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

- and -

OMAR AHMED KHADR

Respondent

- and -

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

Interveners

FACTUM OF THE INTERVENER
THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

BRIAN H. GREENSPAN
Greenspan Humphrey Lavine
15 Bedford Road
Toronto, ON M5R 2J7
Telephone: (416) 868-1755
FAX: (416) 868-1990
E-mail: bhg@15bedford.com
Counsel for the Intervener Criminal Lawyer's Association (Ontario)

GOWLING LAFLEUR HENDERSON LLP
2600-160 Elgin Street
Box 466 Station D
Ottawa, ON K1P 1C3
PER: BRIAN A. CRANE, Q.C.
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com
Agent Counsel for the Intervener Criminal Lawyer's Association (Ontario)

NATHAN J. WHITLING AND DENNIS EDNEY
Parlee McLaws LLP
#1500, 10180 – 101 Street
Edmonton, AB T5J 4K1
Telephone: (780) 423-8658
FAX: (780) 423-2870
E-mail: nwhitling@parlee.com
dedney@shaw.ca
Counsel for the Respondent

LANG MICHENER LLP
Lawyers
#300, 50 O'Connor Street
Ottawa, ON K1P 6L2
PER: MARIE-FRANCE MAJOR
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: mmajor@langmichener.ca
Agent Counsel for the Respondent

DOREEN MUELLER
Department of Justice Canada
Prairie Region, #211 Bank of Montreal Bldg.
10199 – 101 Street, N.W.
Edmonton, AB T4J 3Y4
Telephone: (780) 495-8352
FAX: (780) 495-5835
E-mail: Doreen.mueller@justice.ca
Counsel for the Appellants

DEPARTMENT OF JUSTICE CANADA
Room #1161, Bank of Canada Bldg
234 Wellington Street
Ottawa, ON K1A 0H8
PER: ROBERT J. FRATER
Telephone: (613) 957-4763
FAX: (613) 954-1920
E-mail: Robert.frater@justice.gc.ca
Agent Counsel for the Appellants

SACHA R. PAUL
Thompson Dorfman Sweatman LLP
2200-201 Portage Avenue
Winnipeg, AB
Telephone: (204) 934-2571
FAX: (204) 934-0571
E-mail: srp@tdslaw.com
Counsel for the Intervener Amnesty International (Canadian Section, English Branch)

COMMUNITY LEGAL SERVICES -OTTAWA CARLETON
1 Nicholas Street, Suite #422
Ottawa, ON K1N 7B7
PER: MICHAEL BOSSIN
Telephone: (613) 241-7008
FAX: (613) 241-8680
E-mail: bossinm@lao.on.ca
Agent Counsel for the Intervener Amnesty International (Canadian Section, English Branch)

JOHN NORRIS AND BRYDIE BETHELL
100-116 Simcoe Street

LANG MICHENER LLP
300 – 50 O'Connor Street

Toronto, ON M5H 4E2
Telephone: (416) 596-2960
FAX: (416) 596-2598
E-mail: jnorris@dcdlaw.ca
bbethell@dcdlaw.ca
Counsel for the Intervener Human Rights Watch, University of Toronto, Faculty of Law – International Human Rights Program and David Asper Centre for Constitutional Rights

EMILY CHAN
Justice for Children and Youth
1203 – 415 Yonge Street
Toronto, ON M5B 2E7
Telephone: (416) 920-1633
FAX: (416) 920-5855
E-mail: chane@lao.on.ca
Counsel for the Intervener Canadian Coalition for the Rights of Children and Justice for Children and Youth

JOSEPH J. ARVAY. Q.C.
Arvay Finlay
1350 – 355 Burrard Street
Vancouver, BC V6C 2G8
Telephone: (604) 689-4421
FAX: (604) 687-1941
E-mail: jarvay@arvayfinlay.com
Counsel for the Intervener British Columbia Civil Liberties Associaton

LORNE WALDMAN
Waldman & Associates
281 Eglinton Avenue East
Toronto, ON M4P 1L3
Telephone: (416) 482-6501
FAX: (416) 489-9618
E-mail: lawald@web.apc.org
Counsel for the Intervener Canadian Bar Association

