

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

B E T W E E N:

**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

- and -

**AMNESTY INTERNATIONAL (CANADA SECTION, ENGLISH BRANCH), HUMAN RIGHTS
WATCH, UNIVERSITY OF TORONTO FACULTY OF LAW-INTERNATIONAL HUMAN RIGHTS
PROGRAM, AND THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE
CANADIAN COALITION FOR THE RIGHTS OF CHILDREN AND JUSTICE FOR CHILDREN
AND YOUTH, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CRIMINAL
LAWYERS' ASSOCIATION (ONTARIO), THE CANADIAN BAR ASSOCIATION, LES AVOCATS
SANS FRONTIERES CANADA, BARREAU DU QUEBEC ET GROUPE D'ETUDE EN DROITS ET
LIBERTES DE LA FACULTE DE DROIT DE L'UNIVERSITE LAVAL, THE CANADIAN CIVIL
LIBERTIES ASSOCIATION and THE NATIONAL COUNCIL FOR THE PROTECTION OF
CANADIANS ABROAD**

Interveners

**FACTUM OF THE INTERVENERS,
HUMAN RIGHTS WATCH, UNIVERSITY OF TORONTO FACULTY OF LAW –
INTERNATIONAL HUMAN RIGHTS PROGRAM, AND THE DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS**

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PART I – FACTS

1. Human Rights Watch, the University of Toronto, Faculty of Law – International Human Rights Program, and The David Asper Centre for Constitutional Rights (collectively, “the Interveners”) rely on the statement of facts in the Respondent’s Factum.

PART II – POINTS IN ISSUE

2. 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?;¹ and
- b) If such a breach occurred, was the remedy ordered by O’Reilly J. just and appropriate in the circumstances?

PART III - ARGUMENT

A. The conduct of Canadian officials engaged the *Charter* and violated the Respondent’s s.7 *Charter* rights

1) The *Charter* is engaged

3. In *R. v. Hape*, this Honourable Court held that the *Charter* will apply extraterritorially when Canada has failed to act in accordance with its international human rights law obligations.² In *Canada (Justice) v. Khadr*,³ this Court held that the *Charter* applied to Canadian officials in their dealings with the Respondent while he has been detained at the Guantánamo Bay prison because of Canada’s participation in a process that violated Canada’s international human rights obligations.⁴ The Interveners submit that in addition to the basis on which this Court found the *Charter* to apply in *Khadr 2008*, the decision of Canadian officials to interview the Respondent for intelligence or law-enforcement purposes with knowledge of his personal circumstances and of the conditions under which he has been detained (a matter not before the Court in *Khadr 2008*) further involved Canada in a process that violated Canada’s international obligations and gives rise to additional *Charter*-based duties towards the Respondent.

¹ While the Respondent also relies upon ss. 6 and 12 of the *Charter*, the Interveners limit their submissions to s.7 of the *Charter*.

² *R. v. Hape*, 2007 SCC 26, at paras. 51, 52 and 101, *per* LeBel J.

³ *Canada (Justice) v. Khadr*, 2008 SCC 28 (“*Khadr 2008*”).

⁴ *Khadr 2008*, at para. 3

4. In particular, the decision to interrogate a minor, held in prolonged, *incommunicado* detention without charge, in the absence of counsel or support, and with knowledge of prior abuse and mistreatment, breached Canada's international human rights obligations under the *Convention on the Rights of the Child* ("CRC"), the *International Covenant on Civil and Political Rights* ("ICCPR") and the *Convention Against Torture* ("CAT"), all of which Canada has ratified.

