Court 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

APPELLANTS' FACTUM
(Rule 35 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Federal Court of Appeal has endeavoured to settle the political controversy surrounding the Respondent, Omar Khadr's, continued pre-trial detention by the United States ("U.S.") with an order requiring the Government of Canada ("Government") to request his repatriation. There is no legal basis for such an order, which fails to respect the institutional roles of the executive and the courts under our constitution.

2. The nature of the s. 7 *Charter* breach found by the majority is unclear. If the breach rests on the interviewing of the Respondent by a Canadian official and transmission of the answers to the U.S., that breach has already been remedied - twice - by Canadian courts. If, on the other hand, the breach consists of the failure to observe a new "duty to protect" Canadian citizens abroad, as the courts below held, no such duty exists. The duty does not exist under domestic law, has no support under international

law and is not accepted by other common law countries. It can scarcely be said to be "fundamental to the way in which our legal system operates."

3. The unprecedented and unprincipled remedy imposed ought to raise further doubts about the existence of the infringement it purports to address. Ordering that a specific diplomatic representation of this nature be made to a foreign government fails to respect the institutional competence of the courts and the prerogative powers of the Crown in foreign relations. These are matters of the utmost importance to our constitutional order, as they are in other countries where the courts have shown much more restraint than the courts below in matters affecting foreign relations. Furthermore, the remedy is unresponsive to the nature of the conduct at issue, and is ineffective because its efficacy depends on compliance by a foreign country over which Canadian courts have no control. For that reason, it over-reaches the court's authority.

B. FACTUAL BACKGROUND

4. The Respondent was apprehended by the U.S. military following a battlefield confrontation in Afghanistan in July 2002. The Government of Canada immediately sought consular access to the Respondent and asked the U.S. not to transfer him to Guantánamo Bay, Cuba, particularly given his young age. Notwithstanding Canada's request, the U.S. transferred the Respondent to Guantánamo Bay in October 2002.[1]

(i) Canadian Intelligence Interviews

5. In February 2003, the U.S. authorized officials from the Canadian Security Intelligence Service ("CSIS") and the Department of Foreign Affairs and International Trade ("DFAIT") to conduct intelligence interviews of the Respondent at Guantánamo Bay. These interviews took place over four days. In September 2003, CSIS officials returned to conduct further intelligence interviews over two days.[2]

6. In March 2004, the U.S. authorized a further intelligence interview of the Respondent by a DFAIT official. The DFAIT official reported that he was told by a U.S.

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[1] Joint Record ("JR") at pp. 135 and 164-168 (Kuebler Affidavit at paras. 7-10 and Exhibits F-G)
[2] JR at pp. 138, 271-276, 280-283, 301-302 and 490 (Kuebler Affidavit at paras. 22 and 23 and Exhibits S, U and EE; and Robertson Affidavit at para. 17)

official that they had subjected the Respondent to a sleep deprivation program prior to the intended Canadian interview. The Respondent refused to answer any questions at this interview.[3]

(ii) Canadian Monitoring of Respondent's Welfare at Guantánamo Bay

7. Since 2002, Canada has maintained communications with U.S. officials at various levels to monitor the Respondent's treatment and well-being.[4] In July 2003, Canada repeated its request for consular access to the Respondent and asked the U.S. to consider having him transferred to a facility for juvenile enemy combatants given his age.[5]

8. In November 2003, Canada sought assurances that the Respondent was receiving adequate medical attention. The U.S. advised that the Respondent was being treated humanely and in a manner consistent with the principles of the *Third Geneva Convention*.[6]

9. On June 7, 2004, Canada sent a diplomatic note to the U.S. seeking assurances that treatment of detainees in Afghanistan and Guantánamo Bay would accord with international humanitarian law and human rights law.[7]

10. In January and February 2005, Canada sent diplomatic notes to the U.S. expressing concerns regarding allegations of abuse against the Respondent. In January and July 2005 and April 2006, Canada requested that the Respondent be provided with an independent medical assessment. These diplomatic notes also repeated prior requests for consular access to the Respondent and for assurances that the death penalty would not be sought or imposed against him.[8]

11. Although the U.S. continued to refuse consular access to the Respondent, in March 2005, DFAIT officials were permitted to conduct welfare visits with him. Welfare visits were conducted on numerous occasions between March 2005 and June 2008 and

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[3] JR at pp. 138, 296-300 and 490 (Robertson Affidavit at para. 17; and Kuebler Affidavit at para. 22 and Exhibit DD)
[4] JR at pp. 486 and 489-490 (Robertson Affidavit at paras. 2 and 16)
[5] JR at pp. 487 and 493-494 (Robertson Affidavit at para. 6 and Exhibit A)
[6] JR at pp. 488 and 498 (Robertson Affidavit at para. 9 and Exhibit D)
[7] JR at pp. 488 and 499 (Robertson Affidavit at para. 10 and Exhibit E)
[8] JR at pp. 488-489 and 502-509 (Robertson Affidavit at paras. 12-14 and Exhibits G-I)

have continued regularly since then. The welfare visits allowed Canadian officials to follow up on medical issues for the Respondent, facilitate communication with his family members and provide him with educational materials, books, magazines, special food items, clothing and other personal items. Throughout the welfare visits, the Respondent was generally observed to be in good health.[9]

(iii) *Habeas Corpus* Review of Respondent's Detention

12. In 2004, the U.S. Deputy Secretary of Defence established the Combatant Status Review Tribunal ("CSRT") for the purpose of reviewing whether detainees at Guantánamo Bay were properly determined to be "enemy combatants."[10] At that time, Canada advised the U.S. of its expectation that the Respondent would be provided with a judicial review of his detention by a regularly constituted court affording all judicial guarantees in accordance with due process and international law.[11] The Respondent's case was reviewed by the CSRT on September 7, 2004 and the tribunal concluded that he was an enemy combatant.[12]

13. In June 2004, the U.S. Supreme Court ruled that certain detainees in Guantánamo Bay were entitled under U.S. law to seek *habeas corpus* review in the courts[13], a right reconfirmed by the same court in 2008.[14]

14. The Respondent initiated a *habeas corpus* petition in the U.S. District Court for the District of Columbia in 2004. On November 24, 2008, the Court ruled that the Respondent's petition should be held in abeyance pending the completion of his Military Commission prosecution.[15]

(iv) Injunction Restraining Further Interviews

15. On August 8, 2005, the Federal Court of Canada granted the Respondent's application for an interim injunction prohibiting Canadian officials from conducting

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[9] JR at pp. 490-491 and 512-588 (Robertson Affidavit at paras. 17-21 and Exhibits K-U)
[10] JR at pp. 140 and 320-323 (Kuebler Affidavit at para. 28 and Exhibit HH)
[11] JR at pp. 488 and 500- 501 (Robertson Affidavit at para. 11 and Exhibit F)
[12] JR at p. 140 (Kuebler Affidavit at para. 29)
[13] *Rasul v. Bush*, 542 U.S. 466 (2004)
[14] *Boumediene v. Bush*, 553 U.S. (2008)
[15] *Khadr v. Bush*, Civil Action No. 04-1136 (JDB), United States District Courts, 24 November 2008

further intelligence interviews of the Respondent while still permitting welfare visits.[16] In that action, the Respondent seeks $10,000,000.00 in damages based on allegations that the interviews conducted by CSIS and DFAIT officials in 2003 and 2004 violated ss. 7, 10(a) and (b) and 12 of the *Charter*. The Respondent alleges, *inter alia*, that Canadian officials were aware, or ought to have been aware, that the Respondent was tortured by U.S. officials, including through the infliction of a sleep deprivation program.[17]

(v) Disclosure by Canada

16. In January 2006, the Respondent initiated a judicial review application seeking *Stinchcombe*-like disclosure from Canada for the purpose of allowing the Respondent to make full answer and defence to the charges he was then facing. On May 23, 2008, this Court found that the Respondent's s. 7 *Charter* rights had been breached as a result of Canada's participation in the unlawful process to which the Respondent was subject. The Court ordered disclosure of: "(i) records of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr."[18]

17. This Court's disclosure order required a designated Federal Court Judge to assess whether public interest considerations should limit the information to be disclosed. Justice Mosley conducted that review and issued his decision on June 25, 2008.[19] His review focussed on 26 records, which were essentially written reports of the interviews conducted by Canadian officials of the Respondent in Guantánamo Bay, DVDs containing audio and video recordings of the interviews that took place in February 2003[20], and 5 pages of reports prepared by U.S. agents describing the February 2003 interviews.[21] Most information identifying Canadian and U.S. officials was protected, as was sensitive information pertaining to other subjects, persons and events that would not

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[16] *Khadr v. Canada* (2005), 277 F.T.R. 298, 2005 FC 1076
[17] *Khadr v. Canada*, [2009] F.C.J. 613, 2009 FC 497
[18] *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 ("*Khadr 2008*")
[19] *Khadr v. Canada (Attorney General)* (2008), 331 F.T.R. 1, 2008 FC 807
[20] *Ibid.* Justice Mosley noted at para. 75 that the Respondent's defence team were already in possession of the DVDs, but under restrictions not to share them with the Respondent's Canadian counsel. In addition, at para. 74 he observed that Canadian officials did not have copies of any recordings that may have been made of the September 2003 or March 2004 interviews.
[21] *Ibid.* at paras. 70 and 74-84

be of assistance for the Respondent's defence.[22] The Respondent was provided with this disclosure by Canada in the summer of 2008.[23] Included in the disclosure was the report of the March 2004 interview by the DFAIT official concerning sleep deprivation, which was almost entirely unredacted.[24]

(vi) Military Commission Prosecution

18. Non-capital charges against the Respondent were sworn on April 5, 2007.[25] The Respondent currently faces prosecution before a U.S. Military Commission for his alleged activities in Afghanistan in June and July 2002 on charges which include:

(1) Murder in violation of the laws of war;

(2) Attempted murder in violation of the laws of war;

(3) Conspiracy;

(4) Providing material support for terrorism; and

(5) Spying.

