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Our File: *Notre dossier:* 2-1282[illegible]

Your File: *Votre dossier:*

August 24, 2009

DELIVERED BY HAND

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DELIVERED BY COURIER

Dennis Edney
DENNIS EDNEY PROFESSIONAL CORPORATION
Barrister and Solicitor
234 Wolf Ridge Close
Edmonton, AB T5T 5MG

Dear Sirs:

Re: The Prime Minister of Canada et al v. Omar Ahmed Khadr

Further to this matter, please find enclosed for service upon you, pursuant to Rule 20 of the *Rules of the Supreme Court of Canada*, a copy of the "Application for Leave to Appeal Filed by the Applicant, Attorney General of Canada" and a copy of the "Motion to Stay the Order of the Court Below and to Expedite the Hearing of the Case".

I trust the foregoing to be satisfactory.

Yours truly,

DOREEN C. MUELLER
Senior Counsel
Civil Litigation and Advisory Services

DCM/af
Enclosures

Canada

File No.: _____

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

Applicants
(Appellants)

- and -

OMAR AHMED KHADR

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
FILED BY THE APPLICANT, ATTORNEY GENERAL OF CANADA
(Pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c. S-26)

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File No.: COPY

IN THE SUPREME COURT OF CANADA
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IN THE SUPREME COURT OF CANADA
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BETWEEN:

THE PRIME MINISTER OF CANADA,
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Applicants
(Appellants)

- and -

OMAR AHMED KHADR

Respondent
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Attorney General of Canada hereby applies for leave to appeal to the Court, pursuant to s. 40(1) of the *Supreme Court Act*, from the judgment of the Federal Court of Appeal in file number A-208-09, pronounced on August 14, 2009, or such further or other order that the said Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. The judgment of the Federal Court of Appeal raises the following questions of law which are of public importance:

a) Was there any breach of s.7 of the *Charter* by Canadian government officials that has not already been remedied in a manner that responds more closely to the nature of the breach?

b) Does s. 7 of the *Charter* encompass a "duty to protect" as a principle of fundamental justice?

c) Does s. 7 of the *Charter* impose affirmative obligations on the government to protect liberty?

d) What are the limits of the judicial branch's ability to make orders directing the government to take specific actions impacting on foreign relations?

DATED at the City of Edmonton in the Province of Alberta, this 24th day of August, 2009.

SIGNED BY:

JOHN H. SIMS, Q.C.
DEPUTY ATTORNEY GENERAL OF CANADA

Per: _____

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NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court of consideration pursuant to section 43 of the *Supreme Court Act.*

File No.: _____

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

BETWEEN:

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Applicants
(Appellants)

- and -

OMAR AHMED KHADR

Respondent
(Respondent)

CERTIFICATE OF COUNSEL OR AGENT OF
THE APPLICANTS (APPELLANTS)

I, Doreen Mueller, counsel for the Applicants (Appellants), hereby certify that:

a. There is no sealing order or ban on the publication of evidence or the names or identity of a part or witness in this case; and

b. There is not confidential information on the file that should not be accessible to the public by virtue of specific legislation.

DATED at the City of Edmonton, in the Province of Alberta, this 24th day of August, 2009.

SIGNED BY:

JOHN H. SIMS, Q.C.
DEPUTY ATTORNEY GENERAL OF CANADA

Per: 

Robert Frater and Doreen Mueller
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MEMORANDUM OF ARGUMENT

PART I - STATEMENT OF FACTS

A. *Overview*

1. The unique circumstances surrounding the Respondent Omar Khadr's detention and pending prosecution by the United States of America (U.S.) have generated a substantial volume of litigation, both in the U.S. and in Canada, and an extremely high level of public attention. The body of resulting jurisprudence has dealt with some of the most fundamental issues courts can consider - the application of the rule of law, the extraterritorial reach of the *Charter,* the sharing of information in the fight against terrorism, and the rights of detainees at Guantanamo Bay, Cuba.

2. This case raises issues no less fundamental. In a 2:1 decision, the Federal Court of Appeal has held that Canada must be disciplined a third time for its decision to allow its officials to interview the Respondent during his detention by U.S. authorities. In so doing, the Court of Appeal appears to have created a new positive obligation on government under s. 7 of the *Charter* - a "duty to protect" that is potentially expansive in scope both internationally and domestically, and uncertain in its application.

