In the Court of Appeal of Alberta

Citation: Khadr v Edmonton Institution, 2014 ABCA 225

Date: 20140708
Docket: 1303-0267-AC
Registry: Edmonton

Between:

Omar Ahmed Khadr

Appellant

- and -

Kelly Hartle, Warden of the Edmonton Institution,
Her Majesty the Queen in Right of Alberta and the Attorney General of Canada

Respondents

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Myra Bielby

Reasons for Judgment Reserved

Appeal from the Judgment by
The Honourable Associate Chief Justice John D. Rooke
Dated the 18th day of October, 2013
Filed on the 31st day of October, 2013
Docket: 1303 11220

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Reasons for Judgment Reserved

The Court:

I. Introduction

[1] This appeal is the latest chapter involving Omar Khadr, the Canadian citizen found fighting in Afghanistan in 2002 at 15 years of age. Khadr was detained for eight years by the United States government in Guantanamo Bay, Cuba before he pled guilty to five offences and was sentenced to eight years imprisonment.

[2] However, unlike earlier legal questions involving Khadr, the one this Court is asked to resolve is relatively narrow in scope. The United States transferred Khadr to Canada to serve the remainder of his sentence under the *International Transfer of Offenders Act*, SC 2004, c 21 (*ITOA*). After being placed in a federal penitentiary, Khadr applied for *habeas corpus* on the basis that the *ITOA* mandated his placement in a provincial correctional facility for adults. The chambers judge denied his application, finding that Khadr had been properly placed in a federal penitentiary under s. 20(b)(iii) of the *ITOA*: ***Khadr v Edmonton Institution***, 2013 ABQB 611. It is from this decision that Khadr appeals.

[3] While the focus of this appeal has been on whether Khadr, on transfer to Canada under the *ITOA*, should have been placed in a provincial correctional facility for adults or a federal penitentiary, this issue is properly divided into a number of sub-issues. These involve the interpretation – and interrelationship – of several sections in the *ITOA* along with other statutory provisions in the *Criminal Code* and the *Youth Criminal Justice Act*, SC 2002, c 1 (*YCJA*).

[4] We have concluded that the chambers judge erred in law in finding that Khadr was properly placed in a federal penitentiary under the *ITOA*. For reasons explained below, we conclude that Khadr ought to have been placed in a provincial correctional facility for adults in accordance with s. 20(a)(ii) of the *ITOA*. In summary, the eight-year sentence imposed on Khadr in the United States could only have been available as a youth sentence under Canadian law, and not an adult one, had the offences been committed in Canada.

[5] Our decision also reflects a fundamental principle underlying the *ITOA*. The courts in this country and the Canadian government must respect the substance of the sentence imposed in the foreign state, here the United States, along with its right to determine that sentence. It is only where a sentence is incompatible with the laws of Canada or where Canadian law so requires that Canada may adapt a foreign sentence to a punishment prescribed under Canadian law for an equivalent offence. The eight-year sentence, which reflects Khadr's cumulative culpability for all five offences, is not incompatible with Canadian laws. Nor does Canadian law mandate adaptation of that sentence. Khadr's sentence was the direct result of a plea agreement. Khadr agreed to waive certain rights and plead guilty to five offences in exchange for a commitment

that his sentence would be a maximum of eight years. The plea agreement could not have been implemented without the express approval of the designee of the United States Secretary of Defense. Under the *ITOA*, no one is entitled to second-guess that decision or the sentence, much less convert the eight-year inclusive sentence into something other than what it is.

[6] We begin our analysis by reviewing certain relevant background facts (Part II). We then turn to the present statutory framework for the international transfer of prisoners between Canada and the United States and the approach taken under the *ITOA* to the recognition of foreign sentences (Part III). This then takes us to the decision of the chambers judge (Part IV) before we summarize the positions of the parties (Part V). We next outline the issues (Part VI) and then address the standard of review (Part VII) and statutory interpretation (Part VIII). This is followed by our detailed analysis of why the chambers judge erred in reaching the conclusions he did (Part IX). Finally, we summarize the key points in this appeal and confirm that the appeal should be allowed, the application for *habeas corpus* granted and an order issued transferring Khadr to a provincial correctional facility for adults (Part X).

II. Background Facts

[7] Khadr, now 27 years old, was born September 19, 1986 in Scarborough, Ontario. Khadr's father, Ahmad Khadr, moved his family to Pakistan in 1990. Khadr's father was a trusted senior member of al Qaeda. When the father was arrested in Pakistan, Khadr and his siblings returned to Canada where they stayed with their grandparents and Khadr spent a year in school. After charges against the father were dropped, Khadr returned to Pakistan. Then in 1996, the father moved his family from Pakistan to Afghanistan in support of al Qaeda. On July 27, 2002, at the age of 15, Khadr was involved in a battle with American forces in Afghanistan during which he admitted throwing a grenade that killed one American soldier. Khadr also admitted to having received training there from al Qaeda.

[8] Apprehended by the US military, Khadr was transferred in October 2002 to the American Naval Base at Guantanamo Bay, Cuba. There he remained for a number of years without charge, held in military detention by Presidential Military Order. He was eventually declared to be an "enemy combatant" and formal charges were laid in 2005. In 2006, the United States Supreme Court held that the military commissions set up by Presidential Military Order to try those detained in Guantanamo Bay contravened both the US *Uniform Code of Military Justice* (*UCMJ*) as well as Common Article 3 of the *Geneva Conventions*: ***Hamdan v Rumsfeld***, 126 S Ct 2749 (2006) [***Hamdan I***].

[9] In response, the United States Congress passed the 2006 *Military Commissions Act*, PL 109-366, 120 Stat 2600. On February 2, 2007, Khadr was charged under the 2006 *Military Commissions Act* with the following offences: (1) murder in violation of the law of war; (2) attempted murder in violation of the law of war; (3) conspiracy; (4) providing material support for terrorism; and (5) spying. Then in 2009, following the decision of the United States Supreme

Court in ***Boumediene v Bush***, 128 S Ct 2229 (2008), the 2006 *Military Commissions Act* was amended by the 2009 *Military Commissions Act*, PL 111-84, 123 Stat 2190, Title XVIII (the original *Act* as amended being referred to as the *MCA*).

[10] In preparing his defence, Khadr sought an order requiring Canadian officials who interviewed him at Guantanamo Bay to disclose all records relating to information they had provided to United States officials stemming from those interviews. The Supreme Court of Canada ordered disclosure on the basis that the United States Supreme Court had found the Guantanamo military commission process in place when the Canadian officials interviewed Khadr to be illegal: ***Canada (Justice) v Khadr***, 2008 SCC 28, [2008] 2 SCR 125 [***Khadr I***]. Khadr also petitioned the Canadian government to repatriate him, but the government refused. He eventually sought to have the courts order his return to Canada. The Supreme Court of Canada found that "Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice": ***Canada (Prime Minister) v Khadr***, 2010 SCC 3 at para 48, [2010] 1 SCR 44 [***Khadr II***]. However, it declined to order the remedy Khadr requested: ***Khadr II***, *supra*, at paras 38-47.

[11] On October 13, 2010, Khadr agreed to plead guilty to all five charges against him in exchange for assurances that the US Convening Authority for Military Commissions, Retired Navy Vice-Admiral Bruce MacDonald (Convening Authority), would not approve a sentence greater than eight years and would take all appropriate action to facilitate Khadr's transfer to Canada after one year. Under the *MCA*, the Convening Authority is the designee of the US Secretary of Defense with the responsibility to oversee and manage the military commissions process. The Convening Authority is granted wide powers to convene military commissions for trials, appoint military commission members, *approve plea agreements*, set aside findings of guilt, and *reduce, but not increase, any sentence imposed by a military commission*.

[12] On October 23, 2010, prior to Khadr's entering his guilty pleas, the governments of Canada and the United States exchanged diplomatic notes in which Canada indicated that it was inclined to favourably consider an application by Khadr to serve the remainder of his sentence in Canada. The United States Diplomatic Note recognized that the remaining portion of Khadr's sentence would be administered in Canada according to Canadian law. Canada, in its Diplomatic Note, confirmed the understanding of the United States government.

[13] On October 31, 2010, Khadr pled guilty to the five offences before a Military Commission set up under the *MCA* composed of seven military officers and presided over by a military judge. The Military Commission, which was not privy to the plea agreement for an eight-year maximum sentence, sentenced Khadr to 40 years imprisonment. On May 26, 2011, in accordance with the plea agreement, the Convening Authority "approved" only eight of the 40 years imposed by the Military Commission, thereby reducing Khadr's sentence to eight years.

[14] Gary D. Solis, an expert witness for Khadr, professor of law and former member of the US Marine Corps who served as a military judge, swore in his affidavit that "[n]either the [*UCMJ*], nor Guantanamo's *Manual for Military Commissions*, employ concurrent or consecutive sentencing": Affidavit of Gary D. Solis, Extracts of Key Evidence (EKE) A2 at para 4. More to the point, the import of his unchallenged affidavit evidence was that this same approach applied to sentencing under the military commission process. Solis further deposed that the record of Khadr's prosecution confirms "that multiple concurrent or consecutive sentences were not imposed upon" Khadr and that the Convening Authority "imposed a unitary sentence of eight years for all five offences": EKE A3 at para 11. Rule 1001(g) of the *Manual for Military Commissions, 2010* expressly prohibited the granting of any credit for pretrial detention which, in Khadr's case, totalled over eight years.

[15] On April 19, 2011, the Correctional Service of Canada (CSC) received Khadr's formal written application to the Minister of Public Safety and Emergency Preparedness (Minister) requesting a transfer to Canada.

[16] It was not until April 13, 2012 that the CSC received the certified support documentation required from the United States Office of the Under Secretary of Defense.

[17] On September 28, 2012, the Minister wrote that he was satisfied that the CSC and the Parole Board of Canada could administer Khadr's sentence in a manner which recognized the serious nature of the crimes Khadr had committed, and he determined that Khadr would serve the balance of his sentence in Canada. By letter the same date, a designate of the Minister at CSC, Lee Redpath, advised the Deputy Assistant Secretary of Defense for the Rule of Law & Detainee Policy in the United States that the Minister had approved Khadr's transfer to Canada under the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, Can. T.S. 1978 No. 12 (*Treaty*).