19. The Respondent's Military Commission trial was scheduled to commence on January 26, 2009. On January 21, 2009, the Military Commission Judge granted a continuance of the Respondent's prosecution until May 20, 2009 in order to allow the new U.S. Administration time to review the Military Commission's process and pending cases. That continuance has since been extended.[26]

20. On January 22, 2009, the newly-elected President of the U.S. issued an order directing that the detention facilities at Guantánamo Bay be closed within one year. The President directed the Secretary of Defence to undertake an immediate review of the conditions of detention at Guantánamo Bay to ensure that individuals are detained in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the *Geneva Conventions*.[27]

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[22] *Ibid.* at paras. 70 and 81-82
[23] JR at pp. 1283-1284 (Cross-examination of Kuebler at p. 16, lines 17-26)
[24] JR at pp. 138 and 296-300 (Kuebler Affidavit at para. 22 and Exhibit DD)
[25] JR at pp. 144 and 345-351 (Kuebler Affidavit at para. 45 and Exhibit KK)
[26] The Appellants will update the Court on developments in this regard in advance of the oral hearing on November 13, 2009.
[27] http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/

(vii) Repatriation

21. The Government of Canada's position in respect of the Respondent's potential repatriation, as stated publicly by the Prime Minister and in Parliamentary proceedings, is that consideration of repatriation of the Respondent should await the conclusion of his prosecution on terrorism charges.[28]

22. Before the current proceedings were instituted against the Respondent, Canada had asked the U.S. in both 2003 and 2004 to advise the Respondent of his right to return to Canada, and to allow him the opportunity to exercise that right, in the event that the U.S. was considering his release.[29]

(viii) Judgments in the Courts Below

23. On August 8, 2008, the Respondent initiated a judicial review application[30] of the Government's "ongoing decision and policy" not to request his repatriation, seeking:

(i) an order in the nature of *mandamus* requiring Canada to demand his repatriation from U.S. custody in Guantánamo Bay;

(ii) an order in the nature of *certiorari* quashing Canada's ongoing decision and policy not to request his repatriation;

and

(iii) an order in the nature of *mandamus* directing Canada to provide further disclosure.

24. On April 23, 2009, O'Reilly J. dismissed the application for disclosure but granted an order directing Canada to make a request to the U.S. for the Respondent's return as soon as practicable. Justice O'Reilly held that Canada had breached the Respondent's rights under s. 7 of the *Charter*. O'Reilly J. rejected Canada's argument that the s. 7 issues had been decided in previous proceedings, noting that "the question whether the respondents have a duty to seek the repatriation of Mr. Khadr has not previously been addressed."[31] With respect to the s. 7 analysis, he took this Court's decision in *Khadr 2008* as having established that the Respondent's s. 7 rights were

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[28] JR at p. 132 (Bedard Affidavit at paragraph 3); and Canada. House of Commons. *Omar Khadr: Report of the Standing Committee on Foreign Affairs and International Development, Subcommittee on International Human Rights*. Ottawa, Government of Canada, June 2008 at pp. 15-17

[29] JR at pp. 488, 497 and 500 (Robertson Affidavit at paras. 8 and 11 and Exhibits C and F)

[30] JR at pp. 111-116 (Notice of Application)

[31] JR at p. 24 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 33)

engaged by the CSIS and DFAIT interviews. O'Reilly J. characterized the nature of the decision he had to make as whether the "applicable principles of fundamental justice require the Canadian Government to protect Mr. Khadr."[32] He found that they did, stating that those principles "obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms."[33] As a remedy, O'Reilly J. ordered that Canada request the Respondent's repatriation.

25. On August 14, 2009, the Federal Court of Appeal dismissed Canada's appeal by a 2:1 majority.[34] The majority, Evans and Sharlow JJ.A., agreed with O'Reilly J. that there had been an infringement of s. 7 of the *Charter,* but discussed the infringement in somewhat different terms. The majority stressed the fact that subsequent to this Court's decision in *Khadr 2008*, it came to light that the DFAIT official was aware before the March 2004 interview that the Respondent had been subjected to sleep deprivation by U.S. officials. The majority described the s. 7 breach in the following manner:

> As stated above, the principles of fundamental justice do not permit the questioning of a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk. That must be so whether the abuse was inflicted by the questioner, or by some other person with the questioner's knowledge. Canada cannot avoid responsibility for its participation in the process at the Guantánamo Bay prison by relying on the fact that Mr. Khadr was mistreated by officials of the United States, because Canadian officials knew of the abuse when they conducted the interviews, and sought to take advantage of it.
>
> Consequently, the rights of Mr. Khadr under section 7 of the *Charter* were breached when Canadian officials interviewed him at the prison at Guantánamo Bay and shared the resulting information with the United States officials. [Emphasis added.][35]

26. The majority agreed with O'Reilly J. that the circumstances of the Respondent's detention and the Canadian officials' questioning of him "gave rise to an obligation on the part of Canada to take steps to protect Mr. Khadr from further abuse."[36] The majority stated that there was "no factual basis for the Crown's argument that a court order

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[32] JR at p. 32 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 54)
[33] JR at p. 39 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 75)
[34] JR at pp. 55-109 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009)
[35] JR at p. 80 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 54-55)
[36] JR at pp. 80-81 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 56-57)

requiring the Government to request the return of Mr. Khadr is a serious intrusion into the Crown's responsibility for the conduct of Canada's foreign affairs."[37]

27. With respect to the remedy, the majority found that Canada had a "heavy onus" to discharge in seeking to set aside the remedy. They regarded the remedy imposed as a reasonable application of this Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[38]

28. Justice Nadon dissented. Unlike the majority, he analyzed the nature of the s. 7 *Charter* breach in the same manner as O'Reilly J., namely, by considering whether Canada had breached its "duty to protect" the Respondent. Although he was "far from convinced"[39] that s. 7 imposed such a duty and found it "impossible to understand how Canada could ever fulfill"[40] this duty, he held that there was no breach of the duty to protect if it did exist. In reaching this conclusion, Nadon J.A. described the many steps Canada has taken in its efforts to protect the Respondent during the course of his confinement. In his view, the application judge "never turned his mind to the question as to whether these steps were sufficient for Canada to meet its duty to protect Mr. Khadr."[41]

29. Nadon J.A. also disagreed with the remedy ordered by O'Reilly J., finding it to be a direct interference with the conduct of foreign affairs by the executive and disproportionate to the breach alleged.[42]

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[37] JR at p. 82 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 59)
[38] [2003] 3 S.C.R. 3, 2003 SCC 62
[39] JR at p. 91 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 86)
[40] JR at p. 96 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 96)
[41] JR at p. 94 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 90)
[42] JR at pp. 100-105 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 104-115)

PART II - ISSUES

30. The issues in this appeal are:

(a) Did the courts below err in finding that the Respondent's rights under s. 7 of the *Charter* were breached?

and

(b) If such a breach occurred, was the remedy appropriate and just in the circumstances?

The Appellants' position is that there was no breach of s. 7. In the alternative, if there was such a breach, the remedy imposed was inappropriate.

PART III - ARGUMENT

A. The Respondent is Due No New Remedy

31. One of the important issues in this case concerns the characterization of the conduct that is alleged to constitute the *Charter* infringement. O'Reilly J. focused primarily on the failure of the Government to protect the Respondent, a so-called "duty to protect", which he found to be a principle of fundamental justice. The majority of the Court of Appeal, while appearing to accept the legal conclusion that s. 7 includes a "duty to protect"[43], focused primarily on the breach occasioned "when Canadian officials interviewed [the Respondent] at the prison at Guantánamo Bay and shared the resulting information with United States officials."[44] That description of the breach is a wholly unremarkable restatement of this Court's conclusion in *Khadr 2008*; what *is* remarkable is the Court of Appeal's failure to explain why that same breach should lead to a new remedy in 2009. If this case is effectively a judicial review of the decision to interview and transmit information, the Respondent has received his remedy.

32. Both courts below placed great weight on the fact that subsequent to this Court's decision in *Khadr 2008,* Mosley J. ordered the Government to disclose previously protected information, including the portion of a document which states that before the third interview of the Respondent by Canadian officials at Guantánamo Bay in March 2004, the DFAIT official conducting that interview was advised that the Respondent had been subjected to sleep deprivation. There is no evidence to suggest that Canadian officials had knowledge that the Respondent was being subjected to such mistreatment prior to that revelation in March 2004. Whatever U.S. authorities may have intended, no benefit accrued to Canada: the Respondent refused to answer the DFAIT official's questions over the course of the two hour interview.[45]

33. This Court held in *Khadr 2008* that s. 7 of the *Charter* was engaged by Canada's participation in a process that violated international human rights obligations. The participation consisted of passing information to U.S. officials obtained during the

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[43] JR at pp. 80-81 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at paras. 56-57)
[44] JR at p. 80 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 55)
[45] JR at pp. 138 and 296-300 (Kuebler Affidavit at para. 22 and Exhibit DD)

interviews where the process, which offended international human rights norms, could result in a significant deprivation of the Respondent's liberty.[46] *Khadr 2008* did not hold that the interviewing was itself a s. 7 breach[47], nor that the passing of the information was itself a s. 7 breach[48]; it was the combination of circumstances that led to the finding. Even if this Court were to now hold that the interviewing alone were the breach, or that the new fact shows that the previously-found breach was more aggravated, the onus is on the Respondent to show why the new fact alone should require a new and different remedy of the kind ordered by the courts below. This is particularly the case given the fact that the violative aspects of that process have now been addressed by the U.S.

