

Court File No. 33289

**SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**THE PRIME MINISTER OF CANADA, THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, AND
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE,**

Appellants (Respondents),

- and -

OMAR AHMED KHADR,

Respondent (Applicants).

**MOTION RECORD FOR LEAVE TO INTERVENE
BY AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)
PURSUANT TO RULE 55 OF THE RULES OF THE SUPREME COURT OF CANADA**

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE
BY AMNESTY INTERNATIONAL
(CANADIAN SECTION, ENGLISH BRANCH)**

TAKE NOTICE THAT the applicant, AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH) hereby applies to a judge pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* for an order granting it leave to intervene in this appeal, to file a factum of up to 20 pages in length, and to present oral argument of up to 15 minutes, the whole without costs.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

1. Affidavit of Alex Neve, sworn September 23, 2009; and
2. such further or other material as counsel may advise.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. The within appeal raises issues respecting the right, if any, of Canadian citizens detained abroad to have the Crown take steps to attempt to obtain their release where there is a reasonable basis to believe that the basic human rights of the Canadian citizen, as protected in international law, are being violated by the detaining state;
2. If granted leave to intervene, the proposed intervener, Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") will make a submission in relation to s. 7 of the Charter of Rights and Freedoms which will be useful and different from the submissions of the parties and which submissions may not be raised if Amnesty Canada is not granted leave to intervene;
3. Amnesty Canada has an interest in and extensive experience in matters relating to international law;
4. Amnesty Canada is directly affected by the outcome of this case because Amnesty Canada has a long history of advocating with respect to:
 - (a) international human rights issues, including issues associated with the human rights of detained or incarcerated people, such as the one at bar, and
 - (b) the treatment of Mr. Omar Khadr by Canada and other states since his apprehension and detention in or about 2002;
5. Rules 55 to 59 of the Supreme Court Rules; and
6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

DATED at Winnipeg, Manitoba, this 23rd day of the month of September, 2009.

SIGNED BY


Applicant to the motion

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Agent for the Respondent (Applicant)

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of this motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

IN THE SUPREME COURT OF CANADA
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Appellants (Respondents),

- and -

OMAR AHMED KHADR,

Respondent (Applicant).

AFFIDAVIT OF ALEX NEVE

I, **ALEX NEVE**, of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

1. I am the Secretary General of Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") and as such have knowledge of the matters hereinafter deposed to.

I Interest of Amnesty in this Appeal

(i) **Amnesty International and Amnesty Canada: The Organizations**

2. Amnesty International ("AI") is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to people's fundamental human rights.

3. AI is impartial and independent of any government, political persuasion or religious creed. AI and Amnesty Canada are financed by subscriptions and donations from its membership, and receives no government funding.

4. There are currently close to 2 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like Amnesty Canada.

5. In essence, Amnesty Canada is the manifestation of the global AI movement in this country.

6. The organizational structure of Amnesty Canada includes a board of 12 directors elected across the country. There are specific country and issue coordinators in each region and province. Amnesty Canada has a membership of approximately 60,000 people.

(ii) The Vision and Work of Amnesty Canada

7. Amnesty Canada implements and shares the vision of AI. AI's vision is of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights ("UDHR")* and other international human rights standards. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, economic, social, and cultural.

8. In 1977, AI was awarded the Nobel Peace Prize for our work in promoting international human rights.

9. **Amnesty Canada seeks to advance and promote international human rights at both the international and national level. As part of its work to achieve this end, Amnesty Canada:**

- (a) monitors and reports on human rights abuses;**
- (b) participates in relevant judicial proceedings;**
- (c) participates in national legislative processes and hearings; and**
- (d) participates in international committee hearings and processes.**

10. **In particular, Amnesty Canada has taken action to promote the protection of the basic human rights of Mr Omar Khadr ("Omar"). As outlined below, Amnesty Canada has been active in Omar's case since his detention in 2002.**

(iii) Monitoring and Reporting on Human Rights Abuses

11. **AI's investigative work is carried out by human rights researchers who receive, cross-check and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, web-sites and other media outlets. As well, AI sends about 130 fact-finding missions to some 70 countries each year to directly assess what is happening on the ground.**

12. **AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists and scholars.**

13. AI's research has been used by Canadian courts and is recognized as credible. These official reports by AI are often relied on as evidence by immigration review boards and in Canadian courts. For example:

