**File No. 32147**

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

BETWEEN:

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

Appellants
(Respondents)

- and -

**OMAR AHMED KHADR**

Respondent
(Appellant)

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**AFFIDAVIT OF LT. CDR. WILLIAM KUEBLER**

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I, Lieutenant Commander William C. Kuebler, of the United States Navy, represent Mr. Omar Ahmed Khadr ("Omar") and as such have personal knowledge of the matters hereinafter deposed to save and except where stated to be on information and belief.

1. I have been on active duty with the U.S. Navy Judge Advocate General's Corps since March 1999. Following graduation from U.S. Naval Justice School in 1999, I was assigned to the U.S. Naval Legal Service Office, Europe and Southwest Asia, where I served as, inter alia, court-martial defence counsel in both the Sigonella, Italy (1999-2000) and London, UK (2000-2003) offices of the command. I then reported to the U.S. Naval Submarine Base New London, Connecticut, where I served as Staff Judge Advocate (i.e., principal legal advisor) to the Commanding Officer of the base, as well as a Special Assistant U.S. Attorney with the responsibility of prosecuting civilian offenders on base in federal court, and as a court-

martial prosecutor. In December 2005, I reported to my current assignment with the Office of the Chief Defence Counsel, Office of Military Commissions in Washington, D.C. Prior to the decision of the U.S. Supreme Court in *Hamdan v. Rumsfeld*, I was detailed to the case of Ghassan Abdullah Al Sharbi. I am one of a handful of military lawyers who have appeared in military commission proceedings under the President's Military Order of 2001 and the Military Commissions Act of 2006. I have given numerous public presentations on the military commissions and am familiar with the matters discussed herein. Before joining the U.S. Navy Judge Advocate General's Corps, I was a lawyer in private practice in San Diego, California, where I practiced with the law firm of Ross, Dixon and Bell (formerly Miller Boyko and Bell). I graduated from law school and was admitted to the bar in the State of California in 1996.

2. I have reviewed the Affidavit of Richard Wilson dated January 20, 2006, and provide the present affidavit for the purpose of advising the Court of events which have occurred in Omar's case since the date of that Affidavit.

3. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") was signed into law on December 30, 2005. This Act places restrictions on the interrogation and treatment of detainees in U.S. custody, and furnishes procedural protections for U.S. personnel engaging in improper interrogation. It also sets forth certain procedures for the status review of detainees held outside the United States. Subsections (a)through (d) of §1005 direct the Secretary of Defense to report to Congress the procedures being used by the CSRTs referred to in paragraphs 15 to 19 in the Affidavit of Richard Wilson to determine the proper classification of detainees held in Guantánamo Bay, Iraq, and Afghanistan, and to adopt certain safeguards as part of those procedures. This statute is publicly available and not here reproduced due to its length.

4. Subsection (e) of §1005 of the DTA purports to strip the courts of the United States from hearing any application for *habeas corpus* filed by or on behalf of an alien detained by the Department of Defence at Guantánamo Bay. Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the "exclusive jurisdiction to determine

the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant." Paragraph (2) also delimits the scope of that review.

5. On June 29, 2006, the Supreme Court of the United States released its decision in *Hamdan v. Rumsfeld* referred to in paragraph 20 of the Affidavit of Richard Wilson. As a preliminary matter, the Court held that the DTA did not apply to *habeas corpus* proceedings which had been commenced prior to the DTA's enactment. This decision is publicly available and not here reproduced due to its length.

6. The Court in *Hamdan* also struck down the military commission regime created by the Orders attached as Exhibits 'G' and 'H' to the Affidavit of Richard Wilson. More specifically, the Court held that this regime was contrary to Article 3 of the Third Geneva Convention (often referred to as "Common Article 3" since it is common to all the Geneva Conventions"), which requires prisoners in Guantánamo Bay to be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." This provision, in turn, was held to have been made applicable to military commissions conducted at Guantánamo Bay by the Uniform Code of Military Justice, 10 U. S. C. §801 *et seq.*(2000 ed. and Supp. III), notably §821. As a result, the Court held that the military commissions were "illegal."

7. A plurality of the Court also held that the offense of Conspiracy was not an offense contrary to the law of war, and that, as a result, the military commission lacked jurisdiction over that offense.

8. In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"). This statute is publicly available and not here reproduced due to its length. Among other things, the MCA purports to strip all of the detainees in Guantánamo Bay, including Omar, of their right to bring applications for *habeas corpus*, and to vest the exclusive jurisdiction upon the United States Court of Appeals of the D.C. Circuit to review determinations by CSRT's.

