Court File No. 33289

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*)

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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.

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[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

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[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 courts[13], 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

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[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 2003[20], 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

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[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]

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[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/

(vii) Repatriation

21. The Government of Canada's position in respect of the Respondent's potential repatriation, as stated publicly by the Prime Minister and in Parliamentary proceedings, is that consideration of repatriation of the Respondent should await the conclusion of his prosecution on terrorism charges.[28]

22. Before the current proceedings were instituted against the Respondent, Canada had asked the U.S. in both 2003 and 2004 to advise the Respondent of his right to return to Canada, and to allow him the opportunity to exercise that right, in the event that the U.S. was considering his release.[29]

(viii) Judgments in the Courts Below

23. On August 8, 2008, the Respondent initiated a judicial review application[30] of the Government's "ongoing decision and policy" not to request his repatriation, seeking:

(i) an order in the nature of *mandamus* requiring Canada to demand his repatriation from U.S. custody in Guantánamo Bay;

(ii) an order in the nature of *certiorari* quashing Canada's ongoing decision and policy not to request his repatriation;

and

(iii) an order in the nature of *mandamus* directing Canada to provide further disclosure.

24. On April 23, 2009, O'Reilly J. dismissed the application for disclosure but granted an order directing Canada to make a request to the U.S. for the Respondent's return as soon as practicable. Justice O'Reilly held that Canada had breached the Respondent's rights under s. 7 of the *Charter*. O'Reilly J. rejected Canada's argument that the s. 7 issues had been decided in previous proceedings, noting that "the question whether the respondents have a duty to seek the repatriation of Mr. Khadr has not previously been addressed."[31] With respect to the s. 7 analysis, he took this Court's decision in *Khadr 2008* as having established that the Respondent's s. 7 rights were

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[28] JR at p. 132 (Bedard Affidavit at paragraph 3); and Canada. House of Commons. *Omar Khadr: Report of the Standing Committee on Foreign Affairs and International Development, Subcommittee on International Human Rights*. Ottawa, Government of Canada, June 2008 at pp. 15-17

[29] JR at pp. 488, 497 and 500 (Robertson Affidavit at paras. 8 and 11 and Exhibits C and F)

[30] JR at pp. 111-116 (Notice of Application)

[31] JR at p. 24 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 33)

engaged by the CSIS and DFAIT interviews. O'Reilly J. characterized the nature of the decision he had to make as whether the "applicable principles of fundamental justice require the Canadian Government to protect Mr. Khadr."[32] He found that they did, stating that those principles "obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms."[33] As a remedy, O'Reilly J. ordered that Canada request the Respondent's repatriation.

25. On August 14, 2009, the Federal Court of Appeal dismissed Canada's appeal by a 2:1 majority.[34] The majority, Evans and Sharlow JJ.A., agreed with O'Reilly J. that there had been an infringement of s. 7 of the *Charter,* but discussed the infringement in somewhat different terms. The majority stressed the fact that subsequent to this Court's decision in *Khadr 2008*, it came to light that the DFAIT official was aware before the March 2004 interview that the Respondent had been subjected to sleep deprivation by U.S. officials. The majority described the s. 7 breach in the following manner:

> As stated above, the principles of fundamental justice do not permit the questioning of a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk. That must be so whether the abuse was inflicted by the questioner, or by some other person with the questioner's knowledge. Canada cannot avoid responsibility for its participation in the process at the Guantánamo Bay prison by relying on the fact that Mr. Khadr was mistreated by officials of the United States, because Canadian officials knew of the abuse when they conducted the interviews, and sought to take advantage of it.
>
> Consequently, the rights of Mr. Khadr under section 7 of the *Charter* were breached when Canadian officials interviewed him at the prison at Guantánamo Bay and shared the resulting information with the United States officials. [Emphasis added.][35]