[18] By letter also dated September 28, 2012, Redpath advised Khadr that the Minister had approved his transfer to Canada. The letter set out, as the Minister was required to do under s. 15 of the *ITOA*, the Canadian equivalent offences as follows:

> (i) First degree murder, contrary to s. 231(6.01) of the *Criminal Code*;
>
> (ii) Attempted murder, contrary to ss. 239 and 81(1)(a) or (b) of the *Criminal Code*;
>
> (iii) Participation in activities of a terrorist group, contrary to ss. 83.18(1) of the *Criminal Code*;

(iv) Commission of an offence for a terrorist group, contrary to s. 83.2 of the *Criminal Code*; and

(v) Spying for the enemy, contrary to s. 78 of the *National Defence Act*, RSC 1985, c N-5.

[19] The letter advised Khadr that, on his transfer to Canada, he would "be deemed to have been sentenced by a court of competent jurisdiction in Canada to a sentence of imprisonment of eight (8) years commencing on October 31, 2010 and ending on October 30, 2018": EKE, R189. It confirmed that Khadr's statutory release would be calculated in accordance with s. 26 of the *ITOA*. It also set out that Khadr was eligible for Temporary Absence on March 1, 2012, Day Parole on January 1, 2013, and Full Parole on July 1, 2013.

[20] Khadr was transferred to Canada the next day, that is on September 29, 2012. At the time of his transfer, Khadr was 26 years old and had been imprisoned for 10 years.

[21] The CSC placed Khadr in a federal penitentiary, first Millhaven Institution in Ontario, later the Edmonton Institution and most recently, Bowden. It did so on the basis of its application of an internal administrative "policy" of the CSC involving global sentences. Under that policy, which appears to date from July 2011, where an offender is sentenced in Canada for multiple offences on the same day in the same court by the same judge, and the judge imposes what is described as a "global sentence", then the global sentence will be entered for "each of the offences". The result in Khadr's case was that, on his transfer to Canada, the CSC considered the unitary eight-year sentence that the Convening Authority imposed on Khadr to be five separate concurrent sentences of eight years each.

[22] Khadr challenged this approach. Relying on s. 20(a)(ii) of the *ITOA*, he demanded, through his counsel, that Kelly Hartle, Warden of the Edmonton Institution, release him from the federal institution in which he was then held. Hartle refused. As a consequence, Khadr brought an application for *habeas corpus* against Hartle. The Attorney General of Canada was added as a party to these proceedings at the hearing before the chambers judge (Hartle and the Attorney General being collectively referred to as the AGC). The chambers judge denied the application.

[23] Alberta was added as a respondent by consent of the other parties. It takes no position on any of the statutory interpretation issues, but has merely provided the Court with information regarding the feasibility of any transfer to a provincial correctional facility. At the oral hearing, Alberta observed that its consent to Khadr's placement in a provincial correctional facility in this province would not be required since Khadr's transfer to Canada had already taken place.

III. Statutory Framework for Transfer of Canadian Offenders from the United States

[24] To situate the issues raised on this appeal in context, we now turn to the basic statutory framework between Canada and the United States for the transfer of prisoners between them. That framework includes the *Treaty* and the Canadian legislation implementing the *Treaty*, namely the *ITOA*.

[25] Historically, the doctrine of state sovereignty was regarded as a barrier to a state's enforcing the criminal sentences imposed in another state. Eventually, increased cooperation between states and the recognized benefits of allowing citizens of a country to serve their criminal sentences in their home states led many countries to conclude bilateral and multilateral treaties to accomplish this objective. This process picked up speed after the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in 1975. That Congress recommended that "in order to facilitate the return to their domicile of persons serving sentences in foreign countries, policies and practices should be developed by utilizing regional cooperation and starting bilateral agreements": *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1-12 September 1975: report prepared by the Secretariat* (United Nations publication, Sales No. E.76.IV.2), chap I, para 23(j), as cited in the United Nations Office on Drugs and Crime, *Handbook on the International Transfer of Sentenced Persons* (Vienna: United Nations, 2012) [*UN Handbook*] at 17.

[26] In 1977, Canada and the United States entered into the bilateral *Treaty*. Canada's initial legislation implementing the *Treaty* was the 1978 *Transfer of Offenders Act*, SC 1977-78, c 9 (*TOA*). Parliament replaced this legislation in 2004 with the *ITOA*. In doing so, it included for the first time a statement of the purpose of Canada's transfer of prisoners legislation. That purpose, as specified in s. 3, explicitly includes both the rehabilitation of offenders and their reintegration into the community:

> The purpose of this Act is to enhance public safety and to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.

[27] Canadians have no right under s. 6 of the *Charter* to serve a foreign sentence in Canada: ***Divito v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 47 at para 3, [2013] 3 SCR 157. Nevertheless, the *ITOA* provides a mechanism for Canadians convicted of crimes in the United States and elsewhere to serve their sentences in Canada if certain conditions are met. In ***Divito***, *supra* at para 42, the Supreme Court of Canada confirmed that the purpose of the treaties on the transfer of offenders between Canada and other countries, on which the *ITOA* rests, is to promote the rehabilitation and social reintegration of offenders.

[28] Under the *ITOA*, a Canadian offender cannot return to complete the remainder of his sentence without first writing to the Minister and requesting a transfer: s. 7. Canada, the foreign state, and the offender must all consent: s. 8(1). This need for the consent not only of the foreign state and Canada but also the offender is consistent with the general approach to the transfer of prisoners internationally. It is designed to avoid transfers being used as disguised extradition or expulsion from the foreign state. Where the Canadian offender would, after transfer, be placed under the authority of a province, the consent of the relevant provincial authority is also required: s. 9.

[29] An underlying principle for transfer of prisoners internationally, also reflected in the *ITOA*, is that of dual criminality: s. 4. The offence for which the sentence has been imposed in the foreign state (called the "foreign entity" under the *ITOA*) must also be an offence in Canada. The rationale for the dual criminality principle is straightforward. A state would not likely wish to implement a sentence for conduct that was not criminal in that state. Dual criminality is considered to be met even if there is not a perfect match in terms of the name, definition or characterization of the offence providing the conduct underlying the offence is a crime in Canada: s. 4(2) of the *ITOA*. Hence the need for the Minister, under s. 15, to identify the criminal offences in Canada equivalent to the offences for which the Canadian offender was convicted.

[30] Most noteworthy for purposes of this appeal, under treaties for the international transfer of prisoners, there are two methods by which the sentence imposed in the foreign state (sometimes called the sentencing state) may be dealt with by the home state (sometimes called the administering state). The two methods are conversion and continued enforcement. Under conversion, the administering state imposes a new sentence based on its own laws but in doing so, it is bound by the relevant fact findings of the court in the sentencing state. The resulting sentence may be less, but not more, severe. The converted sentence is then enforced by the administering state.

[31] The other alternative – adopted by the *Treaty* and implemented by the *ITOA* – is continued enforcement. Under this procedure, the administering state is bound by the legal nature and duration of the foreign sentence. Thus, the administering state does not convert the foreign sentence but rather continues to enforce it. Hence the term "continued enforcement". The *Treaty*, which uses the terms "Sending State" to describe the state from which the offender is to be transferred and "Receiving State" as the state to which the offender is to be transferred, is clearly based on the continued enforcement method. Article V specifies in part:

> The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State.

[32] Canada's adoption of the continued enforcement method is explicitly stated in s. 13 of the *ITOA*:

> The enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada.

[33] Once the Canadian offender is transferred to Canada, the foreign sentence is, with one exception, then *enforced* in accordance with the laws of Canada as if the foreign sentence had been imposed in Canada. This accords with the general principle of continued enforcement: the sentence being served is the foreign sentence but the law governing the *enforcement of that foreign sentence* is the law of the administering state.[1] In the context of Canadian laws, enforcement includes the placement of the offender within the prison system, conditional release, service of a portion of the sentence in the community, temporary absences, parole eligibility and parole. This is contemplated by Article IV 1 of the *Treaty*:

> Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise....

[34] Adaptation is the one exception to the continued enforcement method of recognition of a foreign sentence. If the foreign sentence is incompatible with the laws of the administering state or those laws so require, then the administering state may adapt the foreign sentence to conform with its laws. But adaptation is only allowed within certain limits. Most important, the adapted sentence cannot aggravate the sanction imposed in the sentencing state.[2] Thus, s. 5(1) of the *ITOA* mandates that in no event, and this includes where a sentence is adapted, can a transfer have the effect of increasing a foreign sentence:

> A transfer may not have the effect of increasing a sentence imposed by a foreign entity or of invalidating a guilty verdict rendered, or a sentence imposed, by a foreign entity. The verdict

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[1] See Michael Plachta, "Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective" (1993) 53 La L Rev 1043 at 1079-1081. To be clear, the conversion method also involves enforcement by the administering state except that under this method, the enforcement is not of the original foreign sentence but rather the "converted" sentence.

[2] The *UN Handbook*, *supra* at 7 puts it this way: "The adapted sentence must, as far as possible, correspond with the initial sentence. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum sentence prescribed by the law of the administering State."

> and the sentence, if any, are not subject to any appeal or other form of review in Canada.

[35] Incompatibility can arise because the foreign sentence is incompatible in *nature* or *duration* with the laws of the administering state: *UN Handbook*, *supra* at 6-7. However, in contrast to other bilateral and multinational treaties that Canada has signed with other countries, the *Treaty* between Canada and the United States does not expressly address this possibility.[3] Instead, the *ITOA* provides for adaptation only to the extent set forth in s. 14. Section 14 caps the maximum length of the foreign sentence that an offender will be required to serve in Canada:

> Subject to subsection 17(1) and section 18, if, at the time the Minister receives a request for the transfer of a Canadian offender, the sentence imposed by the foreign entity is longer than the maximum sentence provided for in Canadian law for the equivalent offence, the Canadian offender is to serve only the shorter sentence.

