Court File No. 32147

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

BETWEEN:

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, MINISTER OF FOREIGN AFFAIRS, DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Appellants

- and -

OMAR AHMED KHADR

Respondent

FACTUM OF THE APPELLANTS, THE ATTORNEY GENERAL OF CANADA ET AL

(pursuant to 42 of the Rules of the Supreme Court of Canada)

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PART I – CONCISE STATEMENT OF THE FACTS

A) OVERVIEW

1. Six years after he left Canadian law and legal procedures behind,[1] the Respondent was detained by the United States ("U.S.") military following a battlefield confrontation that took place in Afghanistan in July, 2002. He now faces prosecution before a U.S. Military Commission for his alleged conduct in Afghanistan in June and July of 2002. The only evidence of any Canadian involvement with the Respondent was the fact that long after the time frame described in the charges, Canadian Security Intelligence Service ("CSIS") officials interviewed him during his detention in Guantánamo Bay, Cuba. Summaries of those interviews were shared with U.S. authorities. Despite the

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[1] *R. v. Hape* 2007 SCC 26 at para.99 [*Hape*];United *States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 72 [*Burns*]. The Respondent is a Canadian citizen, who would have been about 9 years old at the time he left Canada.

absence of Canadian proceedings or state action, the Federal Court of Appeal held that s. 7 of the *Charter* and this Court's decision in *R. v. Stinchcombe*[2] required that the Appellants produce all documents in their possession that "might be relevant"[3] to the charges against the Respondent.

2. No right to production of documents exists in these circumstances. Although he had previously received voluminous documentation through *Access to Information Act*[4] requests and through discovery in separate Federal Court proceedings, including redacted copies of summaries of the CSIS interviews, the Respondent was unable to demonstrate a causal connection between the sharing of intelligence information and the potential deprivation of his liberty. It was not open to the Court of Appeal to fill in the evidentiary gap with a theory that the interviews "may have made it more likely that criminal charges would be laid."[5]

3. The Court of Appeal's decision unreasonably expands the reach of both *Stinchcombe* and s. 7 of the *Charter*. This Court has repeatedly stressed that the application of *Stinchcombe* principles beyond the Canadian criminal trial context is limited. In *Suresh*,[6] this Court set out a test for determining when s.7 of the *Charter* is engaged that demands that Canadian participation be a "necessary precondition" to the deprivation of liberty, which occurs as a "foreseeable consequence". The Court of Appeal found the test was met without any evidence to support either requirement; effectively it changed the nature of the test. Furthermore, the Court used the fact of the interviews as a springboard to a sweeping production order that amounts to a fishing expedition in relation to the most sensitive of government-held information.

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[2] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [*Stinchcombe*].
[3] Order of the Federal Court of Appeal, Appellant's Record (A.R.), vol. I, p. 37.
[4] *Access to Information Act*, R.S.C., 1985, c. A-1 [*ATIA*].
[5] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 31, para. 34.
[6] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 [*Suresh*].

B) STATEMENT OF FACTS

1) Facts Relating to the American Prosecution Against the Respondent

4. On November 13, 2001, citing the September 11, 2001 terrorist attacks against the United States, the President of the United States issued a Military Order providing for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[7]

5. The President's Military Order applied to, among others, any individual who is not a citizen of the United States, if there is reason to believe that the individual is or was a member of al Qaeda, or has in any way engaged in acts of international terrorism against the U.S. Offences alleged to have been committed by individuals detained under the terms of the Order are to be tried by military commission. The Order authorized the U.S. Secretary of Defense to establish procedures for the conduct of the military commissions.[8]

6. On March 21, 2002, the U.S. Secretary of Defense issued "Military Commission Order No. 1", establishing detailed procedures for conduct of the military commissions to be held in accordance with the President's Military Order. The procedures accorded to an accused under Military Commission Order No. 1 provided for disclosure of evidence, subject to specified exceptions.[9]

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[7] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 54, para. 8; Exhibit "F" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 158 – 162.
[8] Exhibit "F" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 159 – 160.
[9] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 55, para. 10, and Exhibit "G" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 163 – 178, esp. 168, 173, & 177. On August 31, 2005, the United States Secretary of Defense issued a revised "Military Commission Order No. 1." The procedures accorded to an accused, including the disclosure provisions, were continued in their entirety, with no substantive change: Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 55,

7. On July 27, 2002, Mr. Khadr was captured in Afghanistan by U.S. forces. The current U.S. Military Commissions charge sheet concerning Mr. Khadr indicates that this occurred after a "firefight". One of the charges against Mr. Khadr alleges that, on that date, he unlawfully and intentionally murdered U.S. Army Sergeant First Class Christopher Speer by throwing a hand grenade at the U.S. forces which resulted in Speer's death.[10]

8. Upon capture, Mr. Khadr was detained by the U.S. military pursuant to the President's Military Order. Some months later Mr. Khadr was transported to Guantánamo Bay, Cuba, where he has been detained since, again under the authority of the President's Military Order.[11]

9. Until June 28, 2004, the U.S. government took the position that the Executive had the legal discretion to detain "enemy combatants" for the duration of the "war on terror". However, on June 28, 2004, the U.S. Supreme Court issued two decisions: one confirming that certain detainees being held in Guantánamo Bay have the right to bring a *habeas corpus* application in the U.S. federal courts; and the other confirming a right to counsel in such proceedings.[12]

10. In response to the U.S. Supreme Court decisions, on July 7, 2004 the U.S. Deputy Secretary of Defense issued an "Order Establishing Combatant Status Review Tribunal". Distinct from the military commissions, the tribunal was established for the purpose of reviewing whether certain detainees were previously properly determined to be "enemy combatants". Mr. Khadr's case was reviewed on September 7, 2004, at which time the tribunal concluded

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para. 11, and Exhibit "H" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 179 – 195.

[10] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, pp. 54 & 58, paras. 9 & 26, and Exhibit "B" to Affidavit of Michelle Gascon, dated March 9, 2007, A.R., vol. III, pp. 630 & 631.

[11] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 54, para. 9.

[12] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 55, paras. 12 & 13.

that he was an "enemy combatant". Mr. Khadr elected not to participate in the proceeding.[13]

11. On November 7, 2005, the U.S. military appointing authority approved charges against five persons detained at Guantánamo Bay, including Mr. Khadr. The non-capital charges against Mr. Khadr consisted of allegations that he: (1) conspired with members of the al Qaeda organization to commit various offences, including terrorism; (2) as an unprivileged belligerent, committed murder; (3) as an unprivileged belligerent, committed attempted murder; and (4) aided the enemy. The U.S. charge sheet included background information alleging that Mr. Khadr had lived in Afghanistan since 1996.[14]

12. On June 29, 2006, the U.S. Supreme Court issued its decision in *Hamdan v. Rumsfeld*[15] dealing with the procedures of the U.S. Military Commissions and their relationship to the U.S. Uniform Code of Military Justice[16] and the Third Geneva Convention.[17] Subsequent to the *Hamdan* decision, the U.S. *Military Commission Act of 2006*[18] was passed. Then, on January 18, 2007, the U.S. Secretary of Defence submitted to Congress "The Manual for Military Commissions", a "comprehensive Manual for the full and fair prosecution of alien unlawful enemy combatants by military commissions."[19]

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[13] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 56, paras. 15 – 17; Exhibits "I" and "J" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 196 – 200.
[14] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, pp. 57, paras. 21 & 22; Exhibits "L" and "M" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 218 – 222.
[15] *Hamdan v. Rumsfeld*, 548 U.S. ____ (2005)
[16] U.S.C. tit. 10 § 801 *et sec.*
[17] *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, Can. T.S. 1965, no.20 (entered into force 21 October 1950, entered into force for Canada 14 November 1965).
[18] U.S.C. tit. 10 § 948d.
[19] Exhibit "A" to Affidavit of Michelle Gascon, dated March 9, 2007, A.R., vol. III, p. 388.

