S.C.C. 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

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

INTERVENERS

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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OVERVIEW OF POSITION

1. The Respondent, Omar Ahmed Khadr, has since October 2002 been in detention in U.S. Naval Station Guantánamo Bay ("Guantánamo Bay"), condemned by the Court of Appeal for England and Wales as "a legal black hole," and by United Nations High Commissioner for Human Rights Louise Arbour, who criticized the extraterritorial location of the detention facility, stating that "the choice of the site in Guantánamo Bay was the first marker that there was an attempt by the U.S. administration to manage the war on terror outside the legal framework" because of its physical location outside the United States.[1] The Respondent now faces a proceeding before a Military Commission that is a blatant violation of international law. According to Lord Johan Steyn, a judicial member of the House of Lords, Military Commissions do not comply "with minimum international standards for the conduct of fair trails." Instead, they create "kangaroo court[s]" and "the type of trials one associates with utterly lawless totalitarian regimes."[2]

2. The question raised by this appeal is what constitutional duties Canada owes the Respondent under the *Charter* in light of this flagrantly illegal conduct of the American government. The British Columbia Civil Liberties Association (the "BCCLA") makes the following submissions:

a. By gathering evidence from the Respondent and sharing it with American military authorities for use against the Respondent in the proceedings in Guantánamo Bay, Canada has become "constitutionally complicit" in those proceedings. Canada's complicity violates s. 7 of the *Charter*, because:

i. the potential for the Military Commission to sentence the Respondent to imprisonment poses a threat to his liberty, and

ii. the proceedings in Guantánamo Bay do not accord with the principles of fundamental justice because they violate the basic minimum standards set by international law, and for that reason "shock the conscience."

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[1] Democracy Now!, radio program, Louise Arbour interviewed by Amy Goodman, Carter Center, Atlanta, Georgia, September 7, 2007 at p. 5

[2] *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 at para. 22; Lederer, *U.S. Blasted for Treatment of Detainees*, The Associated Press, March 1, 2007; Steyn, Guantánamo *Bay: The Legal Black Hole*, 27th F.A. Mann Lecture, British Institute of International and Comparative Law, London, England, 25 November 2003 at 11-12

Canada must remedy its s. 7 violation. Logically the most responsive and effective remedy would be to order Canada to retrieve the information from the American authorities and ensure that they retain no copies of the same. Because this may not be practicable, the appropriate and just remedy for the s. 7 breach, and the one sought by the Respondent, requires full disclosure to the Respondent of all evidence in Canada's possession that may equip the Respondent to better defend himself.

b. Regardless of Canada's constitutional complicity in the illegal conduct of a foreign state, s. 7 of the *Charter* places Canada under a duty to protect its citizens from being subjected to proceedings in foreign countries that may deprive them of their liberty, and do so by virtue of procedures that are not in accordance with the principles of fundamental justice because they "shock the conscience." In this case, Canada's duty to protect, at a minimum, requires that it fully disclose all evidence in Canada's possession that may be relevant to the Respondent's defence in the proceedings against him in Guantánamo Bay.

PART I. STATEMENT OF THE FACTS RELEVANT TO ISSUE TO INTERVENE

3. The BCCLA accepts the facts as stated by the Respondent.

PART II. STATEMENT OF POSITION WITH RESPECT TO THE APPELLANTS' QUESTION

4. The BCCLA accepts the issue or question as framed by the Appellants as follows: "Did the Appellants have a legal duty to produce the documents sought by the Respondent in the Whitling request?"[3] In paragraph 2, the BCCLA advances two separate *arguments* why such a legal duty exists: (a) first, as a *remedy* for Canada's "constitutional complicity" in the deprivation of the Respondent's liberty; and (b) second, as part of a "positive duty" on Canada "to protect" the Respondent.

PART III. STATEMENT OF ARGUMENT

A. By gathering evidence from the Respondent and sharing it with American military authorities for use against him in the proceedings before a Military Commission in

[3] Factum of the Appellants at para. 35

Guantánamo Bay, Canada has become "constitutionally complicit" in those proceedings.

