Federal Court  Cour fédérale

Date: 20100705

Docket: T-230-10

Citation: 2010 FC 715

Ottawa, Ontario, July 5, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OMAR AHMED KHADR

Applicant

and

THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS and
THE MINISTER OF JUSTICE

Respondents

AND BETWEEN:

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REASONS FOR JUDGMENT AND JUDGMENT

[1] These applications, at their heart, ask whether Mr. Khadr was entitled to procedural fairness by the executive in making its decision as to how Canada would respond to the declaration issued

by the Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 [*Khadr II*]. In *Khadr II*, the Court held that Mr. Khadr's rights under section 7 of the *Canadian Charter of Rights and Freedoms* had been breached by Canada, and issued a declaration to provide the legal framework for Canada to take steps to remedy that breach. For the reasons that follow, in the unique circumstances of this case, I find that Omar Khadr was entitled to procedural fairness by the executive when making its decision as to the appropriate remedy to take. I further find that the executive failed to provide Mr. Khadr with the level of fairness that was required when making its decision. Both the degree of fairness to which he was entitled and the remedy for having failed to provide it are unique and challenging issues.

Background

[2] The facts surrounding Mr. Khadr, his beliefs, his actions, his treatment by the United States of America (U.S.) while in custody in Afghanistan and Guantanamo Bay in Cuba, the validity of the charges against him, and the legitimacy and fairness of the process he is currently facing are not at issue here. The facts that are relevant to these applications are few, less controversial, and are not in dispute.

[3] Omar Khadr was born in Toronto in 1986. He is a Canadian citizen. He has spent most of his life away from Canada in Pakistan, Afghanistan, and most recently in Guantanamo Bay, Cuba.

[4] In July 2002 there was a gun battle at Khost, Afghanistan, between troops from the U.S. and persons alleged by the U.S. to be terrorists. During that battle, a U.S. soldier was killed by a grenade which the U.S. alleges was thrown by Mr. Khadr, who was then 15 years old.

[5] Mr. Khadr was seriously injured in this battle. He was taken into U.S. custody and treated by U.S. troops. He spent some time at Bagram Airbase in Afghanistan before being transferred to Guantanamo Bay on October 28, 2002. He remains there.

[6] President George W. Bush, by Presidential Military Order in 2001, established the detention camp at Guantanamo Bay for the detention and prosecution of non-U.S. citizens who were believed to be members of al-Qaeda or engaged in international terrorism. Jurisdiction to try such persons was given to military commissions. The persons subject to these orders, one of whom is Mr. Khadr, were described as enemy combatants.

[7] In February and September 2003, agents from the Canadian Security Intelligence Service (CSIS) and the Foreign Intelligence Division of Foreign Affairs and International Trade (DFAIT) travelled to Guantanamo Bay and questioned Mr. Khadr. The information obtained by these Canadian officials was provided to the U.S. Mr. Khadr was interviewed again in March 2004 by a DFAIT official who knew, prior to the interview, that Mr. Khadr had been subjected by U.S. authorities to a program of sleep deprivation. A report[1] described this technique and its purpose:

> In an effort to make him more amenable and willing to talk, [blank] has placed Umar on the "frequent flyer program." [F]or the three weeks before [the] visit, Umar as not been permitted more than three hours in any one location. At three hour intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continuous change of neighbours. He will soon be placed in isolation for up to three weeks and then will be interviewed again.

[1] Reproduced at para 15 of *Khadr v. Canada (Prime Minister)*, 2009 FC 405. The report identifies Mr. Khadr as "Umar".

[8] The actions of these Canadian officials were soundly criticized by the Supreme Court of Canada which found that their conduct violated the principles of fundamental justice.

> This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects: *Khadr II*, para. 25

[9] On March 15, 2004, Mr. Khadr commenced an action against the Crown relating to Canada's actions while he was in Guantanamo Bay (Court File: T-536-04). In that action he is seeking a declaration that his *Charter* rights have been breached, damages, and an injunction against further interrogation by Canadian government officials. That action continues.

[10] In June 2004, the U.S. Supreme Court[2] recognized the power of the government of the U.S. to detain enemy combatants, but ruled that detainees who are U.S. citizens must have the ability to challenge their detention before an impartial judge. The Court's holdings were limited to detainees who were U.S. citizens; however, four of the justices, relying on the Geneva Convention, held that *habeas corpus* should be available to any alleged enemy combatant. In response, the U.S. Department of Defense instituted Combatant Status Review Tribunals for all those held at Guantanamo Bay, Cuba.

[11] On August 31, 2004, after Mr. Khadr had been questioned by the Canadian officials, a Summary of Evidence memo was prepared for his Combatant Status Review Tribunal. The

summary alleged that Omar Khadr had admitted he threw a grenade which killed a U.S. soldier, attended an al-Qaida training camp in Kabul and worked as a translator for al-Qaida to coordinate landmine missions. In addition, he was accused of helping to plant the landmines between Khost and Ghardez, and having visited an airport near Khost to collect information on U.S. convoy movements.[3] The Supreme Court found that "[t]he record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges:" *Khadr II*, para 20 (emphasis added). The Combatant Status Review Tribunal reviewed Mr. Khadr's status and concluded that he was an enemy combatant. In so ruling, Mr. Khadr's continued detention by the U.S. was legal, according to American law.

[12] On February 8, 2005, following his status review, Mr. Khadr brought a motion in this Court (Court File T-536-04) seeking an interlocutory injunction to prevent Canadian officials from interviewing him further. Justice von Finkenstein granted that injunction on August 8, 2005: *Khadr v. Canada*, 2005 FC 1076.

[13] On November 7, 2005, Mr. Khadr was formally charged with a number of offences. As a result of irregularities in the process and procedure followed by the U.S. government, the charges against Mr. Khadr have been re-laid at least twice. He currently stands charged with five offences pursuant to the *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat.2600 and *Manual For Military Commissions*: (1) Murder in Violation of the Law of War, (2) Attempted Murder in Violation of the Law of War, (3) Conspiracy, (4) Providing Material Support for

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[2] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

[3] The Summary of Evidence and the Conclusions of the Combatant Status Review Tribunal may be found in the decision of Justice von Finkenstein in *Khadr v. Canada (Minister of Foreign Affairs)*, 2005 FC 135.

