Court 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

- and -

OMAR AHMED KHADR

Respondent

- and -

UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

RESPONDING MEMORANDUM OF ARGUMENT OF THE UNIVERSITY OF TORONTO, FACULTY OF LAW - INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH TO THE APPELLANTS' MOTION TO STRIKE

PART I – OVERVIEW AND FACTS

Overview

1. The University of Toronto – Faculty of Law, International Human Rights Clinic (the "IHRC") and Human Rights Watch ("HRW") brought a motion for leave to intervene in the within appeal on January 3, 2008. The Appellants opposed that motion on the basis that the IHRC and HRW were inappropriately enlarging the scope of the appeal by raising new issues. After considering the Appellants' arguments and the IHRC and HRW's reply, Binnie J. granted leave to intervene to the IHRC and HRW by order dated January 24, 2008.

2. Pursuant to that order, and in accordance with the proposed submissions outlined in the IHRC and HRW's memorandum of argument on their motion for leave (the "Interveners' Leave Memorandum"), the IHRC and HRW filed their joint factum on February 22, 2008 (the "Interveners' Appeal Factum"). The Appellants now attempt for a second time to prevent the IHRC and HRW from intervening in this appeal, this time in the form of a motion to strike the Interveners' Appeal Factum and to revoke the status of the IHRC and HRW as interveners. In doing so, they make serious and unfounded allegations and raise the same arguments that this Honourable Court considered and rejected in granting the IHRC and HRW leave to intervene.

3. The IHRC and HRW have not adduced any new evidence and have relied entirely on the record already before the Court. Nor have the IHRC and HRW raised new issues. As they stated in reply on the motion for leave to intervene when the Appellants previously raised this objection, the IHRC and HRW are simply proposing alternative legal bases for resolving the central issue in this appeal. The IHRC and HRW respectfully submit that this motion ought to be dismissed.

Facts

4. On December 5, 2007, the Respondent brought a motion to adduce fresh evidence before the Court. On December 11, 2007, counsel for the Appellants, Mr. Robert Frater, wrote to the Court proposing the following arrangement:

> Nevertheless, it is the Appellants' position that in the unusual circumstances of this case, particularly the Respondent's desire for an expeditious hearing, all of the proposed further evidence should be made part of the record, except the affidavit of Richard Wilson, at Tab H of Volume II of the Respondent's motion book, which is already part of the record. The evidence filed in the related proceeding of T-536-04 (which includes the affidavits of Paquette and Hooper) is potentially important to this Court in the resolution of this matter. That evidence was relied on by von Finckenstein J. at first instance. While the Appellants will argue that he erred by going outside the record to look for facts to support the Respondent's claim, it may well prove important for this Court to examine the basis for von Finckenstein J.'s decision.
> ...

> Rather than engage in litigation as to the admissibility of any of this material, the Appellants believe it would be expeditious simply to file the material in a separate volume as the Respondent's Fresh Evidence Record, and leave argument as to the use the Court may make of it to the parties... Where the Appellants believe the material is inadmissible, we are content for the present purposes to make arguments that the material should be given no weight... (emphasis added)

Responding Motion Record, Respondent's Notice of Motion dated December 5, 2007, Tab 1

Responding Motion Record, Letter of Mr. Robert Frater dated December 11, 2007, Tab 2

5. On December 19, 2007, McLachlin C.J. ordered that the new evidence proposed by the Respondent be included in the case on appeal in a separate volume entitled the "Respondent's Fresh Evidence Record", the admissibility of which shall be determined by the Court hearing the appeal.

Responding Motion Record, Order of McLachlin J. dated December 19, 2007, Tab 3

6. On January 3, 2008, the IHRC and HRW filed their motion record for leave to intervene. As stated in these materials, the IHRC is a specialized law practice of the University of Toronto, Faculty of Law (the "Faculty") through which experienced lawyers and professors at the Faculty engage in cases which reflect the Faculty's expertise in international human rights law. HRW is the second largest human rights non-governmental organization in the world, and investigates and reports on human rights violations in over 70 countries. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon those who commit such abuses to end their abusive practices. Both the IHRC and HRW have been granted leave to intervene in prior appeals before this Court.[1]

Responding Motion Record, Interveners' Leave Memorandum, Tab 4, paras. 14, 17, 19 and 22

7. In the Interveners' Leave Memorandum, the IHRC and HRW advised the Court that, if granted leave, they proposed to make the following useful and distinct submissions:

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[1] See *Mugesara v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 and *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

(i) Canada's international human rights law obligations and Khadr's entitlement in international law to an effective remedy are relevant to the Court's consideration of the existence, content and violation of *Charter* obligations owed by Canada to Khadr...

