



SUPREME COURT OF CANADA

CITATION: Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125,
2008 SCC 28

DATE: 20080523
DOCKET: 32147

BETWEEN:

**Minister of Justice, Attorney General 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 -

**British Columbia Civil Liberties Association,
Criminal Lawyers' Association (Ontario),
University of Toronto, Faculty of Law - International Human Rights Clinic
and Human Rights Watch**

Interveners

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

REASONS FOR JUDGMENT: The Court
(paras. 1 to 42)

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Security Intelligence Service and Commissioner of the
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Indexed as: Canada (Justice) v. Khadr

Neutral citation: 2008 SCC 28.

File No.: 32147.

2008: March 26; 2008: May 23.

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

on appeal from the federal court of appeal

Constitutional law — Charter of Rights — Application — Fundamental justice — Duty to disclose — Canadian officials interviewing detainee in Guantanamo Bay and sharing contents of interviews with U.S. authorities — Whether principles of international law and comity of nations precluded application of Charter — Whether process in place at Guantanamo Bay at that time violated Canada's binding obligations under international law — If so, whether detainee entitled to disclosure of records of interviews and of information given to U.S. authorities as a direct consequence of conducting interviews — Canadian Charter of Rights and Freedoms, s. 7.

Evidence — Fresh evidence — Admissibility — Fresh evidence admissible to clarify record — No unfairness to other parties in admitting evidence.

K, a Canadian, has been detained by U.S. Forces since 2002 at Guantanamo Bay, Cuba, where he is currently facing murder and other terrorism-related charges. He was taken prisoner in Afghanistan when he was 15 years old. In 2003, Canadian officials, including agents of the Canadian Security Intelligence Service, questioned K at Guantanamo Bay with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities. After formal charges were laid against him, K, invoking *Stinchcombe*, sought disclosure in Canada of all documents relevant to these charges in the possession of the Canadian Crown, including the records of the interviews. The Federal Court refused the request, but the Federal Court

of Appeal set aside the decision and ordered that unredacted copies of all relevant documents in the possession of the Crown be produced before the Federal Court for review under ss. 38 ff. of the *Canada Evidence Act*.

Held: The appeal should be dismissed. The Federal Court of Appeal's order should be varied as it relates to the scope of disclosure to which K is entitled as a remedy under s. 7 of the *Canadian Charter of Rights and Freedoms*.

K is entitled to disclosure from the appellants of the records of the interviews, and of information given to U.S. authorities as a direct consequence of conducting the interviews. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law and which might otherwise preclude application of the *Charter* to Canadian officials acting abroad, do not extend to participation in processes that violate Canada's binding international human rights obligations. The process in place at Guantanamo Bay at the time Canadian officials interviewed K and passed on the fruits of the interviews to U.S. officials has been found by the U.S. Supreme Court, with the benefit of a full factual record, to violate U.S. domestic law and international human rights obligations to which Canada subscribes. The comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the *Charter* applies. [2-3] [21] [25-26]

With K's present and future liberty at stake, Canada is bound by the principles of fundamental justice and is under a duty of disclosure pursuant to s. 7 of the *Charter*. The content of this duty is defined by the nature of Canada's participation in the process that violated its

international human rights obligations. [3] [29-31]

In the present circumstances, this duty requires Canada to disclose to K records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity. Since unredacted copies of all documents, records and other materials in the appellants' possession which might be relevant to the charges against K have already been produced to a designated judge of the Federal Court, the judge will now review the material, receive submissions from the parties and decide which documents fall within the scope of the disclosure obligation. [3] [39-40]

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Khadr v. Canada*, [2006] 2 F.C.R. 505, 2005 FC 1076; *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7.

Statutes and Regulations Cited

10 U.S.C. § 836.

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 38, 38.06.

Canadian Charter of Rights and Freedoms, s. 7.

Geneva Conventions Act, R.S.C. 1985, c. G-3.