9. The *habeas corpus* application filed on behalf of Omar, and referred to in paragraphs 3 and 14 of the Affidavit of Richard Wilson was consolidated with a number of other *habeas corpus* matters and eventually came before the Court of Appeals of the D.C. Circuit. On February 20, 2007, a divided panel of that Court relied on the MCA to dismiss the leading *habeas* petitions, consolidated as *Boumediene v. Bush*, for lack of jurisdiction. The court held that Guantánamo detainees have no constitutional right to *habeas corpus* review of their detentions in federal court as the common law *habeas*, according to the majority, did not extend to noncitizens captured abroad and held outside the United States. Because the court also found that the MCA eliminated any statutory right to *habeas corpus*, it dismissed the cases.

10. The detainees other than Omar in *Boumediene* sought review of the Circuit Court decision at the Supreme Court. On April 2, 2007, the Supreme Court of the United States denied the petitioners' petition for writ of *certiorari*, declining to hear the case at that time. On June 29, 2007, in an unusual action, the Supreme Court reversed this decision and agreed to hear the case in its 2007-2008 term. *Al Odah* and *Boumediene* will be argued before the Supreme Court on December 5, 2007. In this case, the Court may determine whether or not the detainees in Guantánamo Bay may claim the benefit of rights contained in the Constitution of the United States.

11. Section 3 of the MCA, inter alia, re-defined the nature of the charges which may be laid before the military commissions in Guantánamo Bay. The specific offences are set out in Title 10, §950v of the U.S. Code (as amended by the MCA). Title 10, §950p states as follows:

> **§ 950p. Statement of substantive offenses**
> (a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
>
> (b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

12. On April 5, 2007, new charges were sworn against Omar pursuant to the MCA, which charges are described as "Murder in Violation of the Law of War", "Attempted Murder in Violation of the Law of War", "Conspiracy", "Providing Material Support for Terrorism", and "Spying". These charges were then referred by the Convening Authority as non-capital on April 24, 2007. Attached to this my Affidavit and marked as Exhibit 'A' are the referred charges.

13. On June 4, 2007, Col. Peter Brownback, Military Judge, dismissed the prosecution against Omar on the basis that he had not been found to be an "unlawful enemy combatant" ("UEC") for the purposes of 10 U.S.C. §948a. This decision is publicly available and not here reproduced.

14. On September 24, 2007, the Court of Military Commission Review allowed the government's appeal from Col. Brownback's decision and held that the UEC issue could be heard and determined by the military commission in the context of a preliminary motion. This decision is publicly available and not here reproduced.

15. I first met Omar on June 4, 2007 and was served with the "discovery" or disclosure of evidence for the present military commission prosecution in late October and November of this year. I have had the opportunity to identify certain issues likely to arise in Omar's defence of the charges.

16. The prosecution may seek to introduce evidence of statements Omar allegedly made to U.S. government interrogators and other officials. Unfortunately, protective orders issued by the military commission severely restrict my ability to discuss or disclose the content of materials I have received from the prosecution. The admissibility of statements Omar is alleged to have made as evidence in the proceedings may be an important issue to be determined at trial. One provision of particular importance to the admissibility of any such statements is MCA § 948r(c):

> (c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
(2) the interests of justice would best be served by admission of the statement into evidence.

17. In raising full answer and defence to the charges against Omar, I may wish to demonstrate the unreliability of any statements relied upon by the Prosecution. The MCA and its implementing regulations that limit defence access to classified information relating to interrogation methods erect a barrier on the ability of the defence to call into question the reliability of these statements. Adequate investigation of the case requires a full review of the content of all the statements that may have been taken from Omar at various times, in light of all the surrounding and changing circumstances, including the Government's treatment of Omar at different points in time. To the extent reports or information relating to any interrogations of Omar are in the possession of the Canadian government, their production to the defence would be essential to adequate investigation of the case and preparation for trial.

18. I have reviewed Exhibit 'C' to the Cross-Examination of William Johnson in these proceedings. Parts of the video referred to on page one of that document were recently aired by the CBS News program 60 Minutes. The 60 Minutes story and the video excerpts may be viewed at:
http://www.cbsnews.com/sections/i_video/main500251.shtml?id=3518748n

19. Omar was arraigned on the new charges on November 8, 2007. Attached to this my Affidavit and marked as Exhibit 'B' is a copy of a scheduling order entered by Col. Brownback.

20. This Affidavit is sworn in the City of Washington, District of Columbia and has been executed in the manner required by the Courts of this jurisdiction for the admission of Affidavit evidence.

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) LT. CDR. WILLIAM C. KUEBLER

Subscribed to and sworn on 5 December 2007
LNC (SW/AW) Kelly D. Redman, U.S. Navy
Authority: 10 U.S.C. § 1044a