3. The Court of Appeal, in ordering Canada to seek the Respondent's repatriation from the U.S., has boldly broken new ground under both ss. 7 and 24(1) of the *Charter,* by requiring the government to take particular affirmative steps to enhance the Respondent's liberty interests. The dissenting judge has questioned the justiciability of issues addressed by the majority. It is difficult to imagine a case that presents a clearer opportunity to clarify the respective roles of the judiciary and the executive on issues directly affecting foreign relations.

4. Canada seeks to bring these critical issues to this Court, and to do it as soon as practicable to minimize any prejudice to the Respondent. In addition to this application for leave, Canada is filing an application to stay the order of the Court below to protect the government's interests while the litigation ensues, and an application to expedite the hearing of this application and, if leave is granted, the subsequent appeal.

B. *Summary Of Facts*

(i) Facts Relating to the Detention of the Respondent and his Contact with Canadian Officials

5. The U.S. military detained the Respondent following a battlefield confrontation in Afghanistan in July 2002. In February 2003 and September 2003, the U.S. permitted officials from the Canadian Security and Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) to interview the Respondent at Guantanamo Bay for intelligence purposes ("the CSIS and DFAIT interviews"). The February interviews lasted for four days; the September interviews took two days.

6. In March 2004, the U.S. authorized another intelligence interview with the Respondent by a DFAIT official ("the DFAIT interview"). That official reported that, before he met with the Respondent at Guantánamo Bay to conduct this interview, he was told by a U.S. official that they had subjected the Respondent to a sleep deprivation program.

7. Although the U.S. has refused Canada consular access to the Respondent since he was first detained in 2002, in March 2005, the U.S. did allow DFAIT consular officials to conduct "welfare visits" with the Respondent in Guantanamo Bay. Since March 2005, DFAIT officials have conducted over ten welfare visits.

8. Since his initial detention, three decisions of the U.S. Supreme Court have had a significant effect on the basis for the Respondent's confinement. First, in *Rasul v. Bush*, the U.S. Supreme Court ruled that detainees at Guantánamo Bay were entitled under U.S. law to seek *habeas corpus* review in the courts.[1] Second, in *Hamdan v. Rumsfeld*,[2] the U.S. Supreme Court concluded that the procedures of the U.S. Military Commissions contravened Common Article 3 of the Geneva Conventions.[3] Finally, the U.S. Supreme Court reconfirmed in *Boumediene v. Bush*[4] that detainees in Guantánamo Bay have the right to seek *habeas corpus*.

9. The Respondent faces prosecution before a U.S. Military Commission for his alleged activities in Afghanistan in June and July 2002. Non-capital charges against the Respondent were approved on February 2, 2007 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.

10. On November 24, 2008, the U.S. District Court of the District of Columbia ordered that the Respondent's *habeas corpus* petition in that court should be held in abeyance pending the completion of his Military Commission Prosecution.[5]

11. 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

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[1] 542 U.S. 466 (2004)
[2] 126 S. Ct. 2749 (2006)
[3] *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, Can. T.S. 1965, no. 20 (entered into force 21 October 1950, entered into force for Canada 14 November 1965)
[4] 128 S.Ct. 2229
[5] *Khadr v. Bush*, Civil Action No. 04-1136 (JDB), United States District Courts, 24 November 2008

year and further directing that the Secretary of Defence immediately undertake a 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.[6]

12. At the time of the hearing in the Court below, 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 to September 24, 2009.[7] Although the Respondent is better placed to advise the Court as to when the trial might begin, press reports have indicated there are significant issues to be resolved both on the prosecution side, because of the new American administration's direction that all detainees' cases be reviewed, and on the defence side, because of a substantial change in the Respondent's legal representation. The actual date of trial remains uncertain.

13. In the Court below, the Government of Canada's position in respect of the Respondent, as stated publicly by the Prime Minister and in Parliamentary proceedings, has been that consideration of repatriation of the Respondent must wait until conclusion of the Respondent's prosecution on serious terrorism charges. Canada had, as early as 2003, made diplomatic representations to the U.S. concerning the right of the Respondent to return to Canada if he was released.

