

The Top Five 2010

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



Canada (Prime Minister) v. Khadr, 2010 SCC 3

<http://scc.lexum.org/en/2010/2010scc3/2010scc3.html>

In this case, the Supreme Court of Canada (SCC) ruled that Omar Khadr's s. 7 Charter rights had been violated by Canadian intelligence officials who interrogated him while he was subjected to a sleep deprivation technique. However, the SCC deferred to the federal government to determine the appropriate remedy for the Charter breach.

Date released: January 29, 2010

The Facts

Omar Khadr is the 15 year old Canadian citizen who the American armed forces took prisoner on July 27, 2002 in Afghanistan, as part of military action taken against the Taliban and Al Qaeda after the September 11, 2001 attacks. He was brought to Guantanamo Bay Prison Camp.

In 2003 and 2004, Canadian intelligence agents from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) interviewed Mr. Khadr at Guantanamo Bay for intelligence and law enforcement purposes. On at least one of those occasions they were aware that Mr. Khadr had been subjected to the "frequent flyer program," a sleep deprivation technique used to make inmates less resistant to interrogation.

In Canada (Justice) v. Khadr, 2008 SCC 28 (see OJEN's Top Five 2008), the SCC ruled that the interrogation processes used at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations. Under s. 7 of the Canadian Charter of Rights and Freedoms, the SCC ordered that the Canadian government produce all documents and materials that may be relevant to Mr. Khadr's case to a designated Federal Court judge. That judge would in turn review the materials to ensure that the disclosure of any materials would not, among other things, compromise national security.

Canadian Charter of Rights and Freedoms

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

Subsequent to this decision, Mr. Khadr requested several times that he be repatriated to Canada. Upon refusal of the Canadian government, Mr. Khadr applied to the Federal Court. The Federal Court ordered the Canadian government to request Mr. Khadr's repatriation. The majority of the

Federal Court of Appeal upheld the order, holding that Mr. Khadr's rights under s. 7 of the Charter had been breached during his 2004 interrogation by Canadian agents, when he was interrogated after being subjected to the "frequent flyer" program. The government further appealed the decision to the SCC.

The Decision

In a unanimous decision, the SCC ruled that Mr. Khadr's s. 7 Charter rights were breached during his interrogation by Canadian officials at Guantanamo Bay. However, the SCC removed the original order of the Federal Court to repatriate Mr. Khadr, leaving the appropriate course of action to be decided by the federal government.

*The SCC held that the Charter applied in this case because there was a sufficient connection between the federal government's participation in an illegal interrogation process and the deprivation of Mr. Khadr's liberty and security. This case is based upon the same underlying series of events considered in the Court's 2008 decision of *Canada (Justice) v. Khadr*; Canada actively participated in a process contrary to its human rights obligations. Mr. Khadr, who was a youth at the time, had been detained and interrogated without a lawyer by Canadian officials who knew that he had been sleep deprived. The SCC held that Mr. Khadr's repatriation to Canada would be a reasonable remedy for breach of his Charter rights, particularly given that his Charter rights continued to be breached while he remained at Guantanamo Bay.*

However, the Court recognized that the power to make decisions on foreign relations is a privilege granted to the federal government. The Court recognized that this does not mean that government decisions are free from constitutional scrutiny by courts, since courts have jurisdiction to determine whether a power asserted by the Crown exists and if its exercise infringes the Charter. However, the SCC held that, in this case, the appropriate remedy was best left to the federal government to decide in light of current information in its possession, its responsibility over foreign affairs and the Court's declaration that Mr. Khadr's Charter rights have been violated. The executive government is better placed to make a decision within the range of constitutional options.

Update

On February 3, 2010, the federal government announced that it would not request Omar Khadr's repatriation to Canada.

Discussion Issues

1. *Do you think Mr. Khadr's rights to liberty and security were violated during his interrogation by Canadian officials under the "frequent flyer program?" Do you think the fact that he was charged with war crimes should have altered this right?*
2. *Do you think the SCC made the right decision to have the federal government determine the best course of action, even though it found that Mr. Khadr's Charter rights had been infringed?*
3. *The Court ruled that this was a decision best made by the federal government because it was within the scope of foreign affairs and it was better placed to make the decision. To what extent do you believe that courts should intervene with executive decisions?*
4. *What implications could the SCC's decision have for public confidence in the judicial system?*