Treaties and Other International Instruments

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20, p. 25.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20, p. 55.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, p. 163.

Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20, p. 84.

APPEAL from a judgment of the Federal Court of Appeal (Desjardins, Létourneau and Ryer JJ.A.), [2008] 1 F.C.R. 270, 280 D.L.R. (4th) 469, 362 N.R. 378, 220 C.C.C. (3d) 20, 47 C.R. (6th) 399, 156 C.R.R. (2d) 220, [2007] F.C.J. No. 672 (QL), 2007 CarswellNat 1132, 2007 FCA 182, amended June 19, 2007, reversing a decision of von Finckenstein J. (2006), 290 F.T.R. 313, [2006] F.C.J. No. 640 (QL), 2006 CarswellNat 1090, 2006 FC 509. Appeal dismissed.

Robert J. Frater, Sharlene Telles-Langdon and Doreen Mueller, for the appellants.

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

Joseph J. Arvay, Q.C., Sujit Choudhry and Paul Champ, for the intervener the British

Columbia Civil Liberties Association.

John Norris and *Brydie C. M. Bethell*, for the intervener the Criminal Lawyers' Association (Ontario).

Audrey Macklin, *Tom A. Friedland* and *Gerald Chan*, for the interveners the University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch.

The following is the judgment delivered by

[1] THE COURT — This appeal raises the issue of the relationship between Canada's domestic and international human rights commitments. Omar Khadr currently faces prosecution on murder and other charges before a U.S. Military Commission in Guantanamo Bay, Cuba. Mr. Khadr asks for an order under s. 7 of the *Canadian Charter of Rights and Freedoms* that the appellants be required to disclose to him all documents relevant to these charges in the possession of the Canadian Crown, including interviews conducted by Canadian officials with him in 2003 at Guantanamo Bay. The Minister of Justice opposes the request, arguing that the *Charter* does not apply outside Canada and hence did not govern the actions of Canadian officials at Guantanamo Bay.

[2] We conclude that Mr. Khadr is entitled to disclosure from the appellants of the records of the interviews and of information given to U.S. authorities as a direct consequence of conducting the interviews. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in

processes that violate Canada's international human rights obligations.

[3] The process in place at the time Canadian officials interviewed Mr. Khadr and passed the fruits of the interviews on to U.S. officials has been found by the United States Supreme Court to violate U.S. domestic law and international human rights obligations to which Canada is party. In light of these decisions by the United States Supreme Court that the process at Guantanamo Bay did not comply with either U.S. domestic or international law, the comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the *Charter* applies, and Canada is under a s. 7 duty of disclosure. The content of this duty is defined by the nature of Canada's participation in the process that violated Canada's international human rights obligations. In the present circumstances, this duty requires Canada to disclose to Mr. Khadr records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity.

[4] We thus uphold the Federal Court of Appeal's conclusion that Mr. Khadr is entitled to a remedy under s. 7 of the *Charter*. However, because we reach this conclusion on different grounds than those relied on by the Court of Appeal, we vary the Court of Appeal's order as it relates to the scope of disclosure to which Mr. Khadr is entitled as remedy. Like the Court of Appeal, we make this order subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

1. Factual Background

[5] Omar Khadr is a Canadian citizen who has been detained by U.S. forces at Guantanamo Bay, Cuba, for almost six years. Mr. Khadr was taken prisoner on July 27, 2002 in Afghanistan, as part of military action taken against Taliban and Al Qaeda forces after the September 11, 2001 attacks in New York City and Washington. He was 15 years old at the time. The United States alleges that near the end of the battle at which he was taken prisoner, Mr. Khadr threw a grenade which killed an American soldier. The United States also alleges that Mr. Khadr conspired with members of Al Qaeda to commit acts of murder and terrorism against U.S. and coalition forces. Mr. Khadr is currently facing charges relating to these allegations, which are being tried by a U.S. Military Commission at Guantanamo Bay.