13. The Manual for Military Commissions "governs the procedures and punishments in all trials by military commissions of alien unlawful enemy combatants...", including the U.S. military commission prosecution currently proceeding against Mr. Khadr. The Manual for Military Commissions includes disclosure/discovery provisions which outline in detail the prosecution's duty to provide continuing discovery.[20]

14. On February 2, 2007, revised non-capital charges against Mr. Khadr were brought. The current charges, all of which concern events between June 1, 2002 and July 27, 2002 in Afghanistan, include: (1) murdering an American soldier in violation of the law of war; (2) attempted murder in Afghanistan in violation of the law of war; (3) conspiring with members of the al Qaeda organization to commit various offences including terrorism (and particularizing various overt acts in furtherance of the conspiracy that were directed against U.S. Forces); (4) providing material support for terrorism; and (5) spying on the U.S.[21] On June 4, 2007, the charges against Mr. Khadr were dismissed by the U.S. Military Commission Judge. However, on September 24, 2007, a panel of Appellate Military Judges remanded the charges back to the Military Commission Judge, thereby reinstating the U.S. Military Commission prosecution proceedings.[22]

2) Facts relating to Contact Between Canadian Officials and the Respondent

15. There is very little evidence in the record in this case of the involvement of any Canadian official with the Respondent. In the affidavit of Richard Wilson, one of Mr. Khadr's American counsel, reference is made to two documents

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[20] Exhibit "A" to Affidavit of Michelle Gascon, dated March 9, 2007, A.R., vol. III, pp. 392, 426 - 441.
[21] Exhibit "B" to Affidavit of Michelle Gascon, dated March 9, 2007, A.R., vol. III, pp. 626 – 634.
[22] http://www.defenselink.mil/news/courtofmilitarycommissionreview.html

produced by the Crown in Federal Court Action T-536-04.[23] One appears to be an internal facsimile message in which one Royal Canadian Mounted Police ("RCMP") officer asks another to "attempt to acquire additional information" about Mr. Khadr's capture in Afghanistan. The other also appears to be an internal facsimile, in which one RCMP officer is providing information to another, but all of the information is redacted.[24]

16. Three other documents were acknowledged by the RCMP officer tasked with responding to *Access to Information Act* ("*ATIA*")[25] requests as having been in the possession of the RCMP. However, the officer had no involvement in the creation of the documents or the facts referred to in them and was unable to provide any context or detail with respect to them.[26] Two of the documents, dated November 2002, appear to discuss how an interview with Mr. Khadr may be arranged, if the RCMP decide to interview him.

17. The third document, dated September 2003, is the only indication on the record of any Canadian government contact with Mr. Khadr since his capture and detention by U.S. forces. It is an e-mail from CSIS to two members of the RCMP Financial Intelligence Task Force. The e-mail summarizes the results of two CSIS "operational interviews" of Omar Khadr which took place on the 22nd and 25th of September, 2003. The e-mail also makes reference to a previous February 2003 "operational interview" of Mr. Khadr (collectively, the "CSIS interviews"). This e-mail contains the following caveat: "the information or

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[23] The nature of the action is described at para. 23.
[24] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, pp. 58 – 59, paras. 24 – 27; Exhibits "N" and "O" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 223 – 232.
[25] *ATIA*, *supra* note 4.
[26] Transcript of cross-examination on Affidavit of William Robert James Johnston, A.R., vol. I, pp. 79, 90 – 95, and Exhibits "A", "B" and "C" to the cross-examination of William Johnston, A.R., vol. II, pp. 304 – 312. The three exhibited documents were also included as part of the Crown's documentary production to Mr. Khadr in T-536-04: Transcript of cross-examination on Affidavit of William Robert James Johnston, A.R., vol. I, pp. 89 – 95.

intelligence must not be disclosed or used as evidence without prior consultation with the Canadian Security Intelligence Service."[27]

18. The unredacted portions of the CSIS interview summaries indicate that, throughout the interviews, Mr. Khadr attempted to convince the investigators that the statements he made to CSIS investigators in February 2003 outlining his and his family's involvement with al Qaeda were false. The summary further indicates that the CSIS investigators asked questions concerning: (1) Mr. Khadr's visit to Canada, which occurred between February 14, 2001 until sometime in May 2001, seeking information regarding the purpose of the visit and his and his family's associations during that visit; (2) Mr. Khadr's knowledge concerning some of his brother's (Abdul Rahman Khadr's) activities; (3) the identity of other Canadians who had visited the Khadr family in Pakistan or Afghanistan; and (4) correspondence he had received from his family.[28]

19. There was no other evidence in the record in this case concerning the involvement of any Canadian official with Mr. Khadr. However, in setting out the facts of this case in the court of first instance, Justice von Finckenstein chose to incorporate factual findings he made in a decision to grant an interim injunction against further interviews of the Respondent in the context of action T-536-04: He did so as follows:

> iv) Canadian officials from CSIS and DFAIT, with the consent of US authorities, questioned him in detention at Guantanamo Bay. The circumstances regarding that visit were examined in related proceedings ... In those proceedings, this court, and this judge (who acts as case-managing judge for the various proceedings of the Applicant against the Canadian government), found on the basis of affidavit evidence at paragraph 23:
>
> c) The DFAIT/CSIS visits were not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement (*DFAIT note*

[27] Exhibit "C" to the cross-examination of William Johnston, A.R., vol. II, pp. 309 – 312.
[28] Exhibit "C" to the cross-examination of William Johnston, A.R., vol. II, pp. 309 – 312.

> *of November 1, 2002, Applicant's Record, Ahmad affidavit, Tab 2Q, p. 148, para 7* and *cross-examination of Serge Paquette, Respondent's Record ,Tab 4, pp. 35 and 70*);
>
> d) Summaries of information collected in the interviews were passed on to the RCMP (*cross-examination of William Hooper, Respondent's Record, Tab 5, p. 7*);
>
> e) Canadian agents took a primary role in the interviews, were acting independently and were not under instructions of US authorities (*cross-examination of William Hooper, Respondent's Record, Tab 5, p. 22*);
>
> f) Summaries of the information were passed on to U.S. authorities (*cross-examination of William Hooper, Respondent's Record, Tab 5, pp. 14, 15*);[29]

3) Facts Relating to Production of Documents to the Respondent

20. Mr. Khadr has already obtained extensive disclosure of documents in possession of CSIS, the RCMP, and the Department of Foreign Affairs and International Trade ("DFAIT"). This disclosure has been provided both through the Crown's document production requirements in Mr. Khadr's other two Federal Court of Canada cases against the Crown and in response to Mr. Khadr's requests under the *ATIA*,[30] details of which are provided below.

21. On January 14, 2004, Mr. Khadr's counsel submitted a request under the *ATIA* to DFAIT (the "2004 *ATIA* request"), in which he asked for:

> Production of one copy of any and all documents containing information relating to Mr. Omar Khadr's current legal status and detention in Guantánamo Bay. More specifically, but without limitation, we request copies of all correspondence and communications which have passed

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[29] Reasons for Order and Order of the Federal Court, A.R., vol. I, pp. 6 – 7, para. 19, incorporating portions of paragraph 23 in *Khadr v. Canada* (2005), 257 D.L.R. (4th) 577, 2005 FC 1076.

[30] *ATIA*, *supra* note 4. Affidavit of André Chartrand, dated February 27, 2006, A.R., vol. I, p. 68, paras. 3 & 4; Affidavit of Brian McDivitt, dated February 24, 2006, A.R., vol. I, p. 64, para. 3, and Exhibit "Q" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, p. 236.