34. None of the basic facts that led this Court to find that a s. 7 breach had occurred in *Khadr 2008* have changed in this appeal. Indeed the "fresh" fact, the allegation of mistreatment through sleep deprivation, is not entirely new: the Court in *Khadr 2008* admitted as fresh evidence the affidavit of Muneer Ahmad[49], which is replete with allegations that the Respondent was tortured (consisting of direct physical abuse, not sleep deprivation).[50] Though new facts may justify a departure from settled issues between parties, the new facts must be "demonstrably capable of affecting the result."[51]

35. To the extent that the evidence of Canadian knowledge of the sleep deprivation is "fresh", it only serves to reinforce the finding of a s. 7 breach made by this Court in *Khadr 2008*. After-the-fact knowledge of abuse no more makes someone a party to that abuse than after-the-fact knowledge of a crime makes someone guilty of that crime. Neither is Canada vicariously liable for the actions of the U. S.[52] The *Charter* breach found by the Court previously is no different in kind than the one identified by the majority of the Court of Appeal in the case at bar.

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[46] *Khadr 2008, supra,* at para. 34
[47] *Ibid.* at para. 34
[48] *Ibid.*
[49] *Ibid.* at paras. 9-14
[50] JR at pp. 749 and 892-899 (Exhibit L of Fresh Evidence Record (Affidavit of Muneer Ahmad at para. 11 and Exhibit F))
[51] *Grandview v. Doering*, [1976] 2 S.C.R. 621 at pp. 635-639; and Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Butterworths, 2004) at p. 235
[52] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at p. 692

36. No principle of law entitles the Respondent to a new *Charter* remedy for the same *Charter* breach simply by filing a second application for judicial review; the principle of finality strongly militates against this outcome. In 2008, the Respondent received a remedy from this Court that was finely tailored to the nature of the breach.[53] In fact, it was effectively the second responsive remedy the Respondent had received, since von Finckenstein J. had earlier issued an interim injunction against further interviewing in the context of the Respondent's *Charter* damages claim, a claim that is itself based on the interviewing.[54] As the majority of the Court of Appeal noted, that claim has been amended to seek specific relief based on the discovery of the new fact.[55] The two remedies already given adequately addressed the harm occasioned by any actions of Canadian officials.

B. There Was No New Breach of Section 7 of the *Charter*

(i) The Courts Below Failed to Appreciate the Limited Justiciability of the Issues

37. If this case is not simply about providing a new remedy for a previously-determined *Charter* breach, it is critical to examine the nature of the claim being made, because it affects the justiciability of the issues.

38. In his application, the Respondent sought judicial review of "the ongoing decision and policy" of the Government not to request his repatriation and an order requiring the Government to demand his repatriation on the basis that this "ongoing decision and policy" is contrary to the *Charter*.[56] O'Reilly J. gave only cursory treatment to the standard of review to be applied to the Government's "ongoing decision and policy."[57] The Court of Appeal gave this issue no consideration.[58] While the question of the appropriate standard of review is important and addressed further below, the first

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[53] *Khadr 2008, supra*
[54] *Khadr v. Canada* (2005), 277 F.T.R. 298, 2005 FC 1076
[55] JR at pp. 69-70 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 29)
[56] JR at p. 113 (Notice of Application at p. 3)
[57] JR at p. 30 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 49)
[58] The Court of Appeal was required to determine whether O'Reilly J. had chosen and applied the correct standard of review, and in the event he had not, to assess the executive decision in light of the correct standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at paras. 43-44

question the courts below ought to have asked themselves concerns the extent to which the Government's decision was reviewable at all.[59]

39. There is no doubt about the reviewability of executive decisions by the courts to ensure that such decisions do not infringe the *Charter*.[60] However, the reviewing court must be careful not to review the "soundness" of a decision, but ask instead whether the decision violates the Respondent's rights under s. 7 of the *Charter*.[61]

40. If the executive decision whether to request the repatriation of a Canadian citizen does not engage s. 7 of the *Charter*, then the reviewing court is essentially being asked to review the "wisdom" of the Government's "ongoing decision and policy." The law is firmly settled that the Court is precluded from second-guessing the executive on such policy matters. As Wilson J. stated in *Operation Dismantle*:

> ...if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution.[62]

41. In *Vriend v. Alberta*, Iacobucci J. expressed this principle in this way:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.[63]

42. It is only where a decision of the executive implicates an individual's *Charter* rights that the reviewing court has a significant role to play. Even there, however, the

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[59] *Canada (Auditor Gen.) v. Canada (Min. of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at pp. 90-92; and *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) at paras. 46-51

[60] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at pp. 455 and 459 *per* Dickson J. and pp. 471-474 *per* Wilson J.; and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 183

[61] *Operation Dismantle, supra*, at p. 472 *per* Wilson J.

[62] *Ibid.*

[63] [1998] 1 S.C.R. 493 at para. 136. See also *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at p. 1021 *per* Laskin C.J. and McIntyre and Lamer JJ. (dissenting); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1176; *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at pp. 1046-1047; and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 99-100

court is still required to show deference to the Government's decision provided it is reasonable in all the circumstances.[64]

43. Accordingly, the appropriate starting point is whether the decision of the executive not to request the repatriation of a Canadian citizen abroad prior to the completion of foreign criminal proceedings engages s. 7 of the *Charter*. The applicability of the *Charter* depends on whether there was a s. 7 "deprivation", and whether the "duty to protect" is a principle of fundamental justice.

(ii) The Absence of a s. 7 *Charter* "Deprivation"

44. It is axiomatic that the availability of a *Charter* remedy under s. 24(1) depends on the government action in question violating a protected *Charter* right.[65] Here, any "deprivation" of the Respondent's rights was not the result of Canadian action. Furthermore, s. 7 of the *Charter* does not recognize a "duty to protect" Canadians outside Canada as a principle of fundamental justice. Accordingly, there can be nothing unconstitutional about the Government's decision not to request the Respondent's repatriation. Finally, and in the alternative, even if such a duty does exist in some circumstances then, as Nadon J.A. demonstrated, the duty has been satisfied in this case.

(a) No Deprivation Can Be Attributed to Canadian State Action

45. It is well-established that the adjudication of a claim under s. 7 of the *Charter* involves a two-step analysis. The first question is whether the state action in issue constitutes a deprivation of life, liberty or security of the person. If that question is answered in the affirmative, the second step is whether the deprivation is in accordance with the principles of fundamental justice.[66]

46. There can be no denying that the Respondent's liberty interests have been affected since his capture by the U.S. military in 2002. However, for this deprivation to engage s. 7 of the *Charter*, it has to be the result of direct state action by the Canadian

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[64] *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, 2008 SCC 23 at para. 34
[65] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 at para. 14; and *R. v. Simms*, 2009 ABCA 260 at para. 24
[66] *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387 at p. 401

Government.[67] The s. 7 claim in this case is doomed to fail for the simple reason that any deprivation of the Respondent's s. 7 interests is attributable, not to Canadian state action, but rather to that of his American captors. Similarly, any allegations of mistreatment resulting from his detention are properly justiciable against his American jailers in U.S. courts and not in Canada under s. 7 of the *Charter*. Allegations of Canadian participation in his mistreatment are the subject of his *Charter* damages action.

47. This Court's decision in *Khadr 2008* does not provide *carte blanche* support to raise any s. 7 issue of the Respondent's choosing. *Khadr 2008* recognized that Canada's limited role in a foreign process inconsistent with our human rights obligations justified a procedural remedy (disclosure). In this case, the Respondent seeks a much broader remedy based on a new fact which he believes corroborates his allegations of mistreatment and accords him new rights. That claim is predicated on the actions of foreign officials, and is a matter for American courts.

(b) What the Respondent Seeks is a Positive Rights Claim

48. Moreover, what the Respondent seeks by way of his demand that the Government request his repatriation is by definition a positive rights claim. The Respondent's complaint is not based on government action, but government inaction in not requesting his repatriation. Similarly, the Respondent invokes s. 7, not to remedy a (Canadian) state-imposed deprivation of his rights under s. 7, but to enhance his liberty interests by requiring Canada to take positive action on his behalf. Section 7 of the *Charter* recognizes no such right.

49. The decision of this Court in *Gosselin v. Québec (Attorney General)* is dispositive of the s. 7 *Charter* claim in the instant case. The reasons of McLachlin C.J. for the majority in rejecting the s. 7 *Charter* claim in *Gosselin* are apposite to the case at bar:

> Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people

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[67] *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 SCC 44 at para. 60; and *Operation Dismantle, supra*, at p. 447 *per* Dickson J. and at p. 490 *per* Wilson J.

> of these. Such a deprivation does not exist in the case at bar. [Emphasis in original.][68]

50. The U.S. Supreme Court has rejected the argument that the Due Process Clause of the Fourteenth Amendment, the American equivalent of s. 7 of the *Charter*, imposes an affirmative obligation on the State to protect the life and liberty interests of individuals against harm inflicted by private actors. The only exception to this general principle is in the case of those in State custody, but otherwise the Due Process Clause has been found not to include a positive constitutional duty to protect citizens from harm by third parties.[69] The same is true of s. 7.

(iii) The "Duty to Protect" is Not a Principle of Fundamental Justice

51. Even if the Respondent has shown a deprivation of a protected s. 7 *Charter* right owing to Canadian state action, a s. 7 breach arises only if the "duty to protect" constitutes a principle of fundamental justice and Canadian government action was inconsistent with it. This is to say that the notion that the Government is under a positive duty to take steps to extend protection to Canadian citizens abroad must form "a basic tenet of our legal system."[70] For this to be the case, the duty to protect must: (1) be a legal principle; (2) about which there is significant societal consensus that it is fundamental to the way the legal system ought to fairly operate; and (3) possess sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[71] The duty to protect does not satisfy any of these three criteria.

(a) The Need for a Cautious and Incremental Approach

52. In determining whether these requirements have been met in the present case, it is important to note that the term "principles of fundamental justice" has as its function "setting parameters" on the right not to be deprived of life, liberty and security of the

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[68] [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 81
[69] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)
[70] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 503 and 513
[71] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 8; and *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at para. 113

person.[72] Put another way, the issue under s. 7 is the "delineation of the boundaries of the rights and principles in question."[73] In developing these boundaries, McLachlin C.J. has stressed the need to proceed "incrementally."[74] This is an area of the *Charter* where judicial restraint is not only justified but required.