5. Contrary to the Appellants' submission that Canada's obligations under international human rights law are restricted to Canada's *de jure* territory,⁵ the Interveners submit that despite the fact that the Respondent is outside Canadian territory and is under the control of another State, he remains a person under Canadian jurisdiction as this concept is understood in international human rights instruments. The International Court of Justice ("ICJ") has held that both the CRC and the ICCPR are capable of extraterritorial application, adopting the jurisprudence of the U.N. Human Rights Committee ("HRC") concerning the meaning of "jurisdiction".⁶ The HRC has consistently held that a person can be within or subject to the jurisdiction of a state party to the human rights treaty even where the person is physically outside the territory of that state, where: (a) the person is a citizen of that state, and (b) the state through its agents takes positive actions which directly violate the person's treaty-guaranteed rights.⁷ This jurisprudence applies equally to the concept of "within their jurisdiction" under the CRC.⁸

6. The geographical location of the conduct is irrelevant to Canada's obligations. There can be no doubt that, had the conduct of Canadian officials in question occurred in Canada in the same or similar circumstances, it would constitute a breach of the Respondent's rights under international human rights law. The HRC has observed that the State party concerned can be held accountable for violations of rights under the ICCPR which its agents commit upon the territory of another State.⁹ As one leading commentator observed, when States parties "take actions on foreign territory that violate the rights of persons subject to their sovereign authority [such as

⁵ See the Appellants' factum at para. 55.

⁶ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports, 2004 ("ICJ Wall Case").

⁷ See *Celiberti de Casariego v. Uruguay*, No. 56/1979; *Varela Nunez v Uruguay*, No. 108/1981; *Samuel Lichtensztein v Uruguay*, No. 77/1980; *Pereira Montero v Uruguay*, No. 106/1981. In all of these cases, the victim suffered the violation at the hands of Uruguayan state agents, but was not in the territory of Uruguay nor necessarily in the custody or control of Uruguayan agents.

⁸ *ICJ Wall Case*, at para. 113.

⁹ *Lopez Burgos v. Uruguay*, No. 52/1979, para. 12.3; approved in the *ICJ Wall Case*, see para. 109.

nationals], it would be contrary to the purpose of the Covenant if they could not be held responsible.”¹⁰

7. While interviewing a Canadian citizen held abroad under a violative process may not constitute participation in that process by Canadian officials,¹¹ it is submitted that the purpose of the interview is critical to whether the conduct constitutes participation. Here, Canada was not protecting the Respondent’s welfare but rather set out to interrogate him for law enforcement and intelligence-gathering purposes. In doing so, Canada violated its obligation to respect the Respondent’s rights under the ICCPR and the CRC by, *inter alia*, questioning him when he could not exercise his right to legal assistance¹² and could not exercise his right not to be compelled to confess guilt or give testimony.¹³ Article 40(2)(b)(iv) of the CRC protects a child’s right not to be compelled to give testimony or otherwise incriminate him or herself by making a statement in interrogation.¹⁴ In the context of children, ‘compelled’ is to be given a broad reading, taking into account the impact of age, development, length of interrogation, fear and lack of understanding on the vulnerability of children.¹⁵

8. The abusive treatment to which the US authorities subjected the Respondent, including in the three weeks leading up to the March 2004 interrogation, amounts to at least cruel, inhuman or degrading treatment within the meaning of ICCPR Art 7, CRC Art 37(a) and CAT Art 16. Combined with other serious and credible allegations of psychological and physical mistreatment, the mistreatment may contribute to a finding that the Respondent has been tortured (particularly taking into account his age at the time).¹⁶ The Respondent’s treatment before the interview was meant to overbear his will and make him amenable to interrogation, which suited the objectives of both the Americans and the Canadians. When used in combination with prolonged detention and solitary confinement (to which the Respondent was subjected after the March 2004 interview with the Canadian official with a view to further interviews afterwards), sleep deprivation amounts to

¹⁰ M. Nowak, *CCPR Commentary*, 2nd edition, Kiel: NP Engel, 2005, at p. 44 (“Nowak Commentary”).

¹¹ *Khadr 2008*, at para. 27.

¹² CRC, Art. 40(2)(b)(iv); ICCPR, Art. 14(3)(d)

¹³ CRC, Art. 40(2)(b)(iv); ICCPR, Art. 14(3)(g)

¹⁴ This applies irrespective of whether Khadr had been charged at the time of the interviews. The allegations that he infringed penal law is sufficient: CRC, Art. 40(1).

