

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

(Appellant)

- and -

RAHEEM KHAN

(Respondent)

What the Factum Judges Consider: A Teacher's Guide

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PART I: INTRODUCTION

1. This case is about the... [Here, the judges look for a short paragraph which clearly and concisely captures the main issue (or heart) of the case. In *R v. Khan*, the students might begin by explaining that, “This case is about the limits of Charter protection.” Since this is the opening statement and the first thing the judge will read, a good factum will use persuasive language. This year, one team put forth this introduction:

This case is about extraterritoriality and the limits of the *Charter*, particularly in regards to the question of whether a person with alleged terrorist affiliation should receive rights under the *Charter* after willingly travelling to a foreign country in which terrorist groups are highly active. The respondent claims that the *Charter* does apply and the conscriptive statements he made should be excluded. However, [the appellant submits that] the *Charter* does not apply and any alleged breaches of *Charter* rights are just and reasonable in the war against terror.

It doesn't give away too many details (that is for the summary of the facts), but it provides good context, and leaves you in no doubt of which direction the arguments will go!

PART II: SUMMARY OF THE FACTS

2. The Respondent, born and raised in Canada, is a member of a prominent Toronto family. His parents emigrated from Pakistan many years ago and became Canadian citizens. They own and operate a very successful media company based in Toronto. The family is known for its out-spoken views against Canadian involvement in the war in Afghanistan and is involved in charitable work directed at improving the living conditions of the war-affected in Afghanistan. It is alleged by the Crown that members of the family have connections to individuals in Al Qaeda and the Taliban. It is these alleged connections which gave rise to the charges against the Respondent.

3. On February 7, 2008, the Respondent's father and older brother were arrested and charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the Criminal Code. A year later, the Respondent was charged with this same offence.
4. While the charges against the Respondent's father and brother were recently stayed, the allegations against all three individuals are that they have been raising money in Canada and sending it to Pakistan in order to finance Al Qaeda and Taliban operations in Afghanistan. It is alleged these operations involve attacks on NATO forces in southern Afghanistan, which includes members of the Canadian Armed Forces.
5. In March of 2008, when the Respondent was 17 years old, he spent two weeks visiting extended family in Pakistan while on holiday from school. At that time, the Crown's prosecution was focused on the activities of the Respondent's father and older brother; the Respondent, a minor then, was not charged with any offence nor was he a suspect in the investigation.
6. On March 17, 2008, the Respondent was detained by the Afghan Border Police (ABP) just inside the border of southern Afghanistan. While the Crown asserts he was attempting to cross the border illegally, the trial judge found that there was no evidence that would allow him to make such a finding. The Respondent, whose extended family lives close to the Afghanistan border in Pakistan, took the position that he did not intend to cross into Afghanistan and did so inadvertently.
7. When the Respondent's detention came to the attention of officials at the Canadian embassy in Kabul, the trial judge found that no Canadian consular official intervened on the Respondent's behalf or took any measures to assist him.

8. The trial judge found that Canadian embassy officials in Kabul contacted RCMP members responsible for the Canadian investigation of the Respondent's father and brother and informed them of the Respondent's detention. Subsequently, a decision was made by the RCMP in Canada to have RCMP officers in Afghanistan question the Respondent in respect of the allegations against his father and brother.
9. These particular RCMP officers were present in Afghanistan as part of NATO's international mission and were responsible for training and supporting Afghanistan's various national police forces. The RCMP in Canada, who were responsible for the investigation of the Respondent's father and brother, requested that the RCMP in Afghanistan interview the Respondent in order to see whether his activities had any connection to the financing terrorism charges pending against the Respondent's father and brother.
10. The RCMP sent two members of the ABP to question him. The trial judge found that the Respondent was not given access to any consular officials or legal counsel. The Respondent, a minor at the time, was detained by the ABP in the company of his cousins, who were also minors. At no point were adult family members contacted and informed of the youths' detention.
11. The trial judge also found that the RCMP instructed the ABP not to tell the Respondent that they were questioning him in respect of a criminal prosecution against his father and brother in Canada. They provided the Afghan police with a list of questions to ask the Respondent about his activities in Pakistan and his reasons for crossing the border. The RCMP also provided the ABP with an audio recording device and asked them to record their interview with the Respondent.
12. The ABP would have released the Respondent (returning him to Pakistan) within 24 hours after determining his identity and satisfying themselves that he was not engaged in any illegal activity. However, as a result of the RCMP's decision to interview the

Respondent, the ABP had to detain the Respondent for another two days as the RCMP travelled with officers of the ABP to the border post for the interview.