(b) The Erroneous Incorporation of Canada's International Obligations

53. O'Reilly J. grounded his finding that s. 7 of the *Charter* imposes a "duty to protect" on Canada's obligations under various international human rights instruments, namely: the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[75]; the *Convention on the Rights of the Child*[76]; and the *Optional Protocol on the Involvement of Children in Armed Conflict*[77]. O'Reilly J. concluded that Canada's obligations under these instruments satisfy the three criteria under the second stage of the s. 7 *Charter* analysis required to recognize the "duty to protect" as a principle of fundamental justice.[78]

54. There are two problems inherent in O'Reilly J.'s approach to this part of the *Charter* analysis. First, it runs afoul of the well-established principle that Canada's international obligations are not self-executing; that is they do not form part of our domestic law except to the extent that they are incorporated by legislation.[79] We rely on a combination of laws (including the *Charter*), regulations and policies for their effective domestic implementation. Absent such incorporation, these obligations are not directly enforceable in Canadian law and do not create freestanding legal rights.[80] Further, while Canada's international obligations are a relevant and persuasive source of *Charter* interpretation[81],

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[72] *Re B.C. Motor Vehicle Act, supra*, at p. 501
[73] *Malmo-Levine, supra*, at para. 97
[74] *Gosselin, supra,* at para. 79. See also *Chaoulli, supra*, at para. 193 *per* Binnie, LeBel and Fish JJ. (dissenting)
[75] Can. T.S. 1987 No. 36
[76] Can. T.S. 1992 No. 3
[77] Can. T.S. 2002 No. 5
[78] JR at pp. 32-39 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at paras. 53-75)
[79] *Operation Dismantle, supra*, at p. 484 *per* Wilson J.
[80] *Francis v. The Queen*, [1956] S.C.R. 618 at p. 621; *Capital Cities Communications Inc., Taft Broadcasting Co. and WBEN, Inc. v. Canadian Radio Television Commission*, [1978] 2 S.C.R. 141 at pp. 172-173; and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69
[81] *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 at paras. 55-56; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 46; *Health Services and Support – Facilities*

according inordinate interpretive weight to treaty commitments would subject the scope of substantive *Charter* rights to change each time the executive decides to adhere to a new international human rights treaty, effectively amending the *Charter* without regard to the amending formula.

55. The second difficulty relates to O'Reilly J.'s interpretation of the scope of the international human rights obligations. These obligations are limited to Canada's territorial jurisdiction. Article 2(1) of the *Convention against Torture* and Article 2(1) of the *Convention on the Rights of the Child* expressly provide that Canada's obligations under these instruments only extend to "any territory under its jurisdiction" or "child within [its jurisdiction]" respectively.[82] As this Court recognized in *Hape*, Canada cannot exercise jurisdiction over persons outside its territory except with the consent of the host state.[83]

56. O'Reilly J.'s approach to s. 7 of the *Charter* is not the accepted one of relying on Canada's human rights commitments to inform the content of the principles of fundamental justice; rather, they are incorporated directly into the constitution by adoption.[84] By treating s. 7 as the source for the incorporation of these obligations, O'Reilly J. erred.[85]

57. Moreover, even if some positive duties in these international treaties could be viewed as informing the scope of the principles of fundamental justice, they are not a source for finding a duty to protect Canadians outside Canadian territory. The treaties themselves do not impose an obligation on Canada to protect persons, including Canadian citizens, in respect of conditions and treatment to which the Respondent has been subjected outside of Canada by a foreign state or its agents.[86] O'Reilly J. erred in applying Canada's international human rights obligations extraterritorially. Nadon J.A. was very much alive to this fact when he stated in his dissent that "in imposing obligations on Canada, on the

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Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, 2007 SCC 27 at paras. 69-70; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp. 1056-1057; and *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at pp. 349-350 *per* Dickson C.J. and Wilson J. (dissenting)

[82] Can. T.S. 1987 No. 36, Article 2(1); and Can. T.S. 1992 No. 3, Article 2(1)

[83] *Hape, supra*, at paras. 66-69

[84] *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (C.A.) at paras. 33-34, 41 and 49

[85] Warner La Forest, Anne, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 *UBCL Rev.* 157 at pp. 186-188

[86] *Hape, supra*

basis of international instruments to which Canada is a party, O'Reilly J. failed to recognize the territorial limitation of these instruments."[87]

(c) The "Duty to Protect" is Not a Legal Principle

58. The "duty to protect" citizens outside Canadian territory is not a "legal principle" for s. 7 purposes because its recognition requires the impermissible extraterritorial application of the *Charter*, and its existence as a legal principle is undermined by its rejection under international law and by foreign courts which have considered this issue.

59. Any conception of a "right" to protection necessarily involves the extraterritorial application of the *Charter*. A claim of this nature only arises where a Canadian citizen located in another country demands that the Government take positive steps vis-à-vis that individual in response to treatment or conditions to which the citizen is subject in the foreign state. Moreover, any *Charter* remedy invariably contemplates the foreign government, at the behest of the Canadian Government, either doing something or refraining from doing something in relation to the individual in question.

60. The limits on the extraterritorial application of the *Charter* as discussed by this Court in *Hape* pose an insurmountable hurdle to the recognition of a duty to protect as a legal principle. As LeBel J. stated in *Hape*, "[w]hen a state's nationals are physically located in the territory of another state, its authority over them is strictly limited."[88] The Court in *Hape* also reaffirmed the well known principle that Canadian citizens who commit crimes abroad cannot claim the protections of the *Charter*. LeBel J. stated in this regard that "[w]hen individuals choose to engage in criminal activities that cross Canada's territorial limits, they can have no guarantee that they carry *Charter* rights with them out of the country" but rather these "individuals should expect to be governed by the laws of the state in which they find themselves."[89]

61. This Court in *Khadr 2008* held that s. 7 of the *Charter* applied to the process to which the Respondent was subject in Guantánamo Bay to the extent of any Canadian

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[87] JR at p. 96 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 95)
[88] *Hape, supra*, at para. 60
[89] *Ibid.* at para. 99

involvement in the process in violation of Canada's international obligations. By virtue of Canadian participation in that process, s. 7 was engaged and imposed a duty on Canada to provide to the Respondent disclosure of materials in its possession arising from these interviews.[90]

62. Neither *Hape* nor *Khadr 2008* are capable of elevating to a legal principle a mandatory duty under s. 7 of the *Charter* which would require the Government to take steps to safeguard the life, liberty and security interests of Canadian citizens abroad. This is particularly the case where there was no Canadian involvement in the events leading up to their initial apprehension, their ongoing detention, or their treatment while in detention. While the Government undoubtedly has the *discretion* to intervene on behalf of Canadian citizens detained in other countries, there is no legal principle *requiring* the state to extend protection to such individuals and make representations on their behalf, and certainly no legal basis for compelling the Government to request the repatriation of persons in this situation. As explained below, this conclusion is buttressed by international law and court decisions from other jurisdictions.

(d) The Absence of International Recognition of a "Duty to Protect" as a Legal Principle

63. In *R. v. Seaboyer*, McLachlin J., as she then was, stated that the "basic tenets of our legal system" can be defined with reference to "the legal principles which have historically been reflected in the law of this and other similar states."[91] Following this approach, this Court has treated the international context and the law of other states as relevant to interpreting the principles of fundamental justice within the meaning of s. 7 of the *Charter*.[92] As the Court stated in *Suresh*, "[t]he inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law."[93]

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[90] *Khadr 2008, supra*
[91] [1991] 2 S.C.R. 577 at p. 603
[92] *Hape, supra,* at paras. 55-56; *Suresh, supra*, at para. 46; and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 at paras. 79-80 and 90; and *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24 at para. 55
[93] *Suresh, supra*, at para. 46

64. The notion that there exists an identifiable legal principle imposing a positive duty on states to provide protection to citizens abroad is belied by longstanding principles of international law and the weight of authority from comparable jurisdictions which have considered this issue. O'Reilly J., despite accepting that international law recognizes no duty to protect citizens, nonetheless found such a duty in s. 7 of the *Charter*.[94]

65. It is important in this regard to distinguish between two closely related but distinct international law concepts, consular protection and diplomatic protection. The two concepts are sometimes wrongly conflated or used interchangeably. Consular protection concerns intervention on behalf of a national who is in acute distress in a foreign state, including where the person is subject to detention.[95] The *Vienna Convention on Consular Relations*[96] provides States with a treaty-based right to be notified of a detention should the individual so request, and to obtain access to him or her. Consular protection is not dependent on an internationally wrongful act.

66. Diplomatic protection, on the other hand, refers to a State's espousal of a legal claim by a national in respect of an internationally wrongful act attributable to another State, following exhaustion of domestic legal remedies.[97] Through espousal, the State takes on its national's claim as its own, allowing it to seek adjudication or arbitration against the other State in an international forum. By its nature, diplomatic protection involves intervention with the foreign state.

