

United States of America v. Khadr, [2010] O.J. No. 3301

Ontario Judgments

Ontario Superior Court of Justice

C.M. Speyer J.

August 4, 2010.

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Between The Attorney General of Canada on behalf of the United States of America, Requesting State, and
Abdullah Khadr, Person Sought

(178 paras.)

Case Summary

International law — Extradition and criminal mutual legal assistance — Bars to extradition — Abuse of process — Application by Khadr for stay of proceedings allowed — USA sought Khadr's extradition on terrorism charges — Khadr entitled to safeguards and benefit of law, and not to arbitrary and illegal detention in secret detention centre where he was subjected to physical abuse — USA was driving force behind Khadr's 14-month detention in Pakistan, and USA intelligence agency acted in concert with Pakistan to delay consular access to Khadr — USA pressured Pakistan to delay Khadr's repatriation even though there was no admissible evidence upon which to base charges — Given this gross misconduct, stay of proceedings was warranted.

International law — Proceedings — Practice and procedure — Stays — Application by Khadr for stay of proceedings allowed — USA sought Khadr's extradition on terrorism charges — Khadr entitled to safeguards and benefit of law, and not to arbitrary and illegal detention in secret detention centre where he was subjected to physical abuse — USA was driving force behind Khadr's 14-month detention in Pakistan, and USA intelligence agency acted in concert with Pakistan to delay consular access to Khadr — USA pressured Pakistan to delay Khadr's repatriation even though there was no admissible evidence upon which to base charges — Given this gross misconduct, stay of proceedings was warranted.

Constitutional law — Canadian Charter of Rights and Freedoms — Remedies for denial of rights — Procedural remedies — Stay of proceedings — Application by Khadr for stay of proceedings allowed — USA sought Khadr's extradition on terrorism charges — Khadr entitled to safeguards and benefit of law, and not to arbitrary and illegal detention in secret detention centre where he was subjected to physical abuse — USA was driving force behind Khadr's 14-month detention in Pakistan, and USA intelligence agency acted in concert with Pakistan to delay consular access to Khadr — USA pressured Pakistan to delay Khadr's repatriation even though there was no admissible evidence upon which to base charges — Given this gross misconduct, stay of proceedings was warranted.

Application by Khadr for a stay of proceedings pursuant to s. 24(1) of the Charter to prevent an abuse of process. The USA sought the extradition of Khadr, who was a Canadian citizen, to stand trial on terrorism-related charges. It was alleged that Khadr procured various munitions and explosive components to be used by Al Qaeda against the USA and Coalition Forces in Afghanistan. The corresponding or parallel Canadian crimes identified by the Attorney General were terrorism, weapons and explosives offences contrary to the Criminal Code. In October 2004, Pakistan's federal intelligence service, ISI, apprehended Khadr in Islamabad at the behest of the USA, which paid a \$500,000 bounty for his arrest. Khadr was initially sought by American officials solely for intelligence purposes and not for criminal prosecution purposes. He was detained in a secret detention centre for 14 months before his release and repatriation to Canada on December 2, 2005. Khadr alleged the ISI subjected him to harsh and inhuman treatment, including torture, while in detention. He also alleged threatening conduct by USA intelligence agency officials who interrogated him for 17 days, beginning four days after his apprehension by the ISI. The evidence forming the foundation of the terrorism-related charges consisted of three inculpatory statements made by Khadr to FBI and RCMP agents. Khadr deposed that while in Pakistan, the acts of abuse and cruelty he suffered included the infliction of excruciating pain; acts of sexual humiliation including the squeezing of his testicles and penetration of his rectum with a stick; physical beatings; threats of harm to both him and his sister; and the deprivation of food, sleep and medical treatment. At issue was whether Khadr had established misconduct attributable to the USA on a level so serious that it violated the fundamental principles of justice which underlay the community's sense of fair play and decency.

HELD: Application allowed.

Khadr's detention by the ISI was both arbitrary and illegal, according to the law of Pakistan. Pakistan failed to respect international conventions and due process of law and failed to provide prompt Canadian consular access to Khadr. While Pakistan was not a litigant, the USA, which was a litigant, participated with ISI officials in the violation of Khadr's human rights and thereby disentitled itself from the remedy it sought. During his initial three days of detention by the ISI, Khadr was mistreated and physically abused, but his treatment did not amount to torture. From the beginning of his detention, and after being initially physically abused by the ISI and being confined in a hostile environment, Khadr's well founded fear of his captors was a factor to take into account as an influence on his future conduct over the 14 months in detention. The USA and Pakistan collaborated to deny prompt consular access to Khadr. Intelligence objectives, specifically the interrogation of Khadr, trumped the fundamental right to prompt

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consular access guaranteed by the Vienna Convention. The USA applied pressure to Pakistan to cancel Khadr's release. As a result, Khadr spent a further six months in detention while the USA arranged for FBI agents to interview Khadr for criminal prosecution purposes, as well as to set the wheels in motion for Khadr's possible rendition to the USA or to begin the extradition process to Canada. This was an exceptional case that involved state misconduct that contravened fundamental notions of justice, and which undermined the justice system. The gross misconduct that occurred in Pakistan very much affected the proceedings in Canada. The basis of the case had its genesis in the serious misconduct by the USA. The USA was seeking a benefit from the court, committal, based on evidence derived from its own misconduct. The conduct attributable to the USA was so serious that the court was required to act in order to protect its own integrity. The conduct of the USA was so shocking that a committal order would have amounted to an abuse of process. The sum of the human rights violations suffered by Khadr was both shocking and unjustifiable. Although Khadr may have possessed information of intelligence value, he was still entitled to the safeguards and benefit of the law, and not to arbitrary and illegal detention in a secret detention centre where he was subjected to physical abuse. The USA was the driving force behind Khadr's 14-month detention in Pakistan, and the USA intelligence agency acted in concert with the ISI to delay consular access to Khadr for three months, contrary to the provisions of the Vienna Convention. The USA, contrary to Canada's wishes, pressured the ISI to delay Khadr's repatriation because of its dissatisfaction with Khadr being released without charge, even though there was no admissible evidence upon which to base charges at that time. Given this gross misconduct, a stay of proceedings was warranted.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38.04(2)(c), s. 38(4)

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 24(1)

Criminal Code, s. 82(1), s. 83.03(b), s. 83.18, s. 83.2, s. 99, s. 465(1)(c)

Extradition Act, S.C. 1999, c. 18, s. 13, s. 15, s. 29(1), s. 32(2), s. 44(1), S. 44(2)

Counsel

Dennis Edney and Nathan J. Whitting, for the Person Sought.

Howard Pfafsky and Matthew Sullivan, for the Attorney General of Canada, on behalf of the Requesting State.

REASONS FOR JUDGMENT

C.M. SPEYER J.

Introduction

1A stay of proceedings is granted rarely. It is a remedy of last resort that must meet the "clearest of cases" standard. It is an exceptional remedy because its effect is to deprive society of adjudication on the merits.

2The central issue in this extradition proceeding is whether the applicant, Abdullah Khadr ("Khadr"), has established misconduct attributable to the Requesting State, the United States of America, on a level so serious that it would violate those fundamental principles of justice which underlie the community's sense of fair play and decency. The applicant seeks a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*") and the inherent jurisdiction of this court to prevent an abuse of process.

3In the event the stay of proceedings application is unsuccessful, the applicant raises two other significant issues:

- (i) Should the inculpatory statements contained in the Record of the Case ("ROC") be excluded from these proceedings pursuant to section 24(2) of the *Charter* and the common law confession rule?
- (ii) Are the statements in the ROC "manifestly unreliable" for the purposes of section 29(1) of the *Extradition Act*, S.C. 1999, c. 18 ("*Extradition Act*")?

4Extradition hearings are not concerned with guilt or innocence. Because the right to make full answer and defence is not engaged, *Stinchcombe*-type disclosure is not required in the overwhelming majority of extradition proceedings. A person sought for extradition is entitled to know the case against him: this is found in the ROC relied upon by the Requesting State to establish a *prima facie* case. No other disclosure is usually required.

5This is an exceptional case on many levels; one relates to disclosure. On the basis there was a justiciable issue to be determined involving allegations of torture and other cruel and abusive conduct, voluminous disclosure in the possession of Canadian government departments or agencies was voluntarily provided to the applicant by the Attorney General, subject to a very extensive redacting of documents. This enhanced level of disclosure was provided because the applicant's claims of abuse while in detention in Pakistan had an "air of reality" and were sufficient to provide a realistic possibility that the remedies sought could be achieved. I declined the applicant's request to order disclosure from the United States. I ruled that to do so would give the *Charter* impermissible extraterritorial application. I will return to the unredacted disclosure provided later in these reasons.

6The scope of this hearing was expanded because the justiciable issue concerning inhuman and degrading treatment required determination. With the cooperation of counsel, and for reasons of economy and convenience, a blended hearing was conducted for the purpose of adjudicating all issues. When I refer to a blended hearing, I

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speak of the calling of all *viva voce* evidence relevant to all issues raised. When the evidence over a three week period was concluded, argument ensued on the stay of proceeding issue, separate but inter-related issues of statements taken in both Canada and in a foreign jurisdiction, and the ultimate issue of whether there was sufficient evidence to support a committal order.

Overview

I. History of Proceedings

7The United States of America requests the extradition of Abdullah Khadr to stand trial in Boston, Massachusetts, on terrorism-related charges. It is alleged that Khadr procured various munitions and explosive components to be used by Al Qaeda against the United States and Coalition Forces in Afghanistan. The corresponding or parallel Canadian crimes identified by the Attorney General are terrorism, weapons and explosives offences contrary to the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 ("*Criminal Code*").

