Court File No. 32147

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

BETWEEN:

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

Applicants
(Appellants)

- and -

OMAR AHMED KHADR

Respondent

-and-

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

Respondent
(Intervener)

NOTICE OF MOTION

TAKE NOTICE that the Appellants hereby applies to *a judge* pursuant to Rules 47,57 and 59(3)of the *Rules of the Supreme Court of Canada*, for an order:

1) Striking the Joint Factum of the University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch, and revoking their status as interveners; or

2) Such further or other order that the judge may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1) The Appellant has violated the terms on which intervener status was granted, by raising new issues on the basis of facts not properly before the Court; and

2) Such further and other grounds as counsel may advise and may be permitted.

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APPELLANT'S FACTUM ON THE MOTION TO STRIKE

PART I – THE FACTS

A) OVERVIEW

1. The factum filed by the interveners University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch ("U. of T." or "the Intervener") should be struck in its entirety and U. of T.'s intervener status revoked. The factum fails to respect the order of Binnie J. granting intervener status by seeking to expand the issues before this Court on the basis of evidence not in the record and factual determinations that have not been made.

2. While the Appellant concedes that the subjects raised in the U. of T. factum are generally consistent with those mentioned in the affidavits supporting

the U. of T. intervention,[1] the intervener exhibited a distinct lack of candour in describing the extent to which their proposed arguments depended on contentious facts such as the proposed fresh evidence of the Respondent, Omar Khadr ("the Respondent"), and other "facts" inserted in the factum in the guise of authorities. Whether or not this Court finds the Respondent's fresh evidence admissible, it is wholly inappropriate for an intervener to file a factum dependant on such evidence.

B) FACTS

3. The Appellant relies on the text of the U. of T factum, the affidavit of Sandra McKinnon filed in relation to the Motion to Strike certain paragraphs from the Respondent's factum ("McKinnon #1"), and the affidavit of Sandra McKinnon filed in respect of this Motion ("McKinnon #2"). McKinnon #2 deals with the representations made by U. of T. in their application to intervene, and submissions made by U. of T. in response to the Appellant's opposition to their application to intervene.

4. The attachments to McKinnon #1 set the relevant context for consideration of this Motion. The essential facts are:

a) the Respondent has an action pending in the Federal Court, action number T-536-04, in which the cause of action is based on interviews of the Respondent conducted by Canadian Security Intelligence Service officials, which are alleged to infringe the Respondent's rights under s. 7 of the *Charter*;[2]

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[1] Affidavit of Sandra McKinnon (McKinnon #2", Exhibits "A" and "B")
[2] McKinnon # 1, Exhibit "G" Amended Statement of Claim

b) among the particulars of that claim is paragraph 4, which states:

> At all material times to this action, the defendant was or ought to have been aware that, since being detained in Camp X-Ray,the plaintiff:
>
> a. has been in jeopardy of being charged by the government of the United States of America for acts alleged to have been committed by the Plaintiff when he was of the age of 15 years or younger, for which charges the Plaintiff could face the penalty of death;
>
> b. may be tried before certain *de facto* military commissions convened by the government of the United States of America according to a process which constitutes a gross departure from recognized principles of fairness, natural justice and fundamental justice and to such a degree as to shock the Canadian conscience;
>
> c. has not been permitted to receive, and indeed has been prohibited from receiving, advice from legal counsel of his choice;
>
> d. has not been permitted to receive and indeed has been prohibited from receiving contacts or visits from members of his family;
>
> e. has been interrogated by officials of the United States government on a constant or regular basis;
>
> f, has never been brought before an independent judicial authority for the purpose of determining his legal status or the validity of his detention;
>
> g. has not been advised as to the nature of any charges laid against him;
>
> h. has generally been deprived of all the legal rights conferred upon the Plaintiff by international law, including those reflected in the *Convention on the Rights of the Child* and the *Geneva Conventions;* and
>
> i. has been the victim of criminal offences committed against him by officials of the government of the United States of America contrary to s. 3(1) of the *Geneva Conventions* Act of Canada and s. 6 of the *Crimes Against Humanity and War Crimes Act of* Canada.[3]

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[3] McKinnon # 1, Exhibit "G", Amended Statement of Claim, para. 4

c) That litigation has not proceeded past the point of the granting of an interim injunction against further interviews.[4]

5. The Order of Binnie J. dated January 24, 2008, permitted U. of T. to intervene, subject to conditions, including the following:

> The Interveners shall not be entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.[5]

PART II – ISSUE

6. Does the intervener's factum constitute legitimate advocacy within the terms of the order granting permission to intervene?

PART III – ARGUMENT

7. The Intervener's factum contains two main arguments. The first, at paragraph 8-25, contends that Canadian officials violated the Respondent's *Charter* rights by their interviews of the Respondent at Guantánamo Bay. All of these submissions are predicated on the determination of factual issues which are the subject of Action T-536-04, and have no value in the absence of such factual findings.