(ii) The conduct of Canadian officials which underlies this appeal, namely, the interrogation of Khadr in Guantánamo Bay and the disclosure of the fruits of that interrogation to U.S. officials, violated Canada's binding international human rights law obligations toward Khadr...:

(a) in conducting their interrogation of Khadr, Canadian officials failed to respect the rights of Khadr as a child under the United Nations *Convention on the Rights of the Child* ....;

(b) in conducting their interrogation of Khadr, Canadian officials failed to respect Khadr's rights under the *International Covenant on Civil and Political Rights* ...;

(c) in conducting their interrogation of Khadr, Canadian officials exploited the atmosphere of oppression that prevailed at Guantánamo Bay as a result of conditions such as prolonged arbitrary detention, incommunicado detention, and ill-treatment potentially amounting to torture;

(d) in transferring the fruits of these interrogations to U.S. officials without any conditions being placed on their use and with the reasonably foreseeable consequence that this information would be used in the prosecution of a trial before the Military Commissions, Canadian officials participated in the violation of international human rights resulting from the Military Commissions process;

(e) the current Military Commissions process violates international standards of fairness under both the *ICCPR* and the Geneva Conventions....

(iii) The appropriate remedy for Canada's violations of international human rights law and accompanying violations of the *Charter* includes an order of disclosure under section 24(1) of the *Charter* and such other relief as this Court deems appropriate under ss. 7 and 24(1) of the *Charter*.

Responding Motion Record, Interveners' Leave Memorandum, Tab 4, para. 32

8. The Appellants objected to the motions for leave to intervene of a number of parties, including the IHRC and HRW, in materials filed on January 15, 2008. In their responding memorandum (the "Appellants' Responding Leave Memorandum"), the Appellants argued that the IHRC and HRW were improperly expanding the scope of this case by: (a) raising matters that are more properly the subject of action T-536-04 pending in the Federal Court such as the interrogation of Omar Khadr ("Omar") in Guantánamo Bay; and (b) attempting

to put the Guantánamo Bay regime on trial. The IHRC and HRW responded to these arguments by filing a reply memorandum of argument on January 22, 2008 (the "Interveners' Reply Leave Memorandum").

Responding Motion Record, Appellants' Responding Leave Memorandum, Tab 5, para. 26

Responding Motion Record, Interveners' Reply Leave Memorandum, Tab 6

9. After considering all arguments, including the Appellants' objections, Binnie J. issued an order on January 24, 2008 granting the IHRC and HRW leave to intervene. Binnie J.'s order stipulated, *inter alia*, that the IHRC and HRW "shall not be entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties" and that their factum was to be served and filed on or before February 22, 2008.

Responding Motion Record, Order of Binnie J. dated January 24, 2008, Tab 7

10. Consistent with Binnie J.'s order, the IHRC and HRW served and filed the Interveners' Appeal Factum on February 22, 2008. The IHRC and HRW relied entirely on the record already before the Court, including the Respondent's Fresh Evidence Record. Consistent with the approach taken by the Respondent in its appeal factum, the IHRC and HRW indicated by bold footnotes the few instances where they made reference to the Respondent's Fresh Evidence Record.

11. The IHRC and HRW's submissions in the Interveners' Appeal Factum are entirely consistent with the proposed submissions set out in their Interveners' Leave Memorandum (see para. 8 above): (i) Canada's international human rights obligations are critical to *Charter* analysis in a case with extra-territorial dimensions; (ii) Canadian officials violated international human rights during their interrogation of Omar in Guantánamo Bay and thus violated the *Charter*; (iii) sharing the fruits of the interrogation with U.S. officials constituted participation in a violation of international human rights and violated Omar's *Charter* rights; and (iv) Omar is entitled to the remedy of disclosure under section 24(1) of the *Charter*.

Responding Motion Record, Interveners' Appeal Factum, Tab 8

PART II – QUESTIONS IN ISSUE

12. The IHRC and HRW submit that the questions in issue in this motion are properly characterized as the following: (a) are the IHRC and HRW relying on evidence not in the record; and (b) are the IHRC and HRW raising new issues.

PART III – ARGUMENT

A. The IHRC and HRW are <u>not</u> adducing any new evidence and are relying entirely on the record already before the Court

13. First, the IHRC and HRW rely entirely on evidence that is *in the record.* The Appellants themselves proposed the arrangement whereby the Respondent has been permitted by this Court to adduce fresh evidence, the admissibility of which has yet to be determined. The Appellants expressly suggested that the fresh evidence be "made part of the record" and stated that they would reserve all argument as to the weight/admissibility of the evidence to the hearing of the appeal. It is odd that the Appellants now complain that the IHRC and HRW have referred to this evidence. The Appellants cite no authority for the proposition that it is inappropriate for an intervener to rely on evidence that is properly in the record where the Court has not yet ruled on the weight/admissibility of such evidence.

