

S.C.C. FILE NO. 33289

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

BETWEEN:

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
(Appellants)

- and -

OMAR AHMED KHADR

RESPONDENT
(Respondent)

- and -

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH), THE
HUMAN RIGHTS WATCH, UNIVERSITY OF TORONTO, FACULTY OF LAW –
INTERNATIONAL HUMAN RIGHTS PROGRAM AND 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 FRONTIÈRES
CANADA, BARREAU DU QUÉBEC ET GROUPE D'ÉTUDE EN DROITS ET LIBERTÉS
DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ LAVAL, THE CANADIAN CIVIL
LIBERTIES ASSOCIATION and THE NATIONAL COUNCIL FOR THE PROTECTION OF
CANADIANS ABROAD

INTERVENERS

FACTUM OF THE INTERVENER
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Intervener, the British Columbia Civil Liberties Association:

Joseph J. Arvay, Q.C., Professor Sujit Choudhry and Elin R.S. Sigurdson Arvay Finlay
1350-355 Burrard Street
Vancouver BC V6C 2G8
Tel: 604.689.4421
Fax: 604.687.1941
Email: jarvay@arvayfinlay.com
sujit.choudhry@utoronto.ca
esigurdson@arvayfinlay.com

Counsel for the Appellants:

Robert J. Frater, Doreen C. Mueller and Jeffrey G. Johnston
Department of Justice Canada
Room 1161, Bank of Canada
234 Wellington Street
Ottawa ON K1A 0H8
Tel: 613.957.4763
Fax: 613.954.1920
Email: robert.frater@justice.gc.ca
doreen.mueller@justice.gc.ca
Jeffrey.johnston@justice.gc.ca

Counsel for the Respondent:

Nathan J. Whitling and Dennis Edney
Parlee McLaws LLP
#1500, 10180 – 101 Street
Edmonton AB T5J 4K1
Tel: 780.423.8658
Fax: 780.423.2870
Email: nwhitling@parlee.com
dedney@shaw.ca

Counsel for the Intervener, Amnesty International (Canadian Section, English Branch):

Sacha R. Paul
Thompson Dorfman Sweatman LLP
2200 - 201 Portage Avenue
Winnipeg MB R3B 3L3
Tel: 204.934.2571
Fax: 204.934.0571
Email: srp@tdslaw.com

Agent:

Yavar Hameed
Hameed Farrokhzad Elgazzar Brousseau
43 Florence Street
Ottawa ON K2P 0W6
Tel: 613.232.2688 ext. 228
Fax: 613.232.2680
Email: yhameed@hfeb.ca

Agent:

Robert J. Frater
Department of Justice Canada
Room 1161, Bank of Canada
234 Wellington Street
Ottawa ON K1A 0H8
Tel: 613.957.4763
Fax: 613.954.1920
Email: robert.frater@justice.gc.ca

Agent:

Marie-France Major
Lang Michener LLP
300 – 50 O’Connor Street
Ottawa ON K1P 6L2
Tel: 613.232.7171
Fax: 613.231.3191
Email: mmajor@langmichener.ca

Agent:

Michael Bossin
Community Legal Services-Ottawa Carleton
1 Nicholas Street, Suite 422
Ottawa ON K1N 7B7
Tel: 613.241.7008
Fax: 613.241.8680
Email: bossinm@lao.on.ca

Counsel for the Intervener, the Human Rights Watch, University of Toronto, Faculty of Law - International Human Rights Program and David Asper Centre for Constitutional Rights:

John Norris and Brydie Bethell
100 - 116 Simcoe Street
Toronto ON M5H 4E2
Tel: 416.596.2960
Fax: 416.596.2598
Email: jnorris@dcldlaw.ca
bbethell@dcldlaw.ca

Counsel for the Intervener, the Canadian Coalition for the Rights of Children and Justice for Children and Youth:

Emily Chan
Justice for Children and Youth
1203 - 415 Yonge Street
Toronto ON M5B 2E7
Tel: 416.920.1633
Fax: 416.920.5855
Email: chane@lao.on.ca

Counsel for the Intervener, the Criminal Lawyers' Association (Ontario):

Brian H. Greenspan
Greenspan Humphrey Lavine
15 Bedford Road
Toronto ON M5R 2J7
Tel: 416.868.1755
Fax: 416.868.1990
Email: bhg@15bedford.com

Counsel for the Intervener, the Canadian Bar Association:

Lorne Waldman
Waldman & Associates
281 Eglinton Avenue East
Toronto ON M4P 1L3
Tel: 416.482.6501
Fax: 416.489.9618
Email: lawald@web.apc.org

Agent:

Marie-France Major
Lang Michener LLP
300 - 50 O'Connor Street
Ottawa ON K1P 6L2
Tel: 613.232.7171
Fax: 613.231.3191
Email: mmajor@langmichener.ca

Agent:

Chantal Tie
South Ottawa Community Legal Services
406 - 1355 Bank Street
Ottawa ON K1H 8K7
Tel: 613.733.0140
Fax: 613.733.0401

Agent:

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Box 466 Station D
Ottawa ON K1P 1C3
Tel: 613.233.1781
Fax: 613.563.9869
Email: brian.crane@gowlings.com

Agent:

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa ON K1P 1C3
Tel: 613.233.1781
Fax: 613.788.3433
Email: henry.brown@gowlings.com

Counsel for the Intervener, les Avocats sans frontières Canada, Barreau du Québec et Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval:

Simon V. Potter

McCarthy Tetrault, s.e.n.c.r.l., s.r.l.