- (a) In *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, Justice Tremblay-Lamer found "the [Minister's] delegate's blanket rejection of information from agencies with worldwide reputations for credibility, such as AI and [Human Rights Watch] ... puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources." Indeed, as Justice Tremblay-Lamer pointed out, "the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility."
- (b) Similarly, in *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, the Federal Court allowed a judicial review of a Pre-Removal Risk Assessment ("PRRA") on the basis that the PRRA officer failed to consider a detailed analysis of the applicant's personal circumstances prepared by AI, whom the Court referred to as a "credible source."
- (c) The Federal Court has also emphasized the important evidentiary role of AI reports in *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, and *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118. Finally, in *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, [2002] 1 S.C.R. 3, the Supreme Court of Canada relied on an AI report concerning Sri Lanka's torture of members of the Liberation Tigers of Tamil Eelam.

14. In addition to being used by Canadian courts, AI uses its research to prepare other reports, briefing papers, newsletters and campaigning materials. Amongst its publications is the annual *Amnesty International Report* on human rights conditions in countries around the world.

15. Amnesty Canada has participated in the preparation of these reports and has assisted in the distribution of these reports in Canada.

(iv) Participation in Judicial Proceedings

16. Amnesty Canada has intervened on international human rights issues in seven cases before the Supreme Court of Canada, including:

(a) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008], 2 S.C.R. 326 (granted leave to intervene with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international norms and the constitutional principles of procedural fairness);

(b) *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (presented submissions on the constitutionality of the procedural protections in the *Immigration and Refugee Protection Act* security certificate regime and on the arbitrary detention of foreign nationals under that regime);

(c) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (argued that the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);

- (d) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (presented submissions to the Court regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, which the Court referred to);
- (e) *United States v. Burns*, [2001] 1 S.C.R. 283 (provided information to the Court on the significant international movement towards the abolition of capital punishment);
- (f) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (provided information regarding the international movement towards the abolition of capital punishment); and
- (g) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (provided information regarding the international movement towards the abolition of capital punishment).

17. In addition to advocacy before the Supreme Court of Canada, Amnesty Canada has appeared before lower Canadian Courts or public inquiries as either an intervener or as a party. Examples include the following:

- (a) Amnesty Canada has intervened before the Ontario Court of Appeal in:
 - (i) *Bouzari v. Islamic Republic of Iran* (Court File C38295, June 30, 2004), a case involving the right of a torture victim to sue for compensation from the offending government, and
 - (ii) *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration* (Court file C37565, February 8, 2002), where submissions were made on Canada's international obligations in response to the UN Human Rights

Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee;

(b) Amnesty Canada was an applicant in two matters before the Federal Court concerning fundamental human rights issues:

(i) In *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, the applicants asserted that Canada's "safe third country" agreement with the United States was invalid and unlawful because the United States fails to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

(ii) In *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, the applicants asserted that Canada is in breach of its obligations under the *Convention Against Torture* by transferring Afghan detainees into the custody of Afghan officials where they are at serious risk of torture or cruel, inhuman or degrading treatment.

(c) Amnesty Canada has been granted intervener status in the following inquiries:

(i) The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry"), where it made submissions on the subject of security and human rights.

(ii) The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

("Iacobucci Inquiry") where it made submissions on the substantive issues before the Commissioner on the source of applicable standards under international law; the prohibition against torture; providing or exchanging information and travel plans with foreign officials; the inadequacy of diplomatic assurances with respect to the use of torture; the prohibition against the use of information obtained through torture; communication, the provision of information, and assistance in questioning detained Canadians; the requirement of consular officials to ensure that basic human rights are protected; and the presumption of innocence of Canadians detained abroad, among other things.

18. AI or its local national organizations have made submissions in other countries on various matters, including matters arising from the "War on Terror," such as:

- (a) AI was *amicus curiae* before the Supreme Court of the United States in *Boumediene v. Bush*; *Al Odah v. United States*, 128 S. Ct. 2229, where AI argued that the Military Commission Act of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;
- (b) In 2006, the British House of Lords granted AI intervener status in *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26, an appeal concerning the applicability of the European Convention on Human Rights and the UK's *Human Rights Act 1998* to the actions of British armed forces in Iraq;
- (c) Other proceedings in the United Kingdom include:
 - (i) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, (regarding the admissibility of evidence obtained through torture);

- (ii) *A and others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (regarding indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001*);
- (iii) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (U.K.H.L.) (regarding state immunity for international crimes); and
- (iv) *Chahal v. United Kingdom*, (1997) 23 E.H.R.R. 413 (E.Ct.H.R.) (regarding the absolute prohibition against returning an individual to face a risk of torture).