(a) The relationship between the submissions of the BCCLA and the Respondent

5. The Respondent advances two lines of argument to support the claim that Canada is under a constitutional duty to make documentary disclosure to Khadr. First, the Respondent grounds Canada's constitutional duty to disclose in the right to make full answer and defence, as protected by s. 7 of the *Charter*. Canada has violated s. 7 because its decision to withhold relevant documents increased the risk or danger of the conviction of the Respondent. This was the basis for the judgment of the Federal Court of Appeal.[4] Second, the Respondent grounds the duty to disclose in the fact that Canada "exploited, condoned, encouraged, and benefited from" the commission of "ongoing violations of the Respondent's basic human rights" by the United States.[5]

6. In this part, as it pertains to the "constitutional complicity" argument, the BCCLA supports the Respondent's second line of argument, namely, that the relevant *Charter* violation arises from Canada's course of conduct in gathering evidence from the Respondent and sharing that evidence with American authorities, for use in proceedings which may deprive the Respondent of his liberty in a manner not in accordance with the principles of fundamental justice.

(b) The doctrine of constitutional complicity

7. This appeal involves the application and extension of a well-established and unbroken line of authority beginning with *Singh v. Minister of Employment and Immigration* and proceeding through to *United States v. Burns* and *Suresh v. Canada*. These cases establish what the BCCLA terms the "doctrine of constitutional complicity." Under this doctrine, the Court has held Canada constitutionally liable for human rights abuses committed by foreign states which occur outside of Canada when (a) such abuses would violate the *Charter* had they occurred in Canada at the hands of the Canadian government; and (b) Canada has been complicit in the human rights abuses of the foreign state. The Court has found Canada to have violated the *Charter* even though the *Charter* does not bind foreign governments without their consent.

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[4] *Khadr v. Canada (Minister of Justice)*, 2007 FCA 182 at para. 34
[5] Factum of the Respondent at para. 93

8. Thus, the Court stated in *Suresh* regarding s. 7 that Canada "does not avoid the guarantee of fundamental justice simply because the deprivation in question would be effected by someone else's hand." All that is required is that "there is a sufficient causal connection between our government's participation and the deprivation ultimately effected." The Court decisively rejected the view that Canada would be an "involuntary intermediary" and thus escape *Charter* liability because torture, if inflicted, would occur at the hands of a foreign government.[6]

9. In *Singh*, *Suresh* and *Burns*, Canada bore constitutional responsibility even though: the human rights abuses would occur outside Canada at the hands of a foreign state at its own behest within its own territory; the foreign state would not be acting under the control, as agents, or at the request of Canada; and Canada neither obtained the consent of the foreign state that the *Charter* should apply nor provided notice to the foreign state that the *Charter* would apply to their transaction. The focus is on the "potential consequence" of Canada's complicity in a chain of decisions ultimately leading to a *Charter* violation, even if the consequence is entirely legal in the foreign state (*Burns*).[7]

10. Under this doctrine, the Court has subjected to *Charter* scrutiny decisions to: process refugee claims, which if unsuccessful would subject an individual to "the threat of physical punishment or suffering as well as such punishment itself" in the state from which the refugee is fleeing (*Singh*); extradite an individual to a jurisdiction to face a murder charge, where the penalties include, but are not limited to, the death penalty (*Burns*); deport an individual to a jurisdiction where he would face the risk of torture (*Suresh*).[8]

(c) The degree of causal connection required for Canada to be complicit

11. To be constitutionally complicit, there must be a "sufficient causal connection" between Canada and human rights abuses committed by a foreign state. A "sufficient causal connection" does not require that "but for" Canada's participation, the human rights abuse would not occur. While *Suresh* states that Canada's conduct must be a "necessary precondition" to trigger the *Charter*, *Suresh* did not hold that this is a standard which must be met in every case. What

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[6] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at paras. 44-48, 53-54; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 at paras. 54-60; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 54

[7] *Burns, supra*, at para. 60

[8] *Singh, supra*, at para. 47; *Burns, supra; Suresh, supra*

Suresh actually held is that "**[a]t least** where Canada's participation is a necessary precondition for the deprivation", Canada does not avoid constitutional liability because "the deprivation in question would be effected by someone else's hand." While the phrase "necessary precondition" does seem to contemplate a "but for" test for causation, the phrase "at least" suggests that the requirement that Canada's role be a "necessary precondition" for the human rights abuse to occur is *not* the only manner by which Canada can be causally connected to the conduct of a foreign state.[9]

12. In the BCCLA's submission, Canada can also be constitutionally complicit if it *cooperated with, may likely contribute to,* or *profits from*, human rights abuses committed by a foreign government. In this appeal, Canada has both cooperated with, and profited from, the abuse of the Respondent's human rights at the hands of the American government.