2500 - 1000, rue De la Gauchetière Ouest

Montréal QC H3B 0A2

Tel: 514.397.4268

Fax: 514.875.6246

Email: spotter@mccarthy.ca

Counsel for the Intervener, the Canadian Civil Liberties Association:

Marlys A. Edwardh

Marlys Edwardh Barristers Professional Corporation

20 Dundas Street West, Suite 1100

Toronto ON M5G 2G8

Tel: 416.597.9400

Fax: 416.597.0070

Email: edwardh@marlysedwardh.com

Counsel for the Intervener, the National Council for the Protection of Canadians Abroad:

Dean Peroff

Amsterdam & Peroff

35 Alvin Avenue

Toronto ON M4T 2A7

Tel: 416.367.4100

Fax: 416.367.0076

Email: peroff@amperlaw.com

Agent:

Brian A. Crane, Q.C.

Gowling Lafleur Henderson LLP

2600 - 160 Elgin Street

Box 466 Station D

Ottawa ON K1P 1C3

Tel: 613.233.1781

Fax: 613.563.9869

Email: brian.crane@gowlings.com

Agent:

Eugene Meehan, Q.C.

Lang Michener LLP

300 - 50 O'Connor Street

Ottawa ON K1P 6L2

Tel: 613.232.7171

Fax: 613.231.3191

Email: emeehan@langmichener.ca

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PART I: OVERVIEW OF POSITION AND STATEMENT OF THE FACTS RELEVANT TO ISSUE TO INTERVENE

A. Overview of Position

1. The submissions of the British Columbia Civil Liberties Association (the “BCCLA”) focus on the remedy issued by the Federal Court (Trial Division) (“FCTD”), and upheld by the Federal Court of Appeal (“FCA”): that Canada “present a request to the United States for Omar Ahmed Khadr’s (“Mr. Khadr”) repatriation to Canada as soon as practicable.”¹

2. Nadon J.A.’s dissent in the FCA, and Canada’s submissions, raise three objections to this remedy: (a) it is *non-responsive* to the violation of the Respondent’s *Charter* rights; (b) it is *inappropriate*, since as a form of mandatory relief, it intrudes too deeply into the Crown’s principal responsibility over foreign affairs; and (c) it is *ineffective*, because there is no guarantee that the United States would accede to Canada’s request to repatriate the Respondent.

3. In support of the FCTD’s remedial order, the BCCLA submits that this remedy: (a) is *responsive* because it will specifically deter Canada from engaging in such egregious conduct in the future, i.e. cooperating with foreign states that employ torture and/or cruel, inhuman or degrading punishment as tools of interrogation; (b) is *appropriate* in the unique circumstances of this appeal, because: (i) the remedy would not damage comity between Canada and the United States; (ii) there was no legal doubt surrounding the illegality of Canada’s complicity in the abuse administered by the American authorities in March 2004; and (iii) Canada knew of the abuse of the Respondent since March 2004 but nonetheless obstructed access to information regarding that mistreatment; and (c) is *effective*, because American authorities have already undertaken efforts to have Canada accept the return of the Respondent to Canada, and have arranged for the repatriation of every other Western national detained at U.S. Naval station Guantánamo Bay (“GTMO”).

¹ *Khadr v. Canada (Prime Minister)*, 2009 FC 405 [*Khadr FCTD*], para. 92 [Tab 6]; *Khadr v. Canada (Prime Minister)*, 2009 FCA 246 [*Khadr FCA*], paras. 66-74 [Tab 7]

PART II: STATEMENT OF POSITION WITH RESPECT TO APPELLANTS' QUESTIONS

4. The BCCLA accepts the issues as framed by the Appellants: the BCCLA focuses its submissions on the second issue – “was the remedy appropriate and just in the circumstances?” and argues the question should be answered in the affirmative.

PART III: STATEMENT OF ARGUMENT

A. The remedy is responsive to specifically deter Canada from engaging in such egregious conduct in the future.

5. Both Nadon J.A. and Canada impugn the remedy on the ground that it is not responsive to the harm the Respondent has suffered. While it is true that remedies issued under s. 24(1) of the *Charter*, or the exclusion of evidence under s. 24(2) of the *Charter*, are generally restorative in nature and are not used to punish the state for unconstitutional conduct, *Tobiass* left open the door to constitutional remedies designed to address “exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive.”² This Court specifically contemplated “that something so traumatic could be done to an individual in the course of a proceeding” that an exceptional remedy would be appropriate in light of such “exceedingly serious abuse.”³ In these rare cases, the focus of a *Charter* remedy is not only to “redress a wrong that has already been done,” but rather to act as “a specific deterrent – a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.”⁴

6. These principles apply to the abuse of process in criminal matters. The “specific deterrent” used to condemn and deter egregious state misconduct has been a stay of proceedings, which denies the government the ability to pursue its prosecutorial interest against an accused. Even though the Respondent faces a foreign prosecution, this jurisprudence is relevant because Canada has consistently asserted its prosecutorial interest with respect to the Respondent. *Khadr I*⁵ held that Canadian officials interrogated the Respondent for law enforcement purposes while in American custody and shared evidence with American authorities for the purpose of aiding in

² *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, para. 91 [*Tobiass*] [Tab 2]; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, para. 55 [Tab 9]

³ *Tobiass*, para. 96 [Tab 2]

⁴ *Tobiass*, paras. 91, 96 [Tab 2]

⁵ *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 [*Khadr I*] [Respondent’s Tab 12]

their prosecution, and effectively implicated Canada in that prosecution. This Court accordingly ordered a criminal-law type remedy in light of Canada's misconduct.

