SUPREME COURT OF CANADA

CITATION: Canada (Prime Minister) *v.* Khadr, 2010 SCC 3

DATE: 20100129
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BETWEEN:

Prime Minister 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
- and -
Amnesty International (Canadian Section, English Branch),
Human Rights Watch, University of Toronto, Faculty of Law - International
Human Rights Program, David Asper Centre for Constitutional Rights,
Canadian Coalition for the Rights of Children and Justice for Children and Youth,
British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario),
Canadian Bar Association, Lawyers Without Borders Canada,
Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté
de droit de l'Université Laval, Canadian Civil Liberties Association and
National Council For the Protection of Canadians Abroad
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 48)

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CANADA (PRIME MINISTER) *v.* KHADR

Prime Minister of Canada,
Minister of Foreign Affairs,
Director of the Canadian Security Intelligence Service and
Commissioner of the Royal Canadian Mounted Police *Appellants*

v.

Omar Ahmed Khadr *Respondent*

and

Amnesty International (Canadian Section, English Branch),
Human Rights Watch, University of Toronto, Faculty of Law -
International Human Rights Program,
David Asper Centre for Constitutional Rights,
Canadian Coalition for the Rights of Children,
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Neutral citation: 2010 SCC 3.

File No.: 33289.

2009: November 13; 2010: January 29.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms — Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Khadr v. Canada* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the

Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards

about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K — an order that Canada request his repatriation — is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Khadr v. Canada*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 461; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002

SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

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

Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.

Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

Authors Cited

Canada. Security Intelligence Review Committee. *CSIS's Role in the Matter of Omar Khadr.*

Ottawa: The Committee, 2009.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose-leaf updated 2008, release 1).

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Evans and Sharlow JJ.A.), 2009 FCA 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] F.C.J. No. 893 (QL), 2009 CarswellNat 2364, affirming a decision of O'Reilly J., 2009 FC 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] F.C.J. No. 462 (QL), 2009 CarswellNat 1206. Appeal allowed in part.

Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

John Norris, *Brydie Bethell* and *Audrey Macklin*, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law - International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha Mackinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

[2] For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

[3] Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

[4] On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was

subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

[5] In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Khadr v. Canada*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

[6] Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report on Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

[7] The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

> [TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these issues and the situation remains the same.…We keep on looking for [assurances] of good treatment of Mr. Khadr.
>
> (http://watch.ctv.ca/news/clip65783#clip65783, at 2'3"; referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32))

[8] On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o

mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

[10] The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

[11] Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

[12] Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated

his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

3. If so, does the deprivation accord with the principles of fundamental justice?

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

[13] We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

[14] As a general rule, Canadians abroad are bound by the law of the country in which they

find themselves and cannot avail themselves of their rights under the *Charter.* International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 461, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

[15] The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

[16] This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24, *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The

Canadian government complied with this Court's order.

[17] We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

[18] Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

[19] The United States is holding Mr. Khadr for the purpose of trying him on charges of war

crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

[20] The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality of intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of

evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States of America v. Mohammed Jawad*, Military Commission, September 24, 2008, D-008 Ruling on defense Motion to Dismiss — Torture of detainee (online: http://www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

[21] An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

3. Does the Deprivation Accord With the Principles of Fundamental Justice?

[22] We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

[23] The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

> (1) It must be a legal principle.
>
> (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.
>
> (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[24] We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus.* It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in

Khadr 2008, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hopper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, at p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

[25] This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the

most basic Canadian standards about the treatment of detained youth suspects.

[26] We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter.*

B. *Is the Remedy Sought Appropriate and Just in All the Circumstances?*

[27] In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

[28] The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

[29] First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the

remedy now being sought — an order that the Canadian government ask the United States to return Mr. Khadr to Canada — is appropriate and just in the circumstances.

[30] An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

[31] The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But

their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

[32] We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

[33] Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

[34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed.

1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

[35] The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

[36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

[37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of

government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

[38] Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

[39] Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its

responsibility for foreign affairs, and in conformity with the *Charter*.

[40] As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

[41] In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

[42] The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

[43] The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian

government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

[44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal" (para. 77). It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

[45] Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

[46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional

competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

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

IV. Conclusion

[48] The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

Appeal allowed in part with costs to the respondent.

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Solicitor for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth: Justice for Children and Youth Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Lavine, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

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