Terrorism, and (5) Spying. His trial on these charges is scheduled to commence at Guantanamo Bay on August 10, 2010.

[14] Mr. Khadr has been seeking his return to Canada for more than five years through numerous avenues and intermediaries. A request made by his solicitors on July 28, 2008 directly to Canada and the failure of Canada to respond to it led to an application to this Court for judicial review (Court File T-1228-08).

[15] On April 23, 2009, Justice O'Reilly allowed the application for judicial review of the "ongoing decision and policy" of the Government of Canada not to seek the repatriation of Mr. Khadr to Canada: *Khadr v. Canada (Prime Minister)*, 2009 FC 405. He found that Canada had infringed Mr. Khadr's rights under section 7 of the *Charter*, which provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[16] Justice O'Reilly ordered Canada to remedy this breach of the *Charter* by requesting the U.S. to "return Mr. Khadr to Canada as soon as practicable."

[17] A majority of the Federal Court of Appeal dismissed an appeal by the Crown: *Khadr v. Canada (Prime Minister)*, 2009 FCA 246. The Court of Appeal stated: "At the root of the Crown's appeal is its argument that the Crown should have the unfettered discretion to decide whether and when to request the return of a Canadian citizen detained in a foreign country, a matter within its exclusive authority to conduct foreign affairs." On this issue, the Court of Appeal held that the

Supreme Court had already found that *Charter* was engaged in the circumstances of Omar Khadr in its earlier decision in *Canada (Justice) v. Khadr*, 2008 SCC 28 [*Khadr I*].

[18] The Court of Appeal held that there was no factual basis for Canada's submission that an order to seek repatriation constituted a "serious intrusion into the Crown's responsibility for the conduct of Canada's foreign affairs," and that "Justice O'Reilly did not err in law or fact when he concluded that, in the particular circumstances of this case, the Crown's refusal to request Mr. Khadr's repatriation is a breach of Mr. Khadr's rights under section 7 of the *Charter*."

[19] In *Khadr II* the Supreme Court upheld the finding that Mr. Khadr's rights under section 7 of the *Charter* had been breached, but varied the remedy that had been ordered. In place of the remedy ordered by Justice O'Reilly and affirmed by the Court of Appeal, the Supreme Court issued the following declaration which defined the *Charter* breach:

> … [T]hrough the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice.

[20] The Supreme Court found that "the breach of Mr. Khardr's s. 7 *Charter* rights remains ongoing and that the remedy sought [of asking the U.S. to repatriate Mr. Khadr to Canada] could potentially vindicate those rights" (emphasis added). However, the Court held that the remedy of repatriation sought by Mr. Khadr and ordered by the lower courts was not "appropriate and just in the circumstances" before it.

[21] The Supreme Court gave three reasons why the order of repatriation was not appropriate and just in the circumstances before it. First, in ordering Canada to seek Mr. Khadr's repatriation it said that the lower courts gave "too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs." Second, it held that it was unclear whether the U.S. would agree to a request that Mr. Khadr be repatriated to Canada. Third, it expressed concern that it did not have a complete record from which it could obtain a complete picture of the "range of considerations currently faced by the government in assessing Mr. Khadr's request."

[22] It may be inferred from the judgment that had these three concerns been satisfied, the Supreme Court would have found that repatriation was an appropriate and just remedy, and it would have affirmed the Order of the lower courts.

[23] In my view, the second of the above reasons, the uncertainty of the U.S. response, was the basis upon which the Court said that seeking repatriation "could potentially vindicate" Mr. Khadr's rights (emphasis added). It would be an effective remedy only if the U.S. agreed to the request and did return Mr. Khadr to Canada. If he was released, then he would be removed from U.S. detention, and it was his detention that the Court found to be the consequence of Canada's breach of his *Charter* rights, and it was his detention that the *Charter* obliges Canada to cure.

[24] The Court noted at para 30 of *Khadr II* that "[a]n appropriate and just remedy is 'one that meaningfully vindicates the rights and freedoms of the claimants': *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55." For the three reasons

set out previously, the Court was of the view that it was not in a position to craft an effective remedy, but left the crafting of that remedy to Canada. The Supreme Court held:

> The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*. *Khadr II*, para. 47 (emphasis added)

[25] On February 3, 2010, shortly after the release of *Khadr II*, the Associate Director of Communications for the Prime Minister of Canada and the Minister of Foreign Affairs both provided statements to the press with respect to the position of the government in light of the decision in *Khadr II*. Both stated that the government was reviewing the decision of the Supreme Court but both made it clear that the government had not changed its previous position; it would not seek the repatriation of Mr. Khadr.

[26] These public statements that the executive was continuing its policy of not requesting the U.S. to repatriate Omar Khadr from Guantanamo Bay, Cuba reflect the decision under review in Court File T-231-10.

[27] On February 16, 2010, in response to the decision in *Khadr II*, Canada sent a diplomatic note to the government of the U.S. requesting that it not use any of the information provided to it by Canada in its prosecution of Mr. Khadr. This note and the response from the government of the U.S. are reproduced in Annex A and Annex B, respectively.

[28] Canada's response by way of the diplomatic note constitutes the decision under review in Court File T-230-10 in which Mr. Khadr seeks "judicial review in respect of the Respondents' decision of February 16, 2010, to remedy the *Charter* violation identified in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, by sending the diplomatic note of February 16, 2010, and to provide no other remedy."