[6] The Guantanamo Bay detention camp was established by Presidential Military Order in 2001 (66 FR 57833) for the detention and prosecution of non-U.S. citizens believed to be members of Al Qaeda or otherwise involved in international terrorism. The Order conferred exclusive jurisdiction upon military commissions for the trial of “any and all offences triable by military commission”, and stipulated pursuant to 10 U.S.C. § 836 that applying normal rules of criminal procedure to such trials “is not practicable”. The Order further provided that an individual subject to the order “shall not be privileged to seek any remedy or maintain any proceeding . . . or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”. Subsequent orders purported to remove protections of the *Geneva Conventions* of 1949 (75 U.N.T.S. 31, 85, 135 and 287) and established procedural rules for the military commissions that departed from normal rules of criminal procedure as to the type of evidence that may be admitted,

the right to counsel and disclosure of the case to meet, and judicial independence.

[7] On several occasions, including in February and September of 2003, Canadian officials, including agents of the Canadian Security Intelligence Service (CSIS), attended at Guantanamo Bay and interviewed Mr. Khadr for intelligence and law enforcement purposes. The CSIS agents questioned Mr. Khadr with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities.

[8] After formal charges were laid against Mr. Khadr in November 2005, he sought disclosure of all documents relevant to these charges in the possession of the Canadian Crown, including the records of the interviews, invoking *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The appellants formally refused Mr. Khadr's request in January 2006. Mr. Khadr then applied for an order of mandamus in the Federal Court, which was dismissed, *per* von Finckenstein J. ((2006), 290 F.T.R. 313, 2006 FC 509). The Federal Court of Appeal allowed Mr. Khadr's appeal ([2008] 1 F.C.R. 270, 2007 FCA 182), and ordered that unredacted copies of all relevant documents in the possession of the Crown be produced before the Federal Court for review under ss. 38 ff. of the *Canada Evidence Act*. The Minister of Justice now appeals to this Court, asking that the order of the Federal Court of Appeal be set aside.

2. The Fresh Evidence Applications

[9] Mr. Khadr has filed two applications to admit fresh evidence before this Court. We deal with the applications to admit fresh evidence at the outset.

[10] The first application concerns primarily evidence that is part of a related proceeding brought by Mr. Khadr in the Federal Court (file T-536-04), in which Mr. Khadr is seeking a remedy for alleged violations of his *Charter* rights at Guantanamo Bay. This evidence relates primarily to the general situation at Guantanamo Bay, Mr. Khadr's particular circumstances, and Canadian participation in interviewing Mr. Khadr at Guantanamo Bay. It includes affidavits filed as part of that proceeding from Canadian officials at CSIS and the Department of Foreign Affairs and International Trade, and from Muneer Ahmad, who was counsel for Mr. Khadr in *habeas corpus* proceedings taking place in the United States. The record includes the exhibits that were attached to these affidavits.

[11] Also included in the first application is an affidavit from Lt. Cdr. William Kuebler, Mr. Khadr's defence counsel in the military commission proceedings, updating the Court on developments in relevant U.S. law.

[12] The second application relates to an additional affidavit from Lt. Cdr. Kuebler, as well as exhibits filed under seal with the consent of the U.S. Deputy Assistant Secretary of Defense for Detainee Affairs.

[13] The appellants' primary argument against admitting the fresh evidence is that the evidence from the related proceeding was filed as part of an interlocutory motion in which the appellants chose not to lead certain evidence in response: *Khadr v. Canada*, [2006] 2 F.C.R. 505, 2005 FC 1076. The appellants maintain that the nature of the evidence they led was tailored to the

specific context of that motion and that this evidence should not be imported into the different context of this proceeding. Furthermore, the T-536-04 proceeding has not yet gone to trial, and so the appellants have not yet had an opportunity to present a complete evidentiary record. The appellants argue that it would be unfair to admit the fresh evidence, because, the appellants allege, they were not given an adequate opportunity to respond to it.