(v) Participation In Legislative Proceedings

19. Amnesty Canada has also sought to advance international human rights directly through the legislative process. Amnesty Canada has submitted written and oral arguments to government officials, legislators and House and Senate committees on numerous human rights issues, including the treatment of Omar Khadr. Amnesty Canada's submissions include:

- (a) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development regarding the repatriation of Omar Khadr, May 2008;
- (b) *Amnesty International: Brief on Bill C-31* (Immigration and Refugee Protection Act), March 2001;
- (c) *Security through Human Rights: Amnesty International Canada's Submission to the Special Senate Committee on the Anti-Terrorism Act and House of Commons Sub-Committee on Public Safety and National Security as part of the Review of Canada's Anti-Terrorism Act*, May 16, 2005;

- (d) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act Review Committees* (May and September 2005);
- (e) Oral submissions before the House Committee on Citizenship and Immigration regarding security certificates (November 2006);
- (f) Oral submissions before the House Defence Committee regarding the transfer by Canadian troops of Afghan detainees in Afghanistan (December 2006); and
- (g) Oral submissions before the House of Commons Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism in February 2008 regarding Bill C-3, the proposed amendment to the security certificate regime.

(vi) Participation with International Organizations

20. AI has formal relations with the United Nations Economic and Social Council (ECOSOC), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe, the Organization of American States, the Organization of African Unity, and the Inter-Parliamentary Union.

21. Amnesty Canada has made the following submissions to various international organizations regarding security and human rights:

- (a) *Canada: Submission to the UN Universal Periodic Review*, Amnesty International's submission to the first review of Canada's human rights record by the UN Human Rights Council, February 2009 (including a section highlighting the case of Omar Khadr);

- (b) *Human Rights for All: No Exceptions* (Amnesty International's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada), February 2007;
- (c) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (Amnesty Canada's Submissions to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada), 2005;
- (d) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, October 8, 2004; and
- (e) *It's Time* (Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada), November 2000.

22. These international bodies recognize and trust AI's experience, objectivity and value AI's unique perspective. As Jean-Pierre Hocke, former United Nations High Commissioner for Refugees, noted "It's a worn cliché, but if Amnesty did not exist, it would have to be invented. It is simply unique."

(vii) Participation in Omar Khadr's Case

23. Amnesty Canada has an active and long-standing interest in Omar's case. We became involved with Omar's case when we first learned of his detention by the US military in Afghanistan in 2002. At that time, Omar was 15 years old. Amnesty Canada was one of the first non-governmental organizations in Canada to advocate and raise awareness of Omar's situation.

24. Amnesty Canada's involvement in Omar's case is extensive. Examples of our involvement include:

- (a) As Secretary General for Amnesty Canada, I have written a series of letters to the Prime Minister and various Cabinet Ministers, including the Minister of Foreign Affairs, from 2002 to date respecting Omar's case and the protection of his basic human rights, including rights arising from Omar's status as a juvenile. For example, in July 2008, I co-wrote an open letter to the Prime Minister calling upon him to request Omar's repatriation.
- (b) Amnesty Canada has included information on Omar's case in several of its briefs to UN Committees, such as the Human Rights Committee, as well as through other UN mechanisms, such as the Universal Periodic Review that deals with human rights issues facing all states in the world.
- (c) In 2002-2003, Amnesty Canada featured Omar's case in its "Real Security" campaign. Materials included background sheets and postcards to the US and Canadian Governments. Amnesty Canada has continuously campaigned on Omar's case since that time.
- (d) In 2005, building upon the work of Amnesty Canada, AI featured Omar's case as part of its public campaign respecting individual Guantanamo detainees.
- (e) On three separate occasions, Amnesty Canada has made Omar's case one of the subjects of the International Human Rights Day "write-a-thon." As part of its public advocacy, Amnesty Canada organizes a "write-a-thon" each International Human Rights Day (December 10) to raise awareness of certain cases that raise international human rights issues.