[29] It is of note that after the public statements were made by the government spokesperson and the Minister, counsel for Mr. Khadr wrote to counsel for Canada on February 5, 2010 asserting that Mr. Khadr was entitled to procedural fairness and natural justice in the executive's consideration of a remedy:

> We understand from the recent comments of the Rt. [*sic*] Hon. Minister Cannon and an e-mail of today's date from Mjr. Jeff Grohraring USMC that the Minister of Justice and/or the Minister of Foreign Affairs may be considering an appropriate remedy for the *Charter* violation identified in the recent decision of the Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3. To this end, it appears that copies of the pleadings filed in the upcoming motion to suppress statements before Col. Parish, Military Judge, have been requested of the Prosecution by the Minister of Foreign Affairs.
>
> We as Mr. Khadr's counsel request formal notice as to the nature of any issues presently under consideration which will affect the rights and interests of our client, as well as the opportunity to present informed submissions in advance of any such decision. We also request a reasonable level of disclosure as to those materials which are relevant to this issue and in the possession or power of the Canadian government.
>
> We reserve the right to rely upon any violations of the principles of fairness, natural justice and/or fundamental justice which would result from a failure to respond to this request.

[30] Counsel for Canada responded with an explanation as to why it made the request to the U.S. for copies of the pleadings; however, no response was provided to the request for notice and an opportunity to present submissions before a decision was taken by the executive. Mr. Khadr thus had no knowledge of the action Canada would be taking or an opportunity to make submissions concerning it before Canada sent the diplomatic note to the U.S.

[31] These applications were ordered consolidated by the Chief Justice on April 9, 2010, and were heard together in Edmonton, Alberta, on June 8, 2010.

[32] The relief sought by Mr. Khadr in both applications is identical except for the date of the decision under review. They read as follows:

> The Applicant makes application for:
>
> (1) An Order pursuant to ss. 6, 7, 12 and 24(1) of the *Canadian Charter of Rights and Freedoms* in the nature of *certiorari* setting aside the decision …;
>
> (2) An Order pursuant to ss. 6, 7, 12 and 24(1) of the *Canadian Charter of Rights and Freedoms* in the nature of *mandamus* requiring the Respondents to demand the repatriation of the Applicant from the custody of U.S. forces in Guantanamo Bay, Cuba;
>
> (3) In the alternative, an Order directing the Respondents to reconsider their decision … having first accorded the Applicant a fair opportunity to be heard;
>
> (4) Costs; and
>
> (5) Such further and other relief as the Court deems to be just and appropriate.

Issues

[33] The issues put before the Court in these applications are issues of procedural fairness and natural justice. Counsel for the applicant explicitly stated in his oral submissions that the issue of whether the response of the executive was "unreasonable or patently unreasonable or something of that nature" was not being raised in these applications.

[34] In my view, based on the memoranda filed and the oral submissions made by counsel for the parties, there are five issues that this Court must address. They relate to one or both of the "decisions" under review. The first decision is reflected in the public statements made February 3, 2010, not to seek the repatriation of Omar Khadr from the U.S. which, for convenience, I shall refer to as "Decision I". The second decision is Canada's decision to ask the U.S. not to use any evidence or statements Canada shared with it as a result of the interviews Canadian officials conducted with Mr. Khadr in any proceedings against him which I shall refer to as "Decision II". Collectively, and again for ease of reference, I shall refer to these two decisions as "Canada's Response" to the declaration issued by the Supreme Court of Canada. In my view, Canada's response was two-fold: (1) it decided not to request the U.S. to repatriate Mr. Khadr and (2) it decided to ask the U.S. not to use the information it had shared with them against Mr. Khadr's interests.

[35] The five issues before the Court are the following:

1. Is Decision I, as reflected in the statements made on February 3, 2010, regarding the declaration issued by the Supreme Court of Canada a "decision", subject to judicial review?

2. Is Decision II, Canada's response to the declaration issued by the Supreme Court of Canada by sending the diplomatic note, subject to judicial review?

3. Was Mr. Khadr entitled to receive procedural fairness and natural justice in relation to Canada's Response to the declaration issued by the Supreme Court of Canada?

4. If Mr. Khadr was entitled to receive procedural fairness and natural justice in relation to Canada's Response to the declaration issued by the Supreme Court of Canada, did he receive it?

5. If Mr. Khadr was not provided procedural fairness and natural justice in relation to Canada's Response to the declaration issued by the Supreme Court of Canada, what, if any, Order should this Court issue as a consequence?

Analysis

1. Is the decision reflected in the statements made on February 3, 2010, regarding the declaration issued by the Supreme Court of Canada a "decision" subject to judicial review?

[36] Mr. Khadr submits that the "decision" of February 3, 2010 is captured by the following exchange between Mr. Dimitri Soudas, the Associate Communications Director of the Prime Minister, and the media:

> Q: Will you comply?

> DS: It's a court decision and it's from the highest court. Complying with it means you respect the decision. Their ruling said we get to decide ….
>
> …
>
> Q: Apart from bringing him back to Canada, are there things the government can do to respect the court's judgment regarding the violation of his Charter rights?
>
> DS: We're reviewing that and more will follow….
>
> Q: So there's no shift in your overall position that you've held about whether or not he comes back to Canada?
>
> DS: Correct.
>
> Q: But you are reviewing, just so we're clear, you are reviewing his situation there and there may be things the government of Canada may do to help him or ameliorize [*sic*] his situation?
>
> DS: The minister of justice will obviously have a lead role in this. But there is no shift in Canadian policy on this. And when I say there is no shift in Canadian policy, I take it all the way back to the previous government.

[37] Mr. Khadr further submits that the "decision" of February 3, 2010 is also captured by the following exchange between the Honourable Lawrence Cannon, Minister of Foreign Affairs, and the media:

> Q: Minister Cannon, could you tell us how your government came to the decision not to request Mr. Khadr's return to Canada after the Supreme Court decision? We heard from the Prime Minister's Office today that there's been no change in position on the return of Mr. Khadr.
>
> Hon. Lawrence Cannon: Well, there hasn't been a change in position.
>
> Q: How did you get to that decision?