¹⁵ Committee on the Rights of the Child, *General Comment No. 10, Children’s Rights in Juvenile Justice* (44th session, 2007), U.N. Doc. CRC/C/GC/10 (2007), at para. 57.

¹⁶ See *Selmouni v. France*, ECHR Application No. 00025803/94, paras. 91-105. In *Bacha v. Obama*, 2009 WL 2149949 (D.D.C. 17 July 2009), the U.S. District Court upheld allegations by a Guantanamo detainee that he was subjected to torture in order to make statements while in Guantanamo, and ordered that all such statements be suppressed.

inhumane treatment.¹⁷ Sleep deprivation can also amount to torture, when the age, health, and physical vulnerabilities of the detainee are taken into account.¹⁸

9. The circumstances in Guantanamo Bay created an ‘atmosphere of oppression’ for the Respondent independently of any specific interrogation methods. After his battlefield capture, the Respondent was not accorded a determination by a “competent tribunal” under Article 5 of the Third Geneva Convention as to his proper status or otherwise held in conformity with the Geneva Conventions and customary laws of armed conflict.¹⁹ He was also held in violation of international human rights law: since age fifteen for fourteen months without charge; without independent review of the legality of his detention; with no access to counsel of any kind and with no contact with his family; and without regard to his status as a minor. Each of these circumstances constituted a violation by the US of the Respondent’s rights under the ICCPR and/or the CRC.²⁰ These conditions were well-known.

10. In summary, by participating in a detention regime that contravened Canada’s international human rights obligations when they chose to interview the Respondent with knowledge that US officials had subjected him to cruel, inhuman or degrading treatment for the purpose of making him “more amenable” to providing information, and against a background of information concerning the prevailing conditions of detention at the Guantánamo Bay prison, Canadian officials violated Canada’s binding human rights treaty obligations and thereby engaged the *Charter*. Their actions made them complicit²¹ in a rights-violative regime and abetted ongoing violations of the Respondent’s human rights.

2. Canadian interviews of the Respondent breached Khadr’s s.7 rights and violated the principles of fundamental justice

11. It is submitted that the very same conduct which triggered the application of the *Charter*, including the use of cruel, inhuman or degrading treatment to extract information, and the failure

¹⁷ Committee Against Torture, *Concluding Observations on Israel*, A/57/44, 2000, para. 4(a)(ii).

¹⁸ Committee Against Torture, *Concluding Observations on the Republic of Korea*, A/52/44, 1996, para. 56; *Selmouni v. France*, *supra*, paras. 100-105 (noting the significance of cumulative acts); *Bacha v. Obama*, *supra*.

¹⁹ *Geneva Convention (Third), Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20, Art. 5; *Geneva Convention (Fourth), Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, Art 78; Common Article 3 of the *Geneva Conventions*.

²⁰ CRC, Art. 37(b); ICCPR Art. 9(1); ICCPR Art. 9(4); ICCPR Art. 10(1); CRC, Art. 37(d).

²¹ House of Lords and House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, 21 July 2009, para. 35.

to respect the Respondent's privilege against self-incrimination and right to legal assistance as a child violated the Respondent's rights guaranteed by s.7 of the *Charter*. For example, statements extracted amidst an 'atmosphere of oppression' breach the "right of the detained person to make a meaningful choice whether or not to speak to state authorities."²² In Canadian jurisprudence, indicia of an atmosphere of oppression include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and prolonged, excessively aggressive or intimidating questioning.²³ While Canadian officials are not primarily responsible for the deprivation of liberty and security of the person occasioned by the Respondent's detention and treatment, they became complicit in these deprivations because of their decision to interview him and take advantage of his grave predicament. Further, the record suggests that this decision may itself have had direct, adverse effects on the quality of that detention.