> between Canadian and American officials which relate to his legal status and ongoing detention.[31]

22. Certain issues arose in processing the 2004 *ATIA* request, including whether the application was properly brought under the *ATIA*, as opposed to the *Privacy Act*,[32] and whether a consent to disclose information from Mr. Khadr was required. As a result, processing Mr. Khadr's 2004 *ATIA* request took some time.[33] Ultimately, three packages of documents were released by DFAIT on April 11, 2005, April 22, 2005 and May 6, 2005. A total of 3,084 pages, many in redacted form, were provided to Mr. Khadr's counsel.[34] Neither Mr. Khadr nor his counsel have instituted processes for review of those exemptions, apart from the present proceedings.[35]

23. While the processing of the 2004 *ATIA* request was ongoing, Mr. Khadr instituted two separate proceedings in the Federal Court of Canada. On March 15, 2004, Mr. Khadr filed the action bearing Federal Court file number T-536-04.[36] In a decision refusing a Crown motion to strike this Statement of Claim, Justice von Finckenstein set out that Mr. Khadr is seeking (a) a declaration that his *Charter* rights have been breached, (b) damages for $100,000.00, and (c) an injunction against further "interrogation" by Canadian government officials. The alleged breach of Mr. Khadr's *Charter* rights stems from the CSIS interviews of Mr. Khadr, described above in paragraph 17.[37]

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[31] Exhibit "A" to Affidavit of April Bedard, dated February 6, 2006, A.R., vol. II, p. 239.
[32] *Privacy Act*, R.S.C., 1985, c. P-21.
[33] Exhibits "B" – "X" to Affidavit of April Bedard, dated February 6, 2006, A.R., vol. II, pp 241 – 282.
[34] Affidavit of André Chartrand, dated February 27, 2006, A.R., vol. I, p. 68, paras. 3 & 4.
[35] Affidavit of André Chartrand, dated February 27, 2006, A.R., vol. I, p. 68, para. 4.
[36] http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_moreInfo_e.php?T-536-04
[37] *Khadr v. Canada (Attorney General)*, [2004] F.C.J. No. 1700 (QL), 2004 FC 1394, paras. 1 – 4.

24. On March 31, 2004, Mr. Khadr's family filed the application bearing Federal Court file number T-686-04.[38] In an interim decision concerning this application, Justice von Finckenstein described it as follows:

> Application T-686-04 has been brought by Omar Khadr's family in order to compel the government to extend consular and diplomatic services to him. It is argued that, in failing to provide these services, the Minister has acted contrary to the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22 (DFAITA) and has infringed the rights of Omar Khadr and his family under the *Canadian Charter of Rights and Freedoms* (Charter).[39]

25. In the case at bar, Mr. Khadr's counsel has acknowledged having received, "voluminous materials from DFAIT, CSIS and the RCMP under both the *Access to Information Act* and the Crown's production requirements in Federal Court of Canada Action Numbers T-536-04 and T-686-04."[40] Once again, a number of documents were redacted on the basis of assertions of privilege. As the Court of Appeal noted, "no steps were taken by [Mr. Khadr] to challenge the redactions and deletions made to these documents."[41]

26. Following the approval of charges against Mr. Khadr by the U.S. Military Commission, on November 21, 2005, Mr. Khadr submitted a new request under the *ATIA* ("2005 *ATIA* request"). With this request, Mr. Khadr asked DFAIT, CSIS, the RCMP and the Minister of Justice to provide:

> ... copies of all documentation in the possession of your respective Departments which might possibly be relevant to the matters pleaded in the enclosed charge sheet for the timeframe January 1st, 1999 to the present. For further clarification, but without limitation, we demand copies of all materials which might be of assistance to Mr. Khadr in raising full answer and defence to these charges in accordance with the parameters established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 as applied to

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[38] http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_moreInfo_e.php?T-686-04
[39] *Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1393, at para. 3.
[40] Exhibit "Q" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, p. 236.
[41] Reasons for Judgment of the Federal Court of Appeal, A.B., vol. I, p. 20, para. 9.

> extraterritorial prosecutions in such cases as *Purdy v. Canada (Attorney General)*, 230 D.L.R. (4th) 361 (B.C.C.A.). Relevance in this context should be determined by reference to the contents of the Charge Sheet.[42]

27. On the same day, Mr. Khadr's counsel also sent a letter addressed to the Minister of Justice, the Minister of Foreign Affairs, the Director of CSIS and the Commissioner of the RCMP. In the November 21, 2005 letter, Mr. Khadr's counsel, Mr. Whitling, essentially duplicated the demand for disclosure contained in their 2005 *ATIA* request (the "Whitling request"). The key paragraphs of the Whitling request provided:

> ... Kindly receive this letter as our formal joint demand pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* for production of all relevant documents in the possession of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr, and as such, are necessary to enable Mr. Khadr to raise full answer and defence to the charges.
>
> Through our experience as Mr. Khadr's counsel, we have obtained copies of voluminous materials from DFAIT, CSIS and the RCMP under both the *Access to Information Act* and the Crown's production requirements in Federal Court of Canada Action Numbers T-536-04 and T-686-04. Much of the content of these documents has been redacted or withheld from us on the basis of assertions of privilege, including the statutory privilege created by s. 38 of the *Canada Evidence Act*. ...
>
> ...
>
> At the time that the claims of privilege referred to above were made, Mr. Khadr was not facing the charges. Consequently, Mr. Khadr's constitutional right to raise full answer and defence to the charges would not have been a factor taken into account. We take it you agree that Mr. Khadr's right to raise full answer and defence to the charges now overrides and outweighs the interests forming the basis of these previous assertions of privilege.

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[42] Exhibit "Y" to Affidavit of April Bedard, dated February 6, 2006, A.R. vol. II, p. 283.

> In light of the above, we hereby demand that you now provide us with copies of all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr in accordance with the requirements of *R. v. Stinchcombe,* [1991] 3 S.C.R. 326 as applied to extraterritorial prosecutions in such cases as *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.). Without limitation, these materials include all the content redacted from the documents referred to above. Relevance in this regard should be determined by reference to the matters pleaded in the enclosed charge sheet.[43]

28. By letter dated December 19, 2005, Ms. Doreen Mueller, Senior Counsel for the Department of Justice Canada ("DOJ"), acknowledged the Whitling request and asked to have until mid-January 2006 to provide a response.[44] Before that response was sent, on January 3, 2006, Mr. Khadr instituted a Federal Court application for judicial review, this time seeking an order in the nature of *mandamus* requiring the Crown to provide full and complete disclosure of all the documents requested in the November 21, 2005 letter.[45]

29. By letter dated January 31, 2006, Ms. Mueller provided the Crown's response to the Whitling request. That letter noted that large amounts of documentation had already been provided, and that existing processes were available to seek additional information.[46]

30. Processing of Mr. Khadr's 2005 *ATIA* request continued while his Federal Court *mandamus* application proceeded. At the time the evidentiary record crystallized in this case, the status of the processing of Mr. Khadr's 2005 *ATIA* request was as follows:

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[43] Exhibit "Q" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 236 – 237.
[44] Exhibit "S" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, p. 238.
[45] Notice of Application, dated January 3, 2006, A.R., vol. I, pp. 39 – 42.
[46] Exhibit "A" to the cross-examination of Richard J. Wilson, A.R., vol. II, p. 314 – 315.

a) RCMP – A search for all relevant records was conducted by the RCMP. On February 20, 2006, the RCMP responded to the 2005 *ATIA* request, advising that all information not already disclosed in the context of Federal Court Action No. T-536-04 is exempted information. In the result, no further documents were provided.[47]

b) CSIS – Processing of Mr. Khadr's request was continuing. On January 24, 2006, a consent form specifically addressed to the CSIS was requested. On February 22, 2006, the appropriate consent form was received and the CSIS expected to be in a position to release documents in response to the 2005 *ATIA* request by March 24, 2006.[48]

c) DFAIT – On December 22, 2005, the DFAIT ATIP officer sent a letter to Mr. Khadr's counsel. In light of Mr. Khadr's 2004 *ATIA* request, the December 22, 2005 letter asked Mr. Whitling to clarify the 2005 *ATIA* request in order to reduce duplication. When no response was received, DFAIT considered the request abandoned.[49]

d) DOJ – On December 8, 2005, the DOJ Senior ATIP Advisor sent a letter to Mr. Khadr's counsel seeking the appropriate consent to disclose specific to the DOJ. When the response was not received on a timely basis, the DOJ 2005 *ATIA* request file was closed. Ultimately, the consent was received on February 20, 2006 and the DOJ opened a new file to process the request.[50]

4) The Judgment of Mr. Justice Von Finckenstein

31. On April 25, 2006, Justice von Finckenstein dismissed Mr. Khadr's application on the ground that the criteria for *mandamus* had not been met.[51] He found that section 7 of the *Charter* did not require the disclosure sought,