[36] This section is subject to ss. 17(1) and 18 which deal with offences committed by young persons.[4] Section 18 is directed to offenders who were, like Khadr, 14 to 17 years old at the time they committed the offences in the foreign state. It prescribes that a Canadian offender in this age category is "deemed to be serving an adult sentence within the meaning of the [*YCJA*]" providing "their sentence is longer than the maximum youth sentence that could have been imposed under that Act for an equivalent offence". The effect of this is to deny an offender in this age category the ability to have their foreign sentence adapted, that is reduced, to the maximum youth sentence under the *YCJA* for the equivalent offence.

[37] Section 20 deals with a different topic, but one also related to enforcement of the foreign sentence in Canada, namely placement of an offender who was 12 to 17 years old (the age

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[3] For example, the 2003 Treaty Between the Government of Canada and the Government of the Argentine Republic on the Transfer of Offenders (E104972) provides in Article X the following: "1. The Receiving State shall be bound by the legal nature and duration of the sentence as determined by the Sentencing State. 2. If, however, the sentence is incompatible with the laws of the Receiving State, that State may adapt the sentence to one which is prescribed by its own law for a similar offence. The sentence shall not aggravate, by its nature or duration, the sanctions imposed in the Sentencing State or exceed the prescribed maximum in the Receiving State...." See also to the same effect Article 10 of the *Convention on the Transfer of Sentenced Persons*, ETS No. 112, Strasbourg, 21.III.1983, to which both Canada and the United States are signatories.

[4] Section 17 is not relevant here as it deals with offenders who were 12 or 13 years old at the time they committed the offence in the foreign state. They are entitled to have their foreign sentence adapted to the maximum youth sentence under the *YCJA* for the equivalent offence if the foreign sentence is longer than that maximum youth sentence.

category covered by the *YCJA*) at the time of the offence in the foreign state.[5] The issue under s. 20 is whether the foreign sentence "could have been" a youth sentence or an adult sentence within the meaning of the *YCJA* had the offence been committed in Canada. If it could have been a youth sentence, an offender, like Khadr, who was at least 20 years old at the time of transfer, is to be placed in a provincial correctional facility for adults: s. 20(a)(ii). If it could have been an adult sentence, and the offender was at least 18 at the time of transfer and the foreign sentence was more than two years, then the offender is to be placed in a federal penitentiary: s. 20(b)(iii).

[38] To ensure that a Canadian offender makes an informed choice in consenting to a transfer back to Canada, s. 8(4) of the *ITOA* requires that the Minister inform the offender in writing *how* their foreign sentence is to be served in Canada.

IV. Decision Below

[39] In denying Khadr's application for *habeas corpus*, the chambers judge determined that what he called Khadr's "eight-year global period of confinement" would have resulted, "if imposed in Canada", in five 8-year sentences to be served concurrently: 2013 ABQB 611 at paras 39, 42. Although he recognized that the Convening Authority did not use concurrent or consecutive sentencing, the chambers judge seems to have relied on s. 719 of the *Criminal Code* to support his conclusion that the eight-year unitary sentence imposed by the Convening Authority should be characterized as five concurrent eight-year sentences.[6] While s. 719 only deals with when sentences commence, it has been interpreted to require that sentences imposed in Canada be treated as running concurrently absent an explicit direction they run consecutively: see Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 8th ed (Markham, Ont.: LexisNexis, 2012) [Ruby] at 541-542.

[40] In determining whether the five concurrent eight-year sentences were adult or youth sentences for purposes of the *ITOA*, the chambers judge reasoned that the eight-year sentence for first degree murder must be a youth sentence since it is less than the minimum of life

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[5] Section 21 of the *ITOA* deals with where an offender who was an adult at the time of committing the offence in the foreign state should be placed.

[6] The chambers judge initially cited s. 719 at para 40 of his Reasons and then came to this conclusion at para 42: "In the absence of any indication of a 'totality' sentence, I conclude that this global sentence, if imposed in Canada, would have been five sentences to be served concurrently, at least one of which was a sentence for eight years." Later, in discussing whether the sentences would be adult or youth sentences for the purposes of the *ITOA*, he ends with these conclusions about the sentence for the non-murder offences at paras 50-51: "[50] But what about the other offences? Canada, through the CSC determined that, in the absence of any specification of the sentence for the five individual offences and sentences transferred, they should all be treated as five concurrent sentences of eight years. [51] Each of these sentences is longer than the maximum youth sentence and therefore under s. 18 must be deemed to be adult sentences." The chambers judge offered no reasons for simply accepting, as he did, Canada's characterization of Khadr's eight-year sentence as five concurrent sentences of eight years each. [The chambers judge referred to the AGC and Hartle collectively as Canada while we refer to them as the AGC.]

imprisonment for an adult convicted of murder and less than the maximum youth sentence of 10 years for a young person convicted of murder under the *YCJA*. However, he concluded that the eight-year concurrent sentences for each of the other offences were deemed to be adult sentences under s. 18 since an eight-year sentence for each of those offences exceeded the maximum youth sentence that Khadr could have received.

[41] Having concluded that Khadr's sentence consisted of one youth sentence for murder under s. 42(2)(q) of the *YCJA* and four adult sentences of eight years each on the remaining offences, the chambers judge was left to determine whether Khadr should have been placed in a federal penitentiary or an adult provincial facility. Reading ss. 92(4) and 76(1)(c) of the *YCJA* together with s. 743.5 of the *Criminal Code*, under which an offender serving both youth and adult sentences will have his sentence determined "as if it had been a sentence imposed under [the *Criminal Code*]", the chambers judge concluded that Khadr should be placed in a federal penitentiary.

V. Positions of the Parties

[42] Khadr maintains the issue is straightforward. He received what his counsel referred to as a global sentence of eight years for five offences. In accordance with s. 20 of the *ITOA*, this sentence could have been a youth sentence under the *YCJA* but not an adult one. Accordingly, s. 20(a)(ii) of the *ITOA* mandates that he serve his sentence in a provincial correctional facility for adults. The chambers judge erred, says Khadr, by converting his eight-year global sentence into five separate eight-year concurrent sentences. Only by doing so could the chambers judge conclude that Khadr had received one youth sentence and four adult sentences, thereby leading to his erroneous conclusion that this constituted an adult sentence under the *ITOA*.

[43] The AGC argues that Khadr improperly seeks to read s. 20 of the *ITOA* in isolation. In particular, the AGC relies on ss. 13 and 18, contending that the chambers judge correctly interpreted the *ITOA*, *YCJA*, and *Criminal Code*. It asserts that s. 13 of the *ITOA* requires that enforcement of Khadr's sentence be continued under Canadian law, and under Canadian law, a sentencing judge must, in accordance with s. 725(1)(a) of the *Criminal Code*, specify the individual sentence to be imposed for each offence. Where that is not done, the AGC contends that s. 719 of the *Criminal Code* applies to the foreign sentence. Thus, the global sentence imposed on Khadr must be interpreted as consisting of five concurrent sentences of eight years each. Therefore, on this theory, the chambers judge was correct in concluding that four of the sentences were deemed to be adult sentences under s. 18 of the *ITOA* and were required to be served in a penitentiary in accordance with s. 20(b)(iii) of the *ITOA*.

VI. Issues

[44] This appeal raises the following issues linked to the interpretation of the *Treaty*, the *ITOA*, the *Criminal Code* and the *YCJA*:

1. Is the sentence the Convening Authority imposed on Khadr enforceable under the laws of Canada? Related to this are the following sub-issues:

   (a) What is the proper characterization of the sentence that the Convening Authority imposed on Khadr?

   (b) What does the continued enforcement of that sentence under the laws of Canada entail?

   (c) Is the unitary sentence imposed by the Convening Authority incompatible with Canadian laws?

   (d) Does Canadian law mandate adaptation of the sentence imposed by the Convening Authority?

   (e) Does Khadr's consent to his transfer to Canada bar his *habeas corpus* application?

2. Does s. 18 of the *ITOA* apply to Khadr's sentence so as to deem him to be serving an adult sentence within the meaning of the *YCJA*?

3. Does s. 20(a)(ii) or s. 20(b)(iii) of the *ITOA* apply to Khadr's sentence and placement?

VII. Standard of Review

[45] There is no disagreement on the proper standard of review. The decision of the chambers judge is to be reviewed for correctness since it concerns questions of statutory interpretation: ***Canadian National Railway Co. v Canada (Attorney General)***, 2014 SCC 40 at para 33 ("An issue of statutory interpretation is a question of law."); ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235 at para 8; ***Laasch v Turenne***, 2012 ABCA 32 at para 9, 522 AR 168; ***John Barlot Architect Ltd. v 413481 Alberta Ltd.***, 2010 ABCA 51 at para 9, 487 AR 105; and ***Syncrude Canada Ltd. v Alberta (Human Rights and Citizenship Commission)***, 2008 ABCA 217 at para 4, 432 AR 333.

VIII. Statutory Interpretation

[46] Courts are to interpret legislation purposively and contextually: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont.: LexisNexis Canada, 2008) (Sullivan) at 256-297; Pierre-Andre Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto, Ont.: Carswell, 2011) at 415-429. The governing rule is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Sullivan, *supra* at 1; ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para 21; ***Bell ExpressVu Limited Partnership v Rex***, 2002 SCC 42 at para 26, [2002] 2 SCR 559.

[47] In determining legislative intent, in addition to the words in the written text, the court should look at the context of the legislation, the overall legislative scheme and the purpose of the statute: ***R v Mabior***, 2012 SCC 47 at para 20, [2012] 2 SCR 584. Context includes statutes dealing with the same subject matter which are presumed to be drafted with one another in mind to ensure coherent and consistent treatment of the subject in question: Sullivan, *supra* at 412-414.