SIMON V. POTTER
McCarthy Tetrault, s.e.c.c.r.l., s.r.l.
2500 – 1000, rue De la Gauchetiere Ouest
Ottawa, ON K1P 6L2
PER: MARIE-FRANCE MAJOR
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: mmajor@langmichener.ca
Agent Counsel for the Intervener Human Rights Watch, University of Toronto, Faculty of Law - International Human Rights Program and David Asper Centre for Constitutional Rights

SOUTH OTTAWA COMMUNITY LEGAL SERVICES
406 – 1355 Bank Street
Ottawa, ON K1H 8K7
PER: CHANTAL TIE
Telephone: (613) 733-0140
FAX: (613) 733-0401
Agent Counsel for the Intervener Canadian Coalition for the Rights of Children and Justice for Children And Youth

HAMEED FARROKHZAD LLP
43 Florence Street
Ottawa, ON K2P 0W6
PER: YAVAR HAMEED
Telephone: (613) 232-2688 Ext.228
FAX: (613) 232-2680
E-mail: yhameed@bellnet.ca
Agent Counsel for the Intervener British Columbia Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466, Stn. "D"
Ottawa, ON K1P 1C3
PER: HENRY S. BROWN, Q.C.
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com
Agent Counsel for the Intervener Canadian Bar Association

Montreal, QC H3B 0A2
Telephone: (514) 397-4268
FAX: (514) 875-6246
E-mail: spotter@mccarthy.ca
Counsel for the Intervener Avocats sans Frontiers Canada, Barreau du Quebec et Groupe d'etude en droits et libertes de la Faculte de droit de l'Universite Laval

MARLYS A. EDWARDH
Marlys Edwardh Barristers Professional Corporation
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8
Telephone: (416) 597-9400
FAX: (416) 597-007
E-mail: edwardh@marlysedwardh.com
Counsel for the Intervener Canadian Civil Liberties Association

DEAN PEROFF
Amsterdam & Peroff
35 Alvin Avenue
Toronto, ON M4T 2A7
Telephone: (416) 367-4100
FAX: (416) 367-0076
E-mail: peroff@amperlaw.com
Counsel for the Intervener National Council for the Protection of Canadians Abroad

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Box 466 Station "D"
Ottawa, ON K1P 1C3
PER: BRIAN A. CRANE, Q.C.
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com
Agent Counsel for the Intervener Canadian Civil Liberties Association

LANG MICHENER LLP
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2
PER: EUGENE MEEHAN, Q.C.
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: emeehan@langmichener.ca
Agent Counsel for the Intervener National Council for the Protection of Canadians Abroad

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. It is the position of the Criminal Lawyers' Association (Ontario) ("CLA") that the Appellants breached the Respondent's rights pursuant to section 7 of the *Charter of Rights and Freedoms* by disclosing interview product to United States officials and that the remedy ordered by O'Reilly J. of the Federal Court was reasonable in the circumstances. In summary:

(a) The principles of fundamental justice prohibit conduct that sanctions torture.

(b) The Appellants' interrogation of the Respondent sanctioned torture by indirectly utilizing "enhanced interrogation" techniques to elicit information.

(c) The judicial approach to determining section 7 remedies in domestic prosecutions should inform the approach to section 7 remedies in respect of extraterritorial *Charter* violations.

(d) In domestic prosecutions, certain breaches of section 7 justify the ordering of creative non-procedural remedies in "exceptional cases."

(e) *Hape* requires trial judges granting remedies in respect of extraterritorial state action to reconcile the state's limited control over the proceedings with the principle that the *Charter* only applies where it can be enforced.

(f) In the circumstances, it was reasonable for O'Reilly J. to impose a remedy that could potentially place the Respondent's detention and prosecution under Canadian control.

2. The CLA adopts the statement of facts in the Respondent's Memorandum of Argument filed in this appeal.

PART II – POSITION ON APPELLANTS' QUESTIONS

3. The CLA accepts the Appellants' characterization of the issues in this case and submits that both questions should be answered in the affirmative.