13. First, knowledge of, or wilful blindness to the fact that the summaries of the interrogations would or might be used in the subsequent proceedings against the Respondent (insofar as they are seen as inculpatory) or may not be used (if they are seen as exculpatory) should be enough to establish the necessary "cooperation" or "contribution" for the purpose of the constitutional complicity doctrine. In February and September of 2003, agents of the Canadian Security Intelligence Service ("CSIS") interrogated Khadr at Guantánamo Bay.[10] These interrogations were conducted to collect information for intelligence and law-enforcement purposes.[11] At that time, Canadian officials knew that Khadr was alleged to have killed a U.S. serviceman and to be a member of Al-Qaeda. Because the U.S. President had previously ordered Military Commissions to try suspected members of Al-Qaeda, Canada knew or should have known that Khadr was likely to face prosecution before a Military Commission.[12] Indeed, Canada questioned American authorities about prosecution.[13] As the Respondent notes at paragraph 116 of his Factum, it was also clear at that time that Military Commissions would not comply with international law. In short, Canada was put on notice, (and thus it was "entirely foreseeable"[14])

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[9] *Suresh, supra*, at para. 54
[10] *Khadr v. Canada (Minister of Justice)*, 2006 FC 509 at para. 19; "4 Page E-mail from Eccops to NOC," November 7, 2003, Appellants' Record, Part V, Exhibit C, 309, at para. 1
[11] *Khadr, ibid*: 3 Page Facsimile, November 6, 2002, Appellants' Record, Part V, Exhibit A, 306, at para. 7
[12] U.S. Military Order, November 13, 2001, Appellants' Record, Part V, Exhibit F, 159, at s. 2
[13] 3 Page Facsimile, *ibid*, at 306, at para. 8
[14] *Suresh, supra*, at para. 54

that it was cooperating with and contributing to preparations to prosecute Khadr in a manner inconsistent with international law. That should be more than enough to make out a "sufficient causal connection" for it to be constitutionally liable under the *Charter*.

14. This conclusion has already been reached by the Federal Court (Trial Division), in a related proceeding, where Justice von Finckenstein granted an interim injunction preventing further questioning of the Appellant by Canada and its agents, pending trial of the action (which has not yet occurred). In granting the injunction, a major factor was the "possibility of prosecution by the U.S. based on the interviews." The Crown alleged that this prospect was "remote and purely speculative." The court rejected this submission, in large part because "DFAIT and CSIS... refused on cross-examination to undertake to inform themselves as to whether assurances were sought from the U.S. (or given by the U.S.) as to the future use of any information obtained by Canadian agents from the Plaintiff [who is the Respondent in this appeal] and provided to the U.S." As a consequence, Justice Finkelstein drew "an adverse inference that such information will be used against the Plaintiff."[15]

15. Second, Canada is complicit in the proceedings against Khadr because it profited from the violation of his rights under international law by the American authorities. The Respondent was detained without charge or trial for several years, in a flagrant violation of international law. During that time, not only did Canada not protest his treatment and attempt to secure his release, it sent DFAIT and CSIS agents to Guantánamo Bay to interrogate Khadr. Canada has attempted to profit from the manifest and blatant illegality of the American government, at the very least for the purposes of intelligence gathering. If Canada wishes to benefit from Khadr's illegal detention, it must also accept the corresponding burden, and be tainted by association with the conduct of the American government. In addition, given that the American government has from the outset stated that detention was necessarily incidental to eventual proceedings before a Military Commission, Canada is linked by its conduct to those proceedings as well.