[48] Therefore, all the relevant legislation in this case should be read as a harmonious whole with the central guide emanating from the *ITOA*. In particular, the *ITOA* provisions must be read together with the *Treaty* and the broader statutory scheme governing the transfer, sentencing, detention and parole of Canadian offenders established under the *Criminal Code*, the *YCJA*, the *Corrections and Conditional Release Act*, SC 1992, c 20 (*CCRA*) and the *Prisons and Reformatories Act*, RSC 1985, c P-20: see, for example, ***Pointe-Claire (City) v Quebec (Labour Court)***, [1997] 1 SCR 1015 at para. 61; ***Lévis (City) v Fraternité des policiers de Lévis Inc.***, 2007 SCC 14 at para 47, [2007] 1 SCR 591 ("legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable"). There is no value in reading a statute with a counterintuitive judicial gloss.

[49] While it is self-evident that the *ITOA* and the *Treaty* have a political component since they involve diplomatic relations between Canada and other sovereign nations, this Court's role in interpreting these statutes is not political. It is to give full effect to Parliament's will as reflected in the language of these instruments. Their provisions must be taken to indicate not merely what Parliament intends in these instruments, but also what the Canadian government would have intended, and agreed to, in its dealings with the United States and Khadr in the specific case of Khadr's transfer.

[50] Ultimately, the central issue in this appeal reduces to this: Does Khadr's placement fall under s. 20(a)(ii) or s. 20(b)(iii) of the *ITOA*? The role of this Court in deciding which answer is correct is not merely to provide a declaration of the correct legal interpretation. In light of the recent decision of the Supreme Court of Canada in ***Mission Institution v Khela***, 2014 SCC 24 at para 54 and this Court's jurisdiction in relation to *habeas corpus*, this Court is obliged to state

the lawful custodial location, federal or provincial, in which Khadr should be placed so long as it affects his "residual liberty".

[51] While this appeal did not focus on the legal implications of placing Khadr in a provincial correctional facility, a finding that Khadr ought to have been placed in such a facility rather than a penitentiary would constitute a sufficiently material difference so as to affect his residual liberty. Parliament has seen fit to provide for such a difference in s. 20, and Parliament's intention must be taken as meaningful and not merely window-dressing: ***Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)***, 2012 SCC 37 at para 47, [2012] 2 SCR 345 ("Parliament does not speak in vain (*Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 110)"). That said, we recognize that not every move within the prison system will affect a person's "residual liberty": see, for example, ***Sinobert v Canada (Attorney General)***, 2014 SKCA 51 at paras 8-9.

IX. Analysis

A. Is the Sentence the Convening Authority Imposed Enforceable Under the Laws of Canada?

[52] Against this backdrop, we turn to the crucial underlying point in dispute here. That is whether the eight-year sentence that the Convening Authority imposed on Khadr is enforceable in accordance with the laws of Canada. Under the *Treaty* and the *ITOA*, Khadr's sentence is to be enforced in Canada unless it is incompatible with the laws of Canada or those laws mandate adaptation of that sentence. Respect for the American sentence includes respect for the substance of that sentence. Thus, what that sentence means, how it is situated within the "laws of Canada" under s. 13 of the *ITOA*, and whether it is incompatible with those laws or required by law to be adapted are all of critical importance.

[53] The decision of the chambers judge was premised on Khadr's sentence being, under Canadian law, five concurrent sentences of eight years for each offence to which Khadr pled guilty. Unpacking this conclusion reveals a number of errors in law.

[54] The chambers judge fell into error when he began by framing the issue relating to Khadr's eight-year sentence as follows: "If sentenced in Canada, how would this sentence be applied: as consecutive or concurrent sentences?" This approach is incorrect in law. The issue is not what a Canadian court would have done or how it would have applied an eight-year sentence for five offences had Khadr been sentenced in Canada. This turns the concept of continued enforcement upside down. Under the *Treaty* and the *ITOA*, the sentence imposed by the Convening Authority is to be *enforced as if that sentence had been imposed by a Canadian court unless adaptation of that sentence is required by law*. Therefore, the starting point is what sentence was actually imposed in the United States.

1. The Eight-Year Sentence Represents Khadr's Total Culpability for All Five Offences

[55] In this regard, the evidence is definitive and uncontroverted. The American authorities cited by Solis refer to the sentence that the Convening Authority imposed on Khadr as a "unitary sentence" or a "single inclusive sentence". The most common expression that counsel for both Khadr and the AGC used to describe the eight-year sentence was to call it a "global sentence". Whatever the terminology, the undisputed expert evidence is that the eight-year unitary sentence that the Convening Authority imposed for the five offences to which Khadr pled guilty reflects Khadr's *cumulative culpability* for all five offences. Given the military commission process, the Convening Authority must be taken to have determined that Khadr's cumulative culpability warranted eight years imprisonment in total and no more for all five offences. This being so, no portion of the sentence for any one of the five offences could be equal to as much as eight years. Why? Because otherwise, none of the other offences would have attracted any portion of the cumulative sentence at all. This is illogical and inconsistent with the sentencing regime under the military commission process.

2. The *ITOA* Mandates Continued Enforcement of a Unitary Sentence of a Foreign State

[56] Both the *Treaty* and the *ITOA* are premised on the principle of international comity. In keeping with this principle, s. 13 of the *ITOA* mandates that the sentence imposed by the foreign state is to be enforced in accordance with the laws of Canada as if the sentence had been imposed by a court in Canada. Therefore, what is to be enforced is the sentence imposed in the United States, not some imaginary sentence imposed by a Canadian court. This reflects Canada's decision to choose the continued enforcement method, not the conversion method, of recognizing sentences imposed by foreign states.

[57] Due regard by Canada to the authority of the United States as the sentencing state includes accepting the substance of the eight-year sentence that the Convening Authority imposed on Khadr unless adaptation of that sentence is required under Canadian law. Section 13 allows Canada to acquire jurisdiction over and enforce the foreign sentence: ***Divito***, *supra* at paras 40-43. But obtaining jurisdiction to *enforce* a sentence is quite different from relying on selective bits and pieces of Canadian sentencing law in an attempt to *convert* a foreign sentence into something it never was when imposed in the foreign state. Under the *ITOA*, neither the sentence nor the verdict is subject to any form of review in Canada: s. 5(1). This is consistent with the overall regime under the *Treaty* and the *ITOA*. It is the Convening Authority, who was aware of the strengths and weaknesses of the case against Khadr, who had the right to determine the sentence for those offences as the designee of the United States Secretary of Defense. And he did.

[58] Although the *ITOA* does contain a number of provisions which specifically contemplate the application of Canadian law to the foreign sentence, these have to do with enforcing the sentence, not changing its substance. For example, ss. 23-29 provide that a Canadian offender is

able to seek recourse to parole and statutory release in accordance with the provisions of Canadian law. These arrangements, which are consistent with the principle of continued enforcement, are specifically provided for under the *Treaty* and are a necessary consequence of Canada having jurisdiction over the foreign sentence: ***Divito***, *supra* at para 33. While the *ITOA* also provides for adaptation of the length of the foreign sentence (see ss. 14 and 17(1)), adaptation (capping the maximum sentence an offender must serve in Canada) is the exception to continued enforcement. It is this simple. Apart from adaptation, enforcing a foreign sentence does not include altering its substance.

[59] While not explicitly stated, it appears that underlying the AGC's position on this appeal is the view that a cumulative sentence of eight years for the five offences to which Khadr pled guilty is not sufficiently long to reflect the seriousness of the offences. There also seems to be an unstated premise that had Khadr been sentenced in Canada, he would have received an adult sentence in light of the seriousness of the five offences. But if the AGC or the CSC, as the designate of the Minister, were permitted to go behind the verdict or challenge the sentence imposed by a foreign state, this would contravene the principle of continued enforcement of foreign sentences in Canada.

[60] Further, were it open to the AGC to challenge the substance of the sentence imposed by the Convening Authority, this would then open up the possibility of Khadr's challenging the substance of the verdict. His counsel might well argue that Khadr made a deal. In exchange for receiving no more than eight years for all five offences, Khadr agreed to plead guilty and give up his legal rights, including the right to contest the admissibility of certain evidence against him. And if the AGC were able to treat the sentence agreed to in the plea agreement as five concurrent sentences of eight years each, then Khadr's counsel might seek to have Khadr's guilty pleas struck on the basis not only that the plea agreement was being contravened but that the evidence against Khadr would have been excluded in a Canadian court. The legal process under which Khadr was held and the evidence elicited from him have been found to have violated both the *Charter* and international human rights law: ***Khadr I***, *supra* at paras 3, 6, 22-27; ***Khadr II***, *supra* at paras 16-18, 24-26.

[61] To take another example, one of the offences for which Khadr was charged in 2007 and pled guilty, providing material support for terrorism, is not a crime under international laws of war: ***Hamdan v United States***, 696 F3d 1238, 1248-1252 (DC Cir 2012) [***Hamdan II***]. Though it is now an offence under the *MCA*, Guantanamo detainees whose offence date, like Khadr's, preceded 2006 have had their convictions in the United States vacated on the grounds that it was not until the 2006 *MCA* that this offence was criminalized and the *MCA* does not apply retroactively: ***Hamdan II***, *supra*.[7]

[7] We hasten to add, however, that we are not stating an opinion on the retrospectivity of war crimes which is a complex issue: see the discussion in ***R v Munyaneza***, 2014 QCCA 906 at paras 15-55. Nor is the issue settled in the United States. The decision in ***Al Bahlul v United States***, 2013 WL 297726 (DC Cir January 25 2013), which

[62] However, under the *ITOA*, Khadr cannot now raise these arguments to challenge the validity of the verdict any more than the AGC can now raise arguments to challenge the validity of the sentence the Convening Authority imposed on Khadr. Both the *ITOA* and the *Treaty* leave no room for controversy on this point. It is improper for Canadian courts, the AGC, the CSC or the offender to sidestep the continued enforcement procedure that Parliament has laid down.

3. A Global or Unitary Sentence is Not Incompatible with the Laws of Canada

[63] The chambers judge compounded his error by asking whether the eight-year sentence would be applied in Canada as consecutive or concurrent sentences. Apart from the fact that this mistakenly presupposes that the focus is on what the sentence would be had it been imposed in Canada, and not the United States, it rests on yet another erroneous legal proposition. That is the theory that Canadian law does not allow for the possibility of a sentencing judge's imposing a unitary sentence or what the chambers judge and both counsel for Khadr and the AGC all referred to as a "global" sentence.[8] This amounts to an assertion that a unitary sentence is incompatible, by its *nature*, with Canadian law. However, this is not correct. Not only is a unitary sentence not incompatible with the laws of Canada, but contrary to the position taken before the chambers judge, Canadian law does *allow for the possibility* of a sentencing judge legally imposing, for multiple offences, one sentence for young persons and adults.

