured by U.S. officials, including through the infliction of a sleep deprivation program.¹⁷

(v) Disclosure by Canada

16. In January 2006, the Respondent initiated a judicial review application seeking *Stinchcombe*-like disclosure from Canada for the purpose of allowing the Respondent to make full answer and defence to the charges he was then facing. On May 23, 2008, this Court found that the Respondent's s. 7 *Charter* rights had been breached as a result of Canada's participation in the unlawful process to which the Respondent was subject. The Court ordered disclosure of: "(i) records of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr."¹⁸

17. This Court's disclosure order required a designated Federal Court Judge to assess whether public interest considerations should limit the information to be disclosed. Justice Mosley conducted that review and issued his decision on June 25, 2008.¹⁹ His review focussed on 26 records, which were essentially written reports of the interviews conducted by Canadian officials of the Respondent in Guantánamo Bay, DVDs containing audio and video recordings of the interviews that took place in February 2003²⁰, and 5 pages of reports prepared by U.S. agents describing the February 2003 interviews.²¹ Most information identifying Canadian and U.S. officials was protected, as was sensitive information pertaining to other subjects, persons and events that would not

¹⁶ *Khadr v. Canada* (2005), 277 F.T.R. 298, 2005 FC 1076

¹⁷ *Khadr v. Canada*, [2009] F.C.J. 613, 2009 FC 497

¹⁸ *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 ("*Khadr 2008*")

¹⁹ *Khadr v. Canada (Attorney General)* (2008), 331 F.T.R. 1, 2008 FC 807

²⁰ *Ibid.* Justice Mosley noted at para. 75 that the Respondent's defence team were already in possession of the DVDs, but under restrictions not to share them with the Respondent's Canadian counsel. In addition, at para. 74 he observed that Canadian officials did not have copies of any recordings that may have been made of the September 2003 or March 2004 interviews.

²¹ *Ibid.* at paras. 70 and 74-84

be of assistance for the Respondent's defence.²² The Respondent was provided with this disclosure by Canada in the summer of 2008.²³ Included in the disclosure was the report of the March 2004 interview by the DFAIT official concerning sleep deprivation, which was almost entirely unredacted.²⁴

(vi) Military Commission Prosecution

18. Non-capital charges against the Respondent were sworn on April 5, 2007.²⁵ The Respondent currently faces prosecution before a U.S. Military Commission for his alleged activities in Afghanistan in June and July 2002 on charges which include:

- (1) Murder in violation of the laws of war;
- (2) Attempted murder in violation of the laws of war;
- (3) Conspiracy;
- (4) Providing material support for terrorism; and
- (5) Spying.

19. The Respondent's Military Commission trial was scheduled to commence on January 26, 2009. On January 21, 2009, the Military Commission Judge granted a continuance of the Respondent's prosecution until May 20, 2009 in order to allow the new U.S. Administration time to review the Military Commission's process and pending cases. That continuance has since been extended.²⁶

20. On January 22, 2009, the newly-elected President of the U.S. issued an order directing that the detention facilities at Guantánamo Bay be closed within one year. The President directed the Secretary of Defence to undertake an immediate review of the conditions of detention at Guantánamo Bay to ensure that individuals are detained in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the *Geneva Conventions*.²⁷

²² *Ibid.* at paras. 70 and 81-82

²³ JR at pp. 1283-1284 (Cross-examination of Kuebler at p. 16, lines 17-26)

²⁴ JR at pp. 138 and 296-300 (Kuebler Affidavit at para. 22 and Exhibit DD)

²⁵ JR at pp. 144 and 345-351 (Kuebler Affidavit at para. 45 and Exhibit KK)

²⁶ The Appellants will update the Court on developments in this regard in advance of the oral hearing on November 13, 2009.

²⁷ http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/