- (f) In 2008, Amnesty Canada co-founded a national non-governmental organization (NGO), "Coalition for the Repatriation of Omar Khadr," and assisted in organizing a week of action and other public events that year. This NGO coalition created a website on Omar's case at www.bringomarhome.ca.
- (g) In January 2009, Amnesty Canada unveiled over 50,000 postcards & petitions on Parliament Hill respecting Omar's case.
- (h) In addition to its public advocacy, Amnesty Canada has sought to intervene in legal proceedings involving Omar. Though unsuccessful, Amnesty Canada sought leave to intervene at the Federal Court of Appeal in the case at bar and before this Honourable Court in *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125.

25. Building upon the work of Amnesty Canada, AI has been involved in Omar's case and in raising awareness of Omar's treatment by the USA and Canada to the world. Since 2005, AI has issued press releases and prepared reports, examples of which can be found on AI's website at [www. www.amnesty.org](http://www.amnesty.org), on Omar's case. Examples of these materials include:

- (a) November 2005 case sheet on Omar's case entitled "Who are Guantanamo detainees?"
- (b) April 2008 report entitled "Report USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission."
- (c) August 28, 2009 report entitled "Canada still refusing to seek Omar Khadr's repatriation from Guantánamo; Mohammed Jawad returned to Afghanistan."

26. These are some of the examples of Amnesty Canada's involvement in Omar's case. Our efforts are continuing with on-line action and related initiatives, lobbying and other public advocacy.

II. The Proposed Submissions of Amnesty Canada

27. Amnesty Canada seeks leave from this Honourable Court to make the following submission:

- (a) Canada's knowledge of the infringements of a Canadian citizen's internationally protected human rights by another state is sufficient to trigger s. 7 of the Canadian Charter of Rights and Freedoms.
- (b) The right to "life, liberty, and security of the person" is engaged in this case because Omar, a Canadian citizen, has been detained for over 7 years without trial and has been subjected to conduct, including sleep deprivation for the purposes of interrogation, that amounts to torture under international law.
- (c) The "principle of fundamental justice" in this case is the duty of fairness. It shall be submitted that in addition to the breaches of s. 7 found by the Federal Court of Appeal, Canada breached Omar's s. 7 rights by not providing written reasons for its decision not to request repatriation and for not affording any fair process for Omar to make his case for repatriation.

28. I am not aware of any party to this appeal that takes the same position as Amnesty Canada. Further, when Amnesty Canada's proposed argument is compared to the reasons for decision by the Federal Court of Appeal and the Federal Court, it becomes clear that the proposed argument is useful and different from the judgments below.

29. The issue in this case deals with when (or if) Canada has an obligation to request the repatriation of a citizen detained by another state. On this issue, both the Federal Court and the Federal Court of Appeal held that there could be such an obligation.

30. Amnesty Canada's submissions will be complementary and additional to the reasoning in the lower court judgments in that Amnesty Canada will argue that s. 7 is triggered by knowledge of international human rights abuses and not only by Canada's participation in the interrogation of Omar, as found by the courts below.

31. Further, the proposed argument postulates an additional principle of fundamental justice. In addition to the "duty to protect citizens," Amnesty Canada will argue that the principles of fundamental justice engaged in this case also includes the duty of fairness.

32. Amnesty Canada agrees with the decisions of the Federal Court below. It shall be submitted that the failure to give reasons, or any fair process, is a crucial first step in assessing compliance with a duty to protect citizens.

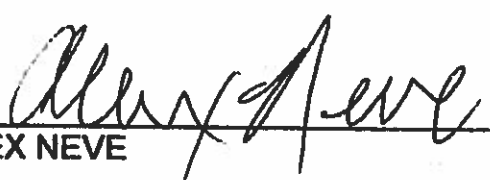
33. I believe that Amnesty Canada brings a unique perspective and approach to the issues raised in this appeal.

34. Amnesty Canada is uniquely positioned as an international NGO to bring a truly international perspective to this appeal. Amnesty Canada has extensive knowledge of the international norms that are relevant in this appeal, most notably the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and the United Nations Convention on the Rights of the Child ("CRC").

35. If granted leave to intervene, Amnesty Canada will be mindful of submissions made by parties and other interveners in this appeal and will seek to avoid duplication of argument and materials before the Court.