[14] We find that the fresh evidence is admissible. The fresh evidence amplifies and significantly clarifies the record as it relates to Canadian officials' interviews with Mr. Khadr and Canada's participation in handing over the products of these interviews to U.S. authorities. As the basic facts are not contested, the appellants are not disadvantaged by the admission of the material.

3. The Application for Disclosure

(i) *Does the Charter Apply?*

[15] As discussed, CSIS, a Canadian government organization, interviewed Mr. Khadr at his prison in Guantanamo Bay and shared the contents of these interviews with U.S. authorities. Mr. Khadr seeks an order that the appellants be required to disclose to him all documents in the possession of the Canadian Crown relevant to the charges he is facing, for the purpose of his defence.

[16] Had the interviews and process been in Canada, Mr. Khadr would have been entitled to full disclosure under the principles in *Stinchcombe*, which held that persons whose liberty is at risk

as a result of being charged with a criminal offence are entitled to disclosure of the information in the hands of the Crown under s. 7 of the *Charter*. The Federal Court of Appeal applied *Stinchcombe* to Mr. Khadr's situation and ordered disclosure.

[17] The government argues that this constituted an error, because the *Charter* does not apply to the conduct of Canadian agents operating outside Canada. It relies on *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, where a majority of this Court held that Canadian agents participating in an investigation into money laundering in the Caribbean were not bound by *Charter* constraints in the manner in which the investigation was conducted. This conclusion was based on international law principles against extraterritorial enforcement of domestic laws and the principle of comity which implies acceptance of foreign laws and procedures when Canadian officials are operating abroad.

[18] In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at para. 52, *per* LeBel J.; see also paras. 51 and 101). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).

[19] If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

[20] At this point, the question becomes whether the process at Guantanamo Bay at the time that CSIS handed the products of its interviews over to U.S. officials was a process that violated Canada's binding obligations under international law.

[21] Issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process. We need not resolve those issues in this case. The United States Supreme Court has considered the legality of the conditions under which the Guantanamo detainees were detained and liable to prosecution during the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities, between 2002 and 2004. With the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. Those holdings are based on principles consistent with the *Charter* and Canada's international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.

[22] In *Rasul v. Bush*, 542 U.S. 466 (2004), the United States Supreme Court held that

detainees at Guantanamo Bay who, like Mr. Khadr, were not U.S. citizens, could challenge the legality of their detention by way of the statutory right of *habeas corpus* provided for in 28 U.S.C. § 2241. This holding necessarily implies that the order under which the detainees had previously been denied the right to challenge their detention was illegal. In his concurring reasons, Kennedy J. noted that “the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status” (pp. 487-88). Mr. Khadr was detained at Guantanamo Bay during the time covered by the *Rasul* decision, and Canadian officials interviewed him and passed on information to U.S. authorities during that time.

[23] At the time he was interviewed by CSIS officials, Mr. Khadr also faced the possibility of trial by military commission pursuant to Military Commission Order No. 1. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the United States Supreme Court considered the legality of this Order. The court held that by significantly departing from established military justice procedure without a showing of military exigency, the procedural rules for military commissions violated both the Uniform Code of Military Justice (10 U.S.C. § 836) and Common Article 3 of the *Geneva Conventions*. Different members of the majority of the United States Supreme Court focused on different deviations from the *Geneva Conventions* and the Uniform Code of Military Justice. But the majority was unanimous in holding that, in the circumstances, the deviations were sufficiently significant to deprive the military commissions of the status of “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”, as required by Common Article 3 of the *Geneva Conventions*.

[24] The violations of human rights identified by the United States Supreme Court are

sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.

