

## The Third Time Is the Charm? The Ongoing Litigation Regarding Omar Khadr

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### Cases Considered:

[\*Khadr v. Canada \(Prime Minister\)\*](#), 2010 FC 715.

Omar Khadr, perhaps the most controversial of the detainees at the U.S. naval base at Guantanamo Bay, Cuba, has won another round, in the Federal Court of Canada, in his ongoing quest to pressure the Government to seek to repatriate him to Canada. The Honourable Mr. Justice Zinn cited the “unique circumstances of this case” and entered a strongly worded judgment, finding that Khadr was entitled to “procedural fairness and natural justice” by the executive in the response to the most recent Supreme Court of Canada ruling in the case – *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 [*Khadr II*].

Justice Zinn, finding the Government’s response to date to be lacking, laid out a number of specific mandates for the Government. He ordered the Government to advise Khadr and his attorneys, within seven days, of all “untried” remedies, which had the potential to cure or at least lessen the prior breach of Khadr’s *Charter* rights. He granted Khadr time to respond with his own list of potential remedies, and even went so far as to retain jurisdiction to resolve disputes and to impose his own remedies if the Government failed to do so in a reasonable time. Not surprisingly, the Government appealed Justice Zinn’s ruling, setting the stage for a possible third round of higher court rulings in this case.

The Khadr litigation is remarkable in several respects, not the least of which is that fact that, in spite of two Supreme Court of Canada rulings, and now this new proceeding at the appellate level, Khadr is a prisoner of the United States and not of Canada. Through his Edmonton-based attorneys, Dennis Edney and Nathan Whitling, Khadr, a Canadian citizen, has assertively sought Canada’s assistance in seeking his release from U.S. custody and his return to Canada.

The position of the Canadian Government is that the proceedings in the U.S. must be allowed to run their course. Those proceedings have their own “unique circumstances.” At about the same time as the Federal Court of Canada ruling, Khadr fired his civilian attorneys, unsuccessfully sought to fire his military attorney, and announced that he would boycott the trial, which is now set for August 2010, based on his belief that the entire process denied him the possibility of a fair hearing. Khadr also revealed that he had rejected a plea bargain, because he felt it would allow the U.S. to get away with torturing him as a child. Although Khadr later agreed to cooperate with his military attorney, questions remain about the validity of the Military Commission proceedings themselves, about the nature of the evidence against Khadr, and about the viability of the specific charges that have been laid.

## Factual Background on the Case

The facts of the *Khadr* case are well known and will be briefly summarized here. He was born in Canada in 1986, a member of a family that has gained some notoriety in Canada because of some members' avowed support for Al Qaeda and Osama Bin Laden. Khadr's family took him to Afghanistan, where, at the age of 15, he was involved in a protracted firefight with U.S. soldiers. When it was over, a U.S. soldier, Special Forces Sgt. First Class Christopher Speer, was mortally wounded, and Khadr, the sole survivor from inside the compound, was seriously injured.

Khadr was first detained at the U.S. military detention centre at Bagram, in Afghanistan, before being transferred to Guantanamo Bay at the age of 16. He was kept with the adult population, and recent interrogator testimony has provided corroboration of some of Khadr's ongoing claims of abuse. A former interrogator, for example, acknowledged in a recent hearing that he intentionally scared Khadr by telling him he might go to prison if he lied, and that he then told Khadr a fictitious story about a "skinny little Muslim," who was raped in a U.S. prison by prisoners still angry about the September 11 attacks, adding that he told Khadr he thought the victim died as a result of the attack. (See Jane Sutton, [U.S. interrogators scared Canadian with rape tale](#), (6 May 2010), Reuters (article by a reporter observing Khadr's hearing, describing testimony of "Interrogator No. 1")). As discussed in the most recent decision of the Supreme Court of Canada, Khadr was also subjected, for extended periods, to the so-called "frequent flyer" program, under which a detainee is deprived of sleep by being moved every three hours. The rationale behind the program is to make the detainee more amenable to interrogation. (See *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 5, 24).