26. The majority agreed with O'Reilly J. that the circumstances of the Respondent's detention and the Canadian officials' questioning of him "gave rise to an obligation on the part of Canada to take steps to protect Mr. Khadr from further abuse."[36] The majority stated that there was "no factual basis for the Crown's argument that a court order

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[32] JR at p. 32 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 54)
[33] JR at p. 39 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 75)
[34] JR at pp. 55-109 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009)
[35] JR at p. 80 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 54-55)
[36] JR at pp. 80-81 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 56-57)

requiring the Government to request the return of Mr. Khadr is a serious intrusion into the Crown's responsibility for the conduct of Canada's foreign affairs."[37]

27. With respect to the remedy, the majority found that Canada had a "heavy onus" to discharge in seeking to set aside the remedy. They regarded the remedy imposed as a reasonable application of this Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[38]

28. Justice Nadon dissented. Unlike the majority, he analyzed the nature of the s. 7 *Charter* breach in the same manner as O'Reilly J., namely, by considering whether Canada had breached its "duty to protect" the Respondent. Although he was "far from convinced"[39] that s. 7 imposed such a duty and found it "impossible to understand how Canada could ever fulfill"[40] this duty, he held that there was no breach of the duty to protect if it did exist. In reaching this conclusion, Nadon J.A. described the many steps Canada has taken in its efforts to protect the Respondent during the course of his confinement. In his view, the application judge "never turned his mind to the question as to whether these steps were sufficient for Canada to meet its duty to protect Mr. Khadr."[41]

29. Nadon J.A. also disagreed with the remedy ordered by O'Reilly J., finding it to be a direct interference with the conduct of foreign affairs by the executive and disproportionate to the breach alleged.[42]

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[37] JR at p. 82 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 59)
[38] [2003] 3 S.C.R. 3, 2003 SCC 62
[39] JR at p. 91 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 86)
[40] JR at p. 96 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 96)
[41] JR at p. 94 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 90)
[42] JR at pp. 100-105 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 104-115)

PART II - ISSUES

30. The issues in this appeal are:

(a) Did the courts below err in finding that the Respondent's rights under s. 7 of the *Charter* were breached?

and

(b) If such a breach occurred, was the remedy appropriate and just in the circumstances?

The Appellants' position is that there was no breach of s. 7. In the alternative, if there was such a breach, the remedy imposed was inappropriate.

PART III - ARGUMENT

A. The Respondent is Due No New Remedy

31. One of the important issues in this case concerns the characterization of the conduct that is alleged to constitute the *Charter* infringement. O'Reilly J. focused primarily on the failure of the Government to protect the Respondent, a so-called "duty to protect", which he found to be a principle of fundamental justice. The majority of the Court of Appeal, while appearing to accept the legal conclusion that s. 7 includes a "duty to protect"[43], focused primarily on the breach occasioned "when Canadian officials interviewed [the Respondent] at the prison at Guantánamo Bay and shared the resulting information with United States officials."[44] That description of the breach is a wholly unremarkable restatement of this Court's conclusion in *Khadr 2008*; what *is* remarkable is the Court of Appeal's failure to explain why that same breach should lead to a new remedy in 2009. If this case is effectively a judicial review of the decision to interview and transmit information, the Respondent has received his remedy.

32. Both courts below placed great weight on the fact that subsequent to this Court's decision in *Khadr 2008,* Mosley J. ordered the Government to disclose previously protected information, including the portion of a document which states that before the third interview of the Respondent by Canadian officials at Guantánamo Bay in March 2004, the DFAIT official conducting that interview was advised that the Respondent had been subjected to sleep deprivation. There is no evidence to suggest that Canadian officials had knowledge that the Respondent was being subjected to such mistreatment prior to that revelation in March 2004. Whatever U.S. authorities may have intended, no benefit accrued to Canada: the Respondent refused to answer the DFAIT official's questions over the course of the two hour interview.[45]

33. This Court held in *Khadr 2008* that s. 7 of the *Charter* was engaged by Canada's participation in a process that violated international human rights obligations. The participation consisted of passing information to U.S. officials obtained during the