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[47] Affidavit of William Robert James Johnston, dated February 24, 2006, A.R., vol. 1, pp. 65 – 66, Exhibit "A" to Affidavit of William Robert James Johnston, A.R., vol. II, pp. 291 – 292.
[48] Affidavit of Brian McDivitt, dated February 24, 2006, A.R., vol. 1, pp. 62 – 64; Transcript of cross-examination on Affidavit of Brian McDivitt, A.R., vol. I, p. 72.
[49] Affidavit of André Chartrand, dated February 27, 2006, A.R., vol. 1, pp. 67 – 68; Exhibit "A" to Affidavit of André Chartrand, A.R., vol. II, pp. 302 – 303.
[50] Affidavit of Brenda Freeland, dated February 27, 2006, A.R., vol. 1, pp. 69 – 70; Exhibit "AA" to Affidavit of April Bedard, A.R., vol. II, pp. 286 – 287.
[51] Reasons for Order and Order of the Federal Court, A.R., vol. I, pp. 3 – 8.

and he distinguished the B.C. Court of Appeal's decision in *Purdy v. Canada*[52] and this Court's decision in *Suresh v. Canada*,[53] decisions later relied on by the Court of Appeal. With respect to the *Purdy* decision, he stated:

> *Purdy*, above stands for the exceptional case where disclosure can be justified if peculiar factual circumstances arise. *Purdy*, above does not stand for the proposition that whenever there is a foreign prosecution against a Canadian citizen and the Canadian government has some documents, that the accused is entitled to disclosure. This proposition would not be desirable or useful as it might lead to interference with foreign legal proceedings which Justice Iacobucci warned against in *Cook*, above. It could also act as an impediment to the providing of consular services by Canada, which is ironically the very thing the Applicant is seeking from the Respondents.[54]

With respect to *Suresh*, Justice von Finckenstein found that the necessary causal connection between the government of Canada's actions and the deprivation of Mr. Khadr's liberty by the U.S. does not exist.[55]

5) The Judgment of the Federal Court of Appeal

32. The Federal Court of Appeal allowed the Respondent's appeal, finding that there was a sufficient causal connection between the actions of Canadian officials and the charges against the Respondent so as to engage s.7 of the *Charter*. The Court's key findings in this regard are contained in paragraphs 34 and 37:

> [34] In these circumstances, the participation of Canadian officials in gathering evidence against the appellant at the pre-charge level raises, in my view, a justiciable Charter issue (*Kwok* at paragraph 106; *Purdy* at paragraph 22 (B.C.C.A.)). They took an active role in interviewing the appellant and in transmitting summaries of the information

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[52] *Purdy v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 361 (B.C.C.A.).
[53] *Suresh*, *supra* note 6.
[54] Reasons for Order and Order of the Federal Court, A.R., vol. I, p. 6, para. 18.
[55] Reasons for Order and Order of the Federal Court, A.R., vol. I, pp. 5 – 7, paras. 13, 19 & 20.

> collected to U.S. authorities. In doing so, they assisted U.S. authorities in conducting the investigation against the appellant and in preparing a case against him. Canada's participation may have made it more likely that criminal charges would be laid against the appellant thereby increasing the likelihood that he would be deprived of his right to life, liberty and security of the person. I believe that in these circumstances the Charter applies. There is a sufficient causal connection between the Canadian government's participation in the foreign investigation and the potential deprivation of life, liberty and security of the person which the appellant now faces. I am satisfied that the applications judge erred in concluding that a sufficient causal connection did not exist.[56]
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> ...
>
> [37] It is uncontested that as a Canadian citizen the appellant falls within the purview of the word "everyone" in section 7 of the Charter. He has the right under section 7 of the Charter not to be deprived of his right to life, liberty and security of the person except in accordance with the principles of fundamental justice. As recognized by the Supreme Court of Canada in *Stinchcombe*, the right to make full answer and defence to criminal charges is a principle of fundamental justice (at paragraph 17). Withholding relevant documents from an accused increases the risk or danger of that person being wrongfully convicted or imprisoned. The appellant has made a *prima facie* case showing a substantial risk of not being able to present a full answer and defence to the charges he faces in the United States if he is denied access to relevant information in the possession of the Crown. The appellant therefore has the right to full disclosure of all relevant documents within the Crown's possession. However, the Crown's disclosure obligation is not absolute. It is subject to privilege and public interest immunity claims which are reviewable by a court of law.[57]

33. Having concluded that Mr. Khadr's s. 7 *Charter* rights had been engaged such that he is entitled to production in accordance with *Stinchcombe*, the Court went on to consider the nature of the order to be issued:

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[56] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 31.
[57] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 32.

> [39] This Court is not in a position to decide, in the case at bar, whether the Crown failed to comply with its obligation under *Stinchcombe*. A number of documents have already been disclosed to the appellant pursuant to requests under the AIA and in the context of Federal Court proceedings T-536-04 and T-686-04. At this stage, this Court has no way of verifying whether there are other relevant documents which should have been disclosed and whether the public interest immunity claims and statutory exemptions previously raised are justified exceptions to *Stinchcombe* disclosure in the circumstances of this case.[58]

34. Ultimately, the Federal Court of Appeal ordered that unredacted copies of all documents, records and other materials in possession of the Crown respondents be produced to a "judge" as defined in section 38 of the *Canada Evidence Act* so that he or she may consider any privilege or public interest immunity claimed.[59]

PART II - THE ISSUES

35. The issue in this case may be simply framed as follows:

1) Did the Appellants have a legal duty to produce the documents sought by the Respondent in the Whitling request?

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[58] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p 36.
[59] Order of the Federal Court of Appeal, A.R., vol. I, pp. 37 – 38.

PART III – STATEMENT OF ARGUMENT

A) There is no Legal Duty to Provide the Requested Information

1) The Factual and Legal Context of the Respondent's claim

36. There are many means of obtaining access to government-held information in Canada, but three are relevant in this case: a) disclosure in the context of criminal litigation conducted by the Crown; b) document discovery in the context of civil litigation against the Crown; and c) access in the context of requests pursuant to the *Access to Information Act*. The Whitling request cited disclosure obligations that arise in the context of criminal litigation, but there is no Canadian prosecution against the Respondent.

37. In the context of civil litigation against the Crown and through *ATIA* requests, the Appellants had already provided substantial amounts of information to the Respondent—in excess of 3000 pages— when the Whitling request was made. The multiplicity of prior proceedings initiated by or on behalf of the Respondent included:

- The January 14, 2004 *ATIA* request sent to DFAIT;
- The civil action filed on March 15, 2004 (T-536-04), alleging breach of various *Charter* rights arising from interviews conducted by CSIS with the Respondent during his detention at Guantánamo Bay;
- The application filed on March 31, 2004 (T-686-04), by the Respondent's family on his behalf, with respect to an alleged failure to provide consular services; and
- The 2005 *ATIA* request for the same material sought from the Appellants pursuant to the Whitling request, filed the same day as the Whitling request.

38. Except for the 2004 *ATIA* request, all of these proceedings were ongoing when this case was instituted. All, including the 2004 *ATIA* request, resulted in varying degrees of disclosure of documents, many of which contain redactions. Processes available to challenge the redactions were not

pursued in the 2004 *ATIA* request.[60] Processes remain(ed) available to challenge the redactions in the documents provided through the other proceedings, yet none have been pursued. Rather than pursue those processes, the Respondent chose to initiate yet another process, this application for an order in the nature of *mandamus*, to enforce a purported legal duty to disclose documents said to arise from this Court's decision in *Stinchcombe* and from s.7 of the *Charter*.