Khadr has been in U.S. custody since that firefight in 2002 and is now 23 years old. He has been accused of throwing the grenade that killed Speer. Khadr has never been tried for the incident, although charges before the Military Commission have been pending, including murder in violation of the law of war, attempted murder in violation of the law of war, spying, conspiracy, and providing material support for terrorism. (See [Charge Sheet](#), *United States of America v. Khadr*).

### [\*Canada \(Justice\) v. Khadr\*](#), [2008] 2 S.C.R. 125, 2008 SCC 28 [*Khadr I*]

The first Supreme Court of Canada case concerned the actions of agents from the Canadian Security Intelligence Service ("CSIS") and the Department of Foreign Affairs and International Trade ("DFAIT"), who went to Guantanamo Bay to interview Khadr. They turned over the information obtained from interviewing Khadr to U.S. authorities for use in the Military Commission proceeding, but did not give the information to Khadr or his attorneys.

In *Khadr I*, the Supreme Court ordered Canadian officials to turn over the interview results to Khadr and his attorneys, once a federal court reviewed the unredacted documents to determine if some were exempt from disclosure (*Khadr I* at paras. 29-40). In so ordering, the Court noted two prior U.S. Supreme Court rulings, *Rasul v. Bush*, 542 U.S. 466 (2004), in which the U.S. Supreme Court found that Guantanamo detainees had a statutory right to *habeas corpus* review, and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in which it invalidated part of the Military Commission proceedings (at paras. 21-26). The Supreme Court of Canada described the U.S. Supreme Court rulings as meaning 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" (at para. 26). The Supreme Court of Canada concluded, therefore, that Canada's participation in the process at that

time violated section 7 of its *Charter* obligations and its international human rights obligations (at paras. 25-26). Noting that the *Charter* did not typically apply to the actions of Canadian officials outside of Canada, in this instance, the Court concluded that the rulings of the U.S. Supreme Court meant that the principles of international law and comity did not apply to this case (at para. 26). For an interesting ABlawg discussion of the extraterritorial application issue relating to Khadr, see Linda McKay-Panos, [My Vote for R. v. Hape as a Significant Legal Case of the Decade](#).

### ***Canada (Prime Minister) v. Khadr*, 2010 SCC 3 [Khadr II]**

Khadr's case came before the Supreme Court of Canada a second time, after a federal appellate court upheld a federal court order, requiring the Canadian Government to seek Khadr's repatriation to Canada (*Khadr II* at paras. 1, 9-10). The Supreme Court considered whether Khadr's *Charter* rights had been violated because of the interview trips to Guantanamo Bay by Canadian officials. When a DFAIT official attempted to interview Khadr in 2004, he refused to answer questions. The Canadian official attempted this second interview, even after being told that Khadr had been subjected to the "frequent flyer" program for a period of three weeks – a process previously described by U.S. officials as intended to "make [detainees] more compliant and break down their resistance to interrogation" (at paras. 5, 24).

The Supreme Court declined to uphold the lower courts in terms of ordering repatriation efforts, although the Court strongly condemned the actions of Canadian officials and concluded that Khadr's section 7 *Charter* rights had been violated. The Court determined that Canada's participation in what, at the time, was an "illegal regime," contributed to and was still a causal component of Khadr's ongoing detention (at para. 21). The Court noted that, at the time Canadian officials interviewed Khadr, it was under a regime that denied him *habeas corpus* rights. Officials who interviewed him knew that he was only 16 at the time and that he had no access to counsel "or to any adult who had his best interests in mind," and they also knew they would be sharing the information from the interrogation process with U.S. authorities (at para. 24). When Canadian officials interviewed Khadr, they knew he was being indefinitely detained, and, during the second interview, knew that he had been mistreated while in custody (at para. 24). Interrogating a minor under such circumstances, the Court said, "offends the most basic Canadian standards about the treatment of detained youth suspects" (at para. 25). This conduct, it determined, violated Khadr's section 7 *Charter* rights and failed to comply with principles of fundamental justice (at paras. 24-25).