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[6] Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities
http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/

[7] Ruling on Government Motion for a Continuance dated May 19, 2009 – P-014 - http://www.defenselink.mil/news/al%20Darbi%20P-014%20Ruling%20and%20Govt%20Motion%20for%20Cont%20redact4aug09.pdf

(ii) Related Proceedings between the Parties

14. Although the Respondent has initiated numerous legal proceedings against Canada, two have special importance to the issues raised in this case. In Federal Court action #T-536-04, *Omar Khadr v. Her Majesty the Queen*, the Respondent has brought an action for $10,000,000.00 in damages and other relief alleging violations of his constitutional rights as a result of the CSIS and DFAIT interviews. On August 8, 2005, Von Finckenstein J. granted an interim injunction in that case, "prohibiting the defendant and its agents from conducting any further interviews of the plaintiff pending the trial of this action."[8]

15. The second relevant proceeding was Federal Court file #T-3-06, in which the Respondent sought an order in the nature of *mandamus* to force the government to disclose documentary evidence to him. That proceeding reached this Court, which held that "s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen."[9] The "participation" in question was the conduct of the three visits to conduct interviews referred to in paragraphs 5 and 6 above.

(iii) The Proceedings in the Courts Below

16. The Respondent brought an application for judicial review of Canada's refusal, as expressed in a statement to a journalist and in Parliamentary proceedings, to seek his repatriation from the U.S. The application was grounded in the alleged breach of his rights under ss. 6, 7 and 12 of the *Charter*. At first instance, O'Reilly J. held that Canada had breached the Respondent's rights under s. 7 of the *Charter*. O'Reilly J. rejected Canada's argument that the issues had been decided in previous proceedings, noting that "[i]n particular, the question whether the respondents have a duty to seek the repatriation of Mr. Khadr has not

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[8] (2005), 257 D.L.R. (4th) 577 (F.C.T.D.) at para. 46
[9] *Canada (Justice) v. Khadr*, 2008 SCC 28, at para. 31

previously been addressed." With respect to the s. 7 analysis, he took this Court's decision in *Canada (Justice) v. Khadr*, (*Khadr (2008)*),[10] as having established that the Respondent's s. 7 rights were engaged by the interviewing conducted by CSIS and DFAIT officials. He regarded the nature of the decision he had to make as being whether the "applicable principles of fundamental justice require the Canadian Government to protect Mr. Khadr." 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." As a remedy, Mr. Justice O'Reilly ordered that Canada request the Respondent's repatriation.

17. Canada appealed Mr. Justice O'Reilly's order to the Federal Court of Appeal. On August 14, 2009, the appeal was dismissed by a 2:1 majority of the Federal Court of Appeal. 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 before the DFAIT interview, a DFAIT official was aware that the Respondent had been subject to sleep deprivation by American officials. The majority described the s. 7 breach in the following manner:

> [54] 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.
>
> [55] 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 United States officials.

[10] *Canada (Justice) v. Khadr, supra*

18. The majority went on to agree with Mr. Justice O'Reilly that the circumstances of the Respondent's detention and the Canadian officials' questioning "gave rise to an obligation on the part of Canada to take steps to protect Mr. Khadr from further abuse." They stated that there was "no factual basis for the Crown's argument that a court order 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."

19. 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)*.[11] In the course of their discussion, the Court rejected Canada's claim that the remedy interfered with the exercise of prosecutorial discretion.

20. Mr. Justice Nadon dissented. Unlike the majority, he analyzed the nature of the s. 7 breach in the same manner as O'Reilly J., namely, examining whether Canada had breached its "duty to protect" the Respondent. Although he was "far from convinced" that Canada had such a duty vis-à-vis the Respondent, he held that there was no breach of that duty. In reaching this conclusion, he described the many steps Canada had taken to attempt 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." He expressed serious reservations about the scope of the duty articulated by the application judge:

> [96] It is apparent from the Judge's Reasons that he has couched Canada's duty to protect Mr. Khadr in the most absolute terms, without regard to the actual circumstances of his detention. As a result, I find it impossible to understand how Canada could ever fulfill the duty of protection which O'Reilly J. has determined, more specifically at paragraph 64 of his

[11] [2003] 3 S.C.R. 3

Reasons. For example, how could Canada prevent Mr. Khadr, from being unlawfully detained by the US military in Guantanamo Bay? Also, how could Canada prevent the US from detaining Mr. Khadr "for a duration exceeding the shortest appropriate period of time"? And how could Canada remove Mr. Khadr from "an extended period of unlawful detention among adult prisoners".