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[15] *Khadr v. Canada*, 2005 FC 1076 at paras. 27 and 34

(d) The doctrine of constitutional complicity encompasses situations where Canada is causally connected to foreign proceedings which are profoundly procedurally unfair

16. In principle, there is no reason why the doctrine of constitutional complicity should not extend to situations where Canada is causally connected to foreign legal proceedings which are manifestly illegal under international law because they are profoundly procedurally unfair. Thus, in *Canada v. Schmidt*, the Court stated that "the nature of criminal procedures... in a foreign country" may be sufficiently egregious "to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7." The doctrine of constitutional complicity allows the Court to scrutinize the proceedings in Guantánamo Bay in light of the principles of fundamental justice.[16]

(e) Canada can be complicit in human rights abuses committed by a foreign state even though the rights-claimant is not in Canada

17. Moreover, although *Singh*, *Burns* and *Suresh* have involved rights-claimants physically present in Canada, the logic of the doctrine of constitutional complicity does not require the rights-claimant to actually be in Canada for Canada to be complicit in human rights abuses committed by a foreign state. Rather, all there need be "is a sufficient causal connection between our government's participation and the deprivation ultimately effected" (*Suresh*). A sufficient causal connection may exist when an individual is outside Canada.[17]

18. For example, in *Purdy v. Canada (Attorney General)*, the refusal of the RCMP to make disclosure to a Canadian in the United States facing American prosecution flowing from a joint criminal investigation has been held to violate the right to full answer and defence. Likewise, in *Singh*, although the claimants were in Canada because they had been released from detention pending consideration of their refugee claims, the Court framed the question as concerning the constitutionality of procedures governing entry to Canada by persons not yet in the country. The Court rejected the view "that persons who are inside the country are entitled to the protection of the *Charter* while those who are merely seeking entry to the country are not."[18]

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[16] *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at para. 47
[17] *Singh, supra; Burns, supra; Suresh, supra*, at para. 54
[18] *Singh supra*, at para. 53; *Purdy v. Canada (Attorney General)*, 2003 BCCA 447 at para. 17

19. There is no relevant legal distinction between cases where (a) Canada delivers an individual to a foreign state which engages in human rights abuses, and (b) where Canada is causally connected to human rights abuses committed against an individual already in foreign custody even though Canada has had no role in apprehending that individual. For example, in *Burns*, the Court held that Canada could not extradite an individual to face the death penalty. Likewise, the handing over of evidence to be used in criminal proceedings abroad which could culminate in the imposition of the death penalty is no different, for constitutional purposes, than the handing over of the claimant to be tried before such proceedings. In both cases, Canada would contravene the *Charter* through its complicity in the imposition of a death sentence.

(f) Where s. 7 is in issue, Canada's complicity will only be established if the conduct or proceedings of the foreign state is not in accordance with the principles of fundamental justice which will not be the case if the conduct or processes violate international law

20. The Court has been careful to hold that Canada will not violate the *Charter* merely because it is complicit in the actions of a foreign state, which, if it had occurred in Canada and the hands of the Canadian government, would be unconstitutional. Where s. 7 is the right that is at issue, Canada's complicity in the deprivation of one's life, liberty or security of the person will only be established if the conduct or proceedings of the foreign state so greatly offend the principles of fundamental justice that they "shock the conscience."

21. Thus, as *Suresh* reaffirmed, "Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil." Likewise, in *Schmidt*, the Court stated:

> ... I do not think our constitutional standards can be imposed on other countries. A person who is accused of violating the laws of a foreign country within its jurisdiction cannot, it seems to me, rightly complain that she has been deprived of her liberty and security in a manner inconsistent with the principles of fundamental justice simply because she is to be surrendered to that country for trial in accordance with its traditional procedures, even though those procedures may not meet the specific constitutional requirements for trial in this country.[19]

22. In so doing, the Court has struck a balance between two competing imperatives. On the one hand, the Court has prevented Canada from circumventing its obligations under the *Charter* by

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[19] *Suresh*, *supra*, at para. 58; *Schmidt*, *supra*, at para. 55

acting through foreign intermediaries. But on the other hand, because foreign states are not bound by the *Charter*, the Court has sought to avoid the *de facto* application of the *Charter* to foreign states through the backdoor.

23. These two competing imperatives are at play in a number of distinct but interconnected bodies of case-law which arise out of the broader phenomenon of cross-border cooperation between Canada and foreign states in intelligence gathering, criminal investigation, and law enforcement in the criminal justice and national security contexts. These cases include those falling under the doctrine of constitutional complicity (*Singh*, *Burns* and *Suresh*) and the extra-territorial application of the *Charter* to Canadian officials operating abroad. These cases must be interpreted as a coherent whole.