67. As important as these distinctions may be to the conduct of foreign relations, what matters in this case is what is common to the two types of protection: as a matter of international law, the right to seek protection on behalf of a national is that of the State and not the individual concerned. Moreover, the decision by a State whether to exercise this right is entirely at the State's discretion. There can be no duty to make diplomatic representations where there is no legally enforceable duty to protect. The seminal statement of the international law position is found in the decision of the International

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[94] JR at p. 29 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 47)
[95] Currie, John H., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at pp. 577-578
[96] 19 March 1967, 596 U.N.T.S. 261
[97] Currie, *supra, Public International Law*, at p. 579

Court of Justice in *Barcelona Traction, Light and Power Company, Limited.*[98] In that case, the Court described the discretionary nature of diplomatic protection as a right vested in the State alone:

> ...a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand performance of that obligation, and clothe the right with the corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.
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> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that. [Emphasis added.][99]

68. The same view has been expressed by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case[100] and by the U.S. Supreme Court in *Medellin v. Texas.*[101]

69. Significantly, no international human rights instruments provide for a right to consular or diplomatic protection. The closest that any international authority has come to recognizing such a right is contained in a set of draft articles adopted in 2004 by a working group of the International Law Commission ("ILC") established by the UN General Assembly in 1996 to examine the codification and progressive development of diplomatic protection. The draft articles conceive of this right in a manner consistent with *Barcelona Traction*. Specifically, the right of diplomatic protection is described as

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[98] *I.C.J. Reports 1970* at p. 3
[99] *Ibid.* at p. 44, paras. 78-79
[100] *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), 1924 *P.C.I.J. Series A*, No. 2 at p. 12
[101] 552 U.S. (2008) at para. 13. See also *China Navigation Co. v. Attorney General* [1932] 2. K.B. 197 at pp. 213 and 218 (C.A.)

being the prerogative of the State. Draft article 2 states in this regard that "[a] State has the right to exercise diplomatic protection."[102] The commentary to draft article 2 explains that a State is under no obligation to provide this protection.[103]

70. It should be noted that during the drafting stage "[a] proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law."[104] The Commission recognized that this proposal was clearly in conflict with the traditional view under international law.[105]

71. The articles ultimately adopted by the ILC only go so far as recommending that a State having the right to exercise diplomatic protection give "due consideration" to exercising this right, particularly where a significant injury has occurred to one of its nationals. In making this recommendation, the ILC observed that a right of diplomatic protection does not exist as a matter of customary international law. The ILC also reaffirmed the traditional view that States are under no duty to provide diplomatic protection and that the right of diplomatic protection remains that of the State to exercise at its discretion.[106]

72. Domestic courts that have rejected the notion of a duty to provide diplomatic or consular protection have done so through reliance on international law. The English Court of Appeal, in concluding that neither the *European Convention on Human Rights* nor the *Human Rights Act* imposed an enforceable duty on the Foreign Secretary to exercise diplomatic protection on behalf of British citizens abroad, stated that "[i]t is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with

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[102] International Law Commission (2006) *Draft Articles on Diplomatic Protection with Commentaries* UN Doc A61/10 at p. 28
[103] *Ibid.* at p. 29, para. 1-2
[104] International Law Commission (2004) *Report of the International Law Commission on the Work of Its 56th Session (3 May-4 June and 5 July-6 August 2004)* UN Doc A/59/10 at p. 28, para. 2
[105] International Law Commission (2000) *First Report on Diplomatic Protection* UN Doc A/CN.4/506 at pp. 27-34, paras. 75-93
[106] International Law Commission (2006) *Draft Articles on Diplomatic Protection with Commentaries* UN Doc A61/10 at pp. 94-100, paras. 1-8

injury in a foreign State."[107] The Federal Court of Australia, in rejecting a legal duty of diplomatic protection under the Australian Constitution, stated that at its highest this concept is "an unenforceable political duty of imperfect obligation."[108] The Constitutional Court of South Africa, in similarly rejecting a constitutional right to diplomatic protection, noted that "the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such... Diplomatic protection remains the prerogative of the state to be exercised at its discretion."[109]

73. Academics also accept that under current international law, diplomatic protection is a discretionary process which is incapable of conferring substantive rights on individuals.[110] Some commentators have cautioned against the recognition of an obligation to exercise diplomatic protection, citing the undesirable consequences that could flow from the creation of such a right. As one writer on the subject has stated:

> As eminent scholars have stressed, such an evolution could either create serious frictions between States, as there would probably be floods of requests for the exercise of diplomatic protection that States would be obliged to take into account, or the constant invocation thereof could lead to its weakening and trivialization. In our view, the reality is that diplomatic protection remains a highly political institution that cannot be turned into a duty for the State on the basis of a misconceived idea of effectiveness because ultimately it will become a completely inoperative mechanism.[111]

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[107] *R. (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 at para. 69. See also *R. (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2006] EWCA Civ 1279 at para. 60

[108] *Habib v Commonwealth of Australia (No. 2)* [2009] FCA 228 at paras. 61-62, citing with approval *Hicks v. Ruddock* [2007] FCA 299 at paras. 62-66

[109] *Kaunda v. President of the Republic of South Africa* [2004] ZACC 5 at para. 29

[110] Forcese, Craig, "The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad" (2007) 57 *UNBLJ* 102 at pp. 109-111; Klein, Natalie and Barry, Lise, "A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality" (2007) 13(1) *AJHR* 1 at pp. 15-17; McGregor, Lorna, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" (2007) 18(5) *EJIL* 903 at pp. 908-911; Dugard, John, "Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission" (2005) 24 *Aust. YBIL* 75 at pp. 80-81, 83 and 91; and Warbick, Colin and McGoldrick, Dominic, "Diplomatic Representations and Diplomatic Protection" (2002) 51 *Int'l & Comp. L.Q.* 723 at p. 731

[111] Pergantis, Vasileios, "Towards a "Humanization" of Diplomatic Protection?" (2006) 66 *HJIL* 351 at p. 393

74. It has also been suggested that rights to diplomatic protection could impede the work of the international criminal tribunals insofar as governments may resist the prosecution and surrender of their nationals to these bodies by making claims of diplomatic protection on their behalf.[112] As well, some writers have pointed out that the efficacy of diplomatic protection in assisting nationals depends on this right remaining that of States to exercise as States are better able to advance claims of diplomatic protection against other States in the international arena than are individual citizens.[113]

75. Domestic courts, in rejecting a legal duty on the part of the State to provide diplomatic or consular protection on behalf of its citizens, have pointed out that recognizing such a duty would necessarily require courts to assess the wisdom of foreign policy decisions taken by the executive which the judiciary is precluded from doing. The English Court of Appeal in *Abassi* stated that in reviewing such a decision "the court cannot enter the forbidden areas, including decisions affecting foreign policy."[114] Similarly, the Federal Court of Australia in *Habib* observed that "[t]o embark upon a substantive consideration of whether the foreign policy steps taken by the Commonwealth were reasonable would involve this Court in directly examining the merits of Australian foreign policy....such a duty cannot be countenanced."[115]

76. The Constitutional Court of South Africa has noted that a duty to extend consular protection is also potentially incompatible with State sovereignty. The Court in *Kaunda* stated in this regard:

> For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.[116]

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[112] Deen-Racsmány, Zsuzsanna, "Diplomatic Protection and International Criminal Law: Can the Gap Be Bridged?" (2007) 20 *LJIL* 909 at pp. 918-920

[113] Vermeer-Kunzli, Annemarieke, "As If: The Legal Fiction in Diplomatic Protection" (2007) 18:1 *EJIL* 37 at pp. 67-68

[114] *Abassi, supra*, at para. 106

[115] *Habib, supra*, at para. 62

[116] *Kaunda, supra*, at para. 44

77. Thus, in contrast to the recent decision of this Court in *R. v. D.B.*[117] in which the majority relied heavily on international consensus in recognizing the presumption of diminished moral capacity in young persons as a principle of fundamental justice, the "duty to protect" does not enjoy comparable international support. Quite the opposite: the international consensus is clearly that the duty to protect is not an accepted legal principle.

(e) The "Duty to Protect" is neither Vital nor Fundamental to Our Societal Notion of Justice

78. This requirement is concerned with whether the right claimed is viewed as a critical component of our justice system. This was made abundantly clear in the *Re B.C. Motor Vehicle Act* case where Lamer J., as he then was, wrote that "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system."[118] To similar effect is the explanation of this requirement by McLachlin C.J. in *Canadian Foundation for Children, Youth and the Law*:

> The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. [Emphasis added.][119]

79. There can be no societal consensus that a "duty to protect" is vital to the operation of domestic court proceedings. Rather, as in this case, it will only ever be asserted by Canadian citizens who are involved in the justice systems of foreign states in relation to the administration of justice in those countries. Canadian courts should not be used to lobby the Government to exercise its discretion in a particular way.

80. Thus, far from being vital or fundamental to our societal notion of justice, a "duty to protect" is irrelevant to the way in which our justice system operates. For this reason alone, the right claimed cannot satisfy the second requirement. It is not a "basic tenet of

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[117] [2008] 2 S.C.R. 3, 2008 SCC 25 at paras. 47-61 and 67
[118] *Re B.C. Motor Vehicle Act, supra,* at p. 512
[119] *Canadian Foundation for Children, Youth and the Law, supra,* at para. 8

our legal system" because the right alleged does not and cannot form part of our system of justice or its administration.

(f) The "Duty to Protect" Cannot Be Gauged With Any Precision

81. O'Reilly J. found that the "duty to protect" requires Canada to protect the Respondent "from being subjected to any torture or other cruel, inhuman or degrading treatment or punishment, from being unlawfully detained, and from being locked up for a duration exceeding the shortest appropriate period of time"[120] as well as "to take all appropriate measures to promote" the Respondent's "physical, psychological and social recovery."[121]

82. Although Nadon J.A. found it unnecessary to determine whether O'Reilly J. erred in finding a duty to protect in s. 7 of the *Charter*, he stated that this obligation as conceived by the trial judge made it "impossible to understand how Canada could ever fulfill the duty of protection."[122] This assessment is compelling. The "duty to protect" recognized by O'Reilly J. and endorsed by the majority of the Court of Appeal does not lend itself to a manageable constitutional standard. Indeed, it cannot be identified with any degree of precision to satisfy the third criterion.

83. As Nadon J.A. appreciated, the notion of a right to diplomatic protection invites more questions than it answers.[123] What level of oversight would be required to enable Canadian authorities to monitor conditions of detention in other countries in a way that would satisfy this duty? How would the duty to protect apply in the deportation and extradition contexts? What types of conditions or treatment would obligate Canadian officials to make diplomatic representations to foreign states? What would the nature of any representations have to be for this duty to be met? At what point would the Government be constitutionally required to request repatriation? The decision of O'Reilly J. and the majority judgment of the Court of Appeal do not offer any meaningful guidance as to how to go about answering these complex, fact-laden policy questions.