PART III – STATEMENT OF ARGUMENT

A) The *Hape* exception and the *Charter* apply to the Respondent's circumstances.

4. Although the *Charter* does not generally apply to investigations conducted by Canadian officials in foreign jurisdictions, in *Regina v. Hape* this Honourable Court recognized as an exception to this principle, that "comity concerns that would ordinarily justify deference to foreign law have no application" when the participation of Canadian officers in investigative activities sanctioned by foreign law places Canada in violation of its international obligations in respect of human rights.

R. v. Hape, [2007] 2 S.C.R. 292 at 88, 90, 101

5. Building on the *Hape* exception, this Honourable Court concluded in *Canada (Justice) v. Khadr* [Khadr 2008] that the *Charter* binds Canadian state actors to the extent that their "participation" in foreign processes violate Canada's human rights obligations. In *Khadr 2008*, this Honourable Court concluded that Canada's disclosure of the fruits of its interrogations of the Respondent at Guantánamo Bay (GMTO) to U.S. officials constituted a degree of participation in a violative process sufficient to activate the *Charter*. As the facts set out by the Respondent indicate, the disclosure by CSIS of its interview product was instantaneous; it included videotaping and sound recording by the U.S. of interviews between CSIS and detainees. Canada therefore began disclosing the fruits of its investigation, triggering its participation in the GTMO regime and the application of the *Charter*, when the Appellants conducted the first interrogation of the Respondent. Accordingly, the *Charter* must be found to apply from February 2003.

Canada (Justice) v. Khadr [2008] 2 S.C.R. 125 at 19, 21, 26, 27

Respondent's Factum at 29

B) Canadian officials breached the Respondent's section 7 rights by disclosing the product of their interviews.

6. This Honourable Court established in *Khadr 2008* that Canadian officials contributed to the deprivation of the Respondent's right to liberty by disclosing the fruits of their investigation to U.S. officials. It did not find it necessary to conclude that this disclosure constituted a breach of the Respondent's section 7 rights. New facts indicating Canada's implicit approval of the use

of torture against the Respondent should lead this Honourable Court to determine that a breach of section 7 has been established.

Khadr 2008, *supra*, at 27 and 31

a. Principles of fundamental justice prohibit Canada from taking advantage of torture to achieve its objectives.

7. This Honourable Court's specific reference in *Suresh* to government-sanctioned torture in its explanation of this principle of fundamental justice implies that state actors may violate this principle of fundamental justice not only by inflicting torture but by condoning it. This Honourable Court properly read section 12 as a recognition of Canada's fundamental opposition, not only to government-*inflicted* torture, but also to participation and acquiescence in torture.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at 51

8. Canadian opposition to government-sanctioned torture as a principle of fundamental justice is based on the idea that no state objective is important enough to justify the denial of humanity that necessarily results from torture. In the context of the objectives of law enforcement and intelligence-gathering, every subject of a Canadian interrogation has the "right not to be tortured or coerced into making a statement by threats or promises held out by a person who is and who[m] he subjectively believes to be a person in authority."

R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571 at 159

Suresh, supra at 47 and 49-51

R. v. Hebert, [1990] 2 S.C.R. 151 at , referring to *Ibrahim v. The King*, [1914] A.C. 599 (P.C)

R. v. Oickle, [2000] 2 S.C.R. 3 at 24

9. On this basis, the CLA accepts the Federal Court of Appeal's finding that the principles of fundamental justice prohibited Canadian officials from seeking to profit by interrogating an individual who they knew had been subjected to cruel and abusive treatment to induce him to talk. To condone this conduct would, in effect, constitute an admission that torture inflicted for the purpose of achieving the objectives of law enforcement and intelligence-gathering can legitimately aid in the achievement of these objectives. Such an acknowledgement would be tantamount to state sanction of an act of torture and contrary to the principle of fundamental justice as explained in *Suresh*.

Khadr v. Canada (Prime Minister), [2009] F.C.J. No. 893 at 50

b. Canada's knowing involvement in the mistreatment of the Respondent contravened the principles of fundamental justice and violated section 7.