13. The interview lasted approximately three hours. There was no evidence of torture or other oppressive circumstances. While the ABP did not explain to the Respondent the purpose of the interview or the reason for his continued detention, the trial judge found that it was clear that the Respondent suspected these reasons; he inquired, half-way through the interview, whether the questioning had anything to do with his family in Canada.
14. One year following his interview in Afghanistan, the Respondent was charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the *Criminal Code*. At trial, the Crown sought to introduce statements made by the Respondent to the ABP in Afghanistan. The Respondent opposed the introduction of these statements into evidence. He brought an application before the trial judge, arguing that his *Charter* rights had been violated and the statements had to be excluded. The trial judge granted his application and the statements were excluded.
15. **A summary of the trial judge's decision should follow here. Students are not allowed to change the facts above, but they can be judicious in highlighting aspects of the trial judge's decision in the next few paragraphs. Ideally, the summary should be no longer than 2-3 paragraphs. A good summary will make sure to include how Justice Garcia decided each of the four Charter issues. Paraphrasing is just fine – they do not need to include full quotes – but they should reference the decision whether paraphrasing or quoting. For this section, “less is more” so students who are able to paraphrase the decision concisely, will do better than those who are too comprehensive – and end up reproducing the trial judge's decision in their own factum.**

PART III

GROUND OFS OF APPEAL

ISSUE ONE: DOES THE CHARTER APPLY?

16. This was the main issue of the case. Students who were able to argue this issue convincingly could really impact the outcome for their whole team. Those who spent time on the Charter Challenge Online Discussion Board learned that *R. v. Hape* was an extremely important case. The trial judge referenced both it and *R. v. Cook* in his decision, so at a minimum, the factum judges wanted to see that the students knew the decisions and understood how the arguments could be used to their benefit. In addition to *Hape* and *Cook*, students could have, and did, draw on *Harrer*, *Terry*, *Khadr* and other SCC decision which dealt with the extraterritorial application of the Charter. This case was the Appellant's case to win; *Hape* is the most recent SCC case on the issue and in it, the court has veered away from its previous decision in *Cook* (which was far more helpful to the Respondent). Here is how the SCC (in *Hape*) explained the analysis for this issue:

At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the Charter will not apply.

17. A good Appellant's factum pointed out the trial judge's failure to apply the SCC's reasoning in *Hape* and argued that the facts were not so different from those in *Hape*. They might also raise the importance of state sovereignty and the principle of non-intervention – referencing the "objectionable extraterritorial effect" which the SCC was concerned about in *Hape* and earlier cases. They could also argue that the investigation was more "cooperative" and less "directed" than the trial judge seemed to think it was.

18. A good Respondent's factum went beyond reiterating the trial judge's decision. It would further distinguish the facts of this case from those in *Hape* – and argue that the SCC's decision in *Cook* was not overruled by *Hape*; both are good law and their application depends on the specific facts of a case. They might argue that the ABP were not really in control of the investigation; they could even go further, and argue that the ABP's compliance with all RCMP requests amount to "consent" that Canadian law (and standards) should apply. Creative students might even draw on international law and argue that the conduct of the investigation in Afghanistan contravened international standards.

ISSUE TWO: WERE THE APPLICANT'S CHARTER RIGHTS VIOLATED? (9, 10(A), 10(B))

19. This was probably the most difficult issue for the Appellant. On these facts, it is hard to argue that Khan's rights were not breached – if the *Charter* is found to apply. The trial judge's decision does not really elaborate on his reasons for finding that the Khan's section 9, 10(a) and 10(b) rights were breached, so students who had this issue were compelled to do their own research. On the Charter Challenge online discussion board, students were directed to CanLII's Charter Digest for this issue – to read how courts have interpreted the three sections of the Charter.
20. A good factum divided this issue into three sub-issues – tackling each of the three sections in turn, citing 1-2 applicable precedents and then arguing how the facts applied to this particular case. (For future Charter Challenges – encourage your students to use sub-headings within their facta – to make their arguments clearer and easier to read.)
21. When students asked for "tips" on this issue on the Online Discussion Board, one lawyer wrote back with this message:

To be honest, the s. 10(b) issue is probably the hardest one to argue for the appellant. You can take on the meaning of "arbitrary" in s. 9 and perhaps have a better argument for s. 10(a) as well (check out the SCC

decision in Latimer), but the s. 10(b) issue is the appellant's weakest argument. (Make sure that your colleagues' arguments on the 1st, 3rd and 4th issues are strong - you have the hardest part!) I would check out Canlii's Charter Digest on s. 10(b) to see if there is anything helpful:

http://www.canlii.org/en/ca/charter_digest/s-10-b.html

And I would also look at how the Supreme Court of Canada handled the issue in Cook:

<http://www.canlii.org/en/ca/scc/doc/1998/1998canlii802/1998canlii802.html>

A section 10(b) violation was the issue in Cook and although the majority found that the Charter applied and the accused's rights were violated, the dissenting judges took a different approach. See if the facts in Cook can be distinguished from the facts of this case.

22. A good factum would have made an attempt to examine the term “arbitrary” for section 9. It would have argued whether it mattered that the accused was specifically informed that he was being questioned with respect to the charges against his father and brother (based on the fact that he appeared to have suspected as much, part-way through the interview). Finally, it would have looked at other section 10(b) cases to determine how the alleged violation in this case matched up against other section 10(b) cases. (i.e. Was the breach serious – or even flagrant?)

ISSUE THREE: SHOULD THE STATEMENTS BE EXCLUDED FROM EVIDENCE?

23. This section was all about the *Grant* factors. Student who checked out the Online Discussion Board learned that they needed to apply the three factors from the Supreme Court of Canada decision in *R. v. Grant*. (OJEN has produced a resource on this case – which is included in the 2009 Top Five Resource – and available for free download on the website: <http://www.ojen.ca/resource/1999.>) Here is a reproduction of the lawyer's posting on the *Grant* analysis:

If you are arguing to exclude the evidence under s. 24(2) - you need to frame your argument by walking the reader through an analysis that was laid out by the Supreme Court of Canada in a case called *R. v. Grant*:

<http://www.canlii.org/en/ca/scc/doc/2009/2009scc32/2009scc32>.

Three main factors should be considered when determining whether evidence should be excluded under s. 24(2):

(1) The seriousness of the Charter-infringing state conduct

This inquiry focuses on the severity of the state conduct leading to the Charter breach, and includes an analysis of whether the breach was deliberate, and whether the officers were acting in good faith. In Khan's case, you might want to look at whether or not there is evidence of bad faith on the part of the RCMP officers in Afghanistan...

(2) The impact on the Charter-protected interests of the accused

This inquiry focuses on how the accused person was affected by the state conduct. Depending on the Charter right engaged, this could include an analysis of the intrusiveness into the person's privacy, the direct impact on the right not to be forced to incriminate oneself, and the effect on the person's human dignity. If you check out the trial judge's decision at paragraph 43 - he found the impact to be quite severe. Do you think that the accused's age at the time of the detention is something to consider?

(3) Society's interest in an adjudication on the merits

This inquiry focuses on how reliable the evidence is in light of the nature of the Charter breach, importance of the evidence to the Crown's case, and seriousness of the offence. I think that in this case, we can assume that the evidence was quite important to the Crown's case - otherwise they would not have bothered to appeal the decision. Although we do not know this for sure, it is likely that the exclusion of the evidence crippled the Crown's case to such a degree that Khan was acquitted of the crime.

Be creative in your arguments on these three factors! That is what lawyers do - they take a test (or an analytical framework) established by the courts and apply the facts and unique circumstances of their case to persuade the court in one direction or another.

24. A good factum would have worked through these three factors and applied them to the facts of the case. Bonus points would be given to students who organized their arguments using subheadings for each factor!

**ISSUE FOUR: DOES THE ADMISSION OF THE STATEMENTS VIOLATE THE APPLICANT'S
RIGHT TO A FAIR TRIAL?**

25. The fourth issue involved the second step of the analysis students learned about in *Hape*, *Cook* and other SCC cases which involved the extraterritorial application of the Charter to investigative efforts that occur in a foreign state:

The methodology for determining whether the Charter applies to a foreign investigation can be summarized as follows:

The first stage is to determine whether the activity in question falls under s. 32(1) such that the Charter applies to it (issue #1).

- If it does, then it must be determined whether a breach of a *Charter* right has occurred (issue #2);
- If a breach has occurred, then it must be determined whether the evidence should be excluded under s. 24(2) of the *Charter* (issue #3).

(ISSUE #4): If the Charter is not found to apply, the inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

- This issue is about how to ensure the fairness of a