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[120] JR at pp. 35-36 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 64)
[121] JR at p. 36 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 65)
[122] JR at p. 96 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 96)
[123] JR at p. 96 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 96)

84. LeBel J. stated in *Ruzic* that the Court's duty in interpreting s. 7 of the *Charter* requires that it only consider as principles of fundamental justice "concepts which are constrained and capable of being defined with reasonable precision."[124] LeBel J. noted that any other approach "would inject an unacceptable degree of uncertainty into the law."[125] The "duty to protect" found by the Federal Court of Appeal in this case is the very embodiment of the type of amorphous concept against which this Court cautioned in *Ruzic*.

C. If There is a "Duty to Protect" it Has Been Satisfied in this Case

85. In the alternative, if the Government owed a "duty to protect" the Respondent in the circumstances of this case, Canada's actions satisfied this duty. The decision of the executive to await the results of the foreign trial rather than requesting the Respondent's immediate repatriation is reasonable and should not be disturbed.

86. If a review of the decision whether to request repatriation does not simply involve questioning the wisdom of the Government's "decision and policy" not to request the Respondent's repatriation but also possesses a *Charter* dimension based on a "duty to protect" under s. 7, then the standard of review is one of reasonableness and the decision is to be accorded substantial deference.

87. In *Dunsmuir v. New Brunswick*, this Court noted that where the decision subject to review is a fact-based decision involving the exercise of discretion or policy considerations the appropriate standard of review will be that of reasonableness which standard warrants a deferential approach.[126] The level of deference owed a decision reviewed against the reasonableness standard will vary depending on the nature of the decision. A highly deferential approach will be justified in the case of decisions involving exceptional and discretionary forms of relief which the constitution has vested

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[124] *Ruzic*, *supra*, at para. 41
[125] *Ibid.*
[126] [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 53

in the executive and not the courts.[127] This is the case regardless of whether the decision under review also engages s. 7 *Charter* rights.[128]

88. There are two salient features of the decision not to request repatriation which support a high degree of deference in applying the reasonableness standard of review to this decision. First, this decision is a discretionary one for the executive; there is no right to demand repatriation, nor is there any duty on the part of the executive to consider a repatriation request. Second, this decision invariably involves matters of foreign affairs and international relations. It is the executive, not the courts, which is best equipped to deal with such issues.

89. This Court has repeatedly held that highly discretionary decisions are presumptively due deference and that the decision-makers involved should be given "substantial leeway."[129] The Court has also long recognized that responsibility for the conduct of Canada's foreign relations is vested in the executive who have a much greater expertise than the courts in this area.[130] The Court has emphasized in this regard the importance of the judiciary respecting the role of the executive and the institutional limits on courts in reviewing executive action.[131] As one U.S. federal appeals court has trenchantly observed, "[w]hen foreign affairs are involved the national interest has to be expressed through a single authoritative voice."[132]

90. Moreover, as with Ministerial decisions to deport or extradite, an executive decision not to seek the repatriation of a Canadian citizen possesses a negligible legal dimension.[133] The comments of La Forest J. in the extradition context are apposite to the case at bar:

> The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the

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[127] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 57- 62
[128] *Lake, supra*, at paras. 37-39
[129] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 at para. 18; and *Baker, supra*, at para. 56
[130] *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at p. 523; *Argentina v. Mellino*, [1987] 1 S.C.R. 536 at pp. 557-559; *United States of America v. Allard*, [1987] 1 S.C.R. 564 at pp. 572-573; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p. 659
[131] *Vriend, supra,* at para. 136; and *Chaoulli, supra*, at para. 184
[132] *United States v. Li*, 206 F.3d 56 at p. 67 (1st Cir., 2000)
[133] *Suresh, supra,* at para. 39; and *Lake, supra*, at paras. 38-39

> courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance. [Emphasis added.][134]

91. Indeed, judicial review of a decision not to seek the repatriation of a Canadian citizen, like the review of a decision to extradite, "must be exercised with the utmost circumspection consistent with the executive's pre-eminent position in matters of external relations."[135] As in the extradition context, given the Minister's expertise in the area of foreign relations, he is in the best position to determine whether the factors weigh in favour of or against requesting the repatriation of a Canadian citizen.[136]

92. In applying the reasonableness standard of review, a key distinction to be borne in mind as between the executive decision whether to request repatriation and the executive decision whether to extradite is that the former is discretionary in the truest sense of the word. This is to be contrasted with the latter which, although discretionary in nature, is a statutorily mandated decision from which there is an automatic right of judicial review.[137] Conversely, a decision whether to request repatriation is not a decision that the responsible Minister is required to make. In fact, the Minister is not even obliged to respond to such a request. Rather, it is the prerogative of the Minister as part of the conduct of foreign affairs to seek the repatriation of Canadian citizens from abroad. As the Court of Appeal noted, s. 10 of the *Department of Foreign Affairs and International Trade Act*[138], which authorizes the executive to request the repatriation of a Canadian citizen detained in a foreign country, is not subject to any statute or regulation governing the exercise of the Minister's discretion.[139]

93. Decisions of foreign courts which have considered this issue have all recognized the desirability of a highly deferential standard of review. Courts in England, Germany and South Africa have each held that there is an extremely narrow scope for judicial review of decisions of the executive in this area.

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[134] *Schmidt, supra*, at p. 523
[135] *Mellino, supra*, at pp. 557-558
[136] *Lake, supra*, at para. 41
[137] *Extradition Act*, S.C. 1999, c. 18, ss. 40 and 57
[138] R.S.C. 1985, c. E-22
[139] JR at p. 74 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 41)

94. In *Abassi*, the English Court of Appeal held that it will be the "extreme case" where a court will disturb a decision by the executive declining to exercise its discretion to consider a repatriation request. The Court stated:

> The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth officer were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case.[140]

95. While the Court in *Abassi* held that the exercise of discretion by the executive in responding to requests for protection might be reviewable if it could be demonstrated that the decision of the executive not to consider such requests was "irrational" or "contrary to legitimate expectation" (a doctrine which has wider scope in the U.K.[141]), even in these cases, the reviewing court would be precluded from entering into the "forbidden areas" of foreign policy inherent in decisions involving the making of diplomatic representations.[142]

96. Similarly, in *Kaunda*, the Constitutional Court of South Africa held that the government has a broad discretion in considering requests for diplomatic protection and the courts must generally respect those decisions. The Court identified those limited circumstances in which a court would be justified in intervening as where the government "refuses to consider a legitimate request, or deals with it in bad faith or irrationally."[143] The Court acknowledged that executive decisions in relation to diplomatic protection are matters of foreign policy to which reviewing courts are to defer.[144]

97. Even the Federal Constitutional Court of Germany in *Hess,* despite recognizing a constitutional right to diplomatic protection, held that "the Federal Government enjoys a wide discretion in deciding the question of whether and in what manner to grant protection against foreign States", noting that the role of the courts was limited to

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[140] *Abassi, supra*, at para. 104
[141] *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281, 2001 SCC 41 at paras. 22-37; and *Ahani, supra*, at paras. 58-59 and 63
[142] *Ibid.* at para. 106
[143] *Kaunda, supra*, at paras. 77-81
[144] *Ibid.* at paras. 77 and 177

reviewing "the acts and omissions of the Federal Government for abuses of discretion."[145]

98. The level of deference is arguably heightened where consular or diplomatic protection is sought to immunize an individual from foreign court proceedings. Diplomatic action of this nature has been characterized as "an attempt to influence and interfere with the legal process of a friendly foreign State" involving matters of "high government policy in the conduct of foreign relations" which is pre-eminently an area for the executive and not for the courts.[146]

99. Thus, assuming that Canada has jurisdiction to prosecute the Respondent for the conduct which is the subject of the American charges, there is nothing unreasonable about the executive deferring to the judicial processes underway in the U.S., a country with similar constitutional safeguards. The principles of comity and sovereignty militate against interfering with this process.[147] In the extradition context, the Court has expressed this principle in these terms: "[a] Canadian citizen who leaves Canada for another state must expect that he will be answerable to the justice system of that state in respect of his conduct there."[148]

100. O'Reilly J. found that the "duty to protect persons in [the Respondent's] circumstances" obliged Canada to take "appropriate steps to ensure that [the Respondent's] treatment accorded with international human rights norms."[149] However, he provided little guidance as to what international human rights norms require of Canada in these circumstances if it is to satisfy this duty. O'Reilly J. expressed concerns about: the Respondent's youth; his need for medical care; the lack of opportunity for education; the lack of consular access; the lack of access to legal counsel; the limitations on family contact; the Respondent's initial inability to challenge his detention or the conditions of

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[145] *Rudolf Hess Case* (Case No 2 BvR 419/80) (1980) 90 *ILR* 386 at p. 395 (Fed. Rep. of Germany Constitutional Court)
[146] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt* (1999) 116 *ILR* 607 at p. 620 (England, High Court and Court of Appeal)
[147] *R. v. Finta*, [1994] 1 S.C.R. 701 at p. 747 *per* La Forest, L'Heureux-Dubé and McLachlin JJ. (dissenting)
[148] *United States of America v. Cotroni*; *United States of America v. El Zein*, [1989] 1 S.C.R. 1469 at p. 1510; and *Burns, supra*, at para. 72
[149] JR at pp. 38-39 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at paras. 71 and 75)

confinement in a court of law; and Canada's knowledge that he had been mistreated by U.S. officials. The majority of the Court of Appeal expressed the same concerns, focussing on the knowledge of mistreatment of the Respondent by U.S. officials. But the majority, while endorsing the notion of a "duty to protect", similarly do not offer any assistance as to how this duty is to be discharged.

101. Moreover, what is conspicuously absent from the decision of O'Reilly J. and that of the majority of the Court of Appeal is any consideration of whether Canada's ongoing efforts to date to protect the Respondent's health and welfare have satisfied any "duty to protect." The Appellants submit that if such a duty exists, then, as found by Nadon J.A. in his dissent, this duty has been met in the case at bar with the result that there is no breach of s. 7 of the *Charter* and therefore no basis for the remedy imposed.