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[43] JR at pp. 80-81 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 56-57)
[44] JR at p. 80 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 55)
[45] JR at pp. 138 and 296-300 (Kuebler Affidavit at para. 22 and Exhibit DD)

interviews where the process, which offended international human rights norms, could result in a significant deprivation of the Respondent's liberty.[46] *Khadr 2008* did not hold that the interviewing was itself a s. 7 breach[47], nor that the passing of the information was itself a s. 7 breach[48]; it was the combination of circumstances that led to the finding. Even if this Court were to now hold that the interviewing alone were the breach, or that the new fact shows that the previously-found breach was more aggravated, the onus is on the Respondent to show why the new fact alone should require a new and different remedy of the kind ordered by the courts below. This is particularly the case given the fact that the violative aspects of that process have now been addressed by the U.S.

34. None of the basic facts that led this Court to find that a s. 7 breach had occurred in *Khadr 2008* have changed in this appeal. Indeed the "fresh" fact, the allegation of mistreatment through sleep deprivation, is not entirely new: the Court in *Khadr 2008* admitted as fresh evidence the affidavit of Muneer Ahmad[49], which is replete with allegations that the Respondent was tortured (consisting of direct physical abuse, not sleep deprivation).[50] Though new facts may justify a departure from settled issues between parties, the new facts must be "demonstrably capable of affecting the result."[51]

35. To the extent that the evidence of Canadian knowledge of the sleep deprivation is "fresh", it only serves to reinforce the finding of a s. 7 breach made by this Court in *Khadr 2008*. After-the-fact knowledge of abuse no more makes someone a party to that abuse than after-the-fact knowledge of a crime makes someone guilty of that crime. Neither is Canada vicariously liable for the actions of the U. S.[52] The *Charter* breach found by the Court previously is no different in kind than the one identified by the majority of the Court of Appeal in the case at bar.

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[46] *Khadr 2008, supra,* at para. 34
[47] *Ibid.* at para. 34
[48] *Ibid.*
[49] *Ibid.* at paras. 9-14
[50] JR at pp. 749 and 892-899 (Exhibit L of Fresh Evidence Record (Affidavit of Muneer Ahmad at para. 11 and Exhibit F))
[51] *Grandview v. Doering*, [1976] 2 S.C.R. 621 at pp. 635-639; and Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Butterworths, 2004) at p. 235
[52] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at p. 692

36. No principle of law entitles the Respondent to a new *Charter* remedy for the same *Charter* breach simply by filing a second application for judicial review; the principle of finality strongly militates against this outcome. In 2008, the Respondent received a remedy from this Court that was finely tailored to the nature of the breach.[53] In fact, it was effectively the second responsive remedy the Respondent had received, since von Finckenstein J. had earlier issued an interim injunction against further interviewing in the context of the Respondent's *Charter* damages claim, a claim that is itself based on the interviewing.[54] As the majority of the Court of Appeal noted, that claim has been amended to seek specific relief based on the discovery of the new fact.[55] The two remedies already given adequately addressed the harm occasioned by any actions of Canadian officials.

B. There Was No New Breach of Section 7 of the *Charter*

(i) The Courts Below Failed to Appreciate the Limited Justiciability of the Issues

37. If this case is not simply about providing a new remedy for a previously-determined *Charter* breach, it is critical to examine the nature of the claim being made, because it affects the justiciability of the issues.