> Hon. Lawrence Cannon: Well, how did we get to that decision? It's exactly the same decision that we have taken since the very outset of this incident or at least of this file. You'll recall that we of course respect the decision that the Obama administration has taken to close down Guantanamo but at the same time to make sure that those people who are held and that have charges that are – that they – that are being put forward and that they are facing that indeed the American justice system go forward. That has been our position from the beginning. We've said the [*sic*] Mr. Khadr is facing serious charges. As you will recall, Mr. Khadr is being held by the Americans because of his involvement or alleged involvement, I should say, in the murder of an American military officer who indeed I should say American medical officer who died in an incident and he's being held on those charges. We continue to provide consular services. We have done so. Mr. Khadr is receiving all of the services that normally we would provide any other citizen and in that regard –
>
> Q: What about his rights violation?
>
> Hon. Lawrence Cannon: – I'm finishing my question, Jennifer. And in that regard –
>
> Q: What about his rights violation?
>
> Hon. Lawrence Cannon: – in that regard we will continue – we will continue to monitor the situation as we have been doing and my understanding is that the Americans will make a determination on that and we will let the Americans make that determination and once that is done we will see what the next steps are.

[38] The respondents submit that these statements made to the media that underlie the application in T-231-10 are not amenable to judicial review. They submit that they are "merely statements and not decisions." The respondents say that *1099065 Ontario Inc. (carrying on business as Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, supports this submission.

[39] The "decision" under review in *1099065 Ontario Inc.* was a letter proposing a meeting and suggesting dates. The Court of Appeal noted that there was nothing in the letter that impacted the applicant as he could simply choose to ignore it or decline the proposal to meet. The circumstances here are substantially different. Here the "decision" to hold the course and not seek repatriation did directly impact Mr. Khadr. Here, it is not the statements of these two men that are under review but the decision made by the executive that is reflected in the statements made. Further, I agree with the applicant that this Court has already held in *Khadr v. Canada (Prime Minister)*, 2009 FC 405 that decisions not to take a certain course of action that are evidenced by public statements are justiciable.[4] In this respect the decision in T-231-10 is no different in nature than the decision under review in *Khadr II* although the circumstances when the decisions were each made differed significantly. The real question is whether these statements evidenced a new decision or whether these men were merely reiterating the government's previous position. In my view, these statements can only be seen to reflect a new decision made after the declaration of the Supreme Court had issued such that they clearly indicate that regardless of what action the executive would be taking, it would not be seeking repatriation. To find that these statements were not reflective of a new decision in these circumstances would require a finding that the Prime Minister's Associate Communications Director and the Minister of Foreign Affairs were speaking without the authority of a decision by the executive having been made. There is no evidence to support such a finding and given their senior roles such lack of authorization should not be assumed absent convincing evidence.

[4] That finding was not challenged by Canada before the Federal Court of Appeal: 2009 FCA 246, para. 38.

[40] This leads to the second objection raised by the respondents. They submit that the decision not to seek Mr. Khadr's repatriation has already been litigated by these parties, culminating in *Khadr II*, and that it is therefore *res judicata* in that this very issue was finally determined by the Supreme Court.

[41] *Res judicata* functions to prevent causes of action or issues from being re-litigated. In this case, the respondents rely on issue estoppel as a bar to these applications. In order to successfully plead issue estoppel, the pleading party must prove:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies: *Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460 at 477 citing *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254.

[42] This tri-partite test is conjunctive; all three tests must be met before an estoppel is found.

[43] The second and third parts of this test are satisfied in that the parties in this application are the same as in *Khadr II* and it was a final decision. However, I am of the view that the first part of the test is not met.

[44] It is true that Justice O'Reilly held that Canada's refusal to seek repatriation violated the principles of fundamental justice (because Canada had a duty to protect Mr. Khadr) and therefore, his section 7 *Charter* rights; however, the Federal Court of Appeal and the Supreme Court of

Canada defined the question before them quite differently. The Supreme Court defined the issue before it as whether Canada had participated in a process that contributed to Mr. Khadr's detention so as to deprive him of his right to liberty, not in accordance with the principles of fundamental justice. The question that was answered is not the same question as is before this Court on this application.

[45] Furthermore, the context of the application made to Justice O'Reilly and this application are substantially different. In *Khadr II*, the decision made by Canada was not in response to a declaration issued by the Supreme Court finding a breach of Mr. Khadr's *Charter* rights and mandating a remedy. In this case, the decision made by Canada was such a response. While procedural fairness could have been argued in *Khadr II*, the question would not have been whether Mr. Khadr was entitled to procedural fairness in Canada's decision responding to a declaration of the Supreme Court in the nature already discussed. The questions could not possibly have been the same because the circumstances had changed significantly by the time the decision in this application was made. Therefore, the first precondition for issue estoppel is not met. The issue before me is not *res judicata*.

2. *Is Canada's response to the declaration issued by the Supreme Court of Canada subject to judicial review?*

[46] The respondents submit that to the extent that Court File T-230-10 "seeks to review the question of whether a court should make an order that the government request Mr. Khadr's repatriation" that issue was already decided in *Khadr II*. Accordingly, it says that issue is *res judicata*.

[47] As noted previously, it is true that Mr. Khadr in these applications is asking the Court to direct Canada to seek his repatriation; however, this application seeks to set aside Decision II because he was not afforded procedural fairness in Canada's response to the Supreme Court's declaration. That question was not before any of the courts in *Khadr II* nor could it have been.

[48] Therefore, I reject the respondents' submissions that Canada's response to the declaration issued by the Supreme Court of Canada is not subject to judicial review because of the application of the doctrine of *res judicata*.

[49] The respondents also submit that these decisions are not reviewable because section 7 of the *Charter* is not engaged by the process Canada undertook to comply with the Supreme Court's declaration in *Khadr II*. Their submission, as set out in their memorandum, is as follows:

> In Khadr 2010, the Supreme Court held that the section 7 rights of Mr. Khadr were engaged because information from the Canadian interviews could be taken to have contributed to his continued detention. It was from this engagement of his section 7 rights that the analysis of the applicable principles of fundamental justice and appropriate remedy flowed. In this case, however, how can it be said that Mr. Khadr's section 7 rights are triggered by the steps taken by the government to address the breach so identified by the Supreme Court?
>
> If section 7 is not engaged, the government's response to the declaration issued by the Supreme Court of Canada in Khadr 2010 is an entirely discretionary decision within the realm of foreign policy by the executive branch of government which is not amenable to review on procedural fairness grounds.