8. With respect to the alleged violations of the *Convention on the Rights of the Child*, that allegation has been specifically pleaded in Action T-536-04,[6] and no factual determinations have yet been made on that issue by a trial court. In paragraph 16, U. of T. states that "Canadian officials failed to make the best interests of Omar a primary consideration." In the same paragraph, they rely on

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[4] Mckinnon # 1, Exhibit "D", Court docket for Action T-536-04
[5] Mckinnon # 1, Exhibit "C", Order of Binnie J. dated January 24, 2008

disputed fresh evidence to allege other human rights violations. In paragraph 17 they allege that Canadian officials "[knew]" of a real risk of serious and continuing violations of the child's rights."

9. Such arguments depend on the existence of adjudicative facts, i.e., a record involving full consideration of what Canadian officials did, and what they knew.[7] It is manifestly unfair to tar officials with such serious allegations based on a record that is, at its highest, seriously incomplete.

10. The same method of argument continues throughout the intervener's arguments. At paragraph 19 the intervener relies on an *absence* of evidence with respect to informing the Respondent about alleged rights to counsel. There is an absence of evidence on this issue *precisely because* there has been no adjudication of T-536-04. In paragraphs 20-22 the intervener alleges "compulsion" of the Respondent in the obtaining of statements. The intervener relies on this Court's decision in *R. v. Oickle*, yet *Oickle* amply demonstrates that issues such as this are essentially factual ones, demanding that a "trial court" properly consider all the relevant circumstances."[8]

11. In paragraph 23, the intervener relies on *allegations* of rights violation as a relevant fact ("there are serious allegations of incommunicado detention, solitary confinement and physical and psychological mistreatment"), and relies on the Respondent's fresh evidence for such "facts".[9] In paragraph 24, the Intervener accuses Canadian officials of "disregard of past, ongoing and potential violations of international human rights by another state". These are serious, and *untried* allegations.

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[6] McKinnon # 1, Exhibit "G", Amended Statement of Claim, Para 4(h)
[7] *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086, at 1099.
[8] *R. v. Oickle*, [2000] 2 S.C.R. 3 at para 71
[9] The same mode of argument is also used in the last sentence of para. 29 of the Intervener's factum.

12. The intervener's second major argument, at paragraphs 26-34, is an argument that sharing information with American authorities constitutes a *Charter* violation. It is equally unhelpful because of its reliance on unproven "facts".

13. The Intervener asserts throughout its factum[10] that the sharing of information with the American officials was "unconditional". As the Appellant has argued in the motion to strike certain paragraphs from the Respondent's factum, this argument is entirely contingent on facts contained in the Respondent's Fresh Evidence Application. Only an assiduous reader could discover this problem in the Intervener's factum, by reading paragraph 35 and tracing footnote 61 back through footnote 20. In addition, the Intervener relies on an *absence* of evidence that conditions were placed on use, an issue that requires an evidentiary hearing. In paragraph 30 the intervener alleges unreasonable delay, an issue that in Canada is a highly factual issue as well as contextual (i.e., what is reasonable in particular judicial districts.)[11] Paragraph 34 contains an example of "bootlegging" facts through authorities,[12] by referring to a fact not in the record but discussed in an academic writing.

14. Whether or not the Respondent's fresh evidence is admissible, it is inappropriate for an intervener to make submissions that are dependent on contested evidence. The usefulness of interveners' submissions should not be in any way contingent on resolution of factual controversies. An intervener's ability to make "useful" submissions[13] ought to be able to be determined at the time of their application to intervene, and not rise or fall with the ability of a party to supplement the record. At the very least, the intervener ought to be candid about its intention to rely on such material, and this intervener was not, neither in its

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[10] U. of T. Factum, paras. 6, 26, 35, 36
[11] *R. v. Morin*, [1992] 1 S.C.R. 771
[12] *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845
[13] Supreme Court Rule 57(2)

original application nor in its response to the Appellant's submissions in opposition to its application to intervene.[14]

15. The Intervener also proposes an extensive trial before this Court of the American military justice regime at Guantánamo Bay. In paragraphs 28 and 29 it attacks that regime in a manner reminiscent of an attack on domestic legislation. There are no constitutional questions stated concerning whether the American Military Commissions comply with the *Charter,* nor could there be. This Court has no jurisdiction to sit in judgment of that American legislation, particularly where the U.S. is not a party to the litigation.

16. This is a case that began as an application for judicial review of a decision by the Appellants not to comply with a request by counsel for the Respondent for disclosure of information for making full answer and defence in a foreign trial. At neither level below was it a free-standing inquiry into the quality of military justice at Guantánamo Bay. Neither the Respondent nor his supporting interveners should be allowed to make it so.

PART IV – COSTS

17. No costs are sought

PART V – ORDER SOUGHT

18. Because such substantial portions of the arguments proposed by the intervener are so dependant on facts not before the court, the factum should be struck in its entirety. Further, because the intervener was less than candid in its intervention application about the extent to which its arguments relied on contentious facts, its intervener status should be revoked.

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[14] McKinnon #2, Exhibit "C"

All of which is respectfully submitted.
Dated at Ottawa, this 28 day of February, 2008.

Robert Frater for Sharlene Telles-Langdon for Doreen Mueller