3. Section 7 right to security of person also includes right to seek protection while abroad; denial of protection in this case did not accord with fundamental justice

12. Canada's violation of s. 7 of the *Charter* also stems from its continuing inaction. Canada has failed to take reasonable steps within its power to remedy the abuse suffered by the Respondent and protect him from the ongoing consequences of the abusive regime in which it participated. This inaction deprives the Respondent of liberty and security of the person. It is submitted that in the circumstances of this case, fundamental justice includes an obligation to take the reasonable step of requesting his repatriation.

13. The Respondent's right to security of the person entails the right to seek Canada's protection in the form of a request for repatriation by Canada. This right is codified by s. 10 of the *DFAIT Act*.²⁴ Canada's exercise of discretion in responding to the Respondent's plea is constrained by the principles of fundamental justice. The Interveners submit that Canada's inaction in refusing to accede to this request violates the principles of fundamental justice.

14. A crucial factor in evaluating Canada's *Charter* obligations toward the Respondent is the fact that he is a Canadian citizen. All of Canada's dealings with the Respondent since his detention have been based on this relationship. Canada's actions and inaction in respect of the

²² *R. v. Singh*, 2007 SCC 48.

²³ *R. v. Oickle*, [2000] 2 S.C.R. 3.

²⁴ *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, ("*DFAIT Act*"), s.10.

Respondent are equally episodes in an ongoing and uninterrupted exercise of nationality jurisdiction over him arising from his relationship to Canada *qua* citizen.

15. To the extent that s. 7 *Charter* obligations are to be interpreted consistently with Canada's human rights obligations, the human rights principle of the duty to ensure is a relevant source of interpretation and content. The duty to ensure, explicitly stipulated in the ICCPR and CRC, entails a duty to take **reasonable and appropriate positive steps** to protect a person within jurisdiction from human rights violations at the hands of third parties.²⁵ Under human rights principles, Canada continues to owe him a duty to ensure,²⁶ even though the content of this duty may be more limited because he is outside Canadian territory. In particular, Articles 3 and 39 of the CRC require a state to act in a child's best interests and to take appropriate steps to ensure the reintegration and rehabilitation of children who have been subjected to torture or cruel, inhuman or degrading treatment.

16. In *Ilascu v Moldova*, the European Court of Human Rights held that the obligation "to secure" (an equivalent concept in the European Convention) the rights of persons within jurisdiction required the State "to endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign states and international organizations, to continue to guarantee the enjoyment of rights and freedoms defined" in the treaty.²⁷ This duty persisted even though the applicants were outside the control of the Moldovan government.

17. In *Boumedienne v Bosnia Herzegovina*, the applicants' claim alleging a violation by Bosnia of the obligation to secure was dismissed as unfounded precisely because the court found that Bosnia had made repeated interventions *vis-à-vis* the US authorities and "thereby **demonstrated their unequivocal commitment to repatriating the applicants** [from Guantanamo]".²⁸ The court concluded that "Bosnia Herzegovina can be considered to **taking all possible steps** to protect the basic rights of the applicants," who were detained in Guantanamo Bay.²⁹ "All possible steps" to protect the applicants included a request to repatriate them and removing all internal obstacles to their return.

²⁵ Nowak Commentary, pp. 37-41.

²⁶ ICCPR, Art. 2; CRC, Art. 1.

²⁷ *Ilascu and Others v Moldova and Russia*, Application No. 48787/99, 8 July 2004, para. 317.

²⁸ *Boumediene and Others v. Bosnia Herzegovina*, Application No. 38703/06, 18 November 2006.

²⁹ *Ibid*, paras 63, 65, 67 (emphasis added).