[64] In Canada, various terms have been, and continue to be, used to describe a sentence that reflects the cumulative culpability of an offender: "global"; "cumulative"; "total"; "aggregate"; or "single". The central shared premise of what is commonly referred to as a "global" sentence in Canada and a "unitary" sentence in the United States is the determination of a single number that represents the cumulative culpability for all offences. Viewed from this perspective, a unitary sentence is akin to what in Canada might be called a global, cumulative, total, aggregate or single sentence. Thus, we sometimes use these terms interchangeably in these Reasons. The only difference is that in the case of the unitary sentence, individual sentences are not allocated for each offence. In the case of a global sentence, such allocation would typically be made, but not always.

(a) Sentencing of Adults and Single Sentences

[65] It is correct that in sentencing adults in Canada, a trial judge is required, in accordance with s. 725(1)(a) of the *Criminal Code*, to impose a sentence for each offence. This section

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followed the ***Hamdan II*** ruling, is the subject of a rehearing *en banc* (No. 11-1324, Doc. No. 1432126 (DC Cir April 23 2013)).

[8] The context in which this terminology was used was in reference to a global sentence for multiple offences where separate sentences were not allocated to individual offences. The term "global sentence" can also involve a situation in which separate sentences are allocated to individual offences.

provides that in determining sentence, a court shall consider, if possible and appropriate to do so, any other offences for which the court found the offender guilty "and shall determine the sentence to be imposed for each of those offences". Thus, in sentencing *adults* for multiple offences in this country, the trial judge is required to allocate an individual sentence to each offence.[9] The global sentence for multiple offences would typically exceed a fit individual sentence for the worst of the offences in order to reflect the offender's cumulative culpability for all offences: ***R v Abrosimo***, 2007 BCCA 406 at paras 20-31, 225 CCC (3d) 253; ***R v May***, 2012 ABCA 213 at para 15, 533 AR 182. Under this approach, a fit sentence for each of the other offences would generally be reflected in the differential between the global sentence and the fit sentence for the main offence.

[66] However, a trial judge's failure to impose individual sentences for each offence does not necessarily make a single inclusive sentence illegal. Section 728 of the *Criminal Code* expressly contemplates the legality of a single sentence:

> Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.

[67] Accordingly, a global sentence which fails to specify individual sentences for each count is valid under Canadian law as long as the length of the sentence can be justified by at least one of the counts. For recent applications of this rule, see ***R v Hanna***, 2013 ABCA 134 at para 20, 544 AR 135; ***R v TAP***, 2014 ONCA 141 at paras 15-16. In such event, the other offences might well attract concurrent sentences of a lesser number than the main offence. Regardless of what limitations might apply to a single inclusive sentence imposed in this country, the laws of Canada nevertheless recognize the possibility of such a sentence. Thus, a single inclusive sentence for multiple offences is not *incompatible* with Canadian law simply because individual sentences are not allocated for each offence.

[68] Further, while a failure to allocate a specific sentence to an individual offence will often be corrected on appeal in Canada, the CSC can, and does, *administer single sentences* in this country for adults. Indeed, the September 8, 2011 sentence calculation document by the "National Advisor, Sentence Management" described Khadr's sentence as "8 years approved by military commission (5 cts)": EKE, R186. While the reference to the "military commission" is inaccurate, this document treats the disposition in Khadr's case as a "Total Aggregate Sentence" calculated in number of days.

(b) Sentencing Young Persons and Global or Unitary Sentences

[9] Those sentences may be made consecutive should the court so order. When the total of those sentences offends the totality principle because the resulting number is unduly long or harsh, a "global" sentence less than the original total is determined and separate sentences allocated to each of the offences: s. 718.2 (c) of the *Criminal Code*.

[69] In sentencing young persons, Parliament has provided that Part XXIII (sentencing) of the *Criminal Code* does not apply to proceedings under the *YCJA* except for certain limited exceptions: see ss. 50, 74 of the *YCJA*. In particular, the *YCJA* does not contain a provision comparable to s. 725(1)(a) of the *Criminal Code* requiring a judge to determine individual sentences for each offence. Instead, where a young person has committed multiple offences, the *YCJA* contemplates the very possibility of a trial judge's imposing one sentence, that is a unitary sentence or what is typically referred to by youth court judges in this country as a global sentence, reflecting the young person's cumulative culpability. That is evident from s. 42(15) of the *YCJA* which provides in relevant part:

> ... *[I]f* more than one youth sentence is imposed under this section in respect of a young person with respect to different offences, the continuous combined duration of those youth sentences shall not exceed three years, except if one of the offences is first degree murder ... in which case the continuous combined duration of those youth sentences shall not exceed ten years in the case of first degree murder...[Emphasis added].

[70] While this section is directed to the maximum sentence that can be imposed on a young person for multiple offences, its significance for this appeal lies in the reference to "if" more than one youth sentence is imposed. Inferentially, more than one youth sentence need not be ordered for multiple offences. Instead, the youth court judge may choose to impose a global, that is unitary, sentence reflecting the young person's cumulative culpability for a number of offences: see, for example, ***R v GE(A)***, 2012 ONCJ 750 at para 56, 2012 CarswellOnt 15520; ***R v JF***, 2012 BCSC 780 at para 65, 2012 CarswellBC 1582. This accords with the practice in youth court in Alberta. That practice sometimes involves imposing a single inclusive youth sentence for multiple offences without specifying a separate sentence for each offence. Accordingly, global youth sentences (which do not allocate a specific sentence to each individual offence) are recognized under the *YCJA* and imposed commonly in courts in Canada. Consequently, a unitary sentence is not incompatible with the laws of Canada.

[71] That said, it is of course possible for a youth court judge to impose consecutive youth sentences. Section 718.3(4) of the *Criminal Code*, under which a trial judge may direct that sentences be served consecutively, does not apply to youth sentences under the *YCJA*.[10] However, a youth court judge is permitted to make youth sentences for multiple offences consecutive. But this is permissible in certain circumstances only: see ss. 42(13) and 42(16) of the *YCJA*. It is also true that when and if separate sentences are ordered and are not stated to be consecutive under ss. 42(13) or 42(16) of the *YCJA*, they will, as is the case in sentencing under the *Criminal Code*, be administered as concurrent sentences: Peter J. Harris & Miriam

[10] It does apply if an adult sentence is imposed under the *YCJA*.

Bloomenfeld, *Youth Criminal Justice Act Manual*, looseleaf (Toronto: Canada Law Book, 2014) at 4-193.[11] The critical point however is that, notwithstanding the possibility of consecutive youth sentences being imposed, a unitary or global sentence is, as noted, also entirely permissible for youth sentences.

[72] Nor is Khadr's eight-year unitary sentence incompatible with Canadian law because of its length. No such incompatibility exists. The eight years for five offences is well below the maximum for an adult who has committed first degree murder (the minimum itself is life imprisonment) and below the maximum for a youth sentence under the *YCJA* for multiple offences including first degree murder (the maximum youth sentence for multiple offences, including first degree murder, being 10 years).

(c) CSC's Inability to Attribute Notional Numbers Does Not Bar Enforcement

[73] The AGC made much of the fact that the *ITOA* does not permit the CSC to attribute notional sentencing numbers to each of the multiple offences represented by the global sentence imposed by the Convening Authority. This is correct. The AGC also contends that allowing the CSC to attribute notional numbers to the multiple offences subsumed in the Convening Authority's global sentence would confer too much discretion on the CSC. We do not disagree. However, it does not follow that the CSC is then entitled to ignore the substance of the sentence the Convening Authority imposed on Khadr – a cumulative global sentence of eight years for five offences – and instead "convert" that global sentence into five separate sentences of eight years each. Put another way, the CSC's inability to attribute notional numbers to each offence lower than the eight-year total sentence imposed by the Convening Authority for all offences does not justify its attributing maximum notional numbers – eight years – to each offence. Under the *ITOA*, the CSC is entitled to do neither. The fact that this is so does not make the unitary sentence incompatible with Canadian law.

[74] Indeed, we are bound to say that to apply a notional eight-year sentence to each offence creates an inflationary circularity. The sentences are treated by the CSC policy as each being of a specific quantum that takes them out of the range of the *YCJA* and then, by reason of that policy, the sentences are out of that range. This kind of circular reasoning is impermissible.

[75] Accordingly, the eight-year unitary sentence imposed by the Convening Authority is not incompatible, by nature or length, with Canadian law. Thus, there is no barrier on this basis to its continued enforcement in Canada.

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[11] Under s. 42(15), if the trial judge elects to impose more than one sentence and to make them consecutive, the continuous combined duration of the youth sentences, if one of them is first degree murder, cannot exceed 10 years.

4. Canadian Law Does Not Mandate Adaptation of the Unitary Sentence

[76] The argument that the eight-year unitary sentence for five offences imposed by the Convening Authority should be treated as five 8-year concurrent sentences – which essentially amounts to a claim for adaptation of the sentence – is without merit. We offer three reasons for this conclusion.

(a) Adaptation is Limited in Scope

[77] First, there is nothing in the *ITOA* or *Treaty* or elsewhere in Canadian law that mandates that a unitary foreign sentence for multiple offences be "adapted" to concurrent sentences of the same length for each offence. Indeed, the *ITOA* provides for adaptation of a foreign sentence *only* where it exceeds the maximum sentence under Canadian law for an equivalent offence. This is entirely consistent with the narrow approach taken to adaptation under international treaties and conventions. [Adaptation is discussed further below in the context of s. 18.]