[50] The respondents' submission that section 7 of the *Charter* is not engaged is without merit. The Supreme Court of Canada found that Canada's breach was first done in 2003 and 2004 by

interviewing Mr. Khadr and passing on the content of the interviews to the U.S. It also found that it was a continuing breach as Mr. Khadr remained in detention by the U.S. and that Canada's illegal acts contributed to this. So long as the breach of Mr. Khadr's rights remains ongoing, section 7 of the *Charter* is engaged. How can it be said that a decision to cure or ameliorate that ongoing breach does not engage his section 7 *Charter* rights? The whole premise of the government action was to remedy the breach that it had caused.

[51] In my view, if it has been found that a person's rights under the *Charter* have been infringed by the government and that infringement is ongoing, then the *Charter* remains engaged until the government has taken steps to cure the breach or has satisfied a court of competent jurisdiction that it cannot be cured and that it has taken all reasonably practicable steps to provide a remedy for its breach.

[52] On the record before this Court, Canada has taken only one positive action in response to the declaration that it breached Mr. Khadr's rights; it sent the diplomatic note to the U.S. It received a response and has done nothing further. In her oral submissions, counsel for the respondents reminded the Court that Canada has a remarkable history of complying with court decisions[5] and, consistent with this history, Canada has complied with or responded to every court decision relating to Mr. Khadr. Counsel for the respondents also admitted in her oral submissions that Canada was obligated to respond to the Supreme Court's declaration swiftly and that "not doing anything at all would be very difficult to justify." In light of that acknowledgment and given the response of the U.S. to the note, one must conclude that Canada is of the view that its first and only action has

[5] A fact noted by the Supreme Court in *Doucet-Boudreau*, para. 32.

remedied the breach or that there are no reasonably practicable steps to provide a remedy; otherwise it would have advanced other potential curative remedies. As will be seen, I do not share the view that Canada, in its actions taken to date, has remedied the breach or that there are no other potential curative remedies available.

[53] In any event, the respondents' submission, in my view, is really a submission that the actions of the executive in fashioning the remedy it did are not subject to judicial review because they were was done in the exercise of the royal prerogative; this brings us to the third issue.

3. Was Mr. Khadr entitled to receive procedural fairness and natural justice in relation to Canada's Response to the declaration issued by the Supreme Court of Canada?

[54] The respondents submit that like a decision delegated by statute to the Governor in Council, a decision made pursuant to the royal prerogative must be treated with much sensitivity, and that the Supreme Court recognized this sensitivity in *Khadr II* by leaving the final decision of how to proceed up to the government. They rely on the decision of the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, and the statement at p. 757 therein that "… there is no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition …" from those affected.

[55] I agree with the applicant that the facts before the court in *Inuit Tapirisat* differ significantly from those in this application. There, the decision of the executive was its denial of an appeal of a decision of the CRTC regarding telephone rates. It was a decision affecting many persons. The

Supreme Court held that whether the rules of natural justice and procedural fairness applied was dependant upon a number of considerations including the subject matter of the decision at issue and the consequences to the person(s) affected. The Court held that no such duty was owed in that case, given these and other considerations. Importantly, it also made it clear that where the decision is an administrative one, rather than a legislative one, and where the *res* or subject matter is an individual concern or a right unique to the petitioner or appellant, rather than something affecting a broad group, different considerations arise.

[56] Unlike *Inuit Tapirisat*, the present decisions under review directly impacted only one citizen, Omar Khadr.

[57] The respondents submit that Canada's Response is not justiciable because it was a decision of the executive, on broad grounds of public and foreign policy, taken in the exercise of the royal prerogative in that it affected foreign relations.

[58] The narrow issue to be determined is whether the duty to be fair applies to Canada's Response, which the applicant concedes involved the exercise of the royal prerogative.

[59] The Magna Carta (1215), The Bill of Rights (1689), and the Act of Settlement (1701) were arguably the first steps taken to curtail the absolute powers of the Crown and establish the concept of parliamentary sovereignty. They began a process of restricting the prerogatives of the Crown that continues to the present day.

[60] The applicant says that fairness applies because the decisions affect his individual rights. He cites and relies upon the following passage from David Phillip Jones & Anne D.S. De Villars, *Principles of Administrative* Law, 5th ed. (Toronto: Carswell, 2009) at p. 244:

> More recent decisions, however, seem to hold that, at least in principle, the duty to be fair does extend to the exercise of the prerogative powers. These cases suggest that the prevailing consideration in determining whether the duty of fairness extends to the exercise of the prerogative power is the subject matter involved, not the source of the power: that is, regardless of whether the decision stems from a prerogative power, does the decision affect the rights of an individual? If yes, the decision is subject to judicial review and the duty of fairness [citations omitted].

[61] Although not cited by these authors, their conclusion is consistent with that reached by the Ontario Court of Appeal in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.). That court adopted the finding of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, which the Court of Appeal at para. 51 summarizes as follows:

> Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[62] In this case, as has been discussed, the applicant submits that his rights are affected by the executive's exercise of the royal prerogative because his section 7 rights were engaged. Therefore, he says, Canada's Response is reviewable. I agree that his section 7 rights were engaged. Whether

the remedy the executive chose cured the breach or not, its decision most certainly affects Mr. Khadr's *Charter* rights and therefore is justiciable.

[63] Moreover, I am of the view that Mr. Khadr had a legitimate expectation that Canada would take action to cure the breach of his *Charter* rights in light of the declaration that Canada had breached his rights. As was observed by Chief Justice McLachlin, writing for the Court in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, at para. 20 "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach." As such, the decision taken affected his legitimate expectations and, following the finding in *Council of Civil Service Unions*, it is justiciable.

[64] Madame Justice L'Heureux-Dubé at p. 839-840 of her reasons in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, described how a party's legitimate expectations may determine his entitlement to procedural fairness:

> …[T]he legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights …. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness …. Similarly, <u>if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded</u>…. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-

> makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights. [emphasis added and authorities omitted]

[65] In my view, Mr. Khadr had a legitimate expectation based on the declaration of the Supreme Court that Canada would effect a remedy that would cure the breach, and if no such curative remedy was available, then it would effect a remedy that would ameliorate the breach. This expectation is founded on section 24 of the *Charter* and the express words of the Supreme Court that its declaration provided "the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."