8On October 15, 2004, Pakistan's federal intelligence service, Inter-Services Intelligence Directorate ("ISI"), apprehended the applicant in Islamabad, Pakistan. He was detained in a secret detention centre for approximately fourteen months before his release and repatriation to Canada on December 2, 2005.

9Khadr alleges the ISI subjected him to harsh and inhuman treatment while in detention, including torture. The applicant also alleges threatening conduct by United States intelligence agency officials who interrogated him for seventeen days: an interrogation that commenced four days following his apprehension by the ISI.

10The evidence forming the foundation of the terrorism-related charges consists solely of three inculpatory statements made by the applicant. The first statement was taken by two FBI agents over a three day period in July 2005, while the applicant remained in a secret detention centre in Pakistan: this occurred nine months after his apprehension.

11The second statement was taken on December 2, 2005 by Detective Inspector Shourie of the Royal Canadian Mounted Police ("RCMP") immediately after the applicant disembarked in Toronto from Pakistan. This statement was videotaped and took place in an interview room at Pearson International Airport.

12The third statement was taken in Toronto on December 4, 2005, two days following the applicant's repatriation to Canada: this statement was taken by the same FBI agents who interviewed Khadr in July 2005 in Islamabad.

13When the applicant arrived in Canada on December 2, 2005, there were no outstanding charges against him and he was not under arrest. Upon leaving Pearson Airport, after providing his videotaped statement, the applicant was driven by the RCMP officers to his family residence in Toronto.

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14On December 16, 2005, a Provisional Arrest Warrant was issued pursuant to section 13 of the *Extradition Act* and Khadr was arrested one day later. Khadr was denied bail by Justice Molloy on December 17, 2005 and subsequently by Justice Trotter on August 19, 2008: he has been in custody since the date of his arrest.

15The criminal charges, the subject of this extradition proceeding, were filed against applicant in Boston, Massachusetts. A Request for Extradition was made to Canada, dated February 9, 2006. Pursuant to s. 15 of the *Extradition Act*, an Authority to Proceed ("ATP") dated March 15, 2006 was issued on behalf of the Minister of Justice, authorizing the Attorney General to seek an order for the committal of the applicant.

16The Canadian offences which correspond to the alleged conduct in the ATP are the following:

- * Directly or indirectly providing or making property available knowing that, in whole or in part, it will be used by or will benefit a terrorist group contrary to section 83.03(b) of the *Criminal Code*;
- * Knowingly participating in or contributing to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity contrary to section 83.18 of the *Criminal Code*;
- * Conspiracy to traffic in weapons contrary to sections 99 and 465(1)(c) of the *Criminal Code*;
- * Possession of an explosive substance contrary to section 82(1) of the *Criminal Code*;
- * Commission of an indictable offence for the benefit of, at the direction of, or in association with, a terrorist group contrary to section 83.2 of the *Criminal Code*.

17On March 15, 2006, counsel for Khadr was served with a copy of the ROC dated February 9, 2006. Subsequently, four Supplementary ROCs ("SROCs") have been filed in these proceedings.

18In August, 2006, counsel for Khadr filed a motion for disclosure of all documents in the possession of Canada, the United States of America and third parties relating to issues raised by a "*Voir Dire* and Stay Application": the stay application and request for a *voir dire* were grounded upon allegations of torture and other cruel and inhuman treatment of Khadr while he was illegally detained in Pakistan. The evidentiary foundation for the disclosure motion was found in Khadr's lengthy 226 paragraph affidavit.

II. Proceedings in the Federal Court of Canada

19As noted, much of the voluminous material provided to Khadr by the Attorney General was redacted on grounds that such disclosure would cause injury to Canada's national security and international relations. Not surprisingly, counsel for Khadr sought the production of unredacted copies of the disclosed material. This was another matter

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beyond my jurisdiction and required an application to the Federal Court pursuant to section 38.04(2)(c) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*").

20Justice Richard Mosley was designated by the Chief Justice of the Federal Court to conduct the hearing under s. 38(4) of the *CEA*. Following a full hearing, Justice Mosley ruled on the application on April 29, 2008.

21Justice Mosley concluded the public interest in disclosure of relevant material to the applicant outweighed that of non-disclosure. Accordingly, he exercised his discretion to authorize disclosure of relevant information in the form of summaries of relevant documents. In arriving at this conclusion, Justice Mosley provided two sets of reasons: the first set is public, found at *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 770, and the second set private. Justice Mosley's private reasons contained the summaries of redacted material. This decision also set the stage for the next procedural debate between the parties. The issue focused on whether this court ought to sit in closed session when information contained in Justice Mosley's private reasons was received in evidence.

III. Application to Close the Court to the Public

22The Attorney General argued this extradition hearing ought to be closed to the general public when information contained in the judicial summaries of Justice Mosley was disclosed. I ruled the court was to remain open.

23In a nutshell, I noted Justice Mosley had specifically not made it a condition of disclosure that the unredacted material be heard in camera. Indeed, the judge clearly contemplated the possibility of disclosure of the materials in open court, and specifically tailored the summaries with that possibility in mind. Most importantly, he was satisfied the public interest in disclosure still outweighed the public interest in nondisclosure in the event I declined to hear such evidence in closed session.

24I ruled the presumptive "open court principle" had not been displaced. I concluded that, given the enhanced public interest in this proceeding and Khadr's right to a fair and public hearing, closing the court each time redacted information was mentioned would seriously detract from the public's understanding of the totality of the evidence and also make the orderly management of this proceeding difficult.

The Evidence

25Somewhat surprisingly, at the conclusion of the hearing all the evidence, and with an important exception relating to the applicant's credibility, it became evident that most of the facts bearing on the resolution of the legal issues were not a matter of great controversy. It is the interpretation of those facts and the application of the appropriate legal principles which are at issue. In this section, I attempt to highlight some of the evidence that pertains to Khadr's detention.

I. Evidence Called by the Applicant

26The applicant led evidence relevant to his detention and allegations of abuse. He submitted three affidavits: one was his own, upon which he was extensively cross-examined; the remaining two affidavits, to which I will refer shortly, relate to the domestic law of Pakistan at the time of these events and Pakistan's reputation for human rights violations. In addition, the applicant called a psychiatrist, Dr. Leslie Payne, who interviewed Khadr five months following his return to Canada. Dr. Payne opined the applicant was suffering from post-traumatic stress disorder, consistent with a history of detention and torture in Pakistan. Dr. Payne's evidence was relevant to Khadr's mental state when he gave his December 2, 2005 statement at Pearson Airport.

II. Witnesses Called by the Attorney General

27The Attorney General called five witnesses, including two from the Canadian Security Intelligence Service ("CSIS") and two from the RCMP. A fifth witness, Dr. Michael First, a psychiatrist, disagreed with Dr. Payne's diagnosis that Khadr suffered from post-traumatic stress disorder. He testified that post-traumatic stress disorder is reserved for cases of "intense psychological distress". Dr. First was of the opinion that Khadr did suffer from a chronic adjustment disorder, which he described as a maladaptive reaction to his life circumstances. Dr. First, like Dr. Payne, testified as to his opinion with respect to Khadr's mental state when he provided his videotaped statement at Pearson Airport.

28"John" was the senior CSIS official on the ground in Pakistan during the period of the applicant's detention. In order to protect John's identity, he testified behind a screen and used a pseudonym. John gave his evidence in a candid and frank manner.

29John's evidence is vital to the unfolding of events. John was the officer who directly interacted with representatives of the two other intelligence agencies involved in this case, ISI and an American agency. It is noteworthy that the ISI refused to deal with other Canadian government departments or agencies: its policy was to deal directly with other intelligence agencies. As a consequence of this policy, John became Canada's point man. It was John who arranged and organized the consular visits for Department of Foreign Affairs and International Trade (DFAIT) officials when such visits were eventually permitted. It was John who facilitated the interviews conducted by the RCMP with Khadr in April 2005. It was John who interviewed Khadr, from time to time, for intelligence purposes in his capacity as an intelligence officer. It was John's testimony that interpreted and shed light on facts contained in the summaries disclosed by Justice Mosley.

30"Christine" is a second CSIS officer who testified. Christine also testified behind a screen and used a pseudonym to protect her identity. The scope of Christine's testimony is limited to remarks made by the applicant while she

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accompanied him home to Canada on December 2, 2005 from Islamabad to Toronto. During that trip, Khadr advised the CSIS officer of the details of the abuse he suffered in the initial days of his detention.

31Detective Inspector Shourie was called as a witness by the Attorney General. He is the RCMP officer who took the December 2, 2005 videotaped statement of the applicant at the Pearson Airport. He was called on the issue of the voluntary nature of this statement. Detective Inspector Shourie also testified as to the part he played in the investigation of the applicant with a view to potentially laying criminal charges against Khadr if sufficient evidence came to light. It was for this purpose that this witness went to Islamabad in April 2005 to interview the applicant in the hope of obtaining a *Charter* compliant statement.

32The final Crown witness called was Constable Tarek Mokdad. This witness was a junior officer to Detective Inspector Shourie and was called primarily with respect to the voluntary nature of the December 2, 2005 statement.

III. Pakistani Law, the ISI and Human Rights

33CSIS is an intelligence agency. Its mandate is to collect and analyze information relating to Canada's national security and report to government. The evidence establishes that Canada is a net consumer of intelligence and dependent upon foreign governments sharing their intelligence.

34The ISI is Pakistan's senior federal intelligence agency. CSIS has a "non-traditional" or "liaison relationship" with ISI based on sharing threat-related intelligence. An illuminating perspective of the ISI is captured in an e-mail dated March 31, 2005 from the RCMP liaison officer in Islamabad to RCMP headquarters. The ISI is graphically described as "the most powerful in the country and may even act autonomously from the government. The ISI view law enforcement, whether local or western, as low priority and a possible source of embarrassment."