2) Canadian Disclosure Law Provides no Basis for Access to the Documents Sought

i) Introduction

39. While the Court of Appeal's reasons for judgment dwell primarily on production of the CSIS interview summaries, it is important to bear in mind that the order appealed from is not limited to production of the unredacted copies of those summaries. Rather, the Court's order required production of "all documents, records and other materials in [the Appellants'] possession which might be relevant to the charges...".[61] To the extent the order concerns production of the interview summaries, it is based on a speculative connection between the interviews and the bringing of charges; to the extent it requires production of material unrelated to the interviews, there is no justification at all.

ii) The Court of Appeal Erred in its Application of *R. v. Stinchcombe*

40. In ordering that this matter be returned to the Federal Court for a determination as to whether the Respondent was entitled to further documents, the Court of Appeal appears to have accepted the basic premise

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[60] Affidavit of André Chartrand, dated February 27, 2006, A.R., vol. I, p. 68, para. 3 & 4; *ATIA*, *supra* note 4, s. 41.
[61] Order of the Federal Court of Appeal Order, A.R., vol. I, p. 37.

of the Whitling request: that the Appellants had a *Stinchcombe* obligation to provide further documentation to the Respondent as though they were the prosecution.[62] The Court of Appeal's reasoning fails to appreciate that *Stinchcombe* set out rules intended to ensure the fairness of Canadian criminal proceedings between an accused and his antagonist, the prosecution. It is predicated on a trial court's capacity to provide effective remedies in that particular context. *Stinchcombe* itself, and the decisions of this and other courts that have applied it, do not support the Court of Appeal's approach.

41. Stinchcombe was a Calgary lawyer charged with indictable offences. Disclosure is discussed in the reasons of Sopinka J. as being part of the adversarial process, intended to allow "the parties" to be informed of the case to be met.[63] There are repeated references to the notion that disclosure is an obligation of "the prosecutor" or "Crown counsel."[64] What must be disclosed are the "fruits of the investigation."[65] In the Respondent's case, the U.S. military is the prosecutor. The Appellants are not a party to that prosecution, did not investigate, and have no "fruits" to share.

42. *Stinchcombe* recognizes that the Crown's obligation to disclose is not absolute and that the Crown retains a discretion with respect to the assertion of privilege, and the time and manner of disclosure. The integrity of the process is to be invigilated by the *trial* judge, with a *voir dire* frequently being the appropriate procedure to resolve disputes.[66] Absent a domestic prosecution, no trial judge is sufficiently seized of the issues to properly adjudicate questions such as relevance. Nor is there an effective remedy,

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[62] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, pp. 27 & 33, paras. 24-26 & 38-39.
[63] *Stinchcombe, supra* note 2, at p. 332.
[64] *Ibid.* at pp. 333 – 338.
[65] *Ibid.* at p.333
[66] *Ibid.* at pp 339 – 341.

such as a stay of proceedings, in the event of inadequate prosecution disclosure.

43. Sopinka J. expressly limited the applicability of the principles set out in *Stinchcombe* to the context of prosecutions for indictable cases, mentioning, by way of example, that they may not even be fully applicable to summary conviction offences proceedings.[67] Subsequent decisions from this Court have made it abundantly clear that the *Stinchcombe* principles cannot be applied without regard for the context in which they are said to be germane. *Stinchcombe* principles, and s.7 rights generally, are not unique in this regard. As Cory J. stated in *R. v. Wholesale Travel Group Inc.*:

> It is now clear that the Charter is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of Charter rights, as well as to the determination of the balance to be struck between individual rights and the interests of society. [68]

44. This Court's refusal to apply *Stinchcombe* in extradition cases is illustrative of this contextual approach.[69] In these cases, there is no *Stinchcombe*-like disclosure obligation because "it is not the Canadian government that is prosecuting."[70] The significance of this fact was first emphasized by this Court in *U.S.A. v. Allard* where, in response to an argument that an extradition judge was entitled to look at delay occurring in the requesting state, La Forest J. stated:

> It is not the Canadian government that is prosecuting the respondents. Therefore, it is not that government that has a responsibility to see that the prosecution is conducted in accordance with procedures applicable in Canada. Accordingly, we need not enquire into whether the

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[67] *Ibid.* at p. 342.
[68] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 226.
[69] *United States of America v. Dynar*, [1997] 2 S.C.R. 462 [*Dynar*]. See also *United States of Amercia v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 [*Kwok*].
[70] *United States of America v. Allard*, [1987] 1 S.C.R. 564, at pp. 571 – 571.

> prosecution will conform to our procedures or if there are defences that could be raised if the trial took place in Canada. This would amount to exercising a jurisdiction that belongs to the country where the crime was committed.[71]

45. In *U.S.A. v. Dynar*, a person facing extradition sought disclosure of material gathered by Canadian authorities that he felt was necessary to make full answer and defence at his extradition hearing in Canada. His claim was rejected by this Court:

> It follows that it is neither necessary nor appropriate to simply transplant into the extradition process all the disclosure requirements referred to in *Stinchcombe*, *supra*, *Chaplin*, *supra*, and *O'Connor*, *supra*. Those concepts apply to domestic criminal proceedings, where onerous duties are properly imposed on the Crown to disclose to the defence all relevant material in its possession or control. This is a function of an accused's right to full answer and defence in a Canadian trial. However, the extradition proceeding is governed by treaty and by statute. The role of the extradition judge is limited and the level of procedural safeguards required, including disclosure, must be considered within this framework. [72] [Emphasis added]

46. To the extent that Dynar might have been entitled to any disclosure, it was limited to that which was relevant to the case he had to meet at the extradition hearing,[73] a proposition confirmed in *U.S.A. v. Kwok*.[74] *Dynar* recognized the inherent difficulty in litigating disclosure issues in this context, because of the "limited information available to an extradition judge and his jurisdictional inability to obtain it."[75] The Court further rejected a claim that disclosure was required from Canadian officials because "no justiciable *Charter* issue can arise from the potential involvement of the Canadian

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[71] *Ibid.*
[72] *Dynar*, *supra* note 69, at para.130.
[73] *Ibid.* at para.135.
[74] *Kwok*, *supra* note 69.
[75] *Dynar*, *supra* note 69, at para.133.

authorities in the gathering of evidence."[76] In the case at bar, there is no evidence that Canadian officials were even involved in evidence gathering.

47. It should also be noted that in the extradition cases, there was at least a Canadian proceeding to which the claimed disclosure was referable. To the extent the case at bar involves a claim for the interview summaries, the Respondent has an ongoing action in the Federal Court with respect to the propriety of those very interviews. Disclosure has been provided, and if the Respondent finds it unsatisfactory, he can litigate it in that context. Thus far, he has not.

48. In *May v. Ferndale*, this Court also refused to apply *Stinchcombe* obligations in the context of administrative law proceedings involving loss of a party's liberty, again noting that, "the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings."[77] The Court reiterated that "[t]he requirements of procedural fairness must be assessed contextually in every circumstance"[78] and relied on administrative law principles to determine the appropriate level of disclosure in the particular circumstances there present.

49. The discussion in *May* of disclosure as an aspect of procedural fairness again suggests that at a minimum, there must be a *lis* between the parties before any disclosure obligations arise. The Appellants owed no legal obligation to produce documents to the Respondent outside of that which was incidental to the fair litigation of his other legal proceedings. No true *lis* exists between the parties to this appeal with respect to the American prosecution. The Court of Appeal effectively used rules designed to regulate the conduct of parties within proceedings as a platform for the creation of new proceedings.

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[76] *Ibid.* at para. 145.
[77] *May v. Ferndale*, [2005] 3 S.C.R. 809, 2005 SCC 82, at para. 91 [*May*].
[78] *Ibid.* at para. 90.