[66] Mr. Khadr's circumstances vis-à-vis Canada may be contrasted with that of Mr. Abassi vis-à-vis the United Kingdom as set out in the decision of the English Court of Appeal in *Abassi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598.

[67] Mr. Abassi is a British national. Like Mr. Khadr, he was captured by the U.S. in Afghanistan and transported to Guantanamo Bay, Cuba. After he had been detained for 8 months without charge or access to a court or hearing, his family brought an application for judicial review, to compel the government of the United Kingdom to make representations on his behalf to the U.S. government to either take appropriate action or explain why it had not done so.

[68] The Court of Appeal dismissed the application holding that at international law a State was under no "duty to intervene by diplomatic or other means to protect a citizen who is suffering or

threatened with injury in a foreign State:" *Abassi*, para. 69. The Court also found that the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, provided Mr. Abassi with no assistance unless it could be shown that England had effective control over Guantanamo Bay or that it had extra-territorial jurisdiction over Mr. Abassi. It had neither. As it was put by the Court:

> [His counsel] has not identified any relevant control or authority exercised by the United Kingdom over Mr. Abassi in his present predicament. Nor has he identified any act of the United Kingdom government of which complaint can be made that it violates Mr. Abassi's human rights.

[69] Just as the United Kingdom had no control or authority over Mr. Abassi, Canada has no control or authority over Mr. Khadr. However, unlike the United Kingdom's treatment of Mr. Abassi, there has been a finding that Canada violated Mr. Khadr's human rights, and this fact, and the requirement at law that such breaches be vindicated, imposes on Canada a duty to intervene by diplomatic or other means to cure the breach if possible and, if it is not possible to cure it, to attempt to ameliorate it.

[70] The Supreme Court found that a person whose rights under the *Charter* have been breached is entitled to an effective remedy from the breaching party – Canada in this case. Having found that Mr. Khadr's section 7 rights were breached and having issued a declaration to that effect, Mr. Khadr could legitimately expect that the Crown would remedy its breach. In my view, the option of doing nothing was not an option that was legally available to Canada, given the declaration of the

Supreme Court – doing nothing would not be in conformity with the *Charter*.[6] Such a response, or non-response, in my view, would only comply with Canada's *Charter* obligations if there was no action that could be taken to cure or ameliorate the breach. The paucity of remedy is not the case here as the Supreme Court held that requesting repatriation was potentially an effective remedy.

[71] Mr. Khadr was entitled to receive procedural fairness and natural justice from the executive as it reached its decision as to the *Charter* remedy it would provide. Had the government done what Mr. Khadr sought, seeking his return to Canada, then it would not have been necessary for the executive to engage Mr. Khadr. His wishes were already stated and well-known. When Canada made the decision not to seek his repatriation but to fashion a different remedy, then Mr. Khadr was entitled to be afforded procedural fairness and natural justice.

4. Did Mr. Khadr Receive Procedural Fairness and Natural Justice from Canada?

[72] The procedural fairness and natural justice required will vary depending on the circumstances of the decision and the decision-maker. In this case, I find that the level of fairness required to have been provided was at the low end of the scale. Even so, I find that Mr. Khadr did not receive fairness.

[73] The most basic requirement of justice is that a person affected by a decision be given notice of it. In my view, that basic principle applies all the more when the decision being taken directly affects one individual and is being take to cure or ameliorate a previous breach of that individual's

[6] It is instructive to note that the Supreme Court stated that its declaration would provide the framework for the executive to consider "what" actions to take; it did not say that it was a framework for the executive to consider whether to take any action.

Charter rights. Donald J. M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, 2d ed., looseleaf (Toronto: Canvasback Publishing, 2009) at p. 9-1 summarize this duty and its importance in the following passage:

> It is therefore a fundamental element of the duty of fairness at common law, and, where applicable, of the constitutionally-guaranteed principles of fundamental justice, that prior notice be given to those entitled to participate that a decision is going to be made or some administrative action taken. In the words of the Supreme Court of Canada:
>
> > This rule is so very fundamental in our legal system that I do not think there is any necessity to discuss it at length. [citation omitted]

[74] Mr. Khadr's counsel attempted to become involved in the process after the decision was taken that Canada would not seek the return of Mr. Khadr, as is evident from the email sent on February 5, 2010.

[75] When the Supreme Court provided the executive with an opportunity to fashion a remedy and after the executive decided that it would not seek Mr. Khadr's return as he had requested, the executive then had a duty to inform Mr. Khadr of that decision, the remedy it was considering, and the action it would be taking. It also had a duty to give Mr. Khadr an opportunity to make written submissions as to remedial action(s) that would be appropriate before it unilaterally imposed its purported remedy.

[76] One should not interpret anything that has been said as suggesting that the executive had to accede to any request or suggestion made by Mr. Khadr. On the other hand, that is not to say that

the executive could do nothing, or could choose not to provide the best possible remedy for the breach.

5. What, if any, Order should this Court issue?

[77] The *Charter* was breached when Canadian officials interrogated Mr. Khadr in the circumstances as described above and then shared the information they obtained from him with the U.S. The Supreme Court held that in so doing Canada contributed to Mr. Khadr's detention and his ongoing detention by the U.S. The initial breach cannot be cured; the ongoing breach may be curable.

[78] At the hearing, I stated that there appeared to me to be two obvious remedies that, if accepted by the U.S., would cure the breach: (1) to ask the U.S. to end the detention of Mr. Khadr and return him to Canada or (2) to ask the U.S. not to use the information Canada provided so that if he continues to be detained, the detention is not casually linked to Canada's actions.

[79] There may be other possible remedies that would cure the breach.

[80] Counsel for the applicant at the hearing, in response to a question from the Court, submitted that there are a number of actions Canada could take that would not cure the breach but would ameliorate it. One example given was asking the U.S. to try Mr. Khadr as a juvenile, given his age at the time the alleged offences were committed. Whether this remedy would ameliorate the effect of the breach or just ameliorate the consequences of the charges Mr. Khadr faces is unclear. What is

clear to the Court is that Mr. Khadr claims to have a number of suggestions of remedial action that he would offer to the Crown if given the opportunity.