35Pakistan became a critical partner for the United States in the aftermath of the tragic events that occurred on September 11, 2001. John's evidence is that the Pakistanis, with the prompting of the international community and particularly the United States, were involved in the arrests of hundreds of individuals believed to be affiliated with Al Qaeda.

36Normally, the law of a foreign state and its record for respect of human rights are not matters for consideration at the judicial phase of an extradition hearing. Those are matters reserved for the executive stage. However, John's understanding of Pakistani law as it relates to Khadr had a bearing on the actions he took. More importantly, the issue of abuse and the arbitrariness of Khadr's detention are central to this proceeding.

37Two affidavits were filed by the applicant: one from Professor Javaid Rehman, a professor of law in London, England, with an expertise in the domestic law of Pakistan; the other from Syed Ali Hasan, principal researcher for Human Rights Watch in Pakistan. Neither affiant was cross examined on their respective affidavits.

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38It is not disputed that Pakistan, during the period of Khadr's detention, had a troubled record with respect to human rights. Canadian officials, when serving in Pakistan, were familiar with this fact. Americans were similarly familiar with Pakistan's problematic human rights record. The United States Department of State, in its 2003 Report on Human Rights, cautioned that security force personnel continued to torture persons in custody in Pakistan.

39The evidence indicates that in Pakistan, while laws applicable to the detention of prisoners are substantially similar to our own laws, failure to comply with procedural safeguards is prevalent. Indeed, in the Crown factum, counsel for the Attorney General puts it this way:

It is clear from the evidence filed by Khadr in the affidavit of Ali Hasan that while Pakistan has a constitution which in many ways appears to resemble Canada's, the rights it confers are generally disregarded in practice. The documentation also reveals the reasons for this. Pakistan is a developing country plagued by poverty and an unstable political environment which shifts back and forth from civilian to military control. When the events at bar occurred, the country was essentially under military control with a civilian façade.

40Professor Rehman deposes that Pakistan's constitutional law and anti-terrorism legislation allow for detention up to and beyond the fourteen month period. However, there are strict procedural requirements with respect to "preventive detention" which were clearly not observed in the case of Khadr.

41John described his knowledge of Pakistani law with respect to "administrative detention," or "preventive detention," as a "basic layman's understanding". He found it confusing because there seemed to be several functioning systems of law occurring simultaneously with overlapping jurisdictions. It was his understanding, based on advice given to him that a person held in "administrative detention" such as Khadr was not entitled to a lawyer.

42It is clear that, even if the Pakistani authorities had the right to arrest Khadr for valid national security concerns, their failure to comply with procedural safeguards made his detention not only arbitrary but also illegal in Pakistan. Moreover, as John noted in his evidence, the ISI did not have a track record for moving people in their detention into the functioning Pakistani criminal justice system.

IV. Pre-Arrest Circumstances

43Abdullah Khadr is a Canadian citizen. He spent many years of his life living with family in either Pakistan or Afghanistan. After his father's violent death in October 2003, Khadr and his family moved from Afghanistan to Islamabad, Pakistan. Certain information provided by the applicant's brother, Abdurahman Khadr, informed intelligence agencies that the applicant was affiliated with the organization Al Qaeda.

44This, and other information in the possession of CSIS, led the agency to believe the applicant was as a national security risk. Intelligence information relating to Khadr was shared amongst CSIS, the American agency, and ISI.

45In late September 2004, Khadr phoned the CSIS offices in Toronto and indicated a willingness to provide this agency with important intelligence information. Khadr informed the CSIS official, "I am willing to tell you everything I know." Subsequent events overtook Khadr's proposal.

46In early October 2004, CSIS was informed by American authorities that Khadr's arrest in Pakistan was imminent. The affidavit of a senior official in the Counter-Terrorism Division of the Federal Bureau of Investigation ("FBI") deposes that American authorities were interested in speaking to Khadr, whom they felt might possess information regarding future terrorist threats against the United States in addition to general information relating to Al Qaeda. Importantly, it is clear and explicit in the affidavit that the interviews conducted by the United States intelligence agency with Khadr were done for intelligence purposes and not for criminal investigative purposes. What was not contained in the ROC or the SROCs, including the affidavit, was the fact that a \$500,000 bounty was paid by the Americans to the ISI for Khadr's arrest. This came to light in the wake of the unredacted disclosure ordered by Justice Mosley.

47In response to the information concerning Khadr's anticipated arrest in Pakistan, CSIS drafted a communiqué to ISI requesting ISI follow accepted norms of international conventions and due process of law. Further, the communiqué asked that, if Khadr was detained in Pakistan, he be allowed consular access.

V. The Applicant's Claims of Abuse

48Khadr was arrested by the ISI in Islamabad on October 15, 2004. He was interrogated by members of ISI for three days. In his affidavit, the applicant alleges he was subjected each day to acts of unspeakable abuse and cruelty. In his affidavit, Khadr deposes these acts included the infliction of excruciating pain; acts of sexual humiliation including the squeezing of his testicles and penetration of his rectum with a stick; physical beatings; threats of harm to both him and his sister; and the deprivation of food, sleep and medical treatment.

49The abuse he suffered in Pakistan, a matter in dispute, was not disclosed by Khadr for the first time in his affidavit. On the flight to Canada from Pakistan on December 2, 2005, the applicant spoke to the CSIS officer, Christine, who was accompanying him back to Toronto. Christine did not identify herself as a CSIS member, but held herself out to Khadr as a representative of the High Commission in Islamabad. She described Khadr's demeanour throughout the trip as relaxed, comfortable and talkative.

50On second leg of the trip, from Manchester, England to Toronto, Christine testified Khadr told her that this was the first opportunity he had had to speak to a Canadian official alone, and that he wanted to tell her what had

happened. Christine emphasized on several occasions he was under no obligation to do so. Christine's evidence is the applicant told her that he was beaten about the head area by Pakistani officials for two hours just after he was arrested: in particular, one blow to his head caused his ear to bleed for weeks thereafter. He further advised Christine that, when it became apparent to Pakistani officials that he was willing cooperate with them, the physical abuse stopped. Further, he told Christine, on the day following this physically abusive treatment, Pakistani officials apologized for what occurred a day earlier. Khadr also told Christine that during the first three weeks of his detention, he was forced to stand for extended periods and was not allowed to sleep for more than two to three hours per night.

VI. Delayed Notification to Canadian Officials by the ISI of Khadr's Detention and the Refusal to Permit Consular Access for Three Months

51 Reports surfaced in Pakistani newspapers of the arrest of a Canadian citizen. On October 19, 2004, American authorities privately advised Canadian officials of Khadr's arrest. On October 24, 2004, a United States intelligence agency advised CSIS that debriefings of the applicant were continuing and that it was important to allow intelligence aspects to play out before official representations were made by any element of the government of Canada.

52 John met with an ISI official on October 28, 2004. The purpose of the meeting was for CSIS to obtain confirmation from ISI that Khadr was being detained. The ISI official refused to confirm the fact that Khadr was in Pakistani custody. It was John's impression that the ISI were stalling acknowledging Khadr's arrest because he was still being interrogated. It was John's opinion that the ISI believed if Canadian authorities demanded full consular access, the operational value of Khadr's information would be diminished.

53 Faced with the unwillingness of the Pakistani intelligence agency to confirm Khadr's detention, John arranged a meeting, held on November 10, 2004, with a more senior member of the ISI. At that meeting, the ISI officer advised John that Khadr was being held. John was advised that Khadr was in good health and being well-treated. John brought up the issue of the Canadian government seeking consular access. The ISI, for a second time, raised concerns with the issue of consular access while Khadr was still being debriefed. This senior ISI official indicated that if the Canadian government pressured Pakistan for consular access through DFAIT, the ISI might be forced to release Khadr to Canada. In such circumstances the official believed the Canadian government could not arrest Khadr, nor would they want to.

54 It was at this meeting of November 10, 2004 that John learned the ISI were investigating Khadr for possible involvement in an assassination attempt of a senior Pakistani political figure.

55 On December 2, 2004, a United States intelligence agency indicated to CSIS that Khadr had been generally cooperative and that his human rights continued to be respected. The communiqué indicated that Khadr had provided the agency with Al Qaeda-related information. The reason for his continued investigative detention was to

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identify locations where other suspected Al Qaeda associates might be found. American authorities indicated that, once their operations were completed, Khadr would be moved out of investigative detention. The message stated, "In the meantime, we ask for your Service's patience in obtaining access to Khadr." This is the second time the United States agency requested CSIS's forbearance in insisting on prompt consular access.

56By December 20, 2004, a senior Pakistani official indicated to John that Khadr might be transferred into the regular Pakistani legal system. John's opinion was that, while this was hopeful and a positive step, he was sceptical because he did not see any track record of the ISI being willing or capable of moving individuals into the criminal justice system.

VII. Consular Visits in 2005

57On January 12, 2005, DFAIT officials were permitted, for the first time, to visit Khadr. The visit was monitored by ISI officers. In addition to the physical presence of a Pakistani official, John's evidence was that it was to be assumed that every visit, whether for consular or intelligence briefing purposes, was electronically monitored by Pakistani authorities.

58Khadr was permitted a second consular visit three months later, on April 14, 2005. This was in advance of the RCMP arriving to conduct their interviews.

59A third consular meeting occurred on June 17, 2005, followed by another on September 7, 2005. The final meeting took place on November 19, 2005. John was present at all of these meetings, with the exception of the first one. Even there, he interviewed Khadr on the same day following the conclusion of the first consular visit.