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

PART II – QUESTIONS IN ISSUE

22. The proposed appeal raises the following questions of law which are of public importance:

(a) Was there any breach of s. 7 of the *Charter* by Canadian government officials that has not already been remedied in a manner that responds more closely to the nature of the breach?

(b) Does s. 7 of the *Charter* encompass a "duty to protect" as a principle of fundamental justice?

(c) Does s. 7 of the *Charter* impose affirmative obligations on the government to protect liberty?

(d) What are the limits of the judicial branch's ability to make orders directing the government to take specific actions impacting on foreign relations?

PART III – ARGUMENT

The Uncertain Nature and Scope of the Section 7 Breach

23. The determination that Canada breached the Respondent's s. 7 *Charter* rights is one that has serious implications for the Government of Canada in its relations both with its own citizens and with foreign countries. A full appreciation of the potential consequences is rendered difficult by the way in which the Court of Appeal majority approached the case, which appears to identify two breaches, each giving rise to significant issues.

24. The primary thrust of the majority decision is to find a breach because Canadian officials interviewed the Respondent knowing that he had been subjected to sleep deprivation by U.S. officials. Leaving to the side the fact that such knowledge was only acquired prior to the third of three visits to conduct interviews, the focus of that breach lies in the decision of the official to conduct an interview in such circumstances. However, the decision to conduct interviews has not only been litigated twice before, it has been remedied twice before, and in decisions much more responsive to the nature of the harm done. In 2005, Mr. Justice Von Finckenstein enjoined the conduct of further intelligence interviews, and in 2008, this Court ordered Canada to provide the fruits of those interviews to the Respondent. There is no principle of law that supports the ability of the Respondent to obtain new remedies for the same conduct in serial applications to the courts, much less a remedy that is not responsive to the nature of the breach.

25. Moreover, the treatment of the issue in this way ignores the nature of the proceedings brought by the Respondent. The Respondent instituted judicial review proceedings focussed on the Government's refusal to seek his repatriation. Both the application judge and the dissenting judge dealt with the

s. 7 breach issue in that way. The majority judgment appears to approve of the application judge's analysis in somewhat oblique terms, describing the application judge's holding that Canada had an obligation to protect the Respondent simply as "the logical extension of his principal conclusion."

26. The acceptance of a "duty to protect" is much more than simply a "logical extension" of a finding of improper interviewing. The recognition of such a duty as a principle of fundamental justice has profound implications for government operations both internationally and domestically. Internationally, it provides little guidance to the government in dealing with the myriad of situations in which Canadians abroad may find themselves. Protection of whom? From what? What steps are acceptable/obligatory? What deference should be given to the sovereign interests of the detaining state?

27. As a duty giving rise to specific and enforceable legal obligations, the duty to protect has been rejected by the courts in the United Kingdom[12] and Australia.[13] It has been accepted in South Africa[14] to the extent that the government must *carefully consider* requests for diplomatic protection. What the Court of Appeal has done, however, exceeds the bounds of even the South African position.

28. What is most remarkable about the acceptance of a "duty to protect" as a principle of fundamental justice is that the duty to protect nationals abroad *does not exist in international law*. The conventional view is expressed as follows:

> International law imposes no duty upon a state to protect its nationals abroad, and states in practice often decline to exercise their right of protection over their nationals abroad. The matter is in the discretion of every state, and while it has an undoubted right to protect one of its nationals who is wronged abroad in his person or property, no national

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[12] *Abbasi v. Secretary of State*, [2002] EWCA Civ 1598
[13] *Habib v. Commonwealth of Australia* (No. 2), [2009] FCA 228 at paras. 60-62
[14] *Kaunda and others v. President of the Republic of South Africa*, [2004] ZACC 5

> abroad has by international law a right to demand protection from his home state.[15]

29. To become a "principle of fundamental justice", there must be, *inter alia*, a "significant societal consensus that [the legal principle] is fundamental to the way in which the legal system ought fairly to operate."[16] How a legal principle which does not exist at international law, has not existed at domestic law and is not recognized by other common law countries, can become one which is fundamental to the operation of our legal system is an issue which requires not simply a "logical extension", but a logical leap of faith.