50. Lower courts have come to similar conclusions in other contexts about the application of *Stinchcombe* principles. In *R. v. A.L.T. Navigation Ltd.*,[79] Mercer J. found that *Stinchcombe* requirements were not applicable for a transfer hearing under the *Mutual Legal Assistance in Criminal Matters Act*:

> The level of disclosure for the transfer hearing must be determined having regard to various factors including: the issues at the hearing; the context and purpose of the Act; and the role and powers of the judge.[80]

51. Again, the judgment contemplates a contextual assessment of the appropriate level of disclosure, not an application of *Stinchcombe*, predicated on the existence of Canadian proceedings and the Court's authority to regulate the conduct of the litigants before it. This common thread runs through other lower court judgments, and undermines the Court of Appeal's estimation of the reach of *Stinchcombe*. These judgments include: *R. v. Lore*[81] (prosecution not obliged to disclose information in the hands of American authorities); *R. v. Schoffer*[82] (prosecution not required to disclose information from another province in unrelated investigation); and *R. v. Gillis*[83] (prosecution not required to disclose before charges laid).

iii) The Court of Appeal's Reasons Misapply O'Connor Principles

52. Although not mentioned by the Court of Appeal, this court's decision in *R. v. O'Connor*[84] further demonstrates that the Respondent would not be entitled to the requested documentation, even if this case involved a domestic prosecution. *O'Connor* established a procedure by which accused persons may gain access to information in the hands of "third parties" – persons or entities not associated to the prosecution, but who may hold information

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[79] *R. v. A.L.T. Navigation Ltd.* (2002), 96 C.R.R. (2d) 155 (Nfld. & Lab.S.C.).
[80] *Ibid.*, at para. 31.
[81] *R. v. Lore* (1997), 116 C.C.C. (3d) 255 (Que.C.A.per Fish,J.A.).
[82] *R. v. Schoffer*, [1993] O.J. No.816 (Ont.Ct.(Gen.Div.).
[83] *R. v. Gillis* (1994), 91 C.C.C.(3d) 575(Alta.C.A.).
[84] *R. v. O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*].

relevant to an accused's right to make full answer and defence. If the Whitling request were to be considered as being notionally analogous to an "*O'Connor* application" for production of third party documents in a domestic case, it would still be untenable, as the Respondent has failed to meet any sort of reasonable onus demonstrating his right to receive the items requested.

53. In the judgment of Lamer C.J.C. and Sopinka J. in *O'Connor*, "disclosure" and "production" are regarded as distinct. "Disclosure" relates to documents in the hands of the prosecutor or the investigator; "production" refers to information in the hands of third parties. Third parties have no obligation to assist the defence;[85] indeed the "default position" is that production is not required.[86] This has the effect of casting an obligation on the accused to establish the documentation's "likely relevance". The burden may not be an onerous one, but it must be sufficient to satisfy a judge that the information sought is "logically probative to an issue at trial or the competence of a witness to testify."[87]

54. The Whitling request amounted to no more than a bare-bones request for information. It acknowledged that the Respondent's counsel had received "voluminous materials", yet it made no attempt to demonstrate in even a minimal way how further documentation might assist – it simply asserted that it would. The request assumes that the appellants could be guided simply by reading a copy of the charges, without acknowledging that those charges related to alleged events (e.g.,murder of an American soldier) in Afghanistan during a narrow time frame in which there is no hint of Canadian involvement. The charge sheet alleges not only that he was outside of Canada in the relevant time frame, but also that he was outside of Canada for six or more years preceding the events. The request asks the Appellants to read the

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[85] *Ibid.* at para. 19.
[86] *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, at para. 104.
[87] *O'Connor*, *supra* note 84, at para. 22.

foreign charges and provide relevant documentation, as if the Appellants were the prosecution.

55. While the Appellants accept that the Respondent certainly is in constrained circumstances with respect to preparing his defence, this is not an occasion where he is in a "Catch-22" situation[88] with respect to identifying documentation he contends would sustain his claim. He has rights of disclosure from the American prosecutor. He has received thousands of pages of documentation pursuant to Canadian legal proceedings. With respect to the CSIS interviews, which seemed of particular concern to the Court of Appeal, not only does he already have redacted copies of the interview summaries, he was *there*.

56. Were there a domestic proceeding, the Respondent would have had to demonstrate that there was an air of reality to his claim that the CSIS interviews were linked to the deprivation of his liberty.[89] An air of reality means a realistic possibility, not a mere assertion,[90] relying on evidence properly in the record.[91] In the extradition context, courts have repeatedly refused to act on requests based solely on "conjecture and speculation."[92]

57. The only attempt by the Respondent to provide any sort of substance to his claimed needs is found in the affidavit of one of his American counsel, Richard Wilson. In paragraphs 24 - 27 of his affidavit, Mr. Wilson attests to having read the material provided to the Respondent by the Canadian government in the Respondent's other legal proceedings, and asserts his

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[88] *Ibid.* at para. 25.; *U.S.A v. Earles* (2003), 171 C.C.C. (2d) 116 (BCCA), at paras 36-37.
[89] *R. v. Carosella,* [1997] 1 S.C.R. 80, at para. 76; *Dynar*, *supra* note 69, at para. 141; *Kwok*, *supra* note 69, at para. 100
[90] *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), at paras. 74 & 78 [*Larosa*].
[91] *Ibid.* at para. 81.
[92] *U.S.A. v. Wacjman* (2002), 171 C.C.C. (3d) 134 (Que.C.A.), at paras. 54, 86 (leave to S.C.C. dismissed [2003] 1 S.C.R. xix); *Larosa*, *supra* note 90,at para 85; *Turenne v. Canada (Minister of Justice)* (2004), 187 C.C.C. (3d) 375 (Man. C.A.), at para 40; *U.S.A. v. Graham* (2004), 193 C.C.C. (3d) 112 (BCSC), at para 14 – 45; *U.S.A. v. Vreeland* (2002), 164 C.C.C. (3d) 266 (Ot. S.C.J.), at paras 34 – 36.

belief that the "government of Canada is in possession of documentary materials relevant to the allegations raised against Omar".[93] The only evidence of this are two documents which indicated that Canadian officials were going to seek to *acquire* information about the details surrounding the Respondent's capture.[94]

58. In the context of Canadian prosecutions, such bare-bones demands for information have been repeatedly decried. As Sopinka J. stated in *R. v. Chaplin*:

> ...the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests.[95]

59. The proscription against fishing has particular significance in this case. With respect to the interviews that appeared to heavily influence the Court of Appeal, they occurred far after the time frames described in the charges against the Appellant, and long before any charges were instituted, such that there is no readily apparent connection to the charges.[96] The interviews were conducted by CSIS, with the permission of, but not under the direction of, American officials.

60. The duties and functions of CSIS are described in ss. 12-20 of the *CSIS Act*.[97] Its functions focus on the gathering of information and intelligence necessary to advise the Government of Canada and prevent "threats to the security of Canada." Its mandate includes "investigations" of

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[93] Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. I, p. 58, para. 24.
[94] Exhibits "N" and "O" to Affidavit of Richard J. Wilson, dated January 20, 2006, A.R., vol. II, pp. 223 – 232.
[95] *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32.
[96] See paras. 11, 14 & 17 above.
[97] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

threats to the security of Canada, but it is not a law enforcement agency or an evidence-gatherer as is the RCMP.

61. The dissemination of information gathered by CSIS is carefully regulated and permitted in limited circumstances. Section 19 of the *CSIS Act* prohibits the disclosure of information in the possession of CSIS except in accordance with the provisions of that section. For example, pursuant to s.19(2)(a), it can share information relating to "an alleged contravention of any law of Canada or a province" with "a peace officer having jurisdiction to investigate the alleged contravention."

62. One of the difficulties with the speculative linking of the CSIS interviews with the charges against the Respondent is that it presumes that CSIS was engaged in something other than its core intelligence-gathering mandate when its agents interviewed the Respondent. That it shared summaries of its interviews with American authorities is wholly unsurprising; the lifeblood of security agencies is the sharing of information.[98] Canada has political obligations under United Nations Security Council Resolutions and from being a party to other international instruments aimed at promoting cooperation in the fight against terrorism.[99] These obligations include the sharing of information with allies and other organizations.[100] If words were spoken during those interviews that might have led to the institution of charges against the Respondent, it was within the Respondent's knowledge to allege such a fact; he did not, and the Court of Appeal had no basis to make such a link. The Court of Appeal then compounded its error by

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[98] *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 44 [*Ruby*].
[99] *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284, Can.T.S. 2002 No.8; *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 275; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 229, Can.T.S. 2002 No.9; United Nations Security Council Resolution 1373, UN SCOR, 2001, 4385th Mtg., UN Doc. S/RES/1373 (2001); United Nations Security Council Resolution 1456, UN SCOR, 2003, 4688th Mtg., UN Doc. S/RES/1456 (2003).
[100] See for example United Nations Security Council Resolution 1456, *ibid.* Art. 2(b), and United Nations Security Council Resolution, *ibid.* Arts. 2(a), 2(f), 3(a) and 3(b).

suggesting that such information would be legally sufficient to engage *Charter* rights.