7. As in *Khadr 1*, the remedy in this appeal must take into account that Canada's prosecutorial interest is directed towards a foreign prosecution rather than a domestic one. In an international context, where Canada has participated in egregious misconduct but does not have custody over the accused, comity and the lack of enforcement jurisdiction preclude a stay of proceedings. The next best remedy is a request to repatriate the accused. Like a stay in domestic proceedings, this remedy denies Canada its ability to pursue its prosecutorial interest in the foreign proceedings, but does not violate comity by directly ordering a foreign court to stay its proceedings.

8. The question is whether the "frequent flyer program" amounts to an instance of "exceedingly serious abuse" that was "so traumatic" to the rights-claimant that it warrants a request for repatriation *in lieu* of the more traditional remedy of stay of proceedings. A measure of the seriousness of abuse is its manifestly criminal character. Had this abuse occurred in Canadian custody, at the hands of Canadian officials, those officials would have committed crimes of the utmost seriousness under Canadian law: (a) criminal negligence causing bodily harm contrary to s. 221 of the *Criminal Code*;⁶ (b) assault causing bodily harm contrary to s. 221 of the *Criminal Code*;⁷ (c) torture contrary to s. 269.1 of the *Criminal Code*;⁸ (d) war crimes contrary to 4(1)(c) of the *Crimes Against Humanity and War Crimes Act*;⁹ and (e) grave breaches

⁶ Section 221 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") prohibits treatment causing bodily harm (including psychological harm) which "shows wanton or reckless disregard for the lives and safety of other persons" (s. 219(1)).

⁷ Section 267(b) of the *Criminal Code* prohibits the threat or actual infliction of force, non-consensually, which causes bodily harm (including psychological harm).

⁸ Section 269.1 of the *Criminal Code* prohibits the intentional infliction of "severe pain and suffering, whether physical or mental" for a purpose, including, *inter alia*, "obtaining from the person... information or a statement." The United Nations Committee Against Torture has concluded that the use of "sleep deprivation for prolonged periods of time... breaches of article 16 and also constitute[s] torture as defined in article 1" of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Article 3 (Can. T.S. 1987 No. 36) [CAT] [Appellants' Tab 74] (*Report of the Committee Against Torture*, U.N. GA/OR 52nd Sess., Supp. No. 44, U.N. Doc. A/52/44 (1997) at para. 257) [Tab 16]

⁹ Section 4(1)(c) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, prohibits war crimes, which is defined as "a war crime according to customary international law" (s. 4(3)), which it in turn defined as including, *inter alia*, the "crimes described in... paragraph 2 of Article 8 of the *Rome Statute*" of the International Criminal Court (s. 4(4)). Articles 8(2)(a)(ii) and 8(2)(b)(xxi) of the *Rome Statute* [Tab 17] provide that war crimes include "Torture or inhuman treatment" (prohibited by the *Geneva Conventions*) and "committing outrages upon personal dignity, in particular humiliating and degrading treatment" in violation of the laws and customs applicable to international armed conflict, respectively. The "frequent flyer program" was "inhuman treatment" and an

of the *Geneva Conventions*, contrary to s.3(1)(b) of the *Geneva Conventions Act*.¹⁰ With respect to the last offence, Mosley J. concluded in proceedings arising from *Khadr I* that the abuse of the Respondent breached the *Geneva Conventions* – a conclusion that Canada has failed to challenge either through an appeal of that holding or in subsequent proceedings.¹¹

9. Had the abuse of the Respondent occurred at the hands of Canadian officials in Canadian custody, it would be appropriate to craft a s. 24(1) remedy to deter such conduct in the future. Canada’s complicity in such conduct by American authorities is also extremely serious. The direct precedent is *Cobb*, where American prosecutors sought the extradition of an accused against whom they made “threats of severe and illegal consequences.”¹² Although Canada did not make these threats itself, its participation in *American* prosecutorial misconduct through the extradition process was a sufficiently serious abuse to warrant a stay of *Canadian* proceedings.

B. Mandatory relief is appropriate in the unique circumstances of this appeal.

10. Nadon J.A. and Canada also object to the remedy as too intrusive, given its mandatory character. In fact, there is no dispute that s. 24(1) encompasses mandatory remedies.¹³ Moreover, this Court issued a mandatory remedy under the *Charter* in the foreign relations context in *Burns*, where it dismissed an appeal against the lower court’s order “to direct the Minister to seek the assurances” that the applicants not be subject to the death penalty.¹⁴ The real question is the respective role of mandatory and declaratory relief. In the foreign relations context, the courts will likely take a graduated approach that begins with declaratory relief, and then proceed to mandatory relief, for the following reasons:

“outrage upon personal dignity” (*Public Committee Against Torture in Israel et al v. State of Israel et al.*, [1999] H.C. 5100/94, para. 23 [Tab 8]).