60At the April 14, 2005 consular visit, Khadr was asked if he knew a lawyer named Dennis Edney. He replied no. When told that he was a Canadian lawyer, Khadr replied that he did not know who he was but perhaps his mother had hired him. He was asked if Edney was his lawyer and he replied no.

61At none of the consular visits did Khadr complain about physical abuse, nor did he appear to exhibit physical signs of ill treatment. On the other hand, he was not asked if he had been abused nor were the circumstances of his detention such that he could not speak freely without fear of reprisals.

VIII. The RCMP Visit and the Interviews on April 16-19, 2005

62Detective Inspector Shourie, from the time of Khadr's arrest, understood that gathering evidence sufficient to charge Khadr would pose significant legal challenges. By March 2005, the ISI had exhausted Khadr as an intelligence source and wanted the RCMP to charge him and take him back to Canada. When Detective Inspector Shourie went to Pakistan in April 2005, he hoped to persuade Pakistani officials to permit conditions which would

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allow for the taking of a legally admissible statement to be used in a criminal prosecution. The ISI refused the RCMP's request to videotape the statement, or to allow Khadr access to a Canadian lawyer for legal advice: a further restriction imposed was any interview must be conducted in the presence of a Pakistani official. Accordingly, Detective Inspector Shourie decided not to take a statement for law enforcement purposes.

63 However, Detective Inspector Shourie did meet with Khadr and questioned him from an intelligence perspective with a view to gathering a greater insight into the intelligence-related information Khadr possessed. Shourie also acknowledged that he wished to establish a rapport with Khadr in the event the two men had further and future dealings.

IX. January-June 2005: Khadr's potential Repatriation to Canada

64 Beginning in early 2005, and certainly by March 2005, ISI no longer saw Khadr as an active producer of intelligence leads: his usefulness was spent. John's evidence put it succinctly when he stated that the ISI was good at capturing and killing militants and at interrogating prisoners, but not very effective at building cases and moving persons into the criminal justice system in Pakistan. ISI authorities spoke less and less to John about moving Khadr into the Pakistan's criminal justice system.

65 In March 2005, the United States was also attempting to persuade the ISI to move Khadr into the Pakistani justice system but the ISI was nervous about anything to do with Pakistan's court system. Nor would ISI allow the FBI to interview Khadr at that time, for fear of information and names of ISI officers becoming public in a criminal court document.

66 In a letter dated March 11, 2005, the ISI advised CSIS that they were approving the RCMP request to interview Khadr and would like release him to Canadian authorities following the interview. As previously noted, when the interview of Khadr took place in April, 2005, ISI restrictions and conditions did not permit the type of interview acceptable by Canadian standards for criminal prosecution purposes. After the interviews in Pakistan, the RCMP was not willing to take Khadr into custody because of a lack of evidence. Without charges laid against him, the ISI declined to release Khadr in April, 2005.

67 By the end of May 2005, CSIS advised Canadian government officials that it was improbable that Pakistan would wait much longer before releasing Khadr. It would be three months before a determination could be made by the RCMP to charge and request extradition of Khadr.

68 During the first couple of weeks of June 2005, CSIS had ongoing interactions with Khadr. John testified that Khadr continued to cooperate during this period, that he was in overall good health, and that he wished to remain in contact with CSIS upon his return to Canada. It was also during this two week period that the ISI informed CSIS that the prosecution of Khadr in Pakistan was not a viable option and that the ISI were not willing to detain him any

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longer. The ISI indicated to CSIS that Khadr would be released and returned to Canada on June 15, 2005. Consequently, Canadian officials made arrangements in preparation for Khadr's return to Canada.

69On the evening of June 14, 2005, the evening before Khadr's planned release and repatriation, John received a phone call from his American intelligence counterpart telling him the United States agency disagreed with and was concerned about plans to repatriate Khadr to Canada. The United States believed Khadr still posed a threat and that releasing him at this point was not a wise course of action.

70Following this telephone call from the American intelligence official, John received a second phone call that evening from his senior liaison at the ISI. John was told there was new evidence relating to Khadr's participation in criminal activity in Pakistan and his release would be delayed. John testified that he made plans to meet with his ISI liaison the next morning.

71John met the senior ISI officer the following day, June 15, 2005. The ISI official apologized for the cancellation of Khadr's repatriation. The ISI official stated his organization had been asked by the United States government to "stand down on the [Khadr] project." John summed up the situation his way:

Obviously, it was a bad situation. The pressure was on the Pakistanis. We wanted obviously the release to go forward. The Pakistanis were under a lot of pressure, but felt -- I think they felt -- they felt they were being pressured from many sides. It was sort of an impasse.

Nevertheless, the Pakistani official stated that the ISI would not release Khadr to the United States without Canada's written authorization and that they would not hold continue to hold him indefinitely.

72In a later communication of August 11, 2005 from a United States agency, the agency requested CSIS's patience during the course of a continuing United States investigation and reassured CSIS that nothing would be done with Khadr without the knowledge and consent of Canada, the United States, and Pakistan. CSIS was of the view that the FBI and its criminal investigation was "driving the agenda" and that the FBI intended to ask ISI to keep Khadr in investigative detention. It was John's opinion that the delay in the repatriation was as a result of the United States trying to move forward with a criminal prosecution.

73On July 15, 2005, the ISI confirmed to CSIS that the FBI was being allowed to interview Khadr. The interview conducted by FBI agents occurred over a three day period from July 21-23, 2005. The ISI gave the FBI seven to ten days to determine if they were going to charge Khadr. If no charges were laid by the United States, Khadr would be sent back to Canada. It was John's opinion that the FBI was asking the ISI to keep Khadr in investigative detention until extradition plans could be completed.

74CSIS believed the ISI were not going to release Khadr to the United States unless Canadian officials agreed.

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Further, Canada would not consent to the American request that Khadr be moved directly from Pakistan to the United States.

75On August 28, 2005, a senior United States official confirmed to a DFAIT official that the United States had no success in getting the Pakistanis to order that Khadr be sent directly to the United States. The American official nevertheless expected that the United States could opt for rendition to the United States to face criminal charges. The official asserted that the United States would do a rendition the next day if not for the fact that the Pakistanis wanted Canada's consent.

76In a communication on November 1, 2005, ISI stated that it wanted to revert to its June 2005 position and deal with Khadr's release. A couple of days later, on November 4, 2005, a senior United States official inquired with DFAIT about the possibility of delaying Khadr's release for a month in order to allow United States officials to "get their act together" with respect to extradition plans. A senior Canadian official denied the request.

77The evidence establishes that by November 30, 2005, the eve of Khadr's departure to Canada, Pakistan's Ministry of Foreign Affairs still had not publicly acknowledged that Khadr was being detained in Pakistan.

X. Circumstances of the Pearson Airport Statement

78When Khadr arrived at the Pearson Airport in Toronto, Detective Inspector Shourie was present. There were other RCMP members; all were in plain clothes. Uniformed members of the Canada Border Services Agency ("CBSA") and the Peel Regional Police were also present. It was Detective Inspector Shourie's intention to keep Khadr's return "as low-key as possible."

79Upon deplaning, Khadr was greeted by five uniformed CBSA officers. He was then escorted to the customs area, where he saw Detective Inspector Shourie. Khadr smiled and waved at Detective Inspector Shourie. They exchanged a few comments. Detective Inspector Shourie explained that he wanted to speak with Khadr but that it was voluntary and there was no obligation. Detective Inspector Shourie testified that he then "backed off" from Khadr.

80After Khadr cleared customs, CBSA officer Sebastian Nowak told him he was free to leave but that the RCMP were interested in speaking with him if it was "of his own free volition." Khadr responded that he was willing to speak with the RCMP and requested a coffee and some water, which were provided. In the presence of Nowak, Detective Inspector Shourie repeated that Khadr was not obligated to speak with him, but Khadr advised that he "did not mind speaking." Khadr agreed in cross-examination that no one at the airport told him that he had to cooperate, even though he stated in his affidavit that he felt he had no choice but to speak with Detective Inspector Shourie.

81Khadr entered a small room in Terminal 3 with Detective Inspector Shourie. The entire interview was video and audio recorded. The door to the interview room was not locked and Khadr was repeatedly told he could leave whenever he wanted. Detective Inspector Shourie emphasized to Khadr during the interview that his participation was voluntary.

82Detective Inspector Shourie gave Khadr a full caution, orally and in writing, including a right to counsel and the phone number for Legal Aid. Khadr did not wish to exercise his right to counsel. Khadr was told he was not under arrest. Importantly, Detective Inspector Shourie advised Khadr that what he had told Shourie in Pakistan was to have no impact or interfere with what was about to be discussed.

83Constable Mokdad was present during the interview. He described Khadr's mood as friendly. Detective Inspector Shourie confirmed this interpretation of Khadr's mood, stating that he laughed and joked during the interview. It was Detective Inspector Shourie's opinion that Khadr "was relieved and was basically trying to get this stuff off his chest." In my view, Khadr's demeanour on the videotape appears to be relaxed and friendly.

84The interview lasted approximately two and a half hours, concluding at 5:05 p.m. Khadr was provided coffee and a washroom break.

85FBI agents were in Toronto at the time of this interview. Detective Inspector Shourie deliberately kept the FBI at a distance, even though they were present at the Pearson Airport. While Khadr had originally agreed to meet with the FBI at Pearson Airport at the end of his interview with the RCMP, he later changed his mind. Detective Inspector Shourie then offered to give him a ride and escorted him through a route in the airport that would draw the least attention and would keep them from encountering the FBI.

XI. Circumstances of the Delta Statement

86Two days after Khadr's return to Canada, Constable Mokdad called Khadr to ask him how he was doing. Khadr called back and arranged to meet with Constable Mokdad and Detective Inspector Shourie at a fast food restaurant near his home. Khadr attended with his brother to meet the officers. At the restaurant, there was a casual conversation about Khadr's return to Canada and what he had been doing over the previous couple of days.