(b) Treating the Sentence as Concurrent Sentences Would Contravene the *ITOA*

[78] Second, to equate Khadr's sentence to five 8-year concurrent sentences would contravene s. 5(1) of the *ITOA*. As noted, while adaptation of a foreign sentence can reduce that sentence, it cannot increase it. This is clear from s. 5(1) of the *ITOA* which expressly prohibits any increase in the foreign sentence as a result of the transfer:

> A transfer may not have the effect of *increasing a sentence* imposed by a foreign entity ... The verdict and the sentence, if any, are not subject to any appeal or *other form of review in Canada*. [Emphasis added]

[79] Given the sentencing regime under the military commission process, the Convening Authority must be taken to have determined that Khadr's cumulative culpability for all five offences warranted eight years imprisonment, no more. This being so, no portion of the sentence for any one of the offences to which Khadr pled guilty could be equal to as much as eight years. Certainly each offence is not of equal magnitude, a reality apparent if one gives a moment's consideration to the nature of each offence. If the CSC were permitted to treat the unitary eight-year sentence as five 8-year concurrent sentences – and ignore the fact that the unitary sentence represented Khadr's cumulative culpability for five offences – this would effectively increase the length of the sentence for each offence. There is a colossal divide between a global sentence of eight years that could have been a youth sentence within the meaning of the *YCJA* and a sentence that is converted into one youth sentence of eight years and four concurrent adult sentences of eight years. Nothing makes that point more compellingly than the competing positions taken by Khadr and the AGC in this case.

[80] The AGC's approach alters and inflates the single sentence imposed by the Convening Authority into five equivalent sentences of eight years each to run concurrently. This is not consistent with reality and the unitary sentence imposed by the Convening Authority. Nor is it required by the laws of Canada. Moreover, this effectively increases the sentence for every one of the five offences to eight years in contravention of s. 5(1) of the *ITOA*.

(c) Section 719 of the *Criminal Code* Does Not Apply in Any Event

[81] Third, there is no legal basis for the suggestion that s. 719 of the *Criminal Code* requires that the eight-year sentence imposed by the Convening Authority be construed as five 8-year concurrent sentences.

[82] Counsel for the AGC stressed in oral argument that the CSC was warranted in treating the eight-year global sentence for five offences as five 8-year concurrent sentences based on the *ITOA* itself and s. 719 of the *Criminal Code*. Particular reliance was placed on s. 15 of the *ITOA*, the dual criminality provision, to suggest that because the Minister must identify each equivalent offence in Canada, it follows that the CSC, as the Minister's designate, must also assign an individual sentence to each offence. However, there is nothing in the *ITOA* which requires, or authorizes, that this be done. To the contrary.

[83] The starting point is this. Section 719 of the *Criminal Code* has no application because it is wholly incompatible with the substance and reality of the sentence imposed by the Convening Authority. The eight-year unitary sentence represents the total sentence imposed on Khadr for five offences. It is incontrovertible on this record that there is no concurrent sentence included in that number.

[84] Even if Canadian law applied so as to permit this sentence to be converted into something it is not, s. 719 would still be irrelevant. As already noted, under Canadian law, where a trial judge has imposed a specific sentence for each of a number of offences for which an offender has been convicted but has failed to state whether those sentences are to run consecutively or concurrently, Canadian law deems the sentences to run concurrently. The rationale is that under s. 719(1), "[a] sentence commences when it is imposed". However, the application of the concurrent sentences rule presupposes that a trial judge has actually imposed a specific sentence for each offence and simply omitted to indicate whether those sentences would be served concurrently or consecutively.

[85] That is not the situation here. The Convening Authority did not impose five 8-year sentences and simply fail to identify whether they would be concurrent or consecutive. Instead, a single sentence, eight years, was imposed to reflect Khadr's cumulative culpability for all offences. Where, as here, this is so, the concurrent sentences rule under s. 719 has no application. All that s. 719 of the *Criminal Code* tells us is that individual sentences commence at the same time they were imposed. Neither that section nor the concurrent sentences rule sheds any light on

what portion of Khadr's eight-year unitary sentence would be properly allocated to each offence to which he pled guilty, even if it were permissible for the CSC to make this allocation under Canadian law – which it is not.

[86] The CSC has said its policy in circumstances involving a purely global sentence for multiple offences is to treat the sentence for each offence as concurrent. Indeed, in support of the AGC's interpretation, the AGC placed great emphasis on this CSC "policy", asserting that it requires that the global sentence be treated as five concurrent sentences of eight years. But an internal administrative "policy" cannot override the law, including the *ITOA*. In any event, the actual sentence calculation document from the CSC in evidence before this Court says nothing about concurrent sentences. Rather, the CSC, consistent with the expert evidence on US military law before this Court, ultimately treats a global foreign sentence as a single sentence under s. 139 of the *CCRA*: EKE, R6.

[87] In short, the concurrent sentences rule under s. 719 of the *Criminal Code* does not apply to a foreign sentence where a unitary or global sentence was imposed. Further, even if this were not so, there is yet another reason why this section would be irrelevant in this case. Section 719 only applies where the sentence is an adult one. The AGC maintains that Khadr's sentence falls within the scope of s. 18 of the *ITOA* because eight years exceeds the maximum prescribed under the *YCJA* for four of the offences. However, the AGC is forced to rely on s. 719 (which applies to adult sentences only, not youth sentences) in the attempt to establish that the global sentence should be broken down into five concurrent eight-year sentences and thus treated as adult sentences. The AGC is therefore presupposing the very thing it is attempting to prove, namely the existence of an adult sentence which it claims engages s. 719 in the first place.

[88] For these reasons, s. 719 has nothing to do with adaptation of a unitary foreign sentence or its enforcement in Canada.

[89] In conclusion, Canadian law does not mandate the adaptation of Khadr's eight-year unitary sentence to five 8-year concurrent sentences.

5. Khadr's Consent to Transfer is Not a Barrier to *Habeas Corpus* Application

[90] Nor is Khadr precluded from raising any of these issues. The AGC's factum implies he is, asserting that Khadr was advised in the September 28, 2012 letter sent to him that his release would be governed by s. 26 of the *ITOA*. However, s. 26 covers both the case where an offender is placed in a penitentiary as well as where the offender is placed in a prison which includes a provincial correctional facility. Further, nowhere in the letter is there any indication that the CSC would treat the eight-year global sentence imposed by the Convening Authority as five 8-year concurrent sentences. That pivotal point is never mentioned.

[91] The letter does refer to the time at which Khadr would be eligible for Temporary Absence, Day Parole and Full Parole. While it could be argued that Khadr ought to have inferred from these references that he would be placed in a penitentiary, placement is not expressly confirmed. Nor could the Minister's rationale for any decision on this issue be deduced from this letter. The purpose of s. 8(4) of the *ITOA*, which requires the Minister to inform a Canadian offender in writing "how their foreign sentence is to be served in Canada" is to ensure that the offender makes a decision on whether to consent to a transfer with knowledge of the implications flowing from the transfer. As discussed, there is a huge disparity between a global cumulative sentence of eight years in total for five offences and eight-year concurrent sentences for *each* of five offences.

[92] In any case, even if an offender agreed to accept a transfer knowing in advance that the Minister had taken a position under the *ITOA* with which the offender did not agree, there is nothing in the law that precludes that offender's agreeing to the transfer and later challenging state action on return to Canada. Estoppel has no application in circumstances such as these. An offender is not required to choose between returning to Canada by consenting to a transfer and enforcing his or her rights under the *Treaty* and the *ITOA*. Consent to a transfer does not equal surrender of rights.[12] Under the rule of law, all Canadians are entitled to challenge the state's alleged improper interpretation of Canadian law in the courts in this country.

6. Conclusion

[93] For all these reasons, the eight-year unitary sentence imposed by the Convening Authority is, in accordance with the principle of continued enforcement, *enforceable in Canada as if this sentence had been imposed by a court in Canada*. It is not incompatible by its *nature* or *length* with the laws of Canada nor does Canadian law mandate adaptation of this sentence to five 8-year concurrent sentences. The chambers judge erred in law in finding that the eight-year sentence should be construed as five separate eight-year sentences running concurrently. For the purpose of its continued enforcement under the *ITOA*, Khadr's sentence remains an eight-year unitary sentence representing his cumulative culpability for all five offences.

[94] This now takes us to the relevant provisions of the *ITOA* and, in particular, ss. 18 and 20.

B. Does s. 18 of the *ITOA* Apply to the Sentence the Convening Authority Imposed?

[95] To determine the placement issue, Khadr's counsel submits that the Court need only zero in on s. 20 which deals expressly with placement and interpret that provision on the basis that it is exhaustive and determinative of the ultimate issue. The AGC disagrees, contending instead that we must consider other provisions in the *ITOA* and related legislation rather than s. 20 alone.

[12] The challenge here is not within the scope of any topic precluded from review under s. 5(1) of the *ITOA* but rather deals with the statutory interpretation of other sections of the statute.

The AGC is correct. The *ITOA* must be interpreted as a whole and in the context not only of the *Treaty* but also other legislation incorporated into the *ITOA* by its terms. Accordingly, it is not proper to simply jump to s. 20 without considering its linkage to other sections in the *ITOA* and other relevant legislation.

[96] The next issue to consider therefore is whether, as the AGC contends, Khadr's sentence falls within the scope of s. 18 of the *ITOA*.

1. Historical Context of the Provisions in the *ITOA* Dealing with Young Persons

[97] The *ITOA* contains special provisions dealing with offenders who were between 12 and 17 years old when they committed the offence in the foreign state and who would have been subject to the *YCJA* had the offence been committed in Canada. As with the *YCJA*, the *ITOA* distinguishes between offenders who were 12 to 13 years old at the time of committing the offence and those 14 to 17 years old. Different provisions apply to those in each category. To help understand why this is so and what Parliament intended under the *ITOA* for offenders in these two age groups, it is useful to situate the current legislation in its historical context and consider the provisions dealing with those in these age groups in the *YCJA* and its predecessor legislation, the *Young Offenders Act*, RSC 1985, c. Y-1 (*YOA*). This historical context is relevant in interpreting s. 18 as well as other sections dealing with young persons in the *ITOA*, including ss. 19 and 20.