30. The existence of a "duty to protect" has also been rejected as a principle protected by the due process clause in the American constitution. In the leading case, *Deshaney v. Winnebago Department of Social Services*, Rehnquist C.J. stated:

> ....nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[17]

31. While *Deshaney* concerned a much different fact situation—a suit against social workers for their failure to protect a boy from his violent father—the principle is apposite. The effect of the Court of Appeal's order is to require the government to take positive steps to attempt to prevent deprivation of the Respondent's liberty by a foreign government. This is not a case, like *United States v. Burns*,[18]

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[15] Jenning R. and Watts A., *Oppenheim's International Law*, vol. 1, Parts 2 to 4, 9th ed. (London: Longman, 1996) at 934, para. 410, citing the *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, [1970] I.C.J. Reg.4 at 45. See also *Abbasi v. Secretary of State*, *supra*, at para.69.
[16] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at para.113
[17] 489 U.S. 189 at 195
[18] [2001] 1 S.C.R. 283

or *Suresh v. Canada (Minister of Citizenship and Immigration)*,[19] where Canada had the ability to *prevent* the potential deprivations of life and liberty because the person at risk was in Canada, and subject to Canada's lawful control.

32. Because this is fundamentally a case about the imposition of a previously unrecognized affirmative duty to enhance the Respondent's interests (while ignoring the other steps taken by Canada to advance his liberty), it is of great importance as a matter of general *Charter* interpretation. In *Gosselin v. Quebec (Attorney General)*,[20] the Chief Justice remarked that "[o]ne day s. 7 may be interpreted to include positive obligations." Whether the majority of the Court of Appeal is correct that such a day has arrived is an issue which merits this Court's consideration.

The Contentious Nature of the Remedy

33. In his dissent, Nadon J.A. criticized the remedy imposed by the application judge and affirmed by the majority in forceful terms:

> In my opinion, the remedy granted by O'Reilly J. exceeds the role of the Federal Court and is not within the power of the Court to grant. Ordering Canada to request the repatriation of Mr. Khadr constitutes, in my view, a direct interference into Canada's conduct of its foreign affairs. It is clear that Canada has decided not to seek Mr. Khadr's repatriation at the present time. Why Canada has taken that position is, in my respectful view, not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr's repatriation at the present is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people.

34. One need not accept the view that this is a question of justiciability to appreciate the importance of the issue to Canada in the future conduct of its foreign relations.

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[19] [2001] 1 S.C.R. 3
[20] [2002] 4 S.C.R. 429 at 491

That this case raises a significant issue about the respective roles of the executive and the courts simply cannot be gainsaid.

35. In *Doucet-Boudreau*,[21] this Court reflected on the proper role of courts, while considering the nature of remedies available under s. 24 of the *Charter*. The majority concluded that an appropriate and just remedy is sensitive to the functional separation among the executive, legislative and judicial branches of government. The Court stated:

> ... an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, **a court ordering a *Charter* remedy must strive to respect the relationship with and separation of functions among the legislature, the executive and the judiciary**. ...
>
> ... an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent. (**emphasis added**)

36. The appropriate division of authority between the executive and the court is particularly important when the context is foreign policy and national security. In *Al Rawi*,[22] the England and Wales Court of Appeal described the issue as follows:

> This case has involved issues touching both the government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. This is the law for constitutional as well as pragmatic reasons, as Lord Hoffmann has explained. The court's role is to see that the government strictly complies with all formal requirements, and rationally

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[21] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, at paras. 30 to 36, 56, 57

[22] *Al Rawi and others v. The Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA Civ 1279 at para. 146

> considers the matters it has to confront. Here, because of the subject-matter, the law accords to the executive an especially broad margin of discretion. This conclusion betrays no want of concern for the plight of the appellants. At the outset we described the case as acute on its facts, and so it is. **But it is the court's duty to decide where lies the legal edge between the executive and judicial functions.** That exercise has been this appeal's principal theme. **(emphasis added)**

37. The decision by the Court below directs a particular state-to-state communication, reversing the executive's assessment of what diplomatic representation to the U.S. in respect of the Respondent would be consistent with Canada's approach to combating terrorism, national security and the management of international relationships.