24. Under the doctrine of constitutional complicity and especially where s. 7 rights are at issue, there is a threshold of seriousness that must be crossed for Canada to violate the *Charter* because of its causal connection to human rights abuses committed abroad at the hands of a foreign state. The question is whether a *Charter* violation "shocks the conscience" (*Schmidt*).[20]

25. The Court increasingly looks to international human rights law to determine what sort of conduct on the part of the foreign state "shocks the conscience" and triggers the application of the *Charter*. The clearest example is *Suresh*, where the Court relied heavily on the *jus cogens* nature of the ban on torture, and the illegality of *refoulement* to torture under the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* to hold that deportation to the risk of torture would "shock the conscience" and hence violate the *Charter*.[21]

26. In *Suresh*, the Court did not explain why international law should play this role. The answer can be found in the cases on the extra-territorial application of the *Charter* to Canadian officials abroad, especially *Hape*. *Hape* holds the *Charter* in general does not apply extra-territorially, because of the need to respect the sovereignty of foreign states. But while "[c]omity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide assistance within its borders", comity "ends where clear violations

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[20] *Suresh*, *supra*, at para. 58; *Schmidt*, *supra*, at para. 47

[21] *Suresh*, *supra*, at paras. 46, 49 and 61-75; UN, *International Covenant on Civil and Political Rights* [ICCPR], 16 December 1966, Article 7 (Can. T.S. 1976 No. 47); UN, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Article 3 (Can. T.S. 1987 No. 36)

of international law and fundamental human rights begin." Accordingly, since the proceedings in Guantánamo Bay violate international law, no respect for American sovereignty is due in this appeal – even assuming, *arguendo*, that the remedy that the Respondent seeks might be seen to be disrespectful of that sovereignty.[22]

27. This is the basis for distinguishing *U.S.A. v. Allard, U.S.A. v. Dynar* and *U.S.A. v. Kwok*, and *Schreiber v. Canada*, which are relied on by the Appellants. *Allard*, *Dynar* and *Kwok* held that Canada's duty of disclosure is limited in extraditions, because the ultimate criminal prosecution occurs abroad. In none of these cases was it alleged that foreign proceedings shocked the conscience because they violated international law. The Court can similarly distinguish *Schreiber v. Canada*, which held that the *Charter* did not apply to a letter of request sent by Canada to Swiss authorities. The better explanation for *Schreiber* is that the *Charter* did apply to the letter of request, but that Canada did not violate the *Charter* because Swiss criminal procedures did not shock the conscience since they did not violate international law.[23]

(g) Canada can be complicit in human rights abuses through the conduct of its officials abroad

28. In this appeal, it is actually not clear from the record where CSIS shared summaries of the interviews with American authorities – Canada, Guantánamo Bay or another foreign location. However, this difference has no bearing on the ultimate disposition of this appeal because Canada can be constitutionally liable under the doctrine of constitutional complicity regardless whether its complicity occurred through the conduct of Canadian officials acting in Canada or abroad. If Canada shared the summaries from within Canada, Canada would be constitutionally liable if it was causally connected to foreign human right abuses in the same manner as in previous appeals, which involved the decisions of Canadian officials physically located in Canada – be it the Minister of Justice (*Burns*) or the Minister of Citizenship and Immigration (*Suresh*).

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[22] *R. v. Hape*, 2007 SCC 26 at para. 52

[23] *United States of America v. Allard*, [1987] 1 S.C.R. 564 at paras. 16-17; *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at paras. 126, 133, 140; *United States of America v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 at paras. 98-99; *Schreiber v. Canada*, [1998] 1 S.C.R. 841 at paras. 23-25; Factum of the Appellants at paras. 44 to 47, 69 and 82

29. If Canada shared the summaries from outside Canada, it would still be constitutionally liable. Although *Hape* holds that the *Charter* in general does not apply extra-territorially to Canadian officials operating abroad, an exception arises in cases where there is a clear violation of international law. Thus, if the proceedings in Guantánamo Bay violate international law, and Canadian officials operating abroad are causally connected to those proceedings, Canada's complicity, albeit occurring outside Canada, nonetheless falls within the scope of the *Charter*.[24]