[98] In 2004, after Parliament had passed the *YCJA* (which replaced the *YOA* effective April 1, 2003), it adopted the *ITOA* in place of the *TOA*. The *ITOA* included more detailed provisions relating to young persons compared to those in place under the *TOA* when the *YOA* was in effect. Parliament's purpose was to ensure that the *ITOA* was consistent with the philosophy of, and substantive changes in, the *YCJA*. Therefore, the overall architecture of the *ITOA* includes the *YCJA*. Section 29(1) of the *ITOA* is explicit on this point:

> Subject to this Act, a Canadian offender who is transferred to Canada is subject to the *Corrections and Conditional Release Act*, the *Prisons and Reformatories Act* and the *Youth Criminal Justice Act* as if they had been convicted and their sentence imposed by a court in Canada.

[99] The *YCJA* took a more detailed approach to juvenile justice than did the *YOA*. On the one hand, the *YCJA* is arguably more reflective of the concerns particular to young persons than the *YOA*.[13] The *YCJA* sets out in s. 3 certain principles including that the criminal justice system for young persons *must be separate from that of adults and based on the principle of diminished*

[13] The *YCJA* preamble notes that Canada is a party to the *Convention on the Rights of the Child* and that young persons have "special guarantees of their rights and freedoms".

moral blameworthiness or culpability.[14] On the other hand, the *YCJA* altered the test under which young persons in the 14 to 17 year old age category might be sentenced as adults compared to the regime under the *YOA*, arguably making it easier for this to occur.

[100] For those who were 12 or 13 when they committed an offence, the law under the *YCJA* remains as it was under the *YOA*. A young person in this age category is *not exposed* to the possibility of an adult sentence. Section 17 of the *ITOA* mirrors this approach for those in this age group. The maximum sentence to be imposed on a Canadian offender who was 12 or 13 at the time of the offence in the foreign state is capped at the *maximum youth sentence* imposed under the *YCJA* for the equivalent offence.[15] In other words, for those in this category, the *ITOA* mandates adaptation of the foreign sentence to this extent. Since there are no circumstances under the *YCJA* where an adult sentence can be imposed on those in this age category, there is a match between the *YCJA* and the *ITOA* for those in the 12 to 13 year old age group. An offender will not serve any more than the *maximum youth sentence* under the *YCJA*. This all accords with the symmetry Parliament intended between both pieces of legislation.

[101] But under the *ITOA*, young persons who were 14 to 17 years old at the time they committed the offence in the foreign state are in a different position. The sentence they have received in the foreign state will not necessarily be capped at the *maximum youth sentence* available for the equivalent offence under the *YCJA* for those in this age category. Why? Because under the *YCJA*, young persons who were 14 to 17 years old when they committed the offence *may*, despite their young age, be subject to an adult sentence.[16] The *YCJA* contains a number of provisions outlining the circumstances under which a young person might receive an adult sentence and if so, what turns on that in terms of placement and parole eligibility.

[102] Prior to Parliament's adoption of the *YCJA*, the *TOA* made little accommodation for offenders who had committed offences in the foreign state while between 12 and 17 years old. If they were sentenced to two years or more in the foreign state, they were to be detained in a penitentiary on transfer back to Canada: *TOA*, s. 7. But once Parliament adopted the *YCJA*, it saw fit to reform the law on transfer of young persons from foreign states. The emphasis shifted from considering only the length of sentence imposed in the foreign state to the distinction between a

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[14] It must also emphasize (1) rehabilitation and reintegration; (2) fair and proportionate accountability; and (3) enhanced procedural protection to ensure that young persons are treated fairly and their rights protected.

[15] Where the offence would have been first or second degree murder under Canadian law, the sentence will be reduced, if necessary, to the maximum youth sentence provided under the *YCJA* for the equivalent offence, namely 10 and 7 years respectively: s. 17(2).

[16] The one exception is where a province has increased the age at which this might occur. The only province to have done so is Quebec which raised the minimum age to the maximum allowed under the *YCJA*. Thus, a young person who commits an offence in Quebec is not exposed to the possibility of an adult sentence unless the offence was committed after the young person attained 16 years.

youth sentence and an adult one. The reason for this shift is understandable. Under the *YCJA*, a sentence of less than two years does not, by itself, automatically make the sentence a youth sentence. It could be an adult sentence. Similarly, a sentence of two years or more under the *YCJA* does not automatically qualify as an adult sentence. It could still be a youth sentence. Thus, in order to conform the *ITOA* to the *YCJA*, Parliament decided that it was no longer appropriate to use two years as an invariable dividing line to determine where a young person, on transfer to Canada, served his or her sentence.

[103] Instead, when Parliament adopted the *ITOA* in 2004, it designed ss. 17 to 20 to address certain circumstances when a young person serving a foreign sentence would be deemed to have received either an *adult sentence or a youth sentence within the meaning of the YCJA*.[17] But Parliament also deliberately left open a wide middle ground where the deeming provisions would not apply and could not therefore be used in classifying the foreign sentence as a youth sentence or an adult sentence under the *YCJA* for purposes of its enforcement in Canada. To cover those situations, Parliament adopted a further test to determine placement of the offender. That test, under s. 20, is whether the foreign sentence "could have been" a youth sentence or an adult sentence under the *YCJA* had the offence been committed in Canada.

[104] Taken together, these sections provide a useful framework in deciding when an offender transferred to Canada will be deemed to be serving either an adult or youth sentence. And if neither deeming provision applies, then the test under s. 20 will be used to determine placement of the offender on return to Canada.

2. Interpretive Approach to s. 18, the Adult Sentence Deeming Provision

[105] Section 18 of the *ITOA* provides:

> A Canadian offender is deemed to be serving an adult sentence within the meaning of the *Youth Criminal Justice Act* if
>
> > (a) the Canadian offender was, at the time the offence was committed, from 14 to 17 years old; and
> >
> > (b) their sentence is longer than the maximum youth sentence that could have been imposed under that Act for an equivalent offence.

[17] It also addressed the effect this distinction would have on parole eligibility for a young person convicted of first or second degree murder.

[106] Section 18 is to be narrowly construed. First, in light of ***R v DB***, 2008 SCC 25, [2008] 2 SCR 3, a young person is presumptively entitled to a youth sentence given the long-standing legal principle that young persons are presumed to have diminished moral culpability: Ruby, *supra* at 780; Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed (Toronto: Irwin Law, 2012) at 660-663, 673. Indeed, under the *YCJA*, the onus of establishing that an adult sentence should be imposed on a young person rests on the Attorney General: s. 72(2) of the *YCJA*. This presumption against adult sentences is consistent with a restrictive interpretation of s. 18. Any ambiguity in whether a young offender should be deemed to be serving a youth sentence or an adult one should err on the side of its being a youth sentence.

[107] Second, a deeming provision ought to be narrowly construed where, as here, penal legislation is involved which directly impacts on the "residual liberty" of an individual: ***R v McIntosh***, [1995] 1 SCR 686 at para 29. The purpose of a deeming provision is to treat something as something it otherwise is not, or may not be, for a particular purpose. As the Supreme Court of Canada explained in ***R v Verrette***, [1978] 2 SCR 838 at 845:

> A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is.

[108] In each instance, the central question is the intended scope of the fiction: Sullivan, *supra* at 87. The intention underlying the fiction in s. 18 is patent. It allows Canadian authorities to treat a foreign sentence as an adult sentence for purposes of enforcement of that sentence where the sentence exceeds the maximum youth sentence that could have been imposed on the offender under the *YCJA* had the offence been committed in Canada. In other words, its purpose is to deny an offender deemed to be serving an adult sentence the ability to claim that their foreign sentence should be "adapted" to the *maximum youth sentence* that could have been imposed under the *YCJA* had the offence been committed in Canada.[18]

[109] However, s. 19 qualifies this deeming provision for those in the 14 to 17 year age group convicted of the equivalent of first or second degree murder. In doing so, it sets out special provisions dealing with eligibility for parole. What is noteworthy for this appeal is that under s. 19(3) of the *ITOA*, if the offender received, as did Khadr, a determinate sentence of less than 10 years for first degree murder (or seven years for second degree murder), the offender is "*deemed to have received a youth sentence*" within the meaning of the *YCJA*.[19]

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[18] This argument would otherwise be available given s. 14 of the *ITOA* and Article IV 2 of the *Treaty*.

[19] If the offender "received a sentence for a determinate period of more than 10 years for conduct" that would have constituted first degree murder in Canada or seven years for conduct that would have constituted second degree murder, the offender is "deemed to have received an adult sentence" within the meaning of the *YCJA*. Section 19

[110] It is unsurprising that where a foreign sentence is higher than the maximum youth sentence under the *YCJA*, Parliament would deem an offender in this age group to be serving an adult sentence. The fact the foreign sentence was higher than the maximum youth sentence implies that the offence was sufficiently serious that had it been committed in Canada, the offender would likely have received an adult sentence under the *YCJA*. Accordingly, for Parliament to deem the offender to be serving an adult sentence in these circumstances is consistent with the sentencing regime and philosophy under the *YCJA*.

3. Why s. 18 of the *ITOA* Does Not Apply to the Eight-Year Sentence Imposed on Khadr

[111] The chambers judge concluded that s. 18 of the *ITOA* applies so as to deem Khadr to be serving an adult sentence within the meaning of the *YCJA*. We do not agree.

[112] Under the *ITOA*, the issue is not whether the foreign sentence was classified in the foreign state as an adult sentence or a youth one but rather with how Canadian law classifies that sentence for enforcement purposes in light of the *YCJA*. Article IV 2 of the *Treaty* gives Canada the express authority to treat youthful offenders in accordance with the provisions of the *YCJA* regardless of that person's status under the laws of the United States:

> The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State.

[113] The rationale for this is obvious. The foreign state may make no distinction between a youth sentence and an adult one. That is certainly so for the military commission process under the *MCA*. It does not differentiate between adults and young persons even though an offender might be within the age group covered by the *YCJA* (12 to 17 years of age). Thus, the *ITOA* is not concerned with the label attached to the foreign sentence in the foreign state but rather with how that sentence ought to be classified when the offender (who would have been under the *YCJA* had the offence been committed in Canada) is returned to Canada. Article IV 2 essentially allows Canada to treat a foreign sentence as a youth or adult sentence under the *YCJA for purposes of its enforcement in Canada*.