[25] Canada is a signatory of the four *Geneva Conventions* of 1949, which it ratified in 1965 (Can. T.S. 1965 No. 20) and has incorporated into Canadian law with the *Geneva Conventions Act*, R.S.C. 1985, c. G-3. The right to challenge the legality of detention by *habeas corpus* is a fundamental right protected both by the *Charter* and by international treaties. It follows that participation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligations.

[26] We conclude 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 the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations.

(ii) *Participation in the Process*

[27] By making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada's international human rights obligations. Merely conducting interviews with a Canadian citizen held abroad under a violative process may not constitute participation in that process. Indeed, it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them. Nor is it necessary to conclude that handing over the fruits of the interviews in this case to U.S. officials constituted a breach of Mr. Khadr's s. 7 rights. It suffices to note that at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations.

(iii) *Implications of Participation in the Process*

[28] Having concluded that the *Charter* applied to Canadian officials when they participated in the Guantanamo Bay process by handing over the fruits of its interviews with Mr. Khadr, the next question concerns what obligations, if any, this entails.

[29] With Mr. Khadr's present and future liberty at stake, s. 7 of the *Charter* required that CSIS conduct itself in conformity with the principles of fundamental justice. The principles of fundamental justice are informed by Canada's international human rights obligations: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 60; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at paras. 82-92; *Hape*, at paras. 55-56.

[30] In the domestic context, the principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy: *Stinchcombe*. In a domestic prosecution, the Crown has put the accused's liberty at risk, which engages s. 7 of the *Charter* and the attendant duty of disclosure.

[31] To the extent that Canadian officials operating abroad are bound by s. 7 of the *Charter*, as we have earlier concluded was the case in this appeal, they are bound by the principles of fundamental justice in an analogous way. Where, as in this case, an individual's s. 7 right to liberty is engaged by Canada's participation in a foreign process that is contrary to Canada's international human rights obligations, s. 7 of the *Charter* imposes a duty on Canada to provide disclosure to the individual. Thus, s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen.

[32] It is not necessary to define for all fact situations the scope of the duty of disclosure, when the *Charter* is engaged by the actions of Canadian officials abroad, but it may differ from the scope of the duty of disclosure in a domestic criminal prosecution. In this case, although Canada participated in the U.S. process by giving the product of its interviews with Mr. Khadr to U.S. authorities, it did not by virtue of that action step into the shoes of the U.S. prosecutors. The scope of the disclosure obligation in this context is defined by the nature of Canada's participation in the foreign process. The crux of that participation was providing information to U.S. authorities in relation to a process which is contrary to Canada's international human rights obligations. Thus, the scope of the disclosure obligation must be related to the information provided to U.S. authorities.

[33] As noted at the outset, the appellants formally refused Mr. Khadr's request for disclosure in January 2006. This refusal of disclosure has put the appellants in breach of s. 7 of the *Charter* and entitles Mr. Khadr to a remedy.

[34] Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities. It is not clear from the record before this Court if all portions of all of the interviews were given to U.S. authorities. If Mr. Khadr is given only partial disclosure of the interviews on the ground that only parts of the interviews were shared with U.S. authorities, it may be impossible for him to evaluate the significance of the parts of the interviews that are disclosed to him. For example, by analogy with *Stinchcombe*, disclosure of an inculpatory statement shared with the U.S. authorities might require disclosure of an exculpatory statement not shared to permit Mr. Khadr to know his jeopardy and prepare his defence. It would seem to follow that fairness requires disclosure of all records in any form of the interviews themselves — whether or not passed on to U.S. authorities — including any transcripts, recordings or summaries in Canada's possession. For similar reasons, it would seem to follow that Mr. Khadr is entitled to disclosure of information given to U.S. authorities as a direct consequence of Canada's having interviewed him.