18. In addition, the broader principles of sovereignty (consistent with international human rights law) require that a state to protect persons within jurisdiction from third-party violations. The common law acknowledged a duty of sovereigns to protect their citizens as early as 1608.³⁰ This duty is operationalized through, *inter alia*, systems of criminal justice, the constitutional entrenchment of rights (including the *Charter*) and the ratification by states of supranational and international human rights instruments. The duty is presupposed by the international refugee regime, which this Court has described as “a back-up to the protection one expects from the state of which an individual is a national.”³¹ The obligation to protect persons within jurisdiction against violations at the hands of others is also presupposed by this Court’s jurisprudence on the obligation to seek assurances against the death penalty in the extradition context.³²

19. The duty is not extinguished when a citizen is outside the state’s territorial jurisdiction. The scope and content of the duty to protect may be circumscribed, but is not eliminated, by the territorial jurisdiction exercised over the citizen by another state.

20. It is submitted that it is contrary to the principles of international legal interpretation, and Art. 73 and the preamble to the *Vienna Convention on Consular Relations*, to argue, as the Appellants do, that the absence of a general right to diplomatic protection in the VCCR (which is not a human rights instrument) precludes a remedy of requesting repatriation for breach of the ICCPR or the CRC (which are human rights instruments).³³

21. The exercise of discretion under the *DFAIT Act* in relation to the Respondent must accord with the principle of fundamental justice that states owe a duty of protection toward citizens abroad. Whatever discretion accrues to the Minister under the *DFAIT Act* in determining whether protection is required and what steps protection requires, complicity in the violation of the Respondent’s international human rights by the United States, and direct violation of his international human rights in the course of the interviews, cannot be a lawful exercise of that

³⁰ “But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects”: *Calvin's Case*, 7 Coke Report 1a, 77 ER 377 (1608).

³¹ *Canada v. Ward*, [1993] 2 SCR 689. The Court ruled that state protection included both refraining from persecution and protecting the individual from persecution by third parties.

³² *United States v. Burns*, 2001 SCC 7.

³³ The preamble of the *Vienna Convention on Consular Relations* (“VCCR”) indicates that the VCCR is not intended to be read as a human rights instrument. Art. 73 sets out the relationship between the VCCR and other international agreements, further indicating that the VCCR is not a human rights instrument.

discretion. This complicity persists as long as Canada fails to exercise its discretion to seek the Respondent's repatriation.

22. Only Canada can request the Respondent's repatriation. Canada's refusal to make this request prolongs Canada's complicity and makes the inaction a contributing factor in the ongoing rights deprivations.³⁴ Notably, a request for repatriation was the determining factor in the cessation of ongoing rights deprivations of detainees who were citizens or permanent residents of other Western states.

B. Remedy

23. The meaningful protection of *Charter* rights may in some cases require the introduction of novel remedies. Section 24(1) of the *Charter* must be interpreted broadly and liberally.³⁵ In *Nelles v. Ontario*, Lamer J. (as he then was) observed that “[t]o create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.”³⁶ When crafting a remedy under s. 24(1) of the *Charter* for breaches of fundamental rights, trial judges have a broad discretion to order flexible and creative remedies.³⁷ A purposive approach to remedies requires the remedies be responsive and effective.³⁸ It is submitted that Canada's international human rights obligations and the remedial principles that have developed under international law provide valuable guidance in the fashioning of an appropriate and just remedy under s.24(1) of the *Charter* in the circumstances of this case.³⁹

24. A state acting in violation of its international obligations has an indisputable obligation to provide reparations. Return to Canada would be an essential aspect of an effective remedy for the violations suffered by the Respondent, taking into account Canada's obligations under CRC Article 39 to ensure his rehabilitation as a victim of torture or inhumane treatment. The concept of “remedy” in international human rights law is broad. It entails an obligation of restitution, “which includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and

³⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at paras. 52-55.

³⁵ *R. v. Taillefer*, [2003] 3 S.C.R. 307 at para. 127; *R. v. Mills*, [1986] 1 S.C.R. 863, at para. 279, *per* McIntyre; cited with approval in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62.

³⁶ *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at para. 50.

³⁷ *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine)*, [2004] 1 S.C.R. 789, at para. 26, citing *Doucet-Boudreau v. Nova Scotia*, *supra*.

³⁸ *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3, at para. 25.