102. As the Respondent did not dispute the steps taken by Canada to ensure his well-being, Nadon J.A. reproduced Canada's submissions summarizing these steps in their entirety.[150] After assessing what steps would be appropriate to protect the Respondent given Canada's lack of control over the Respondent's circumstances and what steps Canada has taken, Nadon J.A. concluded that "Canada has taken all necessary means at its disposal to protect Mr. Khadr during the whole period of his detention in Guantánamo Bay."[151] Nadon J.A. properly recognized the limited control Canada can exercise in respect of the Respondent's detention:

> ...the only possible steps that Canada could take, looking at the matter fairly and realistically, are the ones that it took through the diplomatic channel which I have outlined at paragraph 13 of these Reasons. To this I would add that there were, in my view, no specific means by which Canada was bound to act. As the only means available to Canada were though the diplomatic channel, the means to be employed could only be determined by Canada in the exercise of its powers regarding matters of foreign policy and national interest.[152]

103. Both O'Reilly J. and the majority of the Court of Appeal erred by failing to consider what steps could appropriately be taken by Canadian officials to protect the Respondent and further erred by failing to determine whether those steps taken by

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[150] JR at pp. 92-93 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 88)
[151] JR at p. 91 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 86)
[152] JR at p. 97 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 98)

Canada to protect the Respondent met any "duty to protect." If there is any obligation to protect the Respondent under s. 7 of the *Charter*, it has been satisfied by the actions taken by Canada to date. In these circumstances, the decision not to request the Respondent's repatriation is reasonable.

D. The Remedy Imposed Was an Inappropriate One

104. Assuming, contrary to what has been argued above, that there is a breach of the *Charter* which has not already been remedied, the remedy imposed by O'Reilly J. and affirmed by the Court of Appeal is not an "appropriate and just" one. The remedy of requiring the government to ask for repatriation offends at least three key principles of s. 24(1) jurisprudence, in that it: (a) fails to respect the institutional competence of the courts; (b) is not responsive to the nature of the breach; and (c) is ineffective. The Court of Appeal wrongly deferred to a decision that violated these basic principles.[153]

(i) The Remedy Exceeds the Proper Role of the Courts

105. This Court has always been very circumspect in fashioning *Charter* remedies which may impinge upon the government's ability to carry out its responsibilities. In *Mahe*[154], in respect to minority language rights in education, the Court stressed the importance of leaving the government with the flexibility of fashioning a response suited to the circumstances. In *Schachter*[155], the Court held that s. 52 remedies such as severance or reading in could only be employed where strict criteria were adhered to. In *Ferguson*[156], the Court rejected s. 24(1) constitutional exemptions as a remedy for unconstitutional mandatory minimum sentencing schemes, in part because of its respect for the role of Parliament.

106. In *Doucet-Boudreau*, this Court reflected on the proper role of courts, while considering the nature of remedies available under s. 24 of the *Charter*. The majority concluded that an appropriate and just remedy is sensitive to the functional separation among the executive, legislative and judicial branches of government. The Court stated:

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[153] JR at p. 84 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 66); and *R. v. Carosella*, [1997] 1 S.C.R. 80 at paras. 48-50
[154] *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at pp. 392-393
[155] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at pp. 705-715
[156] *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6 at paras. 50-56

> ...an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationship with and separation of functions among the legislature, the executive and the judiciary.
>
> ...an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent. [Emphasis added.][157]

107. Any consideration of remedies which intrude on the executive's exclusive power to conduct foreign relations also requires the utmost circumspection for several reasons. First, the recognition of a robust s. 24(1) remedy such as ordering the Government to make specific representations to a foreign country risks using one part of the constitution to overrule another part of the constitution. Executive power, including the power to conduct foreign relations, rests with the Crown by virtue of s. 9 of the *Constitution Act, 1867*.[158] Applications for *Charter* relief must respect our constitutional structure.[159]

108. This is not to say that the Court should revisit its decision in *Operation Dismantle* and find review of foreign policy decisions non-justiciable. *Operation Dismantle* did not reach the question of what kind of remedy might be imposed where a foreign policy decision may breach a person's s. 7 *Charter* rights. Should this Court find such a breach, there must be careful consideration of the scope of potential remedies.

109. Courts in other jurisdictions have approached such issues with a healthy degree of diffidence, appropriately recognizing the limitations on the institutional competence of courts in weighing in on matters of foreign affairs and international relations. The U.S. Supreme Court has stated:

> ...the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be

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[157] *Doucet-Boudreau, supra*, at paras. 56-57

[158] *Re Resolution to Amend the Constitution of Canada*, [1981] 1 S.C.R. 753 at p. 876; and *Black, supra*, at paras. 25-27

[159] *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 28; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paras. 4 and 33; and *Doucet-Boudreau, supra*, at para. 42

> undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility, and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[160]

110. Similarly, the English Court of Appeal has cautioned:

> Whether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the courts.[161]

111. The approaches of these courts stand in sharp contrast to that of the majority in the Court of Appeal, which made the remarkable assertion that the Government had failed to adduce evidence that the remedy sought would damage its relations with the U.S.[162], as if the issue were susceptible to forensic proof. Moreover, the issue is not simply about "damage", but about the nuances of effective diplomacy, which is not a matter for the courts. The fact that courts in the Commonwealth, a constitutional republic like the U.S. and a civil law country like Germany have all taken similar approaches shows that there is a fundamental value at play.

112. The proposed remedy of O'Reilly J. raises a second issue of institutional competence, relating to the exercise of prosecutorial discretion. The Court of Appeal gave this subject short shrift, noting that if the Respondent were to be returned, the Attorney General would have the discretion to prosecute or not, as well as suggesting that Canada had lost its right to consider that discretion through its own conduct.[163] With respect, the issue is not that simple. The remedy assumes, for example, that it is a matter of a straightforward diplomatic request, to which a simple yes or no answer will be given. But what if the answer from the U.S. is "yes, we will return him, but only if you agree to prosecute him." Or, "yes, we will return him, but only if you agree to prosecute him for substantially the same offences with which he is presently charged." The potential for the attachment of conditions complicates the issue. Even if the majority were right that prosecutorial discretion is preserved, they failed to realize that the attachment of conditions

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[160] *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103 at p. 111 (1948)
[161] *Ex parte Ferhut Butt, supra*, at p. 622
[162] JR at p. 82 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 59)
[163] JR at p. 87 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 73)

would show just how ineffective the remedy would be: if Canada refused to agree to the condition, would the failure to agree become reviewable?

113. The approach of the courts below is also inconsistent with the approach of this Court in matters of extradition. The principle applied in that field is that it is up to the Minister of Justice to determine what weight to give to the prosecution interests of requesting states. This Court has recently said that that is a political decision, not a legal one.[164] The judgment of the Court of Appeal fails to respect the fundamental divide between the judicial and executive branches in criminal matters.

(ii) The Remedy is Not Responsive to the *Charter* Breach

114. The remedy imposed fails to respect a second important principle, that is, that the remedy be responsive to the nature of the breach.[165] This issue is rendered more difficult by the somewhat ambiguous nature of the majority decision: is the remedy intended to respond to wrongful interviewing and transmission of information by Canadian officials, or the refusal of the government to take a specific positive step - a request for repatriation - predicated on an ill-defined duty to protect the Respondent?

115. Seen as a remedy for wrongful interviewing and transmission of information, a requirement that the Government seek the Respondent's repatriation in no way responds to the nature of the breach. By contrast, the Respondent has already received two remedies that were: von Finckenstein J. issued an interim injunction against further interviewing in the context of the *Charter* damages action concerning the interviewing, and this Court ordered the Government to surrender the fruits of the interviews to the Respondent, subject to editing to protect national security interests. Those remedies helped ensure the fairness of the trial process the Respondent would face.

116. It is difficult to see the remedy imposed as anything other than an attempt to punish the Crown for past misconduct, rather than force it to comply with a legal duty to afford current protection. O'Reilly J. characterized the justification for the remedy as a failure to respect the Crown's duty "to take all appropriate measures to promote Mr.

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[164] *Lake, supra*, at para. 37
[165] *Doucet-Boudreau, supra*, at para. 25

Khadr's physical, psychological and social recovery."[166] Characterizing the scope of the duty in such an expansive manner is capable of justifying an almost infinite array of remedies, but it is an overly-ambitious and unjustifiable characterization.

117. For its part, the Court of Appeal seemed to focus on the fact of conducting an interview of the Respondent with knowledge that he had been sleep-deprived, a fact which it felt "'opens up a different dimension' of a constitutional and justiciable nature."[167] Even if the DFAIT official should not have interviewed the Respondent in those circumstances in 2004 - which is not conceded since consular and welfare visits had been denied to that point in time - it can hardly serve as a justification to request repatriation in 2009. Much has changed, including the order made by the new American President and the permission to conduct welfare visits. The remedy granted fails to take changed circumstances into account.

118. Before either court awarded a *mandamus*-like remedy, they ought to have considered the *Apotex* test for imposing *mandamus*.[168] Had they done so, the inappropriateness of the remedy, and particularly its lack of responsiveness to the impugned conduct, would have been readily apparent. The courts would have had to consider whether the actions of one DFAIT official on one occasion gave rise to an enforceable duty against the Government as a whole. The courts would have also had to consider the largely unqualified nature of the Government's authority to conduct foreign relations, and whether any other remedy was adequate.

(iii) The Remedy is Ineffective

119. The third remedial principle that the courts below failed to respect concerns the effectiveness of the proposed remedy.[169] The Respondent's real complaint is against the U.S. officials who subjected him to sleep deprivation, not those who interviewed him later. And the remedy he seeks, repatriation, is not fairly aimed at those who interviewed him, but is intended to deprive his captors of the ability to try him because of their

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[166] JR at p. 36 (Reasons for Judgment of the Federal Court Trial Division dated April 23, 2009 at para. 65)
[167] JR at pp. 81-82 (Reasons for Judgment of the Federal Court of Appeal dated August 14, 2009 at para. 58)
[168] *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), affirmed [1994] 3 S.C.R. 1100
[169] *Doucet-Boudreau*, *supra*, at para. 25

actions. Effective remedies are not ones aimed at those over whom the court has no control. The integrity and reputation of the Canadian justice system is not enhanced by over-reaching.