10. The disclosure order made by this Honourable Court in *Khadr 2008* revealed that the DFAIT official who interrogated the Respondent at GTMO in March 2004 knew prior to the interview that U.S. officials had subjected the Respondent to a degree of mistreatment that constituted torture. By choosing to benefit from a foreign jurisdiction's "enhanced interrogation" techniques in its own information-gathering activities, Canada contravened section 7.

Respondent's Factum at 40-44 and 84-85

Khadr 2008, supra at 31

11. The Respondent's refusal to answer questions at the 2004 interview did not, as the Appellants imply, sever the connection between the Appellants' contribution to the deprivation of his liberty (the disclosure of interview product to US officials) and the violation of the principle of fundamental justice.

Appellants' Factum at 32

12. Proceeding with the 2004 interview knowing that the Respondent had been subjected to torture demonstrated the Appellants' on-going willingness to contribute to the U.S. prosecution and the deprivation of the Respondent's liberty. This willingness evidences a belief on the part of the Appellants that the goals of law enforcement and intelligence-gathering provided sufficient reason to violate the principles of fundamental justice prohibiting state-sanctioned torture.

13. The decision to proceed with the 2004 interview must affect this Honourable Court's view of the 2003 interviews, which were "highly successful" and generated "quality intelligence information."

Respondent's Factum at 39

Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, July 8, 2009) at p. 13.

14. When the Appellants decided to interrogate the Respondent at GTMO in 2003, CSIS was aware of human rights concerns raised in relation to that detention regime and members of the

international community had expressed serious concerns about its legality. Against this backdrop of Canadian intelligence and international discussion, and in view of the Appellants' sanction in 2004 of the U.S. mistreatment of the Respondent, the CLA submits that the Appellants' initial decision to interrogate the Respondent and contribute to the US prosecution reflects their wilful blindness to the human rights implications of the GTMO regime.

Respondent's Factum at 30-31

15. In Canadian criminal law, wilful blindness is accepted as a basis for criminal liability. In the case at bar, culpability attached to the Appellants' failure in 2003 to inquire into the possibility that involvement in a regime that subjected its detainees to cruel and abusive treatment would violate Canada's international human rights obligations and the *Charter*. The Appellants' disclosure of interview product, in light of the refusal to inquire further into the risk of torture, contributed to a deprivation of the Respondent's liberty that did not accord with the principle of fundamental justice prohibiting Canadian state actors from sanctioning or profiting from torture.

Don Stuart, *Canadian Criminal Law*, 5th ed (Ontario: Thomson Canada Limited 2007) at 240-244

C) The remedy ordered by O'Reilly J. was reasonable.

16. In advancing this position, the CLA accepts the possibility that the Appellants may well have breached the Respondent's *Charter* rights in other ways. The CLA generally adopts the submissions of the Respondent in respect of the nature and extent to which the Appellants' breached his rights. However, the CLA submits that even based upon the limited characterization of the breach which it has set out, the trial judge did not err in his choice of remedy.

17. The proper test for reviewing an order under s. 24(1) is "reasonableness." The CLA adopts the Respondent's argument that, in evaluating the appropriateness of the remedy, appellate courts must show great deference to the trial judge.

18. In support of the Respondent's submission that O'Reilly J.'s order was reasonable, the CLA submits that the remedy is responsive to the breach articulated above and meets the test for effectiveness to the greatest extent possible having regard to the extraterritorial nature of the prosecution.

a. The reasonableness of the order must be viewed in light of this Court's willingness to grant non-procedural remedies in domestic prosecutions.

19. The Appellants argue that this Honourable Court has always been circumspect in fashioning *Charter* remedies which may impinge upon the government's ability to carry out its responsibilities, which include the enforcement of criminal law. The Appellants suggest that the remedy proposed by O'Reilly J. infringes on prosecutorial discretion and that the judgment of the Court of Appeal failed to respect the fundamental divide between the judicial and executive branches in criminal matters.