¹⁰ Section 3(1)(b) of the *Geneva Conventions Act*, R.S.C. 1985, c. G-3. All four *Geneva Conventions* define “grave breaches” as including (i) torture, (ii) inhuman treatment, and (iii) treatment that wilfully causes great suffering or serious injury to body or health: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31, entered into force Oct. 21, 1950, Art. 50; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, entered into force Oct. 21, 1950, Art. 51; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, Art. 130; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force Oct. 21, 1950, Art. 147 [Tab 15].

¹¹ *Khadr v. Canada (Attorney General)*, 2008 FC 807 [Khadr2008FC807], paras. 87-88 [Appellants’ Tab 37]

¹² *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19, para. 43 [Tab 14]

¹³ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 [Doucet-Boudreau] [Tab 3]

¹⁴ *United States of America v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 [Burns] [Tab 13]; *United States of America v. Burns [Re Minister's warrants]*, [1997] B.C.J. No. 1558 (Q.L.) (B.C.C.A.), para. 60 [Tab 12]

- a. the preference for declaratory relief reflects the Crown's greater expertise over foreign affairs. Declaratory relief lowers the risk that a remedy could damage comity between Canada and other nations, because of the courts' relative lack of expertise;
- b. if governments lacked notice of *Charter* obligations because of their novelty, declaratory relief gives them an opportunity to comply with new constitutional obligations of which they had been unaware;¹⁵ and
- c. a general presumption in favour of declaratory relief is reasonable if the rights-claimant has not been impeded in seeking redress from the courts, which can intervene relatively early, issue a declaration, give the executive an opportunity to comply with its *Charter* obligations, and issue mandatory relief if necessary before too much time has passed.

11. Whatever the force of these considerations in general, in this appeal, proceeding directly to mandatory relief is warranted for the following reasons.

i. The order would not damage comity or foreign relations between Canada and the United States.

12. Canada's concern is that the remedy would offend comity between Canada and the United States and could disrupt the delicate fabric of bilateral relations. It should be recalled that *Burns* held that such concerns must be backed by evidence,¹⁶ which was lacking in that case. Likewise, the FCA found in this appeal that "[t]he Crown adduced no evidence that requiring it to request Mr. Khadr's return would damage Canada's relations with the United States. [...W]hen pressed in oral argument, counsel for the Crown conceded that the Crown was not alleging that requiring Canada to make such a request would damage its relations."¹⁷

13. Notwithstanding Canada's failure to adduce evidence, the remedy would not offend comity. Under international law, a State's exercise of diplomatic protection, including a request for repatriation, is in no way an interference with the comity owed to a foreign State. All States have the *right* under international law to exercise of diplomatic protection on behalf of nationals who have suffered an internationally wrongful act, and all States have a corresponding *obligation* to

¹⁵ *Doucet-Boudreau*, para. 66 [Tab 3]

¹⁶ *Burns*, para. 136 [Tab 13]

¹⁷ *Khadr FCA*, para. 59 [Tab 7]

receive and consider such requests.¹⁸ International law is completely neutral as to whether a State exercises this right as a result of an executive or court order.¹⁹

14. Furthermore, in *Hape* and *Khadr 1*, this Court held that “the deference required by the principle of comity ends where clear violations of international law and fundamental human rights begin”.²⁰ The U.S. Military Commission in GTMO has already concluded that sleep deprivation “constitutes abusive conduct and cruel and inhuman treatment.”²¹ The European Court of Human Rights²² and the Israeli Supreme Court²³ have reached the same conclusion. As the U.S. Supreme Court has noted, “[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.”²⁴ A clear violation of international law of this kind does not warrant deference or comity from this Court.

15. The remedy also does not disrupt bilateral relations between Canada and the United States. First, the United States government took the position in *Rasul v. Bush* that diplomatic representations by foreign governments to protect the rights of their nationals detained in GTMO are entirely appropriate. In response to the argument that detainees in GTMO were in a legal black hole, the United States government countered that “these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens.”²⁵ It also cannot be understated that Australia, Denmark, France, Germany, Belgium, Spain, Sweden, and the United Kingdom have all secured the release of their nationals from GTMO without any apparent prejudice to their relations with the United States²⁶

¹⁸ International Law Commission, “Draft Articles on Diplomatic Protection with commentaries,” *Yearbook of the International Law, 2006*, vol. II, Part Two, at Article 2 [**Appellants’ Tab 76**]

¹⁹ *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *Second Judgment*, *I.C.J. Reports 1970*, p. 3 at p. 44 [**Appellants’ Tab 6**]

²⁰ *R. v. Hape*, 2007 SCC 26 [*Hape*] [**Respondent’s Tab 40**]; *Khadr 1*, para. 18 [**Respondent’s Tab 12**], quoting *Hape* at para. 52 (internal quotation marks omitted)

²¹ *United States v. Jawad*, “D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee,” September 24, 2008, para. 12 [**Respondent’s Tab 55**]

²² *Ireland v. United Kingdom*, [1978] 2 EHRR 25, paras. 167-68 [**Tab 4**]

²³ *Public Committee Against Torture in Israel et al. v. State of Israel et al.*, [1999] H.C. 5100/94, para. 23 [**Tab 8**]