[35] In making these observations, we are acutely aware that the record before us is incomplete. As this Court does not have the information given to U.S. authorities before it, we are unable to assess precisely what information is so connected to the shared information that it in fairness must be disclosed to Mr. Khadr. The designated judge of the Federal Court who hears the

application under s. 38 of the *Canada Evidence Act* may be expected to have a fuller picture of what was shared with the U.S. authorities and what other material, if any, should be disclosed, bearing in mind the reasons of this Court and the principles enunciated in *Stinchcombe*. The ultimate process against Mr. Khadr may be beyond Canada's jurisdiction and control. However, to the extent that Canada has participated in that process, it has a constitutional duty to disclose information obtained by that participation to a Canadian citizen whose liberty is at stake.

[36] The Minister of Justice has argued that Mr. Khadr's right to disclosure is confined to disclosure from the U.S. authorities who are prosecuting him. We disagree. The remedy of disclosure being granted to Mr. Khadr is for breach of a constitutional duty that arose when Canadian agents became participants in a process that violates Canada's international obligations. Whether or not he is given similar disclosure by U.S. officials, he is entitled to a remedy for the Canadian government's failure to provide disclosure to him after having given U.S. authorities access to the product of the interviews, in circumstances that engaged s. 7 of the *Charter*.

4. Conclusion

[37] In reaching its conclusions on disclosure, the Federal Court of Appeal held that the *Stinchcombe* disclosure regime should apply, and consequently held that the scope of disclosure extended to all materials in the Crown's possession which might be relevant to the charges against the appellant, subject to ss. 38 ff. of the *Canada Evidence Act*. Our holding is not based on applying *Stinchcombe* directly to these facts. Rather, as described above, the s. 7 duty of disclosure to Mr. Khadr is triggered on the facts of this case by Canadian officials' giving U.S. authorities access to

interviews conducted at Guantanamo Bay with Mr. Khadr. As a result, the disclosure order we make is different in scope than the order of the Federal Court of Appeal. The appellants must disclose (i) all records in any form of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him. This disclosure is subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act*.

[38] As noted above, it is not possible on the record before this Court to determine what specific records should be disclosed to Mr. Khadr. In order to assess what specific documents must be disclosed as falling within the group of documents described in para. 37, a designated judge of the Federal Court must review the documents. The designated judge will also consider any privilege or public interest immunity claim that is raised, including any claim under ss. 38 ff. of the *Canada Evidence Act*.

[39] The Federal Court of Appeal ordered that the appellants produce unredacted copies of all documents, records and other materials in their possession which might be relevant to the charges against Mr. Khadr to a designated judge of the Federal Court. In view of the fact that production has already been made pursuant to the Court of Appeal's order and this Court's order of January 23, 2008, we see no reason to interfere with this order.

[40] The designated judge will review the material and receive submissions from the parties, and decide which documents fall within the categories set out in para. 37 above. In particular, the designated judge will determine which records fall within the scope of the disclosure obligation as

being (i) records of the interviews conducted by Canadian officials with Mr. Khadr, or (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr.

[41] Pursuant to s. 38.06 of the *Canada Evidence Act*, the designated judge will then consider whether disclosure of the records described in (i) and (ii) to Mr. Khadr would be injurious to international relations or national defence or national security, and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The designated judge will decide whether to authorize the disclosure of all the information, a part or summary of the information, or a written admission of facts relating to the information, subject to any conditions that the judge considers appropriate. We note that this review is currently ongoing pursuant to this Court's order of January 23, 2008.

[42] Subject to these variations, we would dismiss the appeal with costs in this Court, and issue an order directing that:

(a) the Minister of Justice and Attorney General of Canada, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police produce to a "judge" as defined in s. 38 of the *Canada Evidence Act* unredacted copies of all documents, records and other materials in their possession which might be relevant to the charges against Mr. Khadr;

and

(b) the “judge” as defined in s. 38 of the *Canada Evidence Act* shall consider any privilege or public interest immunity claim that is raised, including any claim under ss. 38 ff. of the Act, and make an order for disclosure in accordance with these reasons.

Appeal dismissed with costs.

Solicitor for the appellants: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

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

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Ruby &
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