Responding Motion Record, Letter of Mr. Robert Frater dated December 11, 2007, Tab 2

14. Second, it is important to note that only six out of the seventy-four footnotes in the Interveners' Appeal Factum refer to evidence contained in the Respondent's Fresh Evidence Record.[2] Even without any reliance on the Respondent's Fresh Evidence Record, the IHRC and HRW's submissions on international human rights violations still stand: that is, Canadian officials violated Omar's international human rights: (a) in their interrogation in

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[2] The Appellants' overstate the IHRC and HRW's reliance on the Respondent's Fresh Evidence Record. For instance, the submission in para. 35 of the Interveners' Appeal Factum that the sharing of the information with U.S. officials was "unconditional" (which the Appellants specifically complain about at para. 13 of their factum on this motion) does not rely on the Respondent's Fresh Evidence Record, but rather relies on *Khadr v. Canada* (2005), 257 D.L.R. (4th) 577, 2005 FC 1076. Footnote 61 (the citation for the submission in para. 35) in the Interveners' Appeal Factum refers to "*Khadr v. Canada, supra* note 20 at para. 23(h)". The cross-reference in footnote 61 to footnote 20 is an inadvertent typographical error; the cross-reference to the full citation should have been to footnote 21, as can readily be seen from the fact that footnote 21 (and not footnote 20) provides the full citation for "*Khadr v. Canada*".

Guantánamo Bay and (b) in their participation in the U.S. Military Commissions process. Indeed, the latter submission contains no reference at all to the Respondent's Fresh Evidence Record.

15. Nevertheless, the evidence in the Respondent's Fresh Evidence Record may be relevant to the Court's assessment of whether there have been violations of Omar's international human rights. Indeed, the Appellants conceded, the evidence filed in the related proceeding was relied on by von Finckenstein J. at first instance, and is "potentially important to the Court." All of the references in the Interveners' Appeal Factum to the Respondent's Fresh Evidence Record are to evidence filed in the related proceeding before von Finckenstein J.

Responding Motion Record, Letter of Mr. Robert Frater dated December 11, 2007, Tab 2

16. Further, the Appellants have not pointed to any prejudice suffered as a result of the IHRC and HRW's limited reference to the fresh evidence the Appellants agreed to put in the record. The Appellants will have to argue as to the admissibility/weight of this evidence at the hearing of the appeal, in any event, given the Respondent's reliance on such evidence.

17. Finally, the Appellants not only argue about the propriety of relying on the fresh evidence, but they also accuse the IHRC and HRW of exhibiting a "distinct lack of candour" in failing to indicate the extent of their intended reliance on the fresh evidence in their motion for leave to intervene materials. This is a serious allegation that is entirely unfounded.

Appellants' Motion Record, Written Representations, Tab 3, para. 2

18. The Appellants cite no authority for their suggestion that the IHRC and HRW were under an obligation to indicate the precise extent of their intended reliance on the Respondent's Fresh Evidence Record at the motion for leave to intervene stage of the proceedings. Indeed, it is difficult to imagine the rationale for imposing such a duty, as it is entirely reasonable to expect an intervener to rely on the record as it exists.[3]

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[3] The Appellants did not suggest that the IHRC and HRW are subject to any such duty in the Appellants' Responding Leave Memorandum.

19. It is difficult to imagine how the IHRC and HRW could have been more candid than they were about their intention to rely, in part, on the factual findings relating to Canadian officials' interviews of Khadr at Guantánamo Bay. The HRW's affiant Nehal Bhuta explicitly stated in support of the application for leave to intervene:

> The conduct of Canadian officials which underlies this appeal, namely, the interrogation of Khadr in Guantánamo Bay and the disclosure of the fruits of that interrogation to U.S. officials, violated Canada's binding international human rights law obligations towards Khadr ...

Respondent's Motion Record, Affidavit of Nehal Bhuta sworn December 30, 2007, Tab 9, paras. 31 and 32(ii)
Respondent's Motion Record, Interveners' Leave Memorandum, Tab 4, para. 34

20. The IHRC and HRW exhibited the same candour by clearly indicating in the Interveners' Appeal Factum each instance in which they were referring to the Respondent's Fresh Evidence Record by flagging such citations with bold footnotes. This is consistent both with the approach taken in the Respondent's factum and the spirit of McLachlin C.J.'s order of December 19, 2007, which required the Respondent's fresh evidence to be marked separately in the record.