In spite of its strong criticism of the actions of Canadian officials, the Court opted to grant declaratory relief concerning the violation of Khadr's *Charter* rights, but left it to the Government to determine the appropriate action in response. The determination was based, in part, on the traditional deference given to the executive in the matter of foreign affairs, as well as on uncertainty as to whether the requested remedy would be effective, especially in light of changes to Khadr's legal proceedings in the U.S. The Court also expressed concern about the inadequacy of the record before it to determine both what had been done already in terms of negotiations and what larger foreign policy considerations factored into the equation (at paras. 32-46).

### ***Khadr v. Canada (Prime Minister)*, 2010 FC 715 [the Future Khadr III?]**

It was the Supreme Court's determination that the response was to be left to the Government that led to the most recent round of litigation before the Federal Court of Canada, which heard

arguments in Edmonton in June 2010. Khadr argued that he was entitled to “procedural fairness” by the executive in the decision of how to respond to the Supreme Court’s declaration in *Khadr II* (Reasons for Judgment, at para. 1). The Honourable Mr. Justice Zinn declared that Khadr was, indeed, entitled to “procedural fairness and natural justice” in Canada’s determination of an appropriate remedy for its breach of his section 7 *Charter* rights, and that Canada had failed to meet that standard in responding to the Supreme Court ruling (Reasons for Judgment, at para. 1; Judgment, at para. 2). After the *Khadr II* ruling from the Supreme Court, the Government of Canada decided not to seek Khadr’s repatriation and instead sent a diplomatic note to the U.S. Government, asking it not to use any evidence obtained from the interviews by Canadian authorities in the Military Commission proceeding against Khadr (Reasons for Judgment, at paras. 27, 34; Annex A and Annex B (note and response of U.S. Government)).

Justice Zinn explained that, once Canada made the decision not to seek repatriation but instead to pursue a different remedy, Khadr was “entitled to be afforded procedural fairness and natural justice” (Reasons for Judgment, at para. 71). He noted that justice requires that a person who is affected be given notice of the actions taken to cure or ameliorate the breach (Reason for Judgment, at para. 73). Moreover, he noted that the diplomatic note did not remedy the breach, as the U.S. did not agree to Canada’s request, and that, after Canada made the request, the U.S. did, in fact, use the information in its prosecution of Khadr (Reasons for Judgment, at paras. 85-89).

Justice Zinn ruled that Khadr was entitled to know what Canada was considering as a remedy and was entitled to give his own input into potential remedies (Reasons for Judgment, at para. 75; Judgment, at para. 2). He supported his conclusion with a specific ruling that the Canadian Government had seven days in which to advise Khadr of all “untried remedies,” which it thought would potentially cure or ameliorate the breach – the breach defined by the findings of the Supreme Court of Canada in *Khadr II* (Judgment, at para. 3). Khadr was then given seven days on receipt of this information to provide his own written remedies as to what would “cure or ameliorate” the breach of his *Charter* rights, and to respond to the remedies being considered by Canada (Judgment, at para. 4).

Justice Zinn retained jurisdiction, first, to amend the timeframes at any time, and also to determine whether a proposed remedy would be potentially effective, assuming the parties could not agree (Judgment, at paras. 5, 7). He ordered:

Following the procedural fairness process described herein, Canada is to advance a potential curative remedy as soon thereafter as is reasonably practicable and to continue advancing potential curative remedies until the breach has been cured or all such potential curative remedies have been exhausted, following which it is to advance potential ameliorative remedies until such time as the breach has been reasonably ameliorated or all such remedies have been exhausted ... (Judgment, at para. 6).