Appellant's Factum at 105, 112, 113

20. As Canada is not engaged in the prosecution of the Respondent, any remedy ordered must be justified on grounds other than a need to remedy procedural unfairness.

21. The CLA does not suggest that the Respondent is entitled to a stay of the American prosecution against him. Rather, it submits that the judicial determination of section 7 remedies in domestic prosecutions should inform the determination of s. 7 remedies when Canadian state actors violate section 7 extraterritorially.

22. In Canadian prosecutions, a residual category of abusive action exists which does not affect trial fairness, but which, nevertheless, may undermine the fundamental justice of the system. In such cases, section 7 is violated and a stay of proceedings becomes available. In general, stays are prospective remedies; "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings." In "exceptional" cases, however, misconduct that falls into the residual category may be "so egregious that the mere fact of going forward in the light of it will be offensive." Such misconduct breaches section 7, and justifies a remedy based on non-procedural concerns.

R. v. O'Connor [1995] 4 S.C.R. 411 at 73

Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391 at 91

R. v. Regan, [2002] 1 S.C.R. 297 at 55

23. The CLA submits that a similar or analogous remedy should be available to a Respondent whose s. 7 rights are breached extraterritorially by a similar degree of misconduct. As with an

analysis as to the appropriateness of a stay of proceedings, the focus must be on whether the particular circumstances are so egregious that non-reaction by the courts would bring the administration of justice into disrepute.

24. In the domestic context, the offensiveness of "going forward" with a prosecution is based on the idea that court processes should not be devoted to a prosecution that has been tainted by an egregious breach. Devoting court processes to a tainted prosecution, if trial fairness is not affected, is offensive because it suggests to the public that Canadian courts sanction the underlying misconduct. When the *Charter* applies to extraterritorial involvement in a foreign prosecution, it is no less damaging to the reputation of the administration of justice when an egregious *Charter* breach goes unremedied. The underlying concern that Canadian courts avoid sanctioning state actors' egregious misconduct applies equally to domestic prosecutions and to the Respondent in this case.

R. v. Jageshur (2002), 169 C.C.C. (3d) 225 at 15

25. The CLA supports the Respondent's submission that his "special circumstances" should inform the court's choice of remedy. State sanction of the torture of a Canadian citizen in a foreign jurisdiction, particularly in the context of the "special circumstances" outlined the Respondent and found by O'Reilly J., falls into the category of "exceptional" cases where failure to remedy will have a continuing negative effect on the administration of justice. Unremedied, this conduct demonstrates to state actors and to the public that Canada will sanction torture for the purpose of extra-territorial intelligence-gathering as long as its state actors only take advantage of, and do not inflict, the cruel and unusual treatment.

Respondent's Factum at 94.

Khadr v. Canada (Prime Minister), [2009] F.C.J. No. 462 at 9-11

26. The CLA submits that the finding that the complicity of Canadian officials in the Respondent's mistreatment by the U.S. breached his rights under section 7 of the *Charter*, given the circumstances of the Respondent and the effect of sanctioning torture on the administration of justice, leads to the conclusion that this case is precisely what this Honourable Court contemplated when it conceived of the "exceptional case" where a non-procedural remedy for misconduct that breaches section 7 is necessary to maintain Canadian respect for its justice system.

27. O'Reilly J. was justified in imposing a remedy in respect of misconduct, even though this remedy, like a stay of domestic proceedings, may be one that restricts prosecutorial discretion.

b. The remedy was reasonable in light of the Court's pronouncements in *Hape.*

28. The CLA submits that the specific remedy imposed by O'Reilly J. was reasonable in light of this Honourable Court's findings in *Hape*.

29. The Appellants submit that O'Reilly J.'s order was unreasonable in part because it was ineffective. The CLA submits that the effectiveness of a remedy must not be weighed in a vacuum, but must be considered in light of the judiciary's ability to enforce remedies.