B. The IHRC and HRW are <u>not</u> raising any new issues and the Appellants are simply re-litigating the motion for leave to intervene

21. The Appellants argue in the opening paragraph of their factum on this motion that the IHRC and HRW are "seeking to expand the issues before this Court" contrary to Binnie J.'s order granting intervener status. This view is premised on the Appellants' position that this Court cannot pass judgment on the merits of U.S. legislation. However, this position does not consider the jurisprudence of this Court. For instance, this Court's recent decision in *R. v. Hape* states that the "participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada." Thus, the application of *Hape* to the facts of this case necessitates an examination of the U.S. Military Commissions under international human rights law. It would be impossible to determine whether Canadian officials participated in activities that violate international

human rights if the Court were precluded from assessing whether the U.S. Military Commissions comply with international human rights standards.[4]

Appellants' Motion Record, Written Representations, Tab 3, paras. 1 and 15

R. v. Hape, 2007 SCC 26 at para. 101

22. Moreover, the Appellants do not present any new submissions on this motion in support of their argument that the IHRC and HRW are improperly expanding the issues before the Court; rather, they rely on the same arguments that Binnie J. considered and rejected on the IHRC and HRW's motion for leave to intervene. For instance, at para. 15 of the Appellants' factum on this motion, the Appellants' characterize the IHRC and HRW's arguments as calling for "an extensive trial before this Court of the American military justice regime at Guantánamo Bay". At paras. 17 and 26 the Appellants' Responding Leave Memorandum, the Appellants wrote that it is "far beyond the scope of any proper intervention" to try to "put the American military commission trials at Guantánamo Bay on trial".

Responding Motion Record, Appellants' Responding Leave Memorandum, Tab 5, paras. 17 and 26

Responding Motion Record, Interveners' Reply Leave Memorandum, Tab 6, para. 8

23. Similarly, at paras. 8 and 10 of their factum on this motion, the Appellants argue that because allegations of violations of the *Convention on the Rights of the Child*, including a violation of the right to counsel, were specifically pleaded and have not been adjudicated in Action T-536-04, such allegations should not be allowed to be made on this appeal.[5] The Appellants made nearly the exact same submission at para. 26 of the Appellants' Responding Leave Memorandum, in which they argued: "All of the proposed submissions of the

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[4] This Court has also considered capital punishment and torture by other states (see *United States v. Burns,* [2002] 1 S.C.R. 238 and *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, respectively) under international human rights law in order to determine whether the Canadian government would violate section 7 of the *Charter* by removing persons to those states.

[5] If anything, it is the Appellants' submission – that because there has been no adjudication of Action T-536-04 there is no evidence on this point – that is problematic. On the motion in Action T-536-04 to enjoin further interviews of Khadr by the Appellants, the Appellants refused to give undertakings and produce documents on the cross-examination of CSIS official Hooper as to what transpired during interviews with Omar, and specifically as to whether Omar was advised of his rights; von Finckenstein J. concluded that: "There is no evidence that the Plaintiff was advised of his *Charter* rights, e.g. right to silence, right to counsel". (*Khadr v. Canada* (2005), 257 D.L.R. (4th) 577, 2005 FC 1076 at paras. 9, 23(g)).

applicant under para. 32(ii) relate to matters which are subject of the other Federal Court actions or not properly before this Court." As the IHRC and HRW responded in their reply memorandum, "the question is not whether the conduct of Canadian officials in interrogating the Respondent is relevant to *another* proceeding; the question is simply whether that conduct is relevant to *this* proceeding."

Appellants' Motion Record, Written Representations, Tab 3, paras. 8 and 10

Responding Motion Record, Appellants' Responding Leave Memorandum, Tab 5, para. 26

Responding Motion Record, Interveners' Reply Leave Memorandum, Tab 6, para. 9

24. Accordingly, the IHRC and HRW submit that the Appellants' motion to strike the Interveners' Appeal Factum and revoke their status as interveners is simply an attempt to re-litigate the merits of the IHRC and HRW's successful motion for leave to intervene.

PART IV – COSTS

25. The IHRC and HRW do not seek costs in this proceeding.

PART V – ORDER SOUGHT

26. The IHRC and HRW submit that the Appellants' motion be dismissed in its entirety.

March 7, 2008

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PER

Tom Friedland

Gerald Chan

PER

Audrey Macklin

Counsel to the University of Toronto, Faculty of Law - International Human Rights Clinic and Human Rights Watch

PART VI – TABLE OF AUTHORITIES

1. *R. v. Hape,* 2007 SCC 26 at para. 101

2. *United States v. Burns,* [2002] 1 S.C.R. 238

3. *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3,

PART VII – STATUTES

None

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

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(MOTION TO STRIKE)

GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Tom Friedland
Gerald Chan
Tel: 416.979.2211
Fax: 416.979.1234

UNIVERSITY OF TORONTO, FACULTY OF LAW

Audrey Macklin
Tel: 416.946.7493

Solicitors for the Applicants The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

GOODMANS\\5561646