87Detective Inspector Shourie asked Khadr if he was still interested in speaking with the FBI and repeated that he was under no obligation to do so. Khadr agreed to speak with the FBI, but wanted Detective Inspector Shourie to be present.

88Constable Mokdad assisted Khadr in accompanying his brother back to the home, while Detective Inspector Shourie drove over. At the home, Khadr's mother expressed apprehension about Khadr speaking with the FBI.

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Detective Inspector Shourie told Khadr's mother that she could not be present during the actual interview by the FBI, but that she could accompany him to the Delta Hotel.

89Detective Inspector Shourie, Constable Mokdad, Khadr, and Khadr's mother drove to the Delta Hotel. Khadr's mother was concerned that Khadr would be taken by the FBI, but Detective Inspector Shourie assured her that there was no authorization to do so.

90Upon arriving at the Delta Hotel, Detective Inspector Shourie and Khadr went up to the room, while Khadr's mother and Constable Mokdad stayed downstairs. Detective Inspector Shourie set up the camera while Khadr did his prayers. The FBI team then entered the room.

91Detective Inspector Shourie provided him with the appropriate Canadian cautions and right to counsel, in both English and Arabic. After providing the cautions, Detective Inspector Shourie moved to the background to allow the FBI to conduct their interview.

92The FBI interview was conducted by Galen Nace and Gregory Hughes, the same FBI officials who had interviewed Khadr in Pakistan. Many of the questions posed during the Delta interview made reference to Khadr's previous statement in Pakistan. I consider this in further detail later in the judgment.

93Detective Inspector Shourie's opinion was that Khadr's demeanour during the Delta interview was similar to his demeanour during the Pearson Airport statement. Khadr was forthright and cooperative in his responses.

94Two weeks following the Delta statement, on December 17, 2005, Khadr was arrested in Canada. He has been detained ever since.

Findings of Fact

95The events of September 11, 2001 mobilized international efforts to fight terrorism. As John testified, Pakistan became a focus of the war on terrorism because it was the centre of a global terrorist network. Pakistan is a country where threat-related intelligence is gathered by many countries, including Canada and the United States. The gathering and collecting of information and intelligence in relation to national defence is of the highest importance. And so are our democratic values, including respect for human rights and the primacy of the rule of law.

96The capture of Khadr in Pakistan on October 15, 2004 was entirely for intelligence-related purposes. The SROC #3 makes clear, as do the reasons of Justice Mosley, the United States wished to interview Khadr with respect to potential imminent terrorist threats as well as general information relating to Al Qaeda. From the American perspective, Khadr's apprehension was not law enforcement-related. I stress this fact because this is a case where,

in difficult times, the reality of intelligence objectives collides with the protection of individual rights and the rule of law.

97Canada was tipped off shortly before Khadr's capture that his arrest in Pakistan was imminent. Pakistan, at the time of these events, had a troubled history with respect to the violation of human rights. Canada immediately sent a communiqué to Pakistan requesting the ISI "to follow accepted norms of international conventions and due process of law and allow access to Canadian consular officials if Khadr is detained in Pakistan." Both Detective Inspector Shourie and John gave evidence that the ISI was an intelligence agency that CSIS and the RCMP do not traditionally deal with. The purpose of the communiqué was, at least in part, to assert Canada's expectation that Khadr's rights would be adhered to.

98It is clear, and I find for reasons that follow, that Pakistan failed to respect international conventions and due process of law and failed to provide prompt Canadian consular access to Khadr. Pakistan is not a litigant to this proceeding. The important issue is whether the United States, who is a litigant, participated with ISI officials in the violation of Khadr's human rights and thereby disentitled itself from the remedy it seeks from this court.

I. Allegations of Mistreatment

i. By the ISI

99There is evidence from reliable American and Canadian public records that, at the time of these events, Pakistan had a record for human rights violations. The unchallenged affidavit evidence of Syed Ali Hasan supports this conclusion. Moreover, a note from a December 22, 2004 meeting between the RCMP and CSIS refers to Pakistan's "history of torture" and "national reputation for torture." The evidence of John was the ISI was an elite intelligence/military agency. He was not personally aware of instances of torture by the ISI, but testified the agency had a reputation for being "harsh". Accordingly, in assessing the validity of Khadr's allegations, I must take into account there is a credible risk that torture may have occurred, as recounted by Khadr, with respect to the three days following his arrest.

100I find as a fact that Khadr was mistreated immediately following his arrest by the ISI but not to the extent he alleges. In a colloquy with counsel, counsel for the Attorney General took no serious issue with a finding of ill treatment. Counsel for the Attorney General put it this way: "I don't think it is in dispute that there was some sort of rough treatment that occurred immediately upon arrest. The extent of that rough treatment and whether it is precisely as described in his affidavit, that's another matter." Evidence in Justice Mosley's summaries supports a finding of mistreatment.

101Without in any way minimizing the abuse suffered, I am not satisfied, on a balance of probabilities, that the

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mistreatment of Khadr reached the level of severity alleged. I do not find evidence amounting to torture. I come to this conclusion for two reasons.

102First, Khadr's initial disclosure of abuse to Christine is markedly different from the allegations set forth in his affidavit. Khadr never discloses to Christine the acts of sexual humiliation he alleges in his affidavit. Moreover, the beatings he relates to Christine take place over a very confined period of time -- two hours -- rather than the entire three day period leading up to the United States commencing their interrogations. In this respect, it is of significance that Khadr tells Christine that "when it became clear that he was willing to cooperate with Pakistani authorities" the beatings stopped and an apology was forthcoming the next day. I found Christine to be a truthful and reliable witness who accurately recounted the remarks uttered to her by Khadr. These remarks cast doubt on the reliability of the extent of the abuse Khadr suffered and not on the fact of abuse having occurred. In coming to this conclusion, I am cognizant of the data of experience that individuals who are victims of abuse, and particularly sexual abuse, do not necessarily disclose the full extent of the abuse immediately: in many cases they do not.

103Secondly, and more importantly, there were aspects of Khadr's evidence that simply were not credible. The most vivid example relates to his assertion that, during the course of the Pearson statement on December 2, 2005, Detective Inspector Shourie became angry when Christine -- whom Khadr believed was a representative of the Canadian Embassy -- entered the room during the course of the interview. Khadr states in his affidavit that when people from the Canadian Embassy came into the room, Detective Inspector Shourie became angry and told them to leave. Detective Inspector Shourie was upset and told them he was going to report them because they were interfering with the interview. As a result, according to Khadr, the Embassy officials left without a word of assistance.

104This was clearly not the case. The videotape of the interview demonstrates the conduct attributed to Detective Inspector Shourie simply did not occur and, indeed, that Christine offered Khadr fifty dollars for a cab ride home and wished him good luck.

105In conclusion, I am not satisfied on a balance of probabilities that the mistreatment of Khadr was at a level amounting to torture. However, I am satisfied he was the victim of ill treatment, including physical abuse, by the ISI. I would, without hesitation, have found he was tortured if I accepted all the allegations set forth in Khadr's affidavit. That said, I am also satisfied that, from the beginning of his detention, and after being initially physically abused by the ISI and being confined in a hostile environment, Khadr's well founded fear of his captors is a factor I take into account as an influence on his future conduct over the fourteen months in detention.

ii. By a United States Intelligence Agency

106Justice Mosley, with the benefit of a full record, determined the United States intelligence agency's interrogation of Khadr was for intelligence and security purposes only. Khadr alleges the United States intelligence agency which

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interrogated him for seventeen days threatened him and his sister and, on one occasion, an intelligence officer slapped him. The threats and the slap are denied in the SROC #3; that account is presumptively reliable. Moreover, I have, as indicated in the previous section, doubts with respect to the reliability of some, not all, of Khadr's allegations. While, undoubtedly, Khadr was subjected to very lengthy, and vigorous interviews by a United States intelligence agency, I am not satisfied he was slapped or threatened.

II. Did the United States Know That Khadr Would Be Subjected to Mistreatment in Pakistan?

107Counsel for Khadr does not assert that members of this intelligence agency had actual knowledge that Khadr would be subjected to torture or other harsh treatment. It is asserted, however, given Pakistan's reputation for violating human rights, the American intelligence agency would have constructive knowledge that abuses were likely to occur upon Khadr's arrest.

108Given my findings with respect to Pakistan's troubled record, there is a credible risk that people detained for intelligence purposes in Pakistan may be subjected to mistreatment. While I am satisfied that the United States did not order or have any direct knowledge that Khadr would be mistreated by the Pakistani authorities, it is difficult to imagine that mistreatment of Khadr by the ISI would come as a surprise to this intelligence agency, given Pakistan's notorious reputation for physical abuse and mistreatment.

III. The Bounty

109The fact that a bounty was paid for the arrest of Khadr did not come to light until the unredacted disclosure released by Justice Mosley on April 29, 2008. There is no issue that \$500,000 was paid to the ISI for Khadr's capture. This was a private bounty that received no publicity. At the commencement of these proceedings, in the ROC and the SROCs, no mention was made of the bounty. Until the release of Justice Mosley's decision, it appeared that Pakistan was the directing mind behind the capture and arrest of Khadr, and that the role of the United States was to participate in his interrogation for the intelligence reasons previously stated.

110When evidence of the bounty was disclosed, the expanded role played by the United States with respect to Khadr's detention became evident. I agree however with the submission of the Attorney General that it would be wrong to attribute bad faith to the United States because Canada sought to protect this information on grounds of national security in the s. 38 *CEA* proceeding. Justice Mosley found, with the benefit of a full record, that Canada's claims were legitimately based.