38. While the circumstances of the Respondent's situation may be unique, the case is one of an emerging trend in Federal Court jurisprudence to issue specific orders to the government in matters concerning foreign relations. The remedies granted by the Federal Court in *Smith v. A.G. Canada et al*[23] (ordering Canada to comply with its former policy of seeking clemency in foreign death penalty cases) and in *Abdelrazik v. A.G. Canada et al*[24] (ordering Canada to procure Mr. Abdelrazik's return from Sudan), show that issues concerning the remedial powers of the courts in matters affecting the conduct of foreign relations is not confined to the Respondent's case.

39. Canada has a number of legal and political obligations under United Nations Security Council Resolutions and under other international instruments to cooperate in the fight against terrorism, including the prevention, investigation and prosecution of terrorist activities and the sharing of information.[25]

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[23] 2009 FC 228
[24] 2009 FC 580
[25] *Inter alia*, United Nations Security Council Resolution, 4385th Meeting, (S/RES/1373) 28 September 2001; United Nations Security Council Resolution, 4688th Meeting, (S/RES/1456) 20 January 2003; *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 275; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 229, Can.T.S. 2002, No. 9 and *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284, Can.T.S. 2002, No. 8

Clarification of the extent to which the *Charter* may reverse foreign policy is important to assist Canadian officials in carrying out Canada's international commitments and legal obligations.

40. The majority of the Court of Appeal failed to recognize the full implications of the breadth of the remedy it imposed. For example, the Court had the following to say about whether its decision constituted interference with the exercise of prosecutorial discretion. It stated:

> Contrary to the submission of the Crown, Justice O'Reilly's order does not require the Attorney General to prosecute Mr. Khadr in Canada. If Mr. Khadr is returned, it will be for the Attorney General to decide, in the exercise of his or her discretion, whether to institute criminal proceedings in Canada against Mr. Khadr. While Canada may have preferred to stand by and let the proceedings against Mr. Khadr in the United States run their course, the violation of his *Charter* rights by Canadian officials has removed that option.

41. With respect, the issue is simply not that easily disposed of. The remedy assumes, for example, that it is a matter of a straightforward request, to which a simple yes or no answer will be given. But what if the answer from the U.S. is "yes, we will return him, but only if you agree to prosecute him." Or, "yes, we will return him, but only if you agree to prosecute him for substantially the same offences with which he is presently charged." There are no charges in Canada at present. If Canada refuses to provide such an assurance, and the request for repatriation is denied, would that refusal too be subject to judicial review? Moreover, if the answer is a simple "no," it puts Canadian courts in the situation of making orders which have no practical effect. At the very least, this should give the courts pause about the desirability of making orders that depend for their effectiveness on actions by sovereign state authorities over whom the court has no legal power or control.

42. This Court has stated repeatedly that the utmost deference is due to the Attorney General in considering the institution of criminal proceedings. The principle applies in the field of extradition as well, where it is up to the Minister of Justice to determine what weight to give to the prosecution interests of requesting states.

This Court has recently said that that is a political decision, not a legal one.[26] The judgment of the Court of Appeal fails to respect the fundamental divide between the judicial and executive branches in criminal matters.

PART IV – COSTS

43. The Applicants do not seek costs.

PART V – ORDER SOUGHT

44. The Applicants request that this application for leave to appeal from the Judgment of the Federal Court of Appeal, dated August 14, 2009, be granted.

ALL OF WHICH is respectfully submitted this 24 day of August, 2009.

SIGNED BY:

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Per: _____

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[26] *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para.37

PART VI – TABLE OF AUTHORITIES

INTERNATIONAL INSTRUMENTS

OTHER MATERIALS

PART VII – STATUTES, REGULATIONS AND RULES

No references were made.