63. As important as the Respondent's right to make full answer and defence is, it is also critical that courts respect the government's crucial interests in protecting national security interests and conducting foreign affairs.[101] As this Court has recognized, Canada is a net importer of intelligence information and must ensure that our law does not discourage the quality and flow of that information.[102] To the extent the Respondent's requests may be for information Canada has acquired from other states, it is important that there be strict limitations on its accessibility. Unfocussed demands for information don't satisfy domestic standards for production; the case for production is even weaker in the context of this case.

64. It is difficult to see how the withholding of information could contribute at all to a deprivation of liberty. While it may be arguable such a situation might arise if Canada were to withhold information it knew would be exculpatory, absent that situation – and there is no evidence that such is the case here – the issue need not be examined.

65. *Stinchcombe* and *O'Connor* recognize important principles that help ensure the fairness of Canadian criminal proceedings. They do not, however, create portable rights. When the Respondent left Canada with his family six years before the alleged conduct in Afghanistan giving rise to the charges, he left Canadian law and legal procedures behind.[103]

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[101] To the extent that a balancing of interests is to be undertaken, that balancing exercise properly belongs within the existing processes for the release of information (*i.e* the 2005 *ATIA* request) applied in light of *Charter* values.

[102] *Ruby, supra* note 98; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 68.

[103] *Hape. supra*, note 1, at para.99; *U.S.A v.Cotroni*, [1989] 1 S.C.R. 1469 at p.1510; *Burns, supra*, note 1 at para. 72.

3) Other Section 7 Jurisprudence Provides No Basis for Access to the Information Sought

66. The Whitling request, and the Court of Appeal judgment, relied on both *Stinchcombe* and s.7 of the *Charter*. Whether the Court of Appeal's judgment is simply an application of Canadian disclosure law or a finding that there has been or will be a breach of s.7 of the *Charter*, that conclusion is unsupportable. The Court of Appeal found itself unable to determine whether a *Charter* breach occurred, but nevertheless awarded a remedy of a new hearing to determine whether a *Charter* breach had occurred. In so doing, it failed to properly apply the decisions of this Court which establish that, in the circumstances of this case, s.7 is not engaged.

67. The best statement of the applicable law is found in this Court's decision in *Suresh*,[104] and was adverted to by the Court of Appeal.[105] *Suresh* concerned an application for judicial review of the Minister of Citizenship and Immigration's decision to deport an individual to a country where he faced a risk of torture. In rejecting the government's argument that s. 7 was not engaged because any violation of his rights would occur as a result of actions in the foreign state, this Court stated:

> ...the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. ... At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.[106]

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[104] *Suresh*, *supra* note 6.
[105] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 29, para. 30.
[106] *Suresh*, *supra* note 6, at para. 54.

68. As in *Suresh*, the potential deprivation of the Respondent's liberty interest will occur abroad, should he be convicted at his American trial. This does not mean he cannot have any valid s.7 claim in Canada, but to do so he must establish:

a) that Canada's participation is a necessary precondition for the deprivation of liberty; and

b) that the deprivation is a foreseeable consequence of Canada's participation.

69. The Court of Appeal misapprehended both the facts and the law in examining the issue of "Canada's participation." Desjardins J.A. wrote that "the participation of Canadian officials in gathering evidence against the Appellant at the pre-charge level raises, in my view, a justiciable *Charter* issue."[107] As this Court noted in *Schreiber*, "[t]he fact that the government of Canada may play a part in international investigations and proceedings, which might have implications for individual rights and freedoms such as those enumerated in the *Charter*, does not by itself mean that the *Charter* is engaged."[108]

70. Factually, the only evidence was that Canadian authorities had provided summaries of the CSIS interviews with the Respondent to American authorities.[109] There is no evidence in this case that: a) the Canadian officials who conducted interviews, or any other Canadian officials, were engaged in evidence-gathering activities at all, much less at the behest of American authorities; b) such summaries were provided to the U.S. for the purpose of assisting the American prosecution; c) the information forms part of the case the Respondent has to meet; or d) Canadian officials will be witnesses against the Respondent. No evidentiary foundation exists to suggest that Canadian actions in sharing the interview summaries are in any way linked to

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[107] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 31, para. 34.
[108] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para. 29 [*Schreiber*].
[109] This evidence is not on the record, rather, it was borrowed by von Finckenstein J. from the record of one of Mr. Khadr's related proceedings. See para. 19 above.

the Respondent's potential deprivation of liberty. Had the Respondent any credible information in this regard, it ought to have been included in the Whitling request and put before von Finckenstein J.

71. Another difficulty with the Court of Appeal's judgment is that its speculative conclusion as to the relevance of the CSIS interviews became a vehicle to make a much broader-based production order. There was no evidence of Canadian involvement in the events that underlie the charges. The charge sheet, which the Whitling request asked the Appellants to consider, alleged that the Respondent had been outside of Canada for more than six years. There is not a whisper of Canadian action to which the *Charter* might apply.

72. This is not a case like *Suresh* where, unless Canada deported Suresh to Sri Lanka, Sri Lankan authorities would have had no means to effect a deprivation of his liberty. It is not a case like *U.S. v. Burns*[110] where, unless Canada extradited messrs. Burns and Rafay, they could not be subject to execution upon conviction. The Respondent failed to make out either branch of the *Suresh* test. He failed to provide any credible basis on which the Court of Appeal could find that the Appellants had or shared information which could play any role in the deprivation of his liberty. The Respondent had to show that such information was a "necessary precondition" to the deprivation of his liberty, and he failed to do so. Nor did he demonstrate even a more attenuated claim that Canada possessed information which could prevent a deprivation of his liberty. As emphasized above, this is not a "Catch-22" case where the Respondent is without any ability to give substance to his claim.

73. The Court of Appeal's articulation of the relevant test, that "Canada's participation may have made it more likely that criminal charges would be laid against the appellant thereby increasing the likelihood that he would be

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[110] *Burns*, *supra* note 1.

deprived of his right to life, liberty and security of the person,"[111] collapses the two elements of the *Suresh* test into a single one, while simultaneously lessening the burden of proof. No justification was offered for this reformulation. A weaker test should not serve to justify either production of unredacted interview summaries or any other material.

4) *Purdy* is Distinguishable

74. As noted above, the Court of Appeal relied on the B.C. Court of Appeal's decision in *Purdy*[112] in coming to its conclusion that documents should be produced to the Federal Court. Before the Federal Court of Appeal's decision in this case, *Purdy* was unique in Canadian law in ordering production of documents in order to make full answer and defence in a foreign prosecution. Apart from the similarity of the claim of entitlement, it is easily distinguished.

75. The distinctions between this case and *Purdy* are readily apparent from Donald J.A.'s description of the issue in that case in paragraph 1 of the Court's judgment:

> This appeal explores the reach of s. 7 of the *Canadian Charter of Rights and Freedoms* and poses the question: does a Canadian citizen, investigated by the R.C.M.P. in Canada, lured by the R.C.M.P. to the United States to effect his arrest, and facing charges there primarily on evidence gathered in Canada, entitled to disclosure as a *Charter* remedy in order to defend those charges?[113]

76. The Applicant in *Purdy* had been the subject of a joint RCMP/FBI investigation that was the subject of a written agreement. One term of that agreement was that the prosecution would take place in the United States. Purdy applied for an order for disclosure to the Supreme Court of British

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[111] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 31, para. 34.
[112] *Purdy*, *supra* note 52.
[113] *Ibid.* at para. 1.

Columbia, filing supporting material which, apart from detailing the extensive investigative involvement of Canadian officials:

> **a)** specified defences to which the documentation was relevant ("innocent intent" and "entrapment");
>
> **b)** indicated that the material sought could not be obtained via disclosure in the United States; and
>
> **c)** points to specific involvement of Canadians who induced Purdy to travel to the U.S., and whose actions allegedly constituted a *Charter* violation.