[114] The chambers judge's decision that Khadr's sentence falls within s. 18 was based on the premise that Khadr is serving five concurrent sentences of eight years each. We have already

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also sets out the parole eligibility periods for those sentenced to life imprisonment for conduct that would have constituted first or second degree murder in Canada. Where the offender was 14 or 15 years old at the time of the murder, even if the offender received a life sentence in the foreign state, the offender is eligible for full parole no later than after five years of service of the sentence.

explained why this underlying premise is fatally flawed. The Convening Authority sentenced Khadr to one unitary sentence of eight years, representing his cumulative culpability for all offences. Therefore, to assert that Khadr received eight-year sentences for each of the offences other than murder is incorrect in law. He did not.

[115] At no time before this Court did the AGC attempt to argue that Khadr's eight-year sentence for all offences would still fall within s. 18 even if it were not treated as five 8-year concurrent sentences. This is not surprising. That argument cannot be sustained on these facts. There will be many cases in which it will be evident that the deeming provision under s. 18 applies even where a global or unitary sentence has been imposed. But this is not one of them.

[116] Khadr received an eight-year unitary sentence for conduct that included what would have been first degree murder in Canada. The chambers judge found, and the AGC concedes, that given the length of the sentence, eight years, Khadr is, in accordance with s. 19(3), deemed to have received a youth sentence under the *YCJA* for the murder. Under the *YCJA*, the other four offences to which Khadr pled guilty would have attracted a maximum of three years for each of three offences (attempted murder: s. 42(2)(o); commission of offence for terrorist group: s. 42(2)(n); and spying for the enemy: s. 42(2)(n)); and two years for one offence, participation in activity of terrorist group (s. 42(2)(n)). Apart from the first degree murder conviction, the maximum sentence imposed for these four other offences under the *YCJA* could not exceed in the aggregate three years. However, given the first degree murder verdict, the maximum for all is increased to no more than 10 years: s. 42(15) of the *YCJA*.

[117] To suggest that one of the non-murder offences attracted a portion of the eight-year sentence in excess of the maximum under the *YCJA* for that offence, whether individually or collectively with the others, is pure speculation. This Court will not read up penal legislation including s. 18 to allow a foreign sentence to be manipulated in this way. The sentence that the Convening Authority actually imposed on Khadr – eight years for all five offences – is less than the maximum 10-year cumulative sentence that Khadr could have received *as a youth sentence in Canada* for the five offences. Thus, it does not exceed the maximum youth sentence, much less the maximum adult sentence, for multiple offences including first degree murder.

[118] Nor is this Court entitled to read into s. 18 circumstances that it does not cover. When Parliament adopted the *ITOA*, it was not oblivious to the fact that there would be situations in which it could not be definitively established whether a foreign sentence exceeded the maximum youth sentence under the *YCJA* for the equivalent offence or where Parliament's deeming provisions were not applicable. On this point, the language of s. 20 – whether a foreign sentence "could have been" a youth sentence or an adult sentence – is revealing. It demonstrates that Parliament recognized that, despite the deeming provision in s. 18 (and also ss. 17 and 19), there would be other foreign sentences to which those deeming provisions would not apply. In those instances, Parliament prescribed a different test, the "could have been" test under s. 20.

[119] For these reasons, s. 18 of the *ITOA* does not apply to the eight-year sentence that the Convening Authority imposed on Khadr so as to deem him to be serving an adult sentence.

C. Does s. 20(a)(ii) or s. 20(b)(iii) of the *ITOA* Apply to Khadr's Sentence and Placement?

[120] That then takes us to s. 20, the relevant part of which provides:

> A Canadian offender who was from 12 to 17 years old at the time the offence was committed is to be detained
>
> (a) if the sentence imposed in the foreign entity could, if the offence had been committed in Canada, have been a youth sentence within the meaning of the *Youth Criminal Justice Act* ...
>
> > (ii) in the case of an offender who was at least 20 years old at the time of their transfer, in a provincial correctional facility for adults; and
>
> (b) if the sentence imposed in the foreign entity could, if the offence had been committed in Canada, have been an adult sentence within the meaning of that Act, ...
>
> > (iii) in the case of an offender who was at least 18 years old at the time of their transfer, in a penitentiary if their sentence is at least two years.

[121] The language of s. 20 indicates that a court must decide whether the foreign sentence falls within s. 20(a) or s. 20(b). Section 20(a) applies if the foreign sentence could have been a youth sentence had the offender been sentenced under the *YCJA*, while s. 20(b) applies if the foreign sentence could have been an adult sentence. There are no other options; and only one can apply.[20] Further, the words "could have been" are a clear signal that a court may be called on to determine, on a case-by-case basis, whether the foreign sentence to be enforced "in accordance with the laws of Canada" is to be served in a penitentiary, a provincial correctional facility or a youth custody facility.

[20] There is no specified hierarchy in the event that a foreign sentence could have been both a youth sentence and an adult sentence under the *YCJA*. Parliament intended that placement of a Canadian offender be based on one of two choices: the offender having received either the equivalent of a youth sentence or an adult one. Therefore, even if the foreign sentence could have been both a youth sentence and an adult sentence under the *YCJA* (which is not the case here), a youth sentence should be presumed given the sentencing principles involving young persons discussed above.

[122] The basic question reduces to this. Could Khadr's eight-year sentence have been either a youth sentence or an adult sentence within the meaning of the *YCJA* had the offences been committed in Canada? The answer to this question may be summed up this way. There are hundreds of permutations and combinations under which Khadr's eight-year sentence for the five offences to which he pled guilty "could have been a youth sentence" within the meaning of the *YCJA* and not one under which it could have been an adult sentence. Why? Under the *YCJA*, an adult sentence for the first degree murder offence can be no less than life imprisonment: s. 74, *YCJA*; and s. 235, *Criminal Code*. Since the sentence imposed by the Convening Authority was a total of eight years for all five offences including the equivalent offence of first degree murder, it follows that there is no basis whatever under which this sentence "could have been an adult sentence" within the meaning of the *YCJA*. As for whether it could have been a youth sentence, the answer is equally obvious. The length of the sentence, eight years, is well within the outer limits for a youth sentence for multiple offences that includes first degree murder, namely 10 years.

[123] For the reasons given, we conclude that under the *YCJA*, Khadr's eight-year sentence could have been a youth sentence but could not have been an adult one. Indeed, it could only have been a youth sentence. Accordingly, s. 20(a) rather than s. 20(b) of the *ITOA* applies. Since Khadr was over 20 years old at the time of the transfer, he falls under s. 20(a)(ii) of the *ITOA* and therefore must be placed in a provincial correctional facility for adults.

X. Conclusion

[124] In summary, our reasons for allowing the appeal are as follows:

> 1. The Convening Authority, as the designee of the United States Secretary of Defense, imposed an eight-year unitary sentence on Khadr representing his total cumulative culpability for all five offences to which he pled guilty.
>
> 2. This sentence was a result of a plea agreement approved by the Convening Authority under which Khadr agreed to plead guilty and give up legal rights in exchange for receiving a total sentence for all five offences not to exceed eight years.
>
> 3. Under the *Treaty* and the *ITOA*, Canada is to enforce the sentence that the Convening Authority imposed on Khadr unless it is incompatible in nature or duration with the laws of Canada or unless those laws mandate its adaptation to five 8-year concurrent sentences.

4. The unitary sentence is a legally enforceable sentence under the laws of Canada. It is not incompatible with Canadian laws. Nor do those laws mandate its adaptation from a unitary sentence of eight years for five offences to five 8-year concurrent sentences. In fact, under the *YCJA*, a unitary sentence may be imposed as a youth sentence on young persons convicted of multiple offences.

5. Due regard by Canada to the authority of the United States as the sentencing state includes respect for the substance of the sentence the Convening Authority imposed on Khadr.

6. It is wrong in law to treat Khadr's eight-year sentence for five offences as five 8-year concurrent sentences. To do so effectively increases the eight-year unitary sentence, is not realistic on the facts, is not required by the laws of Canada and contravenes the *ITOA*. No policies of the CSC could operate to do otherwise than the *ITOA* requires.

7. Section 18 of the *ITOA* does not apply to Khadr's sentence so as to deem him to be serving an adult sentence. The sentence for murder is indisputably a youth sentence within the meaning of the *YCJA* and the *ITOA*. The sentence for the other offences is reflected in the eight-year total sentence that the Convening Authority imposed on Khadr. It is pure speculation to suggest that any one of the other four offences attracted a portion of the eight-year sentence higher than the maximum under the *YCJA* for that offence, whether individually or collectively with the others.

8. A unitary or global sentence of eight years for the multiple offences to which Khadr pled guilty could have been a valid youth sentence under the *YCJA*, but a unitary or global sentence of eight years for those offences could not have been a valid adult sentence under the *YCJA* or elsewhere under the laws of Canada.

9. Khadr's sentence to be enforced in Canada is, by operation of s. 20(a)(ii) of the *ITOA*, a sentence to be served in a provincial correctional facility for adults. In addition, the differential of that disposition from a penitentiary placement is sufficient to constitute an alteration of Khadr's residual liberty interest under the laws of Canada so as to justify an order for *habeas corpus*.

[125] Accordingly, the appeal is allowed and the application for *habeas corpus* is granted.

[126] Khadr is to be transferred to a provincial correctional facility for adults in accordance with s. 20(a)(ii) of the *ITOA*.

Appeal heard on April 30, 2014

Reasons filed at Edmonton, Alberta
this 8th day of July, 2014

Fraser C.J.A.

Watson J.A.

Bielby J.A.

Appearances:

D. Edney, QC
N.J. Whitling
for the Appellant

B.F. Hughson
K.G. Fernando
for the Respondents Kelly Hartle, Warden of the Edmonton Institution, and Attorney General of Canada

D.C. Mueller
for the Respondent Her Majesty the Queen in Right of Alberta