120. The Respondent is not without any possible remedy for the discovery of the new fact about Canadian knowledge of the Respondent's sleep deprivation. In his ongoing *Charter* damages action against the Government, he has amended his pleadings to take account of this. It may be a relevant factor in those proceedings. However, it alone is insufficient to justify the *mandamus*-like remedy imposed in this case.

PART IV - COSTS

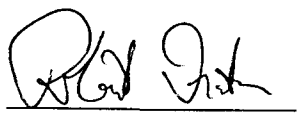
121. The Appellants do not seek costs.

PART V – ORDER SOUGHT

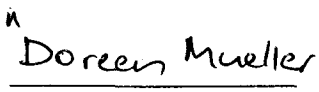
122. The Appellants request that the appeal be allowed, the order of the Federal Court of Appeal be set aside, and the application for judicial review be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Ottawa, in the Province of Ontario, this 21st day of September, 2009.



Robert J. Frater



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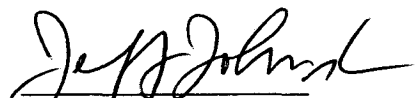

Jeffrey G. Johnston

Counsel for the Attorney General of Canada

PART VI - TABLE OF AUTHORITIES

PART VII – RELEVANT LEGISLATIVE PROVISIONS

	TAB
Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, s. 10	A
Extradition Act, S.C. 1999, c. 18, ss. 40 and 57	B

TAB "A"

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

10. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development.	**10.** (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à la conduite des affaires extérieures du Canada, notamment en matière de commerce international et de développement international.
(2) In exercising his powers and carrying out his duties and functions under this Act, the Minister shall (*a*) conduct all diplomatic and consular relations on behalf of Canada; (*b*) conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization; (*c*) conduct and manage international negotiations as they relate to Canada; (*d*) coordinate Canada's international economic relations; (*e*) foster the expansion of Canada's international trade and commerce; (*f*) have the control and supervision of the Canadian International Development Agency; (*g*) coordinate the direction given by the	(2) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi, le ministre : *a*) dirige les relations diplomatiques et consulaires du Canada; *b*) est chargé des communications officielles entre le gouvernement du Canada, d'une part, et les gouvernements étrangers ou les organisations internationales, d'autre part; *c*) mène les négociations internationales auxquelles le Canada participe; *d*) coordonne les relations économiques internationales du Canada; *e*) stimule le commerce international du Canada; *f*) a la tutelle de l'Agence canadienne de développement international; *g*) coordonne les orientations données par le gouvernement du Canada aux chefs des missions diplomatiques et consulaires du Canada; *h*) assure la gestion des missions diplomatiques et consulaires du Canada; *i*) assure la gestion du service extérieur;

Government of Canada to the heads of Canada's diplomatic and consular missions; (*h*) have the management of Canada's diplomatic and consular missions; (*i*) administer the foreign service of Canada; (*j*) foster the development of international law and its application in Canada's external relations; and (*k*) carry out such other duties and functions as are by law assigned to him. (3) The Minister may develop and carry out programs related to the Minister's powers, duties and functions for the promotion of Canada's interests abroad including: (*a*) the fostering of the expansion of Canada's international trade and commerce; and (*b*) the provision of assistance for developing countries.	*j*) encourage le développement du droit international et son application aux relations extérieures du Canada; *k*) exerce tous autres pouvoirs et fonctions qui lui sont attribués de droit. (3) Le ministre peut élaborer et mettre en oeuvre des programmes relevant de ses pouvoirs et fonctions en vue de favoriser les intérêts du Canada à l'étranger, notamment : *a*) de stimuler le commerce international du Canada; *b*) d'aider les pays en voie de développement.

TAB "B"

40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.	**40.** (1) Dans les quatre-vingt-dix jours qui suivent l'ordonnance d'incarcération, le ministre peut, par un arrêté signé de sa main, ordonner l'extradition vers le partenaire.
(2) Before making an order under subsection (1) with respect to a person who has made a claim for refugee protection under the *Immigration and Refugee Protection Act*, the Minister shall consult with the minister responsible for that Act.	(2) Si l'intéressé demande l'asile au titre de la *Loi sur l'immigration et la protection des réfugiés*, le ministre consulte le ministre responsable de l'application de cette loi avant de prendre l'arrêté.
(3) The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.	(3) Avant d'extrader, le ministre peut demander au partenaire de lui fournir les assurances qu'il estime indiquées ou poser les conditions qui lui paraissent appropriées, y compris celle voulant que l'intéressé ne soit poursuivi, se fasse infliger une peine ou la purge qu'en rapport avec les infractions pour lesquelles l'extradition est accordée.
(4) If the Minister subjects surrender of a person to assurances or conditions, the order of surrender shall not be executed until the Minister is satisfied that the assurances are given or the conditions agreed to by the extradition partner.	(4) Le cas échéant, l'extradition est retardée jusqu'à ce que le ministre soit satisfait des assurances reçues ou qu'il estime que les conditions sont acceptées.
(5) If the person has made submissions to the Minister under section 43 and the	(5) Le ministre, s'il est d'avis qu'un délai supplémentaire est nécessaire pour rendre une décision par suite des observations que lui présente l'intéressé en vertu de l'article 43, peut proroger le délai qui lui est imparti au paragraphe (1) :

Minister is of the opinion that further time is needed to act on those submissions, the Minister may extend the period referred to in subsection (1) as follows: (*a*) if the person is the subject of a request for surrender by the International Criminal Court, and an issue has been raised as to the admissibility of the case or the jurisdiction of that Court, for a period ending not more than 45 days after the Court's ruling on the issue; or (*b*) in any other case, for one additional period that does not exceed 60 days. (6) If an appeal has been filed under section 50 and the Minister has extended the period referred to in subsection (1), the Minister shall file with the court of appeal a notice of extension of time before the expiry of that period.	*a*) dans le cas où l'intéressé fait l'objet d'une demande de remise par la Cour pénale internationale et qu'il doit se pencher sur une question de recevabilité ou de compétence, d'au maximum quarante-cinq jours après que la Cour pénale internationale a rendu une décision sur la remise; *b*) dans les autres cas, d'au maximum soixante jours. (6) En cas d'appel interjeté conformément à l'article 50 et de prorogation du délai de quatrevingt- dix jours, le ministre dépose un avis de prorogation à la cour d'appel avant l'expiration de ce délai.
57. (1) Despite the *Federal Courts Act*, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40. (2) An application for judicial review may be made by the person. (3) An application for judicial review shall be made, in accordance with the rules of	**57.** (1) Malgré la *Loi sur les Cours fédérales*, la cour d'appel de la province où l'incarcération a été ordonnée a compétence exclusive pour connaître, conformément au présent article, de la demande de révision judiciaire de l'arrêté d'extradition pris au titre de l'article 40. (2) La demande peut être présentée par l'intéressé. (3) La demande est faite, en conformité avec

court of the court of appeal, within 30 days after the time the decision referred to in subsection (1) was first communicated by the Minister to the person, or within any further time that the court of appeal, either before or after the expiry of those 30 days, may fix or allow.	les règles de pratique et de procédure de la cour d'appel, dans les trente jours suivant la première communication de l'arrêté à l'intéressé par le ministre, ou dans le délai supérieur que la cour d'appel peut, avant ou après l'expiration de ces trente jours, fixer.
(4) Section 679 of the *Criminal Code* applies, with any modifications that the circumstances require, to an application for judicial review.	(4) L'article 679 du *Code criminel* s'applique, avec les adaptations nécessaires, aux demandes présentées en application du présent article.
(5) An application for judicial review shall be scheduled for hearing by the court of appeal at an early date whether that date is in or out of the prescribed sessions of that court.	(5) La demande est inscrite pour audition dans les meilleurs délais que la cour soit ou non en session.
(6) On an application for judicial review, the court of appeal may (*a*) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to do or has unreasonably delayed in doing; or (*b*) declare invalid or unlawful, quash, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister referred to in subsection (1).	(6) Saisie de la demande, la cour d'appel peut : *a*) ordonner au ministre d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; *b*) déclarer nul ou illégal, annuler, infirmer, ou infirmer et renvoyer pour décision suivant ses instructions, l'arrêté d'extradition, en restreindre la portée ou en interdire la prise.
(7) The court of appeal may grant relief	(7) Elle peut prendre les mesures prévues au présent article pour les mêmes motifs que la Cour fédérale peut le faire en application du paragraphe 18.1(4) de la *Loi sur les Cours fédérales*.

under this section on any of the grounds on which the Federal Court may grant relief under subsection 18.1(4) of the *Federal Courts Act*. Motifs (8) If the sole ground for relief established in an application for judicial review is a defect in form or a technical irregularity, the court of appeal may (*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; or (*b*) in the case of a defect in form or a technical irregularity in the decision, make an order validating the order, to have effect from the time and on the terms that it considers appropriate. (9) If an appeal under section 49 or any other appeal in respect of a matter arising under this Act is pending, the court of appeal may join the hearing of that appeal with the hearing of an application for judicial review. (10) Unless inconsistent with the provisions of this Act, all laws, including rules, respecting judicial review in force in the province of the court of appeal apply, with any modifications that the circumstances require, to applications under this section.	(8) Elle peut rejeter toute demande fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun tort grave ni déni de justice et, le cas échéant, valider la décision entachée de vice et lui donner effet selon les modalités qu'elle estime indiquées. (9) En cas d'appel en instance interjeté dans le cadre de l'article 49 ou fondé sur la présente loi, elle peut joindre l'audition de l'appel à celle d'une demande de révision judiciaire. (10) Sauf incompatibilité avec la présente loi, les lois ou règles relatives à la révision judiciaire en vigueur dans la province s'appliquent, avec les adaptations nécessaires, aux demandes présentées au titre du présent article.