77. Purdy started from an entirely different place than the Respondent – Canadian initiation of, and constant involvement in, the investigation that led to the charges; "luring" of Purdy across the Canada-U.S. border to the American authorities; demonstration of relevance of the requested information; explicit cooperation between Canadian and American investigators (i.e., by signed agreement); and demonstrated inability to obtain the information from the prosecution. None of those factors are present in the Respondent's case.

78. *Purdy* does not stand for the proposition that Canada has disclosure obligations with respect to foreign criminal proceedings; if it does, it is wrongly decided. Even if it were established that there were Canadian involvement in an investigation that led to a foreign prosecution, that would be insufficient in and of itself to engage s.7 rights.[114]

79. Nor is the *Charter* right to make full answer and defence a right that exists outside the bounds of a Canadian prosecution. *Purdy* should be confined to its specific facts and seen as a case in which that particular constellation of facts was held to amount to "participation" sufficient to satisfy the "necessary precondition" and "foreseeability" components of the *Suresh* test, requiring production of at least some documents.

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[114] *Dynar*, *supra* note 69; *Schreiber*, *supra* note 108.

5) The Court of Appeal's Judgment Involves an Erroneous Application of Section 32 of the Charter

80. In paragraphs 29-34 of its judgment, the Court of Appeal considered whether the Charter has extraterritorial reach in the circumstances of this case and concluded that it does, holding that a "justiciable Charter issue" arises from the "participation of Canadian officials in gathering evidence against the [Respondent] at the pre-charge level."[115] In so holding the Court misapplied the law with respect to s.32 of the *Charter*.

81. Section 32 of the *Charter* is capable of telling us only who is bound by the *Charter* and in what circumstances it applies.[116] As noted above, the Respondent has no *Stinchcombe* right to obtain disclosure from Canadian officials to defend himself in a U.S. prosecution. A prosecution conducted by Americans is not a matter within the "authority of Parliament." Under the rules enacted pursuant to the Military Commission, disclosure is a matter for the military prosecutor. While there was evidence that the interview summaries had been provided to American officials, there was no evidence as to why those summaries could not have been obtained through the American trial process. The comity of nations is an essential interpretive principle in these circumstances, and it is the American trial court that is best positioned to determine what is reasonably required by the defence.[117]

82. The CSIS interviews alone could in no way implicate the Respondent's liberty interests. This is not a case, as were *Terry*,[118] *Harrer*,[119] *Cook*[120] and *Hape*,[121] in which the evidence of the actions of Canadian or

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[115] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 31, at para. 34
[116] *R. v. Hape*, at para.32 .
[117] *Ibid.*, at para.47-52.
[118] *R. v. Terry*, [1996] 2 S.C.R. 207.
[119] *R. v. Harrer*, [1995] 3 S.C.R. 562.
[120] *R. v. Cook*, [1998] 2.S.C.R. 597.
[121] *Hape*, *supra* note 116.

foreign officials abroad was to be used to incriminate an accused in a Canadian trial. There is no evidence the summaries will be used by American authorities; the fact that they were shared is immaterial absent evidence they will be used. Given Canada's important obligations to share intelligence information, we should not lightly assume that sharing itself is sufficient to engage the Charter, no more than the sending of a letter of request did in *Schreiber*.[122] Even assuming the sharing of information could constitute sufficient Canadian action, there is no evidence that it had any impact on the Respondent's s.7 interests in this case.

83. It is important to note that in this case, von Finckenstein J. was willing to step outside the record to consider the justiciability of the *Charter* issue. He did so by considering evidence filed in support of an interim injunction against further interviewing by Canadian officials, evidence that he had used to impose an interim injunction on the standard applicable to such proceedings. Even by taking such an expansive (and erroneous) approach to the record before him, he was unable to find evidence of the link between Canadian action and a deprivation of the Respondent's liberty. The Court of Appeal was in a much worse position: that court did not have the interim injunction materials before it, so it had even less of a factual foundation to draw on in an attempt to uncover Canadian state action giving rise to a justiciable *Charter* claim. As mentioned above, it improperly filled in those evidentiary gaps with speculative theories.

84. Moreover, it is important to note that the Respondent has an ongoing action in the Federal Court in which the essence of the claim is that Canadian officials infringed his *Charter* rights through the conduct of their interviews with the Respondent in Guantánamo Bay. While it is extremely dubious that the action is at all sustainable following this Court's decision in *R. v. Hape*, it underscores that there is an available forum in which he can litigate the

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[122] *Schreiber*, *supra* note 108, at para. 30.

propriety of the only contact between Canadian officials and himself. That proceeding is also one in which he can seek to persuade a judge that he ought to have access to unredacted versions of the interview summaries. He has not sought to do so in those proceedings. This proceeding should not be permitted to become one in which he effectively folds all his outstanding claims into one roving commission in search of a *Charter* violation.

B) The Court of Appeal Erred in its Approach to Remedial Issues

85. The erroneous nature of the Court of Appeal's reasoning can also be shown in its approach to the remedy it imposed. The Court stated that it was not:

> in a position to decide... whether the Crown failed to comply with its disclosure obligation under *Stinchcombe*. ... The matter should be returned to the Federal Court for a determination of the precise documents the [Respondent] is entitled to obtain under section 7 of the Charter.[123]

Despite its inability to find a violation, the Court granted the mandamus remedy sought by the Respondent by ordering the commencement of proceedings under s.38 of the *Canada Evidence Act*. That order was wrong as an application of the law of mandamus, and a misapplication of the procedure set out in s.38. It serves only to demonstrates how deeply flawed the court's approach was.

86. Von Finckenstein J. correctly applied the law governing applications for mandamus set out by Robertson J.A of the Federal Court of Appeal and approved by this Court in *Apotex*.[124] The first three elements of that test require that:

- There be a public legal duty to act;
- The duty must be owed to the applicant; and

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[123] Reasons for Judgment of the Federal Court of Appeal, A.R., vol. I, p. 33, para. 39.
[124] *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100.

- There be a clear right to performance of that duty.

For the reasons set out above, no public legal duty was owed to the Respondent in the circumstances of this case, arising either as a pure question of Canadian disclosure law or as an interpretation of s.7 of the *Charter*.

87. Another consideration in deciding whether mandamus should issue is whether the order sought will be of some practical value or effect.[125] The Court of Appeal clearly thought that the commencement of proceedings under s.38 of the *Canada Evidence Act* would be efficacious. However, such proceedings serve only to further demonstrate why no duty to disclose could exist: there is no practical way of enforcing compliance.

88. Section 38 of the *Canada Evidence Act* depends on the interplay between two courts: the first is the s.38 court, which is tasked with determining whether sensitive or potentially injurious information should be disclosed;[126] the second is the trial court, which serves to protect the right of an accused or other litigant to a fair hearing where the s.38 Court prohibits disclosure, or the Attorney General issues a prohibition certificate under s.38.13. Section 38.14 gives the trial court the power to take remedial action up to and including the imposition of a stay of proceedings where the effect of the s.38 proceedings would be to compromise the ability of an accused person to defend himself or herself.

89. Section 38 loses its effectiveness when the trial court is a foreign court. The s.38 proceedings are irrelevant to a foreign court. The foreign court is unlikely to delay its proceedings to await completion of the s.38 process. It is under no obligation to recognize the impact of the withholding of information,

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[125] *Ibid.*
[126] *Canada Attorney General) v. Ribic*, [2005] 1 F.C.R. 33, 2003 FCA 246, at para. 21.

should it occur. The fact that no effective remedy exists can only serve to cast further doubt on the existence of the alleged legal duty.

PART IV - COSTS

90. In the unusual circumstances of this case, no costs are sought.

PART V - ORDER SOUGHT

91. The Appellants ask that the appeal be allowed, the Order of the Federal Court of Appeal dated May 10, 2007 and amended June 19, 2007 be set aside, and the Respondent's application for judicial review be dismissed.

All of which is respectfully submitted.
Dated at Ottawa, this 17 day of December, 2007.

Robert Frater for Sharlene Telles-Langdon for Doreen Mueller

PART VI – TABLE OF AUTHORITIES

Other References

PART VII - RELEVANT LEGISLATIVE PROVISIONS