²⁴ *Ashcraft v. State of Tennessee*, 322 U.S. 143 (1944), p. 150, footnote 6 [**Tab 1**]

²⁵ *Rasul v. Bush*, Memorandum Opinion (DC U.S. Dist. Ct., July 30, 2002), 215 F. Supp. 2d 55 [*Rasul*], p. 1 [**Tab 10**]

²⁶ Factum of the Respondent, para. 53

16. Second, as noted by the FCA, American authorities have already undertaken efforts to have Canada accept the return of the Respondent to Canada and have shared evidence with Canada in anticipation of a potential prosecution of the Respondent in this country.²⁷ This contradicts Canada's characterization of the remedy as requiring Canada to initiate a conversation with American authorities regarding repatriation. It also distinguishes this appeal from the facts of the appeals before the English Court of Appeal in *Abbasi* and *Al-Rawi*,²⁸ where the United States had not yet initiated discussions with the United Kingdom regarding the fate of the UK nationals and residents detained in GTMO who were at issue in those cases. Rather, in this appeal there is an existing conversation regarding repatriation, initiated by American authorities, which the remedy simply requires Canada to engage in and continue.

ii. There was no legal doubt surrounding the illegality of Canada's complicity in the Respondent's abuse.

17. There is little doubt that the abuse was not novel and was clearly illegal, and that had the abuse occurred at the hands of Canadian authorities, they would have breached the *Charter*. But to displace the presumption in favour of declaratory relief, the additional question is whether *Canada's complicity in this abuse* was also clearly illegal at the time it occurred.

18. The answer to this question arises from the line of cases proceeding from *Singh*²⁹ through to *Burns*, *Suresh*³⁰ and most recently, *Khadr 1*. These cases establish what the BCCLA terms the "doctrine of constitutional complicity," whereby Canada has been constitutionally liable for human rights abuses committed by foreign states outside Canada when: (a) such abuses would have violated the *Charter* had they occurred in Canada at the hands of the Canadian government; and (b) Canada has been complicit in the human rights abuses of the foreign state.

19. The question in these cases is whether there has been a "sufficient causal connection"³¹ between Canada and human rights abuses committed by a foreign state. *Khadr 1* clarifies that

²⁷ *Khadr FCA*, para. 59 [Tab 7]; see also *Khadr2008FC807*, para. 73 [Appellants' Tab 37]

²⁸ *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ 1598 [Respondent's Tab 2] and *R (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2006] EWCA Civ 1279 [Appellants' Tab 57]

²⁹ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [Tab 11]

³⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 [Suresh] [Respondent's Tab 52]

Canada's complicity need not meet a "but for" standard for causation in order for Canada's role to trigger the application of the *Charter*. It sufficed that Canada decided to interview the Respondent and make the product of its interviews available to American authorities, who were subjecting the Respondent to a legal process that contravened Canada's international legal obligations. The extent of Canada's participation in the violation of the Respondent's rights in this appeal was much greater than in *Khadr I*, since the sole purpose of the abuse was to aid the Canadian interrogation, and Canada was aware of this fact beforehand.

iii. Canada knew of the abuse of the Respondent since March 2004 but nonetheless obstructed access to information regarding that mistreatment.

20. A general preference for declaratory relief presumes that the claimant has not been impeded in seeking redress from the courts and is able to bring a claim soon after a *Charter* breach occurs.

21. This presumption is displaced in this appeal because Canada intentionally and persistently withheld from the Respondent the conclusive evidence needed to prove the breach of his *Charter* rights. O'Reilly J. concluded that, at least "[b]y the spring of 2004, then, Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Mr. Khadr."³² This knowledge was imparted through a report filed by the DFAIT Officer who interrogated the Respondent in March 2004. On November 21, 2005, the Respondent's Canadian counsel sent a letter to the Attorney-General of Canada requesting disclosure relevant to the recently laid charges against him before the U.S. Military Commission, and filed a request under the *Access to Information Act* asking for the identical information. Despite having reliable evidence that U.S. authorities had subjected the Respondent to serious abuse, the government responded neither to the letter nor the access to information request.³³

22. The Respondent then brought an application before the Federal Court in January 2006, requesting a disclosure order in accordance with s. 7 of the *Charter*. The government opposed this motion at the FCTD, the FCA and before this Court in *Khadr I*, which held that the government was acting in contravention of a constitutional duty of disclosure it owed the Respondent. This Court further concluded that this duty arose as soon as the government shared

³¹ *Suresh*, para. 54 [**Respondent's Tab 52**]

³² *Khadr FCTD*, para. 17 [**Tab 6**]

the fruits of its interrogations of the Respondent with American authorities and that such information sharing occurred four to six years previous, between 2002 and 2004.³⁴ In proceedings under s. 38 of the *Canada Evidence Act* arising from *Khadr I*, Canada continued in its attempts to conceal its participation in the serious abuse of the Respondent. Canada specifically sought to redact one paragraph from the March 2004 report, in which the DFAIT officer admits to having been informed that the Respondent was subjected to abuse.³⁵

23. Between the time when Canada gained evidence of its participation in the severe mistreatment of the Respondent and it finally disclosed this information to him, the Respondent suffered serious prejudice. As a direct result of this concealment, the Respondent was forced to wait *four and a half additional years* before bringing this claim for *Charter* relief before the courts, and spent these intervening years in further custody at GTMO. The impact of the disclosure on the Respondent's ability to exercise his *Charter* rights is equally dramatic. One year after the March 2004 DFAIT report was made available to the Respondent and placed before the courts, the FCTD and the FCA both ordered the government to request his repatriation on the basis of the conduct described within it.