38. In his application, the Respondent sought judicial review of "the ongoing decision and policy" of the Government not to request his repatriation and an order requiring the Government to demand his repatriation on the basis that this "ongoing decision and policy" is contrary to the *Charter*.[56] O'Reilly J. gave only cursory treatment to the standard of review to be applied to the Government's "ongoing decision and policy."[57] The Court of Appeal gave this issue no consideration.[58] While the question of the appropriate standard of review is important and addressed further below, the first

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[53] *Khadr 2008, supra*
[54] *Khadr v. Canada* (2005), 277 F.T.R. 298, 2005 FC 1076
[55] JR at pp. 69-70 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 29)
[56] JR at p. 113 (Notice of Application at p. 3)
[57] JR at p. 30 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 49)
[58] The Court of Appeal was required to determine whether O'Reilly J. had chosen and applied the correct standard of review, and in the event he had not, to assess the executive decision in light of the correct standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at paras. 43-44

question the courts below ought to have asked themselves concerns the extent to which the Government's decision was reviewable at all.[59]

39. There is no doubt about the reviewability of executive decisions by the courts to ensure that such decisions do not infringe the *Charter*.[60] However, the reviewing court must be careful not to review the "soundness" of a decision, but ask instead whether the decision violates the Respondent's rights under s. 7 of the *Charter*.[61]

40. If the executive decision whether to request the repatriation of a Canadian citizen does not engage s. 7 of the *Charter*, then the reviewing court is essentially being asked to review the "wisdom" of the Government's "ongoing decision and policy." The law is firmly settled that the Court is precluded from second-guessing the executive on such policy matters. As Wilson J. stated in *Operation Dismantle*:

> ...if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution.[62]

41. In *Vriend v. Alberta*, Iacobucci J. expressed this principle in this way:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.[63]

42. It is only where a decision of the executive implicates an individual's *Charter* rights that the reviewing court has a significant role to play. Even there, however, the

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[59] *Canada (Auditor Gen.) v. Canada (Min. of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at pp. 90-92; and *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) at paras. 46-51

[60] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at pp. 455 and 459 *per* Dickson J. and pp. 471-474 *per* Wilson J.; and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 183

[61] *Operation Dismantle, supra*, at p. 472 *per* Wilson J.

[62] *Ibid.*

[63] [1998] 1 S.C.R. 493 at para. 136. See also *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at p. 1021 *per* Laskin C.J. and McIntyre and Lamer JJ. (dissenting); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1176; *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at pp. 1046-1047; and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 99-100

court is still required to show deference to the Government's decision provided it is reasonable in all the circumstances.[64]

43. Accordingly, the appropriate starting point is whether the decision of the executive not to request the repatriation of a Canadian citizen abroad prior to the completion of foreign criminal proceedings engages s. 7 of the *Charter*. The applicability of the *Charter* depends on whether there was a s. 7 "deprivation", and whether the "duty to protect" is a principle of fundamental justice.

(ii) The Absence of a s. 7 *Charter* "Deprivation"

44. It is axiomatic that the availability of a *Charter* remedy under s. 24(1) depends on the government action in question violating a protected *Charter* right.[65] Here, any "deprivation" of the Respondent's rights was not the result of Canadian action. Furthermore, s. 7 of the *Charter* does not recognize a "duty to protect" Canadians outside Canada as a principle of fundamental justice. Accordingly, there can be nothing unconstitutional about the Government's decision not to request the Respondent's repatriation. Finally, and in the alternative, even if such a duty does exist in some circumstances then, as Nadon J.A. demonstrated, the duty has been satisfied in this case.

(a) No Deprivation Can Be Attributed to Canadian State Action

45. It is well-established that the adjudication of a claim under s. 7 of the *Charter* involves a two-step analysis. The first question is whether the state action in issue constitutes a deprivation of life, liberty or security of the person. If that question is answered in the affirmative, the second step is whether the deprivation is in accordance with the principles of fundamental justice.[66]

46. There can be no denying that the Respondent's liberty interests have been affected since his capture by the U.S. military in 2002. However, for this deprivation to engage s. 7 of the *Charter*, it has to be the result of direct state action by the Canadian

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[64] *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, 2008 SCC 23 at para. 34
[65] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 at para. 14; and *R. v. Simms*, 2009 ABCA 260 at para. 24
[66] *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387 at p. 401