30. The Appellants point out that *Charter* remedies must be responsive to the nature of the breach. This Honourable Court has held that in determining appropriate remedies:

> It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.
>
> Appellants' Factum at 114
>
> *R. v. O'Connor, supra* at 69

31. O'Reilly J.'s remedy was responsive to the novel circumstances as well as the breach itself. A remedy that is responsive to the nature of the breach should consider and respond to the acts which gave rise to the breach. In the case at bar, the acts that violated the *Charter* were also the acts that engaged it in the first place. An appropriate remedy for acts which simultaneously engage and violate the *Charter* responds to its initiation as well as the violation.

32. A remedy is reasonable when it is consistent with legal principles. When Canadian officials commit acts that engage the *Charter*, *Hape* dictates that the *Charter* must also be enforceable. O'Reilly J. was entitled to respond to this legal principle and to the novel circumstances of the case, with an order that responded to the actions of Canadian officials as well as the harm done to the Respondent and the administration of justice.

33. In *Hape*, this Honourable Court's finding that enforceability is necessary to the application of the *Charter* supported its ultimate conclusion that the *Charter* does not generally apply to the activities of Canadian officials conducting investigations abroad. In the same case, it created the exception that led to its necessary conclusion in *Khadr 2008* that the *Charter* does

apply when Canada's participation in a foreign regime causes it to breach its international rights obligations.

Hape, supra, at 85, 87-88, 90-101

Khadr 2008, supra at 26

34. The Canadian investigation in *Hape* did not engage the *Charter* and therefore did not require this Honourable Court to consider whether enforceability is a necessary aspect of *Charter* application to circumstances where extraterritorial state action by Canadian officials engages the *Charter*.

35. Where, as in the circumstances of this case, a foreign jurisdiction violates Canada's international obligations, it does not deserve the benefit of comity and sovereignty. This holding justifies Canadian enforcement of the *Charter* in the Respondent's case but does not facilitate it. Although the *Charter* applies, the ability of a Canadian courts to award a remedy that is responsive to the breach is limited if not absent as long as the foreign jurisdiction still controls the procedural forum from which most *Charter* remedies are drawn.

36. Together, the Respondent's circumstances and this Court's holding in *Hape* left O'Reilly J. with the task of awarding a remedy that reconciled the finding that the *Charter* applied with the dicta that the *Charter* should only apply where it can be enforced.

37. In these circumstances, it was reasonable for O'Reilly J. to conclude that placing the Respondent in a jurisdiction where Canadian courts had control over his detention and prosecution was a responsive remedy for Canadian acts in a foreign prosecution which activated and breached the *Charter* and which constituted a finding of misconduct sufficiently egregious to bring the administration of justice into disrepute if the court did not react.

38. This Honourable Court's caution in *Hape* should further preclude it from overturning the remedy granted by O'Reilly J. Binnie J., one of four judges who dissented in *Hape*, raised the following prescient concern: "Issues of more far-reaching importance will soon confront Canadian courts, especially in the context of the "war on terror"...We should, in my view, avoid premature pronouncements that restrict that application of the *Charter* to Canadian officials operating abroad in relation to Canadian citizens." LeBel J., for the majority, responded to this concern by observing: "We cannot always know what new issues might arise before the courts in

the future, but we can trust that the law will grow and evolve as necessary and when necessary in response." This Honourable Court clearly anticipated that cases like that of the Respondent would require a creative development of the law regarding the application of the *Charter* to extraterritorial activities of Canadian officials.

Hape, supra, at 95, 183

39. The Respondent has placed before this Honourable Court a concrete example of the hypothetical case that motivated the Court to make the above comments. This Honourable Court's desire not to overly restrict the Canadian judiciary in deciding cases like the one at bar is best reflected by the formulation and endorsement of unique remedies that are responsive to breaches and which best respond to the Court's concern in *Hape* that the *Charter* only apply in circumstances where it can be enforced.

PART IV – COSTS SUBMISSION AND ORDER REQUESTED

40. The CLA seeks a no costs order and the right to make oral submissions of 10 minutes in length. The CLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 20th day of October, 2009

Brian H. Greenspan
Greenspan Humphrey Lavine

Of Counsel for the Proposed Intervener,
The Criminal Lawyers' Association (Ontario)

PART V - TABLE OF AUTHORITIES

CASES

BOOKS