24. Since Canada has intentionally concealed evidence of its unconstitutional conduct and caused serious prejudice to the Respondent, declaratory relief is not appropriate. Instead, the Court should proceed direct to mandatory relief to sanction such conduct and ensure the claimant is not further denied timely and effective remedy. As this Court noted in *Doucet-Boudreau*, “[a]n 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.”³⁶

C. The remedy is sufficiently effective, because American authorities have already undertaken efforts to have Canada accept the return of the Respondent to Canada, and have arranged for the repatriation of many detainees from GTMO.

25. Both Nadon J.A. and Canada assert that the remedy would be ineffective because the Court cannot be certain that the United States will accede to any request for repatriation.

³³ *Access to Information Act*, R.S.C., 1985, c. A-1, s. 50; *Khadr v. Canada (Minister of Justice)*, [2008] 1 F.C.R. 270, 2007 FCA 182, para. 12 [Tab 5]

³⁴ *Khadr I*, paras. 21, 31, 34 [Respondent's Tab 12]

³⁵ *Khadr2008FC807*, paras. 85-88 [Appellants' Tab 37]

³⁶ *Doucet-Boudreau*, para. 55 (internal quotations marks omitted) [Tab 3]

26. In response, it should be noted that the remedy ordered by O'Reilly J. is not directed at the United States government. Nor is it an order that the Respondent *must* be repatriated. Instead, the remedy is squarely directed at the government of Canada – which is certainly a party over whom the court has control – and requires the government to *request* the repatriation of the Respondent as soon as practicable. The United States is free to grant or deny such a request. Indeed, the remedy in this appeal far less affects the United States than the remedy in *Burns*. The requirement that Canada obtain assurances against the use of the death penalty *before* extraditing an accused effectively meant that the United States *had* to provide such assurances in order to obtain extradition. Nonetheless, this Court did not consider such a remedy to be tantamount to an order directed at the United States.

27. Even if the effectiveness of the remedy is dependent on the likelihood of the United States granting Canada's request, there is ample evidence that the United States would readily do so. First, the United States has consistently adopted the position "that diplomatic channels remain an ongoing and viable means" of addressing alleged breaches of the rights of detainees at GTMO.³⁷ Second, the United States had never refused a request from a Western country for the repatriation of one of its citizens from GTMO.³⁸ Third, the United States has committed to closing the detention facility at GTMO by January 2010, and is actively relocating prisoners to other countries.³⁹ Last, the United States has already entered into discussions with the Canadian government for the repatriation of the Respondent.⁴⁰

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

28. The BCCLA seeks a no costs order, a right to make oral submissions of 10 minutes in length, and otherwise supports the Respondent's request that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

"Joseph J. Arvay QC"

Joseph J. Arvay, Q.C., Professor Sujit Choudhry
and Elin R.S. Sigurdson
Counsel for the Intervener, the British Columbia
Civil Liberties Association

Dated: October 16, 2009

³⁷ *Rasul*, para. 1 [Tab 10]

³⁸ Factum of the Respondent, para. 53; *Repatriation of Omar Khadr to be Tried Under Canadian Law*, Exhibit NN to Affidavit of Lt. Cdr. William Kuebler, para. 51 [J.R. Vol. III, pp. 403-21]

³⁹ Factum of the Respondent, para. 53

⁴⁰ *Khadr FCA*, para. 59 [Tab 7]; *Khadr2008FC807* at para. 73 [Appellants' Tab 37]

PART VI: LIST OF AUTHORITIES

	Paragraph(s)
CASES	
<i>Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department</i> , [2002] EWCA Civ 1598	16
<i>Ashcraft v. Tennessee</i> , 322 U.S. 143 (1944)	14
<i>Barcelona Traction Light and Power Company Limited (Belgium v. Spain)</i> , Second Judgment, <i>I.C.J. Reports 1970</i> , p. 3	13
<i>Canada (Justice) v. Khadr</i> , [2008] 2 S.C.R. 125, 2008 SCC 28	6-8, 14, 18-19, 22
<i>Canada (Minister of Citizenship and Immigration) v. Tobiass</i> , [1997] 3 S.C.R. 391	5
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , [2003] 3 S.C.R. 3, 2003 SCC 62	10, 24
<i>Ireland v. United Kingdom</i> , [1978] 2 EHRR 25	14
<i>Khadr v. Canada (Minister of Justice)</i> , [2008] 1 F.C.R. 270, 2007 FCA 182	21
<i>Khadr v. Canada (Attorney General)</i> , 2008 FC 807	8, 16, 27
<i>Khadr v. Canada (Prime Minister)</i> , 2009 FC 405	1, 21
<i>Khadr v. Canada (Prime Minister)</i> , 2009 FCA 246	1, 16, 27
<i>Public Committee Against Torture in Israel et al. v. State of Israel et al.</i> , [1999] H.C. 5100/94	14
<i>R (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department</i> , [2006] EWCA Civ 1279	16
<i>R. v. Hape</i> , 2007 SCC 26	14
<i>R. v. Regan</i> , [2002] 1 S.C.R. 297, 2002 SCC 12	5
<i>Rasul v. Bush</i> , Memorandum Opinion (DC U.S. Dist. Ct., July 30, 2002), 215 F. Supp. 2d 55	15, 27