[81] A court will not grant a remedy for a breach of procedural fairness if it will have no effect on the result. If the same decision would have been reached even if natural justice had been provided then this Court will not quash the decision.

[82] In this case the diplomatic note has been sent and there has been a response. That cannot be undone – it is an historical fact. Accordingly, I will not grant the order, as requested, in the nature of *certiorari* setting aside the decision to ask the U.S. not to use the information provided to it by Canada. Doing so would be ineffective.

[83] The applicant asks, in the alternative, that the Court issue an order directing the respondents to "reconsider their decision to ask the U.S. not to use the information provided to it by Canada, having first accorded Mr. Khadr an opportunity to be heard.

[84] In my view, if the actions of Canada in asking the U.S. not to use the information provided to it by Canada cured Canada's breach, then there is no need for Canada to reconsider its decision as Mr. Khadr has received his *Charter* remedy. A breach need not be cured twice.

[85] It is clear on the record before the Court that the breach has not been cured. First, the U.S. did not accede to Canada's request not to use the information it provided. The U.S. merely responded that the prosecution of Mr. Khadr would be governed by the *Military Commissions Act of*

2009, Pub. L. 111-84, 123 Stat. 2190; it has provided no assurance that the information would not be used against Mr. Khadr's interests. Second, the record discloses that following the response by the U.S. government to Canada's request, the information was used by the U.S. in the prosecution of Mr. Khadr.

[86] Kobie Flowers, one of Mr. Khadr's defence counsel in the military commission prosecution being conducted at Guantanamo Bay, provided an affidavit in which she swears that on April 28, 2010, in response to a motion brought by Mr. Khadr to suppress evidence, the U.S. called a witness who testified that:

> … [S]he reviewed video recordings of interviews of the Applicant conducted by Canadian government officials at GTMO on February 13. 14, 15 and 16, 2003 and prepared a written report from those videos. She then testified as to the information contained in her report of the Canadian interviews. During her testimony, S.A. Dillard referred to her report of the Canadian interviews to refresh her memory."

[87] The respondents submit that Mr. Khadr is responsible for the introduction into evidence of the interviews conducted by the Canadian officials because Ms. Flowers, during her cross-examination of this prosecution witness on May 1, 2010, asked her to view, in closed session, some seven minutes from these videos "much of which consisted of Mr. Khadr crying." In response, the U.S. then tendered as evidence "DVDs containing the entirety of the Canadian interviews as exhibits on the suppression motion."

[88] I reject the respondents' submission that Mr. Khadr was the cause of the Canadian evidence coming before the commission. It is clear on the record before the Court that it was the U.S. that

first introduced the substance of the Canadian interviews as evidence before the military commission.

[89] Accordingly, Canada has not cured its breach of Mr. Khadr's *Charter* rights.

[90] The *Charter* and the rule of law require that government breaches of *Charter* rights be remedied. In the usual case, a remedy that cures a breach caused by the government is available because the remedy is within the complete control of the government. Mr. Khadr's situation differs because the remedy is not within the complete control of Canada. Canada can propose, but the U.S. must consent. Nonetheless, in my view, the breaching party remains required to attempt to cure the breach. It is only if a cure is not possible that a remedy that merely ameliorates the breach is warranted and must be attempted.

[91] In my view, if there is only one available remedy that potentially cures the breach of one person's *Charter* rights, then that remedy must be ordered by the Court, even if the order involves the exercise of the royal prerogative. This is to be contrasted with the cases relied on by the respondents, such as *Mahe v. Alberta*, [1990] 1 S.C.R. 342, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, where a declaration was issued precisely because a number of options or choices were available to the respective governments that would cure the *Charter* breach at issue; in these circumstances, courts have deliberately and appropriately left the flexibility with governments to fashion remedies that are both appropriate in the circumstances and conform with the *Charter*. In situations where there has been a *Charter* breach that is ongoing and where there is only one

curative remedy identified, the argument for flexibility in the hands of government in significantly diminished. The fact that the one remedy available falls within the scope of the government's prerogative power does not prevent the court from fashioning a remedy. As the Supreme Court stated in *Khadr II* at para. 37: "courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution." If the *Charter*, as a part of Canada's constitution, requires an action to be taken, and it does in the present circumstances, and if that action requires the exercise of the royal prerogative, then this Court is not only empowered to order it, this Court is required to order that it be done.

[92] In this case, if the Court was satisfied on the record that the only potential remedy not yet tried by Canada that could cure the breach was to issue an order requiring Canada, before Mr. Khadr's military commission proceeding commences on August 10, 2010, to request the U.S. to return Mr. Khadr to Canada, that order would be issued. I have previously stated that this is the only alternative remedy I can see that can potentially cure the breach. It may be, however, that Canada and/or Mr. Khadr can fashion other potential curative remedies. If there are others, and keeping in mind the ruling of the Supreme Court in *Khadr II*, it is the role of the executive, after providing Mr. Khadr an opportunity to be heard, to decide which of the alternative potential curative remedies to choose. It must continue that process until Mr. Khadr is provided with an effective remedy that vindicates his rights. As was stated by the Supreme Court in *Doucet-Boudreau* at para. 55:

> … [A]n appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience

> of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just. [citations omitted]

[93] If after such a process there remains but one potential remedy that can cure the breach, then Canada must advance it; it is the only “appropriate and just” remedy.

[94] The parties deserve an opportunity to explore effective remedies. Given that Mr. Khadr’s hearing is scheduled to commence imminently, this process must be undertaken with some urgency and the Court must reserve the right to oversee this explorative process, to amend the short time frame set out in the Judgment for the steps that are to be taken, and to reserve the right to impose a remedy if none is forthcoming from that process.

[95] In keeping with its obligations under the *Charter*, Canada is expected to advance at least one potential curative remedy in sufficient time prior to the scheduled commencement of the military commission’s hearing that one may reasonably expect that the U.S. government will have time to consider the request and respond to it.