36. I make this affidavit in support of Amnesty Canada's application to intervene and for no other or improper purpose.

SWORN BEFORE ME at the City of)
Ottawa in the Province of)
Ontario this 33rd day of)
September, 2009)


ALEX NEVE


A Commissioner for Taking Affidavits
Vester Eivuse



THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PRIME MINISTER OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE
DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, AND THE
COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE,

Appellants,

- and -

OMAR AHMED KHADR,

Respondent.

MEMORANDUM OF ARGUMENT

I. STATEMENT OF FACTS

1. Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") asks this Honourable Court to grant it leave to intervene in the within appeal pursuant to Supreme Court Rule 55.

2. This is an appeal from the judgment of Evans and Sharlow JJ.A of the Federal Court of Appeal (the *Canada (Prime Minister) v. Khadr*, 2009 FCA 24 or "Decision"). The majority held that:

- (a) Mr Omar Khadr's (Omar's) s. 7 Charter rights were violated because Canadian officials participated in interrogating Omar when the officials knew that Omar was "an imprisoned minor" who did not have "the benefit of consular assistance, legal counsel, or contact with his family, [and] who had

been subjected to abusive sleep deprivation techniques in order to induce him to talk:" Decision at para 35.

- (b) The appropriate remedy pursuant to s. 24 of the Charter was to order Canada to request Omar's repatriation: Decision at para 66.

3. Nadon J.A. dissented and:

- (a) accepted the Federal Court determination that there was a duty to protect recognized under s. 7 of the Charter, but held that the duty was met on the facts: see Decision at para 86; and
- (b) held that the remedy of a repatriation order was not appropriate because, amongst other things, the order was a direct interference into the conduct of foreign affairs: Decision at para 106.

II. QUESTIONS IN ISSUE

- 4. Should this Honourable Court grant leave to Amnesty Canada to intervene in the within Appeal?

III. ARGUMENT

5. Pursuant to Supreme Court Rule 55, leave to intervene may be granted where a party has an interest in the subject matter before this Honourable Court and the proposed intervener will be able to make submissions that are useful and different from the other parties.¹

A) The Nature of AI's Proposed Legal Argument

6. In light of the timeframe established by this Honourable Court respecting the hearing of this appeal, the submissions of Amnesty Canada are based on the Decision and its understanding of the submissions of the parties in the courts below.

7. Amnesty Canada supports the Decision and the Respondent. It seeks to present an additional argument regarding s. 7 of the Charter, which is complementary to the s. 7 analysis found in the Decision and the arguments of the parties.

8. Section 7 of the Charter provides, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

9. On the issue of what constitutes the violation of Omar's "right to life, liberty and security of the person", Amnesty Canada accepts and adopts the Decision, which held that Canada's involvement in Omar's treatment, including his interrogation at Guantanamo Bay, was the basis for triggering Omar's s. 7 right to life, liberty and security of the person. Amnesty Canada will also make a complementary submission on this point.

10. Amnesty Canada will contend that Omar's right to "life, liberty, and security of the person" is engaged when a Canadian citizen detained abroad requests repatriation and Canada knows or ought to know that the citizen is being subjected to treatment by another

¹ Supreme Court Rules 55-57; *R. v. Finta*, [1993] 1 S.C.R. 1139.

state that violates international law. Canada need not participate in the mistreatment for an individual's s. 7 right to be engaged.

11. It shall be contended that cases such as *R v. Hape*, [2007] 2 S.C.R. 292, which address the application of the Charter outside of Canada, are unique to situations of search and seizure or police investigation. Where a request for repatriation is at issue, the law arising from *Hape* is inapplicable. The conduct that triggers s. 7 will be Canada's consideration of the repatriation request, which occurs in Canada, though it deals with the mistreatment of Canadian citizens abroad.

12. In essence, the Crown prerogative over foreign affairs, which includes considering requests for repatriation, is a "matter within its authority" pursuant to s. 32 of the Charter. If the Crown chooses to do nothing when faced with a request for repatriation, it becomes complicit in the actions of other states in violating international law; thereby engaging the person's right to "life, liberty, or security of the person".