	Paragraph(s)
<i>Singh v. Minister of Employment and Immigration</i> , [1985] 1 S.C.R. 177	18
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3, 2002 SCC 1	18-19
<i>United States of America v. Burns [Re Minister's warrants]</i> , [1997] B.C.J. No. 1558 (Q.L.) (B.C.C.A.)	10
<i>United States of America v. Burns</i> , [2001] 1 S.C.R. 283, 2001 SCC 7	10, 12, 18, 26
<i>United States of America v. Cobb</i> , [2001] 1 S.C.R. 587, 2001 SCC 19	9
<i>United States v. Jawad</i> , “D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee,” September 24, 2008, para. 12	14

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS CITED

<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</i> , 75 U.N.T.S. 31, entered into force Oct. 21, 1950, Art. 50; <i>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</i> , 75 U.N.T.S. 85, entered into force Oct. 21, 1950, Art. 51; <i>Geneva Convention relative to the Treatment of Prisoners of War</i> , 75 U.N.T.S. 135, entered into force Oct. 21, 1950, Art. 130; <i>Geneva Convention relative to the Protection of Civilian Persons in Time of War</i> , 75 U.N.T.S. 287, entered into force Oct. 21, 1950, Art. 147	8
International Law Commission, “Draft Articles on Diplomatic Protection with commentaries,” <i>Yearbook of the International Law</i> , 2006, vol. II, Part Two, at Article 2	13
<i>Rome Statute of the International Criminal Court</i> , Articles 8(2)(a)(ii) and 8(2)(b)(xxi)	8
<i>United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , 10 December 1984, Article 3 (Can. T.S. 1987 No. 36) [CAT] (<i>Report of the Committee Against Torture</i> , U.N. GA/OR 52 nd Sess., Supp. No. 44, U.N. Doc. A/52/44 (1997) at para. 257)	8

PART VII: STATUTORY PROVISIONS

	Paragraph(s)
<i>Access to Information Act</i> , R.S.C., 1985, c. A-1, s. 50	21
<i>Canada Evidence Act</i> , R.S.C. 1985, c. C-5, s. 38	22
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11, ss. 7, 24(1), 24(2)	2, 5, 9-10, 17-23
<i>Crimes Against Humanity and War Crimes Act</i> , S.C. 2000, c. 24, ss. 4(1)(c), 4(3), 4(4)	8
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, ss. 219(1), 221, 267(b), 269.1	8
<i>Geneva Conventions Act</i> , R.S.C. 1985, c. G-3, s. 3(1)(b)	8



***Access to Information Act, R.S.C. 1985,
c. A-1***

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-a-1/latest/rsc-1985-c-a-1.html>

Order of Court where reasonable grounds of injury not found

50 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

***Loi sur l'accès à l'information, L.R.C.
1985, c. A-1***

<http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-a-1/derniere/lrc-1985-c-a-1.html>

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

50 Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.



Canada Evidence Act, R.S.C. 1985, c. C-5

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html>

38 The following definitions apply in this section and in sections 38.01 to 38.15.

"judge"
«*juge*»

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.

"participant"
«*participant*»

"participant" means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

"potentially injurious information"
«*renseignements potentiellement préjudiciables*»

"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

"proceeding"
«*instance*»

"proceeding" means a proceeding before a court, person or body with jurisdiction to compel the production of information.

Loi sur la preuve au Canada, L.R.C. 1985, c. C-5

<http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-c-5/derniere/lrc-1985-c-c-5.html>

38 Les définitions qui suivent s'appliquent au présent article et aux articles 38.01 à 38.15.

«instance»
"*proceeding*"

«instance » Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements.

«juge»
"*judge*"

«juge » Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l'article 38.04.

«participant»
"*participant*"

«participant » Personne qui, dans le cadre d'une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements.

«poursuivant»
"*prosecutor*"

«poursuivant » Représentant du procureur général du Canada ou du procureur général d'une province, particulier qui agit à titre de

"prosecutor"
«*poursuivant*»

"prosecutor" means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding.

"sensitive information"
«*renseignements sensibles*»

"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

poursuivant dans le cadre d'une instance ou le directeur des poursuites militaires, au sens de la *Loi sur la défense nationale*.

«renseignements potentiellement préjudiciables»
"*potentially injurious information*"

«renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

«renseignements sensibles»
"*sensitive information*"

«renseignements sensibles » Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection.



Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

<http://www.canlii.org/en/ca/const/const1982.html#I>

Life, liberty and security of person

7. 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.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Charte Canadienne des Droits et Libertés, Partie I de la Loi constitutionnelle de 1982 (R.-U.), constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

<http://www.canlii.org/fr/ca/const/const1982.html>

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

24. (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.



Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

<http://www.canlii.org/en/ca/laws/stat/sc-2000-c-24/latest/sc-2000-c-24.html>

Genocide, etc., committed in Canada

4. (1) Every person is guilty of an indictable offence who commits

...