³⁹ *R. v. Mills*, *supra*, *per* Lamer J., at para. 28.

citizenship, return to one's place of residence, restoration of employment and return of property."⁴⁰ It is submitted that similar principles should inform the crafting of an appropriate and just remedy under s. 24(1) of the *Charter* in the circumstances of the case at bar.

25. Cessation of ongoing violations is an essential aspect of an effective remedy under international human rights law. The severity and duration of the violations of the Respondent's human rights as well as the real possibility of future rights violations should be taken into account in formulating a remedy. Importantly, any trial by a military commission would itself amount to a continuing human rights violation, compounding earlier violations.

26. International criminal jurisprudence and Canadian constitutional case law support the contention that the most appropriate remedy for pre-trial rights violations of the magnitude experienced by the Respondent would be a stay of proceedings. International criminal tribunals have consistently held that where a defendant has suffered serious mistreatment and other pre-trial rights violations, an effective remedy will include a stay of proceedings or a decline of jurisdiction unless the prejudice to the fairness of his or her trial can be remedied.⁴¹ This jurisprudence is also consistent with the Canadian jurisprudence on stays of proceedings, which recognize that while granting a stay is a drastic remedy, they are appropriate and just when necessary to prevent the perpetuation of unfairness in a trial or to disassociate the state from an abuse of process.⁴²

27. The fact that Canadian courts lack the territorial jurisdiction to order a stay of proceedings does not terminate the remedial inquiry, but rather invites consideration of whether some other remedy may be the functional equivalent of a stay. It is submitted that a formal, good faith, request for the Respondent's repatriation is the functional equivalent of a stay of proceedings in the highly unusual circumstances of this case. If the request is granted, it will bring an end to a process that

⁴⁰ *UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*, UN Doc. E/CN.4/RES/2005/35, GA Res 60/147, Principle 19 [emphasis added].

⁴¹ *Prosecutor v. Guek Eav Kaing, a.k.a. Duch*, No: 001/18-07-2007-ECC-OCIJ, *Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav a.k.a. 'Duch'*, 3 December 2007; *Prosecutor v. Thomas Lubanga Dyilo*, No: ICC-01/04-01/06, *Decision on Defence Challenge To the Jurisdiction of the Court pursuant to article 19 (2)(a) of the Statute* (3 October 2006); *Prosecutor v. Thomas Lubanga Dyilo*, No: ICC-01/04-01/06, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber 1 entitled "Decision on the release of Thomas Lubanga Dyilo"* (21 October 2008) at para. 36; *Prosecutor v. Thomas Lubanga Dyilo*, No: ICC-01/04-01/06, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber 1 entitled "Decision on the release of Thomas Lubanga Dyilo"* (21 October 2008); *Prosecutor v. Kondewa*, No. SCSL-2004-14-AR72(E), *Decision on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by Lomé Accord* (25 May 2004); *Barayagwiza v. Prosecutor*, No. ICTR-97-19-AR72, *Decision* (3 November 1999).

⁴² *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 82; *R. v. Regan*, 2002 SCC 12; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38; *R. v. La*, [1997] 2 S.C.R. 680, at para. 23.

has entailed numerous violations of rights protected under international law and will be a responsive and effective remedy for Canada's own involvement in that process. The obligation under the *Charter* to make such a request flows directly from the decision to participate in the rights violations. By contributing to the harm, Canada assumed an obligation to make reparations. A request for repatriation is the only available remedy. Such a representation would be within the "reasonable steps" required under the obligation to ensure rights protected by the ICCPR and CRC. Under international law, Canada is free to make this request; to do so would not offend any other state's sovereignty or the rules of international comity.

28. The remedy of requesting repatriation has the potential to mitigate the effects of Canada's direct violation of the Respondent's *Charter* rights and Canada's participation in the US violation of his international human rights. These effects remain unaddressed by the remedy of disclosure ordered by this Honourable Court in *Khadr 2008* on the basis of a different though related *Charter* violation.