111Be that as it may, the disclosure of the bounty, the almost immediate access of a team of American intelligence investigators to interview Khadr following his arrest, and the subsequent actions of the United States to delay consular access and to delay Khadr's repatriation to Canada lead me ineluctably to conclude the United States a driving force behind Khadr's capture and detention in Pakistan. I am satisfied that while the ISI had the final say on

all matters relating to Khadr's detention, the payment of the bounty heavily influenced the ISI to act in accordance with the United States agency's wishes.

IV. Delay in According Consular Rights

112Under the *Vienna Convention on Consular Relations*, a contracting state has a duty to inform a detainee of his right to contact consular officials and to facilitate that right without delay. Pakistan, since 1964, has been a signatory to the *Vienna Convention*. Canada's communiqué to Pakistan prior to Khadr's arrest clearly sets forth Canada's expectation that his consular rights would be observed.

113Khadr was detained for a period of three months before being permitted consular access. I find as a fact that this delay was prompted by the Pakistani and American collaborative decision to refuse consular access until full intelligence debriefings were completed.

114Pakistan did not initially notify CSIS or DFAIT of Khadr's arrest. Indeed, Pakistan never publicly acknowledged the detention of Khadr. CSIS was privately advised by a United States intelligence agency on October 24, 2004 of Khadr's detention. In that communiqué, the United States agency requested CSIS allow intelligence aspects to play out before official representations were made by the government of Canada. It is to be noted that, at this point in time, Khadr's interrogation was in its fifth day.

115John arranged a meeting with his ISI counterpart on October 28, 2004. The ISI refused to acknowledge Khadr was in their custody. John was of the view the ISI were stalling: I agree. The reason for the stall was to permit the interrogation of Khadr by United States intelligence officials to continue until intelligence imperatives were completed.

116On November 10, 2004, when a senior ISI officer finally acknowledged to John that Khadr was in their custody, that agency continued to raise concerns about agreeing to consular access on grounds it would interfere with the debriefings.

117Even in early December 2004, the United States intelligence agency still did not want Khadr to have consular access. That agency asked for continued "patience" from CSIS because Khadr was required to be in detention to potentially identify locations where Al Qaeda members might be found.

118Finally, consular access was granted for the first time on January 12, 2005. At that time, an ISI official was monitoring this consular visit. In addition, it was John's evidence that it was assumed that all visits with Khadr were being videotaped and audio recorded.

119In the presence of Pakistani officials, or in the case of electronic monitoring of visits, it is unlikely that complaints

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with respect to mistreatment could be given in a full and candid fashion, for fear of retribution. It is not without significance that Khadr tells Christine on their flight back to Canada that this was the first time he could tell somebody what had happened to him.

120I am fully satisfied that the United States and Pakistan collaborated to deny prompt consular access to Khadr. There can be no doubt that intelligence objectives, specifically the interrogation of Khadr, trumped the fundamental right to prompt consular access guaranteed by the *Vienna Convention*.

121In the Maher Arar report, at p. 354, Commissioner O'Connor recommended that Canadian officials should normally insist on respect of all of a detainee's consular rights. Even if the rights are denied, the insistence sends a signal that Canada disapproves of any failure to fully respect a detainee's rights. Canada did its best to obtain consular access. DFAIT documentation dated January 4, 2005 confirms that DFAIT and CSIS pressed hard for consular access. Efforts through Pakistan's Minister of Foreign Affairs to gain access were unsuccessful. Only through a continuation of strong representations by Canada did the ISI agree that an officer from Canada's High Commission could meet with Khadr.

122I am satisfied that, in spite of Canada's strong efforts to obtain consular access, Pakistan, in concert with the United States, delayed such access for three months, much to the frustration of both John and DFAIT.

V. The Delay in the Repatriation of Khadr

123In a previous section of these reasons, I set out the events leading up to the cancellation of Khadr's anticipated release and repatriation to Canada on June 15, 2005. Canada wanted Khadr released and repatriated, and worked towards that end. At that time, there was no evidence to form the basis for the laying of any criminal charges. The United States disagreed with the decision to repatriate Khadr. I find as a fact, consistent with the evidence of John, that the United States applied pressure to Pakistan to cancel Khadr's release. As a result, Khadr spent a further six months in detention while the United States arranged for FBI agents to interview Khadr for criminal prosecution purposes, as well as to set the wheels in motion for Khadr's possible rendition to the United States or, alternatively, to begin the extradition process to Canada. During that time, the United States attempted to prevail upon Pakistan and Canada to have Khadr sent directly to the United States. Canada refused to consent and Pakistan declined to send Khadr to the United States absent Canada's consent.

VI. Summary of My Findings

124A summary of my findings is as follows:

1. Khadr was captured in Islamabad, Pakistan by the ISI at the behest of the United States, who paid a \$500,000 bounty for his arrest.

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2. Khadr was initially sought by American officials solely for intelligence purposes and not for criminal prosecution purposes.
3. I am satisfied that Khadr's detention by the ISI was both arbitrary and illegal, according to the law of Pakistan.
4. During his initial three days of detention, Khadr was mistreated and physically abused, but not on the level of severity he alleges in his affidavit. I am satisfied that the United States intelligence agency did not have actual knowledge that Khadr would be abused when it paid the bounty for his arrest. However, I am equally satisfied this agency ought to have known that there was a credible risk he would be mistreated.
5. Khadr's rights to consular access without delay were denied by Pakistan. The United States and Pakistan collaborated in this delay in order to facilitate the completion of American intelligence interrogations.
6. I am satisfied for reasons previously stated that the United States intelligence agency pressured the ISI to delay Khadr's repatriation to Canada for a period of six months. The delay was caused by American dissatisfaction with the decision to return Khadr to Canada without charges being laid. This delay was contrary to Canadian officials' expectations and wishes that Khadr be repatriated. It was a source of frustration: Canadian officials had fully expected Khadr to be released and had made preparations for his return to Canada.

The Law

I. Stay of Proceedings

125The legal principles articulated by the Supreme Court of Canada that govern the granting of a stay of proceedings pursuant to s. 24(1) of the *Charter* are found in the leading cases of *R. v. O'Connor*, [1995] 4 S.C.R. 411, *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, [2002] 1 S.C.R. 297.

126The principles found in those cases have been distilled in the recent Ontario Court of Appeal decision of *R. v. Zarinchang*, 2010 ONCA 286, as follows (at para. 57):

- (1) There are two categories of cases that may attract a stay of proceedings. The first category implicates the fairness of an individual's trial resulting from state misconduct. The second involves a residual category unrelated to the fairness of the trial, but involves state conduct that contravenes fundamental notions of justice, which undermines the integrity of the judicial process.

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- (2) In considering whether to grant a stay of proceedings under either of the above categories, the following criteria must be satisfied:
- (i) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; it must be directed at prospective prejudice, not to redress past prejudice; and
 - (ii) no other remedy is reasonably capable of removing that prejudice.
- (3) In cases in either of the above categories where there remains some uncertainty as to whether the abuse is sufficiently serious to create the prejudice to warrant a stay, there is a third criterion that the court may consider -- the balancing of the interests in granting a stay against society's interest in having a trial on the merits.

127In an extradition context, the case of *United States of America v. Cobb*, [2001] 1 S.C.R. 587 is a leading case relevant to issues raised in this proceeding. In *Cobb* a stay of proceedings was granted based on a finding that the Requesting State, the United States of America, had disintitiled itself to the benefit it sought, the extradition of Cobb, by the application of undue pressure to a Canadian citizen to forego due legal process in Canada. In the present proceeding, counsel differ in their interpretation of *Cobb* and whether a stay is only appropriate where the fairness of the extradition hearing has been compromised.

II. Positions of the Parties

128The position of the applicant is the United States is complicit in the shocking treatment accorded Khadr in Pakistan during his fourteen months in secret detention and this is one of those exceptional cases, the clearest of cases, that warrants a stay. The applicant submits a stay ought to be granted in respect of each of the two categories of abuse of process: first, the fairness of the proceedings has been implicated and, secondly, the residual category has been engaged, where the conduct complained of involves misconduct by the requesting state at such a high level of seriousness as to tarnish the integrity of the administration of justice.

129The Attorney General submits Khadr is an untrustworthy witness and there is no credible evidence to link any

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mistreatment of the applicant, particularly torture, to the United States during his detention. The Attorney General argues that the granting of a stay of proceedings at an extradition hearing must be directly tied to the fairness of the hearing. The Attorney General says the fairness of this extradition hearing has not been in any way compromised. In this respect, the decision in *Cobb* is restricted to cases where the conduct of officials from the Requesting State interferes or attempts to interfere with the conduct of judicial proceedings in Canada.

130The Attorney General submits that allegations of abuse of process that do not interfere with the conduct of the extradition hearing such as matters relating to the bounty and the decision to delay Khadr's release from detention and repatriation are matters for the Minister of Justice to consider at the surrender stage of the proceedings. The Attorney General points to the powers of the Minister found in s. 44(1) of the *Extradition Act*, which provides as follows:

44.(1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; ...

131Further, the Attorney General contends that even if I find a nexus between the abuse of the applicant and the United States or Canada, a fact strenuously denied, this is not the "clearest of cases" meriting a stay.

III. Application of Findings of Fact to the Law With Respect to Abuse of Process

132As indicated, the law distinguishes between two categories of cases that may attract a stay of proceedings: one that implicates the fairness of the proceeding, resulting from state misconduct, and the other involving the residual category, unrelated to the fairness of the hearing, but involving state conduct which undermines the integrity of the judicial process.

