Government Appeals Latest Court Order on Omar Khadr's Constitutional Rights

On July 12, 2010, exactly seven days after the Federal Court gave the government one week to come up with an effective remedy for its violation of Omar Khadr's rights,[1] the government has announced it will appeal.[2] The decision of Federal Court Judge Russel Zinn is the fourth time that a court has ruled that Khadr's *Charter* rights were violated when officials of the Canadian government questioned him in Guantanamo Bay, Cuba, even though they knew he had been subjected to extensive sleep deprivation, and despite him having no access to a lawyer or parent.

The major issue in the appeal is which branch of government – the judiciary or the executive – has the final say on how the rights violation can be remedied, and whether a remedy is adequate. As the government announcement says, "This case raises important issues concerning the Crown prerogative over foreign affairs."[3] Prior to the Khadr cases, there had been few major disputes in Canada over the constitutional boundary between the courts' authority to order *Charter* remedies and the government's Crown prerogative over foreign relations.

In January 2010, the Supreme Court of Canada unanimously ruled that it was up to the government to choose how to remedy the breach of Khadr's rights. This part of the ruling reversed the decisions of the Federal Court and the Federal Court of Appeal, which had ordered the government to ask the United States government for Khadr's repatriation to Canada. The Supreme Court deferred to the Crown prerogative in matters of foreign affairs: it would be up to the government to determine how to remedy the breach. The government responded to the Supreme Court ruling by sending a diplomatic note to American authorities asking that evidence gathered by Canadian officials be excluded from his trial. Although the United States refused this request, the Canadian government was satisfied that it had acted in a manner sufficient to remedy its *Charter* breach.

Khadr's Canadian lawyers once again took the matter to the Federal Court. They argued that the government acted in bad faith in pursuing its preferred remedy without consulting Khadr's lawyers or considering other options. Justice Zinn agreed that the government had denied Khadr procedural fairness and natural justice in the way it responded to the Supreme Court ruling. His ruling set out a series of deadlines for the government and Khadr's lawyers to propose and discuss options for addressing the breach of Khadr's rights.[4] He suggested that there was only one *obvious* way to remedy the Charter breach – a request for Khadr's repatriation to Canada, the response Khadr had requested and the government had denied. He did, however, leave open the possibility for the government to come up with other ways of remedying the breach. The government's announcement of an

appeal came on the same day that Justice Zinn had set for the government to advise Khadr of all possible remedies that might address its breach of Khadr's rights – the first deadline set out in his judgment. A media report suggested Khadr's lawyers might seek a contempt-of-court ruling against the government for missing its deadline for advising Khadr on potential remedies.[5]

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[1] *Khadr v. Canada*, 2010 FC 715. [2] News release, "Statement by Justice Minister Rob Nicholson regarding the Government of Canada's appeal of the Federal court's *Khadr* decision" Department of Justice Canada (12 July 2010). [3] *Ibid*. [4] *Supra* note 1 at 35-37. [5] Juliet O'Neil, "Khadr's lawyer likely to seek contempt ruling against government" *Canada.com* (12 July 2010).