29. Finally, this additional remedy recognizes and affirms Canada's jurisdiction over the Respondent *qua* citizen. Repatriation would restore to the Respondent the rights protection that is available within Canada to citizens and others protected under Canadian law. While it is not necessary to rely on s. 6(1) of the *Charter* directly, taking a purposive approach to the s.24(1) remedy reinforces the important idea embedded in s.6(1) that the right of a citizen to enter Canada itself includes a remedial aspect insofar as re-entry to Canadian territory is a critical means by which citizens can secure access the full and ongoing protection of their country of citizenship.

PART IV -- COSTS

30. The Intervenors do not seek costs.

PART V – ORDER REQUESTED

31. The Intervenors take no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: October 19, 2009

John Norris / Audrey Macklin / Brydie Bethell
Counsel for the Intervenors

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PART VII – RELEVANT LEGISLATIVE PROVISIONS

1. *Department of Foreign Affairs and International Trade Act, R.S., 1985, c. E-22, s. 10*

<p><u>Powers, duties and functions of Minister</u></p> <p>10. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development.</p> <p><u>Idem</u></p> <p>(2) In exercising his powers and carrying out his duties and functions under this Act, the Minister shall</p> <p>(a) conduct all diplomatic and consular relations on behalf of Canada;</p> <p>(b) conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization;</p> <p>(c) conduct and manage international negotiations as they relate to Canada;</p> <p>(d) coordinate Canada's international economic relations;</p> <p>(e) foster the expansion of Canada's international trade and commerce;</p> <p>(f) have the control and supervision of the Canadian International Development Agency;</p> <p>(g) coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions;</p> <p>(h) have the management of Canada's diplomatic and consular missions;</p> <p>(i) administer the foreign service of Canada;</p> <p>(j) foster the development of international law and its application in Canada's external relations; and</p> <p>(k) carry out such other duties and functions as are by law assigned to him.</p>	<p><u>Attributions</u></p> <p>10. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à la conduite des affaires extérieures du Canada, notamment en matière de commerce international et de développement international.</p> <p><u>Idem</u></p> <p>(2) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi, le ministre :</p> <p>a) dirige les relations diplomatiques et consulaires du Canada;</p> <p>b) est chargé des communications officielles entre le gouvernement du Canada, d'une part, et les gouvernements étrangers ou les organisations internationales, d'autre part;</p> <p>c) mène les négociations internationales auxquelles le Canada participe;</p> <p>d) coordonne les relations économiques internationales du Canada;</p> <p>e) stimule le commerce international du Canada;</p> <p>f) a la tutelle de l'Agence canadienne de développement international;</p> <p>g) coordonne les orientations données par le gouvernement du Canada aux chefs des missions diplomatiques et consulaires du Canada;</p> <p>h) assure la gestion des missions diplomatiques et consulaires du Canada;</p> <p>i) assure la gestion du service extérieur;</p> <p>j) encourage le développement du droit international et son application aux relations extérieures du Canada;</p> <p>k) exerce tous autres pouvoirs et fonctions qui lui sont attribués de droit.</p> <p><u>Programmes</u></p>
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<p><u>Programs</u></p> <p>(3) The Minister may develop and carry out programs related to the Minister's powers, duties and functions for the promotion of Canada's interests abroad including:</p> <p>(a) the fostering of the expansion of Canada's international trade and commerce; and</p> <p>(b) the provision of assistance for developing countries.</p> <p>R.S., 1985, c. E-22, s. 10; 1995, c. 5, s. 7.</p>	<p>(3) Le ministre peut élaborer et mettre en oeuvre des programmes relevant de ses pouvoirs et fonctions en vue de favoriser les intérêts du Canada à l'étranger, notamment :</p> <p>a) de stimuler le commerce international du Canada;</p> <p>b) d'aider les pays en voie de développement.</p> <p>L.R. (1985), ch. E-22, art. 10; 1995, ch. 5, art. 7.</p>
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