(c) a war crime

...

Definitions

(3) The definitions in this subsection apply in this section. "crime against humanity" «*crime contre l'humanité*»

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"genocide"

«*génocide*»

"genocide" means an act or omission

Loi sur les crimes contre l'humanité et les crimes de guerre, L.C. 2000, c. 24

<http://www.canlii.org/fr/ca/legis/lois/lc-2000-c-24/derniere/lc-2000-c-24.html>

Génocide, crime contre l'humanité, etc., commis au Canada

4. (1) Quiconque commet une des infractions ci-après est coupable d'un acte criminel:

...

c) crime de guerre.

...

Définitions

(3) Les définitions qui suivent s'appliquent au présent article. «crime contre l'humanité» "*crime against humanity*"

«crime contre l'humanité » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

«crime de guerre»

"*war crime*"

committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"war crime"

«*crime de guerre*»

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Interpretation — customary international law

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

«crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

«génocide»

"*genocide*"

«génocide » Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

Interprétation : droit international coutumier

(4) Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 et 7 et au paragraphe 2 de l'article 8 du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.



Criminal Code, R.S.C. 1985, c. C-46

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>

Criminal negligence

219. (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Causing bodily harm by criminal negligence

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Assault with a weapon or causing bodily harm

267. Every one who, in committing an assault,

...

- (b) causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a

Code criminel, L.R.C. 1985, c. C-46

<http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-c-46/derniere/lrc-1985-c-c-46.html>

Négligence criminelle

219. (1) Est coupable de négligence criminelle quiconque :

- a) soit en faisant quelque chose;
- b) soit en omettant de faire quelque chose qu'il est de son devoir d'accomplir,

montre une insouciance déréglée ou téméraire à l'égard de la vie ou de la sécurité d'autrui.

Causer des lésions corporelles par négligence criminelle

221. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, par négligence criminelle, cause des lésions corporelles à autrui.

Agression armée ou infliction de lésions corporelles

267. Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois quiconque, en se livrant à des voies de fait, selon le cas :

...

- b) inflige des lésions corporelles au

term not exceeding eighteen months.

Torture

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(2) For the purposes of this section,

“official”

« *fonctionnaire* »

“official” means

- (a) a peace officer,
- (b) a public officer,
- (c) a member of the Canadian Forces, or
- (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada;

“torture”

« *torture* »

“torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

- (a) for a purpose including
 - (i) obtaining from the person or from a third person information or a statement,

plaignant.

Torture

269.1 (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans le fonctionnaire qui — ou la personne qui, avec le consentement exprès ou tacite d'un fonctionnaire ou à sa demande — torture une autre personne.

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

«fonctionnaire»

“*official*”

«fonctionnaire» L'une des personnes suivantes, qu'elle exerce ses pouvoirs au Canada ou à l'étranger:

- a) un agent de la paix;
- b) un fonctionnaire public;
- c) un membre des forces canadiennes;
- d) une personne que la loi d'un État étranger investit de pouvoirs qui, au Canada, seraient ceux d'une personne mentionnée à l'un des alinéas a), b) ou c).

«torture»

“*torture*”

«torture» Acte, commis par action ou omission, par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne:

- a) soit afin notamment:
 - (i) d'obtenir d'elle ou d'une tierce personne des renseignements ou une déclaration,
 - (ii) de la punir d'un acte qu'elle

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind,

but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

No defence

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

Evidence

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

ou une tierce personne a commis ou est soupçonnée d'avoir commis,

(iii) de l'intimider ou de faire pression sur elle ou d'intimider une tierce personne ou de faire pression sur celle-ci;

b) soit pour tout autre motif fondé sur quelque forme de discrimination que ce soit.

La torture ne s'entend toutefois pas d'actes qui résultent uniquement de sanctions légitimes, qui sont inhérents à celles-ci ou occasionnés par elles.

Inadmissibilité de certains moyens de défense

(3) Ne constituent pas un moyen de défense contre une accusation fondée sur le présent article ni le fait que l'accusé a obéi aux ordres d'un supérieur ou d'une autorité publique en commettant les actes qui lui sont reprochés ni le fait que ces actes auraient été justifiés par des circonstances exceptionnelles, notamment un état de guerre, une menace de guerre, l'instabilité politique intérieure ou toute autre situation d'urgence.

Admissibilité en preuve

(4) Dans toute procédure qui relève de la compétence du Parlement, une déclaration obtenue par la perpétration d'une infraction au présent article est inadmissible en preuve, sauf à titre de preuve de cette infraction.



Geneva Conventions Act, R.S.C. 1985, c. G-3

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-g-3/latest/rsc-1985-c-g-3.html>

Grave breaches

3. (1) Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule I, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V is guilty of an indictable offence, and

...

(b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

Loi sur les Conventions de Genève, L.R.C. 1985, c. G-3

<http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-g-3/derniere/lrc-1985-c-g-3.html>

Infractions graves

3. (1) Quiconque commet, au Canada ou ailleurs, une infraction grave — au sens des articles 50 de l'annexe I, 51 de l'annexe II, 130 de l'annexe III, 147 de l'annexe IV ou 11 ou 85 de l'annexe V — est coupable d'un acte criminel et passible:

...

b) dans les autres cas, d'un emprisonnement maximal de quatorze ans.