133I find that this case, at its heart, falls into the residual category: one of those exceptional cases that involves state misconduct that contravenes fundamental notions of justice, and which undermines the justice system. The extrajudicial misconduct in this case does not, in the narrow procedural sense, compromise the fairness of this extradition hearing. However, that is not to say the conduct of the Requesting State is not linked or connected to this proceeding. I disagree with the submission by counsel for the Attorney General that there is no nexus between the abuse and the fairness of this hearing. On the contrary, in a broader sense, the gross misconduct that occurred in Pakistan very much affects these proceedings in Canada. The basis of this case has its genesis in the serious misconduct by the Requesting State. The Requesting State is seeking a benefit from this court, committal, based on evidence derived from its own misconduct.

134With respect to the residual category, *Tobiass*, at paragraph 91, the Supreme Court distilled certain legal principles pertinent to a stay, derived from *O'Connor*, as follows:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. **There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.** [emphasis added]

And at paragraph 96:

A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably **the best way to describe a stay is as a specific deterrent -- a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings.** [emphasis added]

135Counsel for the applicant brought to the court's attention three extradition cases in which stays of proceedings were granted: *United States of America v. Tollman*, [2006] O.J. No. 3672 (S.C.J.); *United States of America v. Licht*, [2002] B.C.J. No. 1814 (S.C.); and *United Kingdom of Great Britain and Northern Ireland v. Tarantino*, [2003] B.C.J. No. 1696 (S.C.).

136The case of *Tollman* has similar features to the present one. In both *Tollman* and the present case, extradition was a last resort. In *Tollman*, prior to initiating extradition proceedings, the United States set out to thwart the Canadian extradition process by seeking to use the Canadian immigration system to effect his removal to the United States. When it became apparent that the extradition process would be required, Tollman's release from jail was delayed for ten days to allow the extradition request to be made.

137In her analysis of the law, Molloy J. stated at paragraph 18

An extradition judge has the power to stay proceedings for abuse of process both at common law and under the *Charter* on the same principles established in *O'Connor. Cobb* at paras. 39 and 49. The extent of that power must be analyzed within the context in which it arises: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481; *United States of America v. Yang* (2001), 56 O.R. (3d) 52, 157 C.C.C.

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(3d) 225 (C.A.). It does not expand the limited role of the extradition judge under the *Extradition Act*, but neither is the power so circumscribed that it applies only where the abuse relates directly to the sufficiency of the evidence issue to be determined by the extradition judge. The focus must be on the Canadian judicial process. The abuse power cannot be used to remedy the actions of foreign states outside our borders, nor can it be invoked in respect of any perceived unfairness of the ultimate trial to be held in the foreign state. **However, the power applies to any conduct that reaches into this jurisdiction and undermines the integrity of judicial system here:** *Cobb* at paras. 21-40, and cases referred to therein. [emphasis added]

138In staying the proceedings, Justice Molloy stated at paragraph 149

Misconduct of this sort cannot ever be tolerated, for to do so is to condone, perhaps even to invite, similar conduct in the future. This is the kind of conduct that offends this community's sense of fair play and decency. Having conducted itself in this manner, the requesting state is disentitled to any relief from this court.

139Like *Tollman*, the conduct in this case reaches right into these proceedings and cannot be ignored.

140In *Licht*, a stay was imposed. In the case, United States authorities conducted a "reverse sting" operation in British Columbia without the consent of the RCMP, in order to obtain evidence upon which to base the ROC. The court found the wrongdoing and illegality by Drug Enforcement Agency (DEA) officials so offensive to Canadian society as to constitute an abuse of process disentitling the requesting state from the assistance of the court.

141In *Tarantino*, a stay was granted in circumstances where the certification of the ROC contained certain important inaccuracies. The lack of diligence and care exercised by the Requesting State was so serious that a stay was warranted on the basis that the court must control the integrity of the process.

142In each of these cases, a stay of proceedings was issued on the basis that the conduct attributable to the Requesting State was so serious that the court was required to act in order to protect its own integrity. The conduct complained of in each of those cases, while extremely serious, pales in comparison to the violation of Khadr's rights.

143The Attorney General argues that any abuses or misconduct found ought to be resolved following the committal stage, by the Minister, pursuant to sections 44(1) and (2) of the *Extradition Act*.

144In *Cobb*, at paragraphs 36-37, the Supreme Court of Canada reiterated the common law doctrine of abuse of process was not extinguished by section 7 of the *Charter* and that, at paragraph 44,

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The Minister is not the guardian of the integrity of the courts. It is for the courts themselves to guard and preserve their integrity.

And further at paragraph 48

... the existence of potential remedies at the executive stage does not oust the jurisdiction of the courts to control their own process in cases such as here, where the courts are required to preserve the integrity of their own proceedings.

145I find that, notwithstanding section 44(1) of the *Extradition Act* gives the Minister authority to refuse a surrender order if the Minister is satisfied the surrender would be unjust or oppressive, this jurisdiction is not exclusive to the Minister in circumstances where the conduct of the Requesting State is so shocking that a committal order would amount to an abuse of process.

146The Attorney General seeks support for its position that matters of misconduct by the requesting state ought to be left to the minister in the case of *United States of America v. Hulley*, [2007] B.C.J. No. 1470 (S.C.). In *Hulley*, the applicant, a citizen of the United States, brought an application to stay the proceedings. Hulley's flight to Canada was precipitated by a letter he received from a prosecutor in the state of Washington indicating, that if a plea bargain agreement was not accepted, a significantly longer sentence would be sought if Hulley was found guilty following a trial. The extradition court did not grant the stay of proceedings, holding that the possibility of severe punishment upon conviction in the United States was a matter for the Minister to consider, not the court.

147The issue in *Hulley* was appropriately left to the Minister because it was related solely to the United States' prosecution of the person sought. The domestic dealings of a prosecutor and a person charged in respect of plea bargains simply had no nexus or connection with the extradition process. Hulley was not a Canadian citizen: he fled the United States to Canada to avoid prosecution.

148The courts will not interfere with the extradition proceeding when the misconduct has no connection to Canada's extradition process. Unlike the present case, the facts in *Hulley* did not raise issues which impacted on the integrity of the extradition court.

149On the other hand, the recent case of *R. v Tran*, 2010 ONCA 471, while not an extradition case, is an example of where the appellate court of this province imposed a stay as a remedy in order to distance itself from serious pre-trial misconduct by the police and to affirm fundamental values of our society. *Tran* is a case involving police brutality that occurred shortly after the accused voluntarily surrendered to police in respect to outstanding charges. Evidence of cover up exacerbated the situation. Epstein J.A., writing on behalf of an unanimous court at paragraph 106 said:

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It is essential for the court to distance itself from this kind of state misconduct -- an unwarranted, grave assault causing bodily harm, delayed medical attention, a cover up that included perjury, a prosecutorial response that affected the perception of trial fairness and no effective response. **Not to do so would be to leave the impression that it tacitly approves of it.** The granting of a stay of proceedings affirms the fundamental values of our society and ensures that the rights under the *Charter* are not, in substance, meaningless. [emphasis added]

IV. The Clearest of Cases

150I recognize that the collection of reliable intelligence is of the highest importance in protecting and securing a nation from the dangers of terrorism. It must also be recognized that there will always be a tension, especially in troubled times, in the balancing of intelligence and security issues with cherished democratic values, such as the rule of law and protection from human rights violations. In civilized democracies, the rule of law must prevail over intelligence objectives. In this case, the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable. Although Khadr may have possessed information of intelligence value, he is still entitled to the safeguards and benefit of the law, and not to arbitrary and illegal detention in a secret detention centre where he was subjected to physical abuse. The United States was the driving force behind Khadr's fourteen month detention in Pakistan, paying a \$500,000 bounty for his apprehension. The United States intelligence agency acted in concert with the ISI to delay consular access by DFAIT to Khadr for three months, contrary to the provisions of the *Vienna Convention*. The United States, contrary to Canada's wishes, pressured the ISI to delay Khadr's repatriation because of its dissatisfaction with Khadr being released without charge, even though there was no admissible evidence upon which to base charges at that time. In my view, given this gross misconduct, there cannot be a clearer case that warrants a stay.

151In issuing a stay of proceedings, it is not, in the words of *Tobiass*, a form of punishment to the requesting state, but rather a specific deterrent; that is, a remedy aimed at preventing similar abuse in the future. It is also aimed at this court dissociating itself with the conduct of the requesting state.

The Admissibility of the Three Statements

152In the event that I have fallen into error by imposing a stay of proceedings, it is appropriate that I make findings with respect to the admissibility of each of the three statements, which form the underpinnings of the extradition request.

I. Statement to FBI in Pakistan

153Evidence gathered in a foreign state and included in the ROC is presumptively reliable and thus admissible at

an extradition hearing. Nevertheless, there are two avenues upon which evidence collected in a foreign state may be excluded at an extradition hearing.

i. Manifestly Unreliable Evidence

154In *United States of America v. Ferras* (2006), 209 C.C.C. (3d) 353 (S.C.C.), McLachlin CJC. held that extradition judges possess a limited ability to weigh evidence at an extradition hearing in order to determine whether the evidence meets the committal standard. Defective, unreliable, or otherwise unavailable evidence, upon which it would be unsafe or dangerous to convict, would not go to a jury and would not be sufficient to meet the test for committal.

155McLachlin CJC. described the powers of the extradition judge as follows, at para. 40:

If the extradition judge possesses neither the ability to declare unreliable evidence inadmissible nor to weigh and consider the sufficiency of the evidence, committal for extradition could occur in circumstances where committal for trial in Canada would not be justified. I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so **manifestly unreliable** that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1) ... Similarly, I take it as axiomatic that a person could not be committed to trial for an offence in Canada if the evidence put against the person is not available for trial. [emphasis added]

156Thus, where the evidence contained in the ROC is manifestly unreliable, it cannot be relied upon to determine whether a committal order should issue.