In an especially assertive move, Justice Zinn also retained jurisdiction to impose a remedy if Canada did not implement an “effective remedy within a reasonably practical period of time” (Judgment, at para. 8).

## The Tug of War Continues

It is unclear how Khadr's scheduled U.S. Military Commission hearing will affect the course of this latest round of litigation through Canadian courts. The U.S. proceedings, like those in Canada, do not give any clear indication of being finalized any time soon. (See e.g. [Khadr v. Obama](#), Civil Action No. 04-1136 (JDB)(D.D.C. July 20, 2010)(granting Khadr's request to file a second amended *habeas* petition in U.S. federal court, but leaving in place a stay of the proceedings pending the outcome of the Military Commission hearing, and explaining the appeal process from the Military Commission verdict).

The extensive Canadian litigation notwithstanding, at this stage, one could credibly argue that it is unlikely that the U.S. would respond favorably to a request for repatriation. The change in U.S. Administration initially signaled to some that the policies undertaken by the Bush Administration would no longer be pursued, at least in relation to those at Guantanamo Bay. Many commentators expressed a belief that a request for repatriation from Canada would have, at the time the Administration changed, been favorably received. As time passes, however, it appears that the Obama Administration has adopted at least some of the policies of the former Administration, including the decision to continue with Military Commission proceedings, as reconstituted. That Khadr's case has begun to move forward makes it seem increasingly unlikely that the U.S. would suspend the proceedings at this stage to return Khadr to Canada, although, of course, absent such a request from Canada, it is impossible to know for certain.

Justice Zinn's order is the latest in a string of Canadian judicial rulings condemning the actions of the Government of Canada in relation to Khadr. While the Canadian courts do not have jurisdiction to address the actions of U.S. officials, condemnation of their actions is also implicit and sometimes explicit in these judicial rulings. As described extensively throughout the litigation, the issue is not merely Canada's failure to act on behalf of a citizen held abroad, but, rather, Canada's active participation in the process of that citizen's indefinite detention and mistreatment. That concern is amplified where the citizen was only 15 years old when first detained.

The Canadian Government has made it clear that it will continue to resist judicial measures designed to push it into stronger action on Khadr's behalf. In political terms, it appears that the Government has no real motivation for changing its stance. Recent opinion polls show that a majority of Canadians oppose repatriating Khadr and think the U.S. Military Commission trial should be allowed to proceed. (See e.g. Lawrence Martin, [In the matter of Omar Khadr, shame on us](#) (15 July 2010), *The Globe and Mail*). Moreover, this case continues to be a flashpoint for ongoing, and often vitriolic, public debate. (See, e.g., Peter Worthington, [Khadr's doing fine at Guantanamo: Worthington](#) (15 July 2010), *The Toronto Sun* (accompanying comments)).

What is often lost in much of the public debate is that Khadr has never been convicted of the offenses of which he stands accused, because he has never been afforded baseline standards of judicial process to address those accusations. No matter what one may think of Khadr himself, or of his family for that matter, the fact that a 15-year-old boy was so egregiously mistreated and held for eight years with no trial is in clear and sharp contrast with international and domestic law. The U.S. Military Commission may well, as a practical matter, eliminate any Canadian options in terms of repatriation. Moreover, the fact that the U.S. disregarded Canada's request not to use the fruits of its interrogations in the Military Commission proceedings may, again, suggest that it would not be likely at this stage to respond favorably to a request to repatriate Khadr, even in the unlikely event that such a request is made. It is also not at all clear that Justice

Zinn's specific ruling will be upheld on appeal, or that it will ever be effective in actually bringing about stronger action on the part of the Canadian Government on Khadr's behalf. Regardless of whether such judicial rulings have the pragmatic effect of securing Khadr's return to Canada, however, they continue to stand as important statements, which should resound on both sides of the Canada-U.S. Border, that certain rights cannot be cast aside, and that ongoing detention without trial, much less mistreatment, of a 15-year-old will not be viewed in silence.