[96] In keeping with its continuing obligations under the *Charter*, Canada is expected to continue advancing potential curative and ameliorative remedies until the breach of Mr. Khadr’s *Charter* rights have been cured, or if no cure is possible, until the breach has been ameliorated, or if there is no remedy, until it has exhausted all possible remedies.

JUDGMENT

THIS COURT ORDERS that:

1. These applications are allowed;

2. The Court declares that Mr. Khadr is entitled to procedural fairness and natural justice in Canada's process of determining a remedy for its breach of Mr. Khadr's section 7 *Charter* rights in that (a) he is entitled to know what alternative remedies Canada is considering, if any, and (b) he is entitled to provide written submissions to Canada as to other potential remedies and as to whether, in his view, those being considered by Canada are potential remedies that will cure or ameliorate its breach;

3. The respondents are to advise the applicant within 7 days of the date of this judgment of all untried remedies that it maintains would potentially cure or ameliorate its breach of Mr. Khadr's *Charter* rights as has been determined by the Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3;

4. The applicant shall have 7 days after receiving the respondents' advice as to potential remedies to provide the respondents with his written submissions as to other potential remedies that may cure or ameliorate the breach of his

Charter rights, and as to whether those being considered by Canada, in his view, are potential remedies that may cure or ameliorate the breach;

5. I retain jurisdiction to amend, at any time, the time provided herein for the taking of any step if satisfied that the time that has been provided is too brief for a party to fully and appropriately provide the information required or take the steps ordered;

6. Following the procedural fairness process described herein, Canada is to advance a potential curative remedy as soon thereafter as is reasonably practicable and to continue advancing potential curative remedies until the breach has been cured or all such potential curative remedies have been exhausted, following which it is to advance potential ameliorative remedies until such time as the breach has been reasonably ameliorated or all such remedies have been exhausted;

7. I retain jurisdiction to determine whether a remedy proposed is potentially an effective remedy, should the parties be unable to agree;

8. I retain jurisdiction to impose a remedy if, after the process described herein, Canada has not implemented an effective remedy within a reasonably practicable period of time; and

9. The applicant is entitled to his costs for two counsel at the high end of Column IV.

"Russel W. Zinn"
Judge

Docket: T-230-10
Docket: T-231-10

ANNEX A

Canadian Embassy — Ambassade du Canada

Note No. UNWS0013

The Embassy of Canada presents its compliments to the State Department of the United States of America and has the honour to refer to the matter of Mr. Omar Khadr, a Canadian citizen detained at Guantanamo Bay, Cuba, and its previous notes concerning the circumstances of his detention and proceedings against him.

The Canadian Embassy has the honour to bring to the attention of the State Department of the United States of America the 29 January 2010 decision of the Supreme Court of Canada in *Canada v. Khadr* which found that the Government of Canada is responsible for an ongoing breach of Omar Khadr's section 7 rights under the *Canadian Charter of Rights and Freedoms* to not be deprived of liberty and security of the person except in accordance with the principles of fundamental justice. The Court found that the breach of Mr. Khadr's rights stemmed from Canadian officials having questioned Mr. Khadr in 2003 and 2004 on matters connected to the charges pending against him, without him having access to counsel, having been told he was subjected to a program of sleep deprivation prior to the interview, and sharing the product of these interviews with U.S. authorities.

The Court concluded that the breach of Mr. Khadr's rights is a continuing one in that it was reasonable to infer that the statement to Canadian officials might form part of

.../2

the case against him in the prosecution and in that sense contribute to his ongoing detention. We refer you specifically to para. 21 of the Supreme Court's judgment, which states in part:

> It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim.

The Government of Canada therefore respectfully requests assurances that any evidence or statements shared with U.S. authorities as a result of the interviews with Mr. Khadr by Canadian agents and officials not be used against him by U.S. authorities in the context of proceedings before the Military Commission or elsewhere.

The Embassy of Canada further wishes to note that in order to confirm its response to the decision of the Supreme Court of Canada, the Government of Canada considers itself obliged to provide a copy of this note to Mr. Khadr's counsel. With the State Department's consent, a copy of the response would be provided to Mr. Khadr's counsel as well.

.../3

The Embassy of Canada avails itself of this opportunity to renew to the State Department of the United States of America the assurances of its highest consideration.

Washington, District of Columbia

February 16, 2010

Docket: T-230-10
Docket: T-231-10

ANNEX B

No. 269

The Embassy of the United States of America presents its compliments to the Department of Foreign Affairs and International Trade and has the honor to refer to the diplomatic note UNWS0013, of February 16, 2010, regarding the matter of Mr. Omar Khadr, a Canadian citizen detained at Guantanamo Bay, Cuba.

The Department of State has provided the referenced Diplomatic note to the Department of Defense Office of Military Commissions prosecutors in Mr. Khadr's case. In presenting their case, these prosecutors will be governed by the Military Commissions Act of 2009 (MCA), specifically MCA § 948r, which provides safeguards against the admission in military commission proceedings of evidence obtained through improper means.

Relevant safeguards include the exclusion of all statements obtained by torture or cruel, inhuman, or degrading treatment, "except against a person accused of torture or such treatment as evidence that the statement was made." MCA § 948r(a). Other statements of the accused may be admitted in evidence only if the military judge finds "that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and that -- (A) the statement was made incident to lawful conduct during military

operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given." MCA § 948r(c).

The United States Government confirms that a copy of this response may be provided to Mr. Khadr's counsel.

The Embassy of the United States of America avails itself of this opportunity to renew to the Department of Foreign Affairs and International Trade the assurances of its highest consideration.

Embassy of the United States of America,
Ottawa, April 27, 2010.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-230-10
STYLE OF CAUSE:	OMAR AHMED KHADR v. THE PRIME MINISTER OF CANADA ET AL.
DOCKET:	T-231-10
STYLE OF CAUSE:	OMAR AHMED KHADR v. THE PRIME MINISTER OF CANADA ET AL.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	June 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Zinn J.
DATED:	July 5, 2010

APPEARANCES:

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