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## Editorial

### The *Khadr* Case: An Inadequate and Ineffective Remedy

In *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, the Supreme Court decided the lower courts were correct to hold that Canada had violated Omar Khadr's rights when they interviewed him at Guantanamo Bay, but that they had erred in ordering that the government request his repatriation from the United States. Although this decision affirms that the government's extra-territorial activities are not necessarily immune from Charter review, it raises concerns about the existence of rights without meaningful and effective remedies.

The Court overturned the remedy ordered by the trial judge that Canada request the United States to repatriate Omar Khadr on the basis that such a remedy "gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests" (*ibid.*, at para. 39). The Court defended leaving the government "a measure of discretion in deciding how best to respond" (*ibid.*, at para. 3) to its declaration about the violation of Khadr's rights on the basis of "the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive" (*ibid.*, at para. 46).

The Court essentially made a declaration that Canada had violated Khadr's rights when they interrogated him in 2003 and 2004, but left it up to the government to decide what remedy to provide. Such an approach to remedies is not unprecedented. The Court used this minimalist approach in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. In that case, however, the government indicated that it was attempting to take steps to respond to the Charter violation. No such representations have been made in the *Khadr* case.

Indeed, the federal government initially appeared as if it would do nothing in response to the Court's ruling, with the Prime Minister's

spokesperson announcing that there would be no shift in Canada's policy. A few weeks later, the Minister of Justice fortunately took the case a bit more seriously. He announced that a diplomatic note had been sent to the United States requesting that they not use the evidence obtained by Canadian officials and shared with the United States in Khadr's military commission proceedings. This was the minimal possible remedy that was responsive to the Court's findings that Canadian officials had violated the Charter and participated in a violation of Canada's international obligations when they interviewed Khadr.

In any event, Canada's diplomatic note appears to have fallen on deaf ears. The famous videotape of Khadr being questioned by Canadian officials has already been played at Khadr's military commission at Guantanamo. Although Canadian courts could never require the United States to refrain from using Canadian evidence or to repatriate Omar Khadr, it is now clear that the remedy in the *Khadr* case has been ineffective.

As in the *Little Sisters* case, Khadr must start new litigation to obtain an effective remedy despite having gone to the Supreme Court twice. The follow-up litigation in *Little Sisters* was abandoned when an advance costs order to the small gay and lesbian bookstore was overturned. In retrospect, *Little Sisters* is an unhappy precedent and confirms the wisdom of Justice Iacobucci's strong dissent that general declarations of past violations may be an inadequate remedy in complex, dynamic and contentious contexts.

The Court cited evidentiary uncertainties as one of the justifications for its limited remedy. To be sure, the context is fluid and uncertain, but the Court dealt with similar evidentiary uncertainties in the first *Khadr* case, *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, by remanding the case back to the Federal Court. That court has the capacity to consider claims by the government that information must not be released because of the harm that disclosure will cause to national security, national defence and international relations.

The Court's attempts to distinguish the extradition context and portray it as more certain are not convincing. There is always the possibility that foreign governments might be unwilling or unable to provide Canada with assurances that the death penalty will not be applied. In addition, such requests could also harm Canadian diplomacy with those nations. But such requests are done in order to provide meaningful protections against miscarriages of justice.

The Court's reluctance to order that Canada request Khadr's repatriation are much more fundamental than concerns about evidential uncertainties. They are rooted in concerns about the Court's institutional competence in matters of foreign affairs. One would have thought that such concerns would have been irrelevant given the Court's rejection of a political

questions doctrine in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441.

Although the Court cited *Operation Dismantle* with approval when finding that Khadr's rights had been violated when he was questioned as a juvenile while subject to indeterminate detention and while he was without access to a lawyer, it appears that the Court has implicitly accepted a mini-political questions doctrine that constrains remedial discretion in cases involving foreign affairs and countries that detain Canadians abroad.

The idea that a mini political questions doctrine restrains remedial discretion is supported by the fact that the Court cited *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 in support of its remedial decision. That case established the proposition that the political actors rather than the courts would determine what compliance with the constitution would require. In both cases, the Court seemed content to provide "the legal framework" for negotiations, while allowing the political actors to determine what was necessary to ensure compliance with the legal principles.

It is problematic to rely on the *Secession Reference* in the *Khadr* case because while the political actors can be relied upon to determine the appropriate enforcement of constitutional principles and conventions in a mega political context, it is much less certain that political actors can be relied upon in a case involving violations of the Charter rights of a very unpopular person such as Omar Khadr and perhaps other Canadians detained abroad.

The independent courts should protect unpopular people whose rights are violated. In other contexts, the Court has not shied away from providing such remedies. Recently in *R. v. Morelli*, 2010 SCC 8, it has excluded child pornography obtained as a result of a misleading application for a warrant. If those who possess child pornography are entitled to effective remedies for Charter violations, then those who have been detained for eight years for actions done as a 15-year-old should also receive effective remedies. The rule of law is not meaningful without strong remedies.

To be sure, an affirmation of the trial judge's repatriation remedy would not have ensured that the United States would have sent Khadr home. In addition, steps would had to have been taken in Canada to ensure Khadr's rehabilitation. Nevertheless, Omar Khadr deserved a more effective remedy.

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