13. On the issue of what is the "principle of fundamental justice" in this case, Amnesty Canada agrees and asserts that there is a duty to protect, as the respondent argues and the lower levels of court have found. Amnesty Canada will also make a distinct additional submission. It shall be contended that the concept of "fundamental justice" includes the rules of natural justice, which are commonly seen in administrative law. The rules of natural justice, as a constitutionally protected principle of fundamental justice, require the Crown, amongst other things, to:

- (a) consider a request by a Canadian citizen for repatriation fairly;
- (b) consider the request in accordance with applicable international law;
- (c) decide the request on the basis of the available evidence, supplied by the applicant or obtained by the Crown, and on applicable international law; and

- (d) provide adequate reasons for accepting or rejecting the request for repatriation, which reasons will conform to Canada's obligations under international law;

14. In addition, Amnesty Canada will argue that the rules of natural justice, as a constitutionally protected principle of fundamental justice, allow a citizen the right to have the Crown's decision reviewed by the Court on a substantive basis, adjudged on the principle of reasonableness. This review would allow a judicial assessment of the Crown's action on the basis of the Crown's assessment of the evidence and the law, including international law. Amnesty Canada's position will be that the Federal Court and Federal Court of Appeal decisions confirm that Canada's decision not to request repatriation is unreasonable.

15. In sum, Amnesty Canada's position is that this case has become needlessly complex because of Canada's failure to follow any process for repatriation requests. It shall be submitted that the benefit of the proposed approach is that it promotes thoughtful decision-making, compliance with international law and creates a clear record for why a person's request for repatriation is or is not accepted.

B) The Interest of Amnesty Canada in this Appeal

16. Amnesty Canada is directly affected by the outcome of this appeal.

17. Amnesty Canada has approximately 60,000 members. It is part of the global AI movement, which has close to 2 million members in over 162 countries. AI was awarded the Nobel Peace Prize in 1977.

18. AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights- civil, political, social, cultural and economic. To this end, AI monitors and reports on human rights abuses, participates in international committee

hearings, intervenes in domestic judicial proceedings, and prepares briefs for and participates in national legislative processes and hearings. AI also prepares international and national reports for the purpose of educating the public on international human rights. Amnesty Canada is active in promoting and advancing AI's mission.

19. The work of Amnesty Canada in the area of international law and basic human rights is extensive. Two aspects are highlighted:

- (a) Past Interventions: Amnesty Canada has intervened in seven Supreme Court of Canada cases and twice in the Ontario Court of Appeal. Like the case at bar, Amnesty Canada's past interventions fall within its expertise in international law and human rights.
- (b) Monitoring and Documenting Human Rights Abuses: Amnesty Canada's role extends well beyond the courtroom. It conducts "on the ground" research in countries to monitor and report on human rights abuses. AI's research has been accepted by the Federal Court as credible and reliable. AI's reports are routinely considered by Courts because of AI's reputation for credible research.

20. As such, Amnesty Canada is directly affected by cases that raise issues of international law, such as the case at bar. However, Amnesty Canada also has a long standing interest in Omar's case in particular. Amnesty Canada has made numerous submissions to the Canadian government on Omar's case since his detention in 2002. This request for leave to intervene on the issue of Omar's right, if any, to repatriation is a natural extension of Amnesty Canada's work.

21. In sum, Amnesty Canada asks that this Honourable Court grant it leave to intervene in this appeal. The argument proposed will be useful and different from the arguments at issue. The argument however will remain within the issues raised in the

appeal, namely s. 7 of the Charter. The rights, if any, of Canadian citizens detained abroad is a matter of pressing public interest and is a justiciable issue. It is submitted that the interests of justice are served if Amnesty Canada is allowed to bring its substantial expertise in international law to this appeal.

IV. SUBMISSIONS ON COSTS

22. Amnesty Canada does not seek costs and submits that it should not be liable to pay costs.

V. ORDER SOUGHT

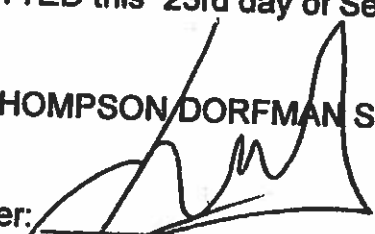
23. Amnesty Canada seeks an Order:

- (a) granting leave to intervene in the hearing of this Appeal pursuant to Rule 55 of the Supreme Court Rules;
- (b) an Order granting leave to file a factum up to 20 pages in length;
- (c) an Order granting leave to make oral argument at the hearing of this Appeal up to 15 minutes in length, time permitting;

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September, 2009.

THOMPSON DORFMAN SWEATMAN LLP

Per:


SACHA R. PAUL
Counsel for the Proposed Intervener
Amnesty International (Canadian
Section, English Branch)

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