157I am satisfied that the evidence gathered by the FBI agents in Pakistan is manifestly unreliable.

158In coming to that conclusion, I am not subjecting this statement to the voluntariness evaluation, required by Canadian rules of evidence, that an inculpatory statement must be proven voluntary beyond a reasonable doubt. However, it is wise to keep in mind that the rationale for reliability of a voluntary statement has its roots in the concept that what people freely say, which is contrary to their interests, is probably true. If it is prompted by threat or inducement, it can no longer be presumed to be true. See *R. v. Hodgson*, [1998] 2 S.C.R. 449 at para. 17. Accordingly, in determining whether a statement given to authorities is manifestly unreliable, the entire circumstances relating to Khadr's detention are important.

159In concluding the statement taken in Pakistan is manifestly unreliable, I take into account the following factors:

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- * Khadr was held in secret detention for a period of nine months prior to the statement being received by the FBI agents. The detention was both arbitrary and illegal. During that nine month period of detention, Khadr was interrogated repeatedly by Pakistani, American and Canadian intelligence agencies. He had been beaten when captured and subjected to other mistreatment. In such circumstances, I accept that Khadr understood, if he failed to cooperate with authorities or departed from statements previously given to various intelligence agencies, he faced a realistic risk of further mistreatment.
- * Khadr had no meaningful opportunity to consult with counsel.
- * Khadr was handcuffed and shackled on each of the three days he was interviewed by FBI agents. Moreover, I accept as a fact that each day of the interview was extremely lengthy in duration.
- * The evidence is that ISI officers were not always present during the course of the three days of FBI interviews. Nevertheless, a camera was in the interview room and I find that Khadr was being, at all times, electronically monitored. I note, in the disclosure released by Justice Mosley, that an ISI officer stated, "a U.S. agency never had access to Khadr without ISI being present and that, off the record, all the interviews of the U.S. agency conducted were recorded." This is consistent with the evidence given by John relating to his assumption of electronic monitoring and it is improbable, in my view, that the FBI statements would not also be monitored.
- * The FBI was not permitted to video or audio record the statement for law enforcement purposes.

160It is important to bear in mind, as a parallel experience, the RCMP attempt to secure a legally admissible statement from Khadr in Pakistan. Detective Inspector Shourie determined the tight restrictions imposed by the ISI, such as the refusal to permit Khadr access to a lawyer, the refusal to permit the use of videotape equipment, and the refusal to allow the interview to proceed in the absence of an ISI officer, made the taking of such a voluntary statement impossible. The circumstantial guarantees of trustworthiness were not permitted. These same restrictions confronted the FBI agents when they interviewed Khadr in July 2005.

161It is apparent the FBI agents were concerned about the circumstances under which the statement in Pakistan was received. The hostile and oppressive environment in which the first statement was taken posed significant legal challenges. It was not a coincidence that the FBI agents were at Pearson Airport seeking an opportunity to re-interview Khadr upon his arrival back in Canada: an opportunity that did not materialize for a further two days. I find the purpose of the second FBI interview was to conduct such an interview under conditions, and with appropriate additional safeguards, that would be more conducive to the taking of a voluntary statement.

ii. Evidence Gathered in an Abusive Manner Pursuant to *United States of America v. Shulman*

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162In *United States of America v. Shulman*, [2001] 1 S.C.R. 616 at para. 56, Arbour J. articulated the following principle in an extradition context:

An extradition judge has the power to exclude evidence under s. 2492) of the *Charter* as a remedy for a violation a fugitive's constitutional rights. The *Charter* applies only domestically and has no effect extraterritorially, except to Canadian authorities: *R. v. Cook*, [1998] 2 S.C.R. 597. However, in an appropriate case, the extradition judge could exclude evidence gathered by the foreign authorities in such an abusive manner that its admission *per se* would be unfair under s. 7 of the *Charter*. *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Harrer*, [1995] 3 S.C.R. 562.

163For reasons stated in the preceding section relating to evidence manifestly unreliable, and for reasons articulated relating to the stay of proceedings, I would also exclude the statement taken by FBI agents in Pakistan on the basis the evidence was gathered in an abusive manner, pursuant to the principles articulated in *Shulman*.

II. The Statement Made at Pearson Airport

164I would find the statement received by Detective Inspector Shourie from Khadr at the Pearson Airport has been proven voluntary beyond a reasonable doubt. Given that the statement was gathered in Canada, by Canadian officials, it is required that the statement meet proper Canadian evidentiary standards under section 32(2) of the *Extradition Act*. This case is another example of the desirability of video records. The video and audio record clearly demonstrates that there was no environment of oppression that existed in the interview room. I note that the interview room was not locked and Khadr was repeatedly told he could leave whenever he wanted.

165The conduct of Detective Inspector Shourie was exemplary. Khadr was made aware that he was not under arrest and was, as indicated, free to leave at any time. He was specifically told to disregard any statements he may have made in Pakistan. No promises or threats were made to Khadr in order to induce a statement. Even though he was not under detention, Khadr was fully advised of his right to counsel and his right to silence.

166The video recording further indicates there was nothing harsh or aggressive about the manner in which questions were posed. The period of the questioning was reasonable. Khadr's demeanour was relaxed and he did not in any way appear intimidated.

167Khadr was clearly aware of what he was saying and did not demonstrate, during the course of the interview, anything that would indicate that he did not have a full operating mind.

168With respect to the issue of an operating mind, Dr. Payne did not suggest that Khadr lacked an operating mind or was in any way disconnected from reality. I agree with Dr. First's assessment, confirmed by viewing the videotaped statement, that "the most credible explanation for the absence of visible signs of anxiety and fear is that

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Khadr was not particularly fearful during these interviews, given his misplaced confidence that admitting to procuring weapons would not get him into trouble."

169Mr. Whitling argues that the statement taken at Pearson Airport and the statement taken at the Delta Hotel are both contaminated or tainted by the excluded statement received by the FBI in Pakistan and relies upon the "derived confession rule". The legal principles with respect to derived confessions are set out in *R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504 at p. 526:

Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. These included the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances.

...

In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement.

170In considering these factors, and unlike the interview that subsequently took place at the Delta Hotel, Detective Inspector Shourie conducted himself in an impeccable manner by not referring at all to Khadr's earlier statement in Pakistan. Moreover, Detective Inspector Shourie cautioned Khadr to disregard any statements he may have made in Pakistan. Detective Inspector Shourie had no connection with the FBI statement. While he had the advantage of having interviewed Khadr in Pakistan three months prior to the FBI statement, the videotape of the Pearson interview depicts his conduct as transparent and fair. Accordingly, the fact that Detective Inspector Shourie had interviewed Khadr previously is of no consequence.

III. The Delta Hotel Statement

171The same FBI agents who received Khadr's statement in Pakistan in July 2005 took his second statement, approximately five months later, at the Delta Hotel. I excluded the first statement taken in Pakistan for reasons given. The issue in respect of the Delta statement is whether this statement contravenes the derived confession

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rule and, if so, ought to be excluded. The degree of connection between the two statements must be determined.

As noted above, those factors include:

- * The time span between the statements;
- * Advertence to the previous statement during questioning;
- * The discovery of additional incriminating evidence subsequent to the first statement;
- * The presence of the same police officers at both interrogations; and
- * Other similarities between the two circumstances.

172No single factor is determinative of admissibility.

173In the present case, the fact that Khadr voluntarily went to the meeting with the FBI five months after his initial statement, that he was not under arrest and that he was cautioned are factors that weigh in favour of admissibility. Indeed, had the statement been taken in the same independent manner as Detective Inspector Shourie demonstrated with respect to the Pearson statement two days prior, I would have, without hesitation, admitted the statement. However, it is clear that the purpose of the FBI was to have Khadr affirm all of the details he provided in his Pakistan statement. From beginning to end, the FBI averted to the Pakistan statement in order to confirm what he had previously said. It is important to emphasize the overwhelming extent to which the first statement was used during the questioning.

174The FBI agents initially stated that they wanted to clarify information from the previous interview. What occurred was, in effect, a cross-examination of Khadr with respect to details previously given in Pakistan. For example, the FBI agents frequently started a question with the phrase, "when you talked to us before, you said ..." Khadr was coaxed to remember specific aspects of the Pakistan statement by saying, "you remember you told us the story ..."

175One of the reasons I excluded the Pakistan statement was that it was manifestly unreliable. A statement derived from that inadmissible statement, taken in an oppressive and hostile environment, cannot be said to be reliable. I see no reason in logic not to apply derivative evidence principles where a subsequent statement is contaminated in an overwhelming fashion by the virtual cross-examination on an inadmissible statement.

Conclusion

176I have ruled that a stay of proceedings pursuant to section 24(1) of the *Charter* shall issue. If I erred in this decision, I would have committed Khadr, based upon his remarks contained in the Pearson statement, on the following Canadian offences set forth in the ATP:

- * Conspiracy to traffic in weapons contrary to sections 99 and 465(1)(c) of the *Criminal Code*;

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- * Directly or indirectly providing or making property available knowing that, in whole or in part, it will be used by or will benefit a terrorist groups contrary to section 83.03(b) of the *Criminal Code*;
- * Knowingly participating in or contributing to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity contrary to section 83.18 of the *Criminal Code*;
- * Commission of an indictable offence for the benefit of, at the direction of, or in association with, a terrorist group contrary to section 83.2 of the *Criminal Code*.

177In arriving at this conclusion, the Attorney General concedes, based on a finding of fact that only the Pearson statement is admissible, there is no evidence of the offence of possession of an explosive substance contrary to section 82(1) of the *Criminal Code*.

178In the result, a stay of proceedings shall issue, pursuant to section 24(1) of the *Charter*.

C.M. SPEYER J.

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