(h) Canada's complicity in this illegal proceeding violated s. 7. To remedy its complicity, Canada must, at the very least, make full documentary disclosure to the Respondent of all evidence in its possession which may better equip him to defend himself

30. Canada was under a constitutional duty under s. 7 to not be complicit in the proceedings against the Respondent in Guantánamo Bay on the side of American authorities, because those proceedings contravene the principles of fundamental justice since, as set out in paragraph 42, they do not meet the basic minimum standards of the United States' obligations under international law and for that reason "shock the conscience." Because there is a causal connection between Canada and these proceedings, and these proceedings could result in the incarceration of the Respondent, Canada's complicity violated s. 7.

31. Canada must remedy its *Charter* violation. As this Court said in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, this requires a purposive approach:

> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin, supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.[25]

32. The most logically responsive and effective remedy would be to require Canada to insist that the information disclosed to the U.S. authorities be returned to Canada and all copies in the possession of the U.S. authorities be destroyed. Since there may never be any realistic way of

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[24] *Hape, supra,* at para. 106

[25] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 at para. 25 [emphasis in original]

knowing whether that would occur in this case, the most responsive and effective remedy (and the one sought by the Respondent) to compensate the Respondent for the harm caused by Canada's complicity must be, at the very least, to require Canada to make full disclosure to the Respondent of all evidence in its possession that may equip him to better defend himself, in accordance with *R. v. Stinchcombe*.[26]

B. Regardless of whether Canada is constitutionally complicit, s. 7 of the *Charter* places Canada under a duty to protect its citizens from violations of international law at the hands of foreign states. In this case, the duty to protect requires Canada to fully disclose evidence that may be relevant to the Respondent's defence in the proceedings against him in Guantánamo Bay.

33. The alternative basis for the Respondent's *Charter* claim to full disclosure raises the more fundamental question of whether Canada has a constitutional duty to protect Canadians from human rights abuses at the hands of foreign states abroad which, had they occurred in Canada at the hands of the Canadian government, would violate the *Charter*. This novel question has not yet reached the Supreme Court of Canada, but it is of considerable importance in the post-9/11 context.

34. Under international law, the state has **a *right*** to protect the interests of its nationals. The question in this appeal is whether the state has a ***duty*** under domestic constitutional law to protect its nationals from human rights abuses committed abroad. Foreign courts have started to recognize such a duty. The leading authority is *Kaunda v. President of Republic of South Africa*, a decision of the Constitutional Court of South Africa.[27] In *Kaunda*, the Constitutional Court of South Africa stated that:

> [t]here may thus be a duty on government... to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances... would be difficult, and in extreme cases probably impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.[28]

The state's duty to protect its nationals under South African constitutional law was founded on the existence of a positive obligation in domestic law to safeguard citizens' enjoyment of their

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[26] *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at paras. 19, 29
[27] *Kaunda et al. v. President of Republic of South Africa et al.*, [2004] ZACC 5; 2005 (4) SA 235 (CC)
[28] *Schmidt, supra*, at para. 47; *Hape, supra*, at para. 52; *Kaunda, supra*, at paras. 69, 126-7

constitutional rights. This flows from as the duty to "protect" and "promote" constitutional rights found in s. 7(2) of the *Constitution of South Africa*.[29]

35. Notwithstanding the lack of a provision in the *Charter* which corresponds exactly to s. 7(2) of the *Constitution of South Africa*, this Court has begun to recognize that the *Charter* imposes positive duties under certain circumstances. Specifically with respect to s. 7, in *Gosselin v. Québec (Attorney General)*, the Court signalled the possibility that a positive constitutional duty under s. 7 "to sustain life, liberty, or security of the person may be made out in special circumstances."[30]

36. It is therefore open to the Court to develop the interpretation of s. 7 in a manner parallel to that taken by the Constitutional Court of South Africa in *Kaunda*. This appeal represents a special circumstance to recognize a narrow positive obligation under s. 7 without the broad resource implications of the claim it rejected in *Gosselin*. In turn, a duty to sustain s. 7 rights would provide the basis in Canadian domestic law for a duty to protect the Respondent from human rights abuses which, if they occurred in Canada at the hands of the Canadian government, would violate s. 7 rights.

37. Indeed, the Court may have already recognized the emerging duty to protect in *Burns*. *Burns* held that Canada "is constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition." The effect of *Burns* is to place Canada under a constitutional duty to make diplomatic representations, with its *failure to act* violating the *Charter*. The idea that an *omission* violates a constitutional bill of rights in this context was explicitly recognized by the Constitutional Court of South Africa in *Mohamed*. There, as in *Burns*, the state's failure to secure assurance that the death penalty would not be imposed represented a violation of its constitutional duty to protect the rights of its nationals.[31]

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[29] *Mohamed*, *ibid.*, at para. 59; *Kaunda*, *ibid.*, at paras. 32, 69; *Constitution of the Republic of South Africa*, Act No. 108 of 1996, Article 7(2)

[30] *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 83. See also *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 at para. 26 and *Baier v. Alberta*, 2007 SCC 31 at para. 55

[31] *Burns, supra*, at para. 143; *Mohamed v. President of the Republic of South Africa*, [2001] ZACC 18, [2001] S.A.J. No. 21 (Q.L.) at para. 54

38. The duty to protect a state's nationals abroad does not arise in every case where a Canadian national faces treatment at the hands of a foreign state that would contravene s. 7 of the *Charter* if undertaken by the Canadian government. As with the "constitutional complicity" doctrine, the conduct of a foreign state must violate the principles of fundamental justice in a way that "shock[s] the conscience." However, "clear violations of international law" rise to this standard and militate against deference.[32]

39. As set out at paragraph 42 below, the BCCLA will argue that the legal proceedings at Guantánamo Bay may result in a deprivation of the Respondent's liberty, and do not meet the minimum standards of due process under international law. For that reason, these proceedings "shock the conscience" and trigger the duty to protect under s. 7 of the *Charter.*

40. The content of the right to protection will vary with the circumstances, depending on the precise manner in which the interests of the rights-claimant have been placed in jeopardy. Traditionally, protection has consisted of diplomatic protection, i.e. the making of diplomatic representations by one state to another. But according to the International Law Commission, protection may extend beyond diplomatic means to encompass the general protection of nationals abroad. Furthermore, in *Kaunda*, the Constitutional Court of South Africa accepted that there may "be a duty on government... to take action to protect one of its citizens against a gross abuse of international human rights norms," and conspicuously did not limit such "action" to diplomatic representations.[33]

41. Thus, there is no reason in principle why an underlying duty to protect cannot, in the instant case, oblige Canada, at the very least, to undertake measures to enable the Respondent to better defend himself in flawed legal proceedings. To that end, the remedy sought is an order that Canada make full disclosure of all evidence in its possession that might be relevant to those proceedings, whether exculpatory or inculpatory.

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[32] *Hape, supra,* at para. 52

[33] International Law Commission, *First report on diplomatic protection*, 7 March 2000, UN Doc. No. A/CN.4/506, pp. 15-16; *Kaunda, supra,* at para. 69

C. The legal proceedings against the Respondent in Guantánamo Bay are a flagrant violation of international human rights law and international humanitarian law

42. The BCCLA adopts the submissions of the Respondent and the intervener University of Toronto International Human Rights Clinic/Human Rights Watch, that the proceedings that the Respondent has been subject to are in gross violation of international law, because (a) at the time of the interviews, Khadr's status had not been determined by a competent tribunal, as required by Article 5 of the *Geneva Convention relative to the Treatment of Prisoners of War*, and he was denied the interim procedural protections required by this treaty, (b) the procedures of Military Commissions do not take into account Khadr's status as a juvenile at the time of the offence, (c) Military Commissions can admit evidence obtained by torture or cruel, inhuman or degrading punishment, (d) there was excessive pre-trial delay, and (e) the Commissions deny fair trial rights to individuals selectively on the basis of their nationality.

PART IV. COSTS SUBMISSION

43. The BCCLA does not seek any costs in this application and asks that it not be subject to any costs orders.

PART V. ORDER SOUGHT

44. That the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ARVAY FINLAY

Per: Erin Aspenlieder

Dated: February 21, 2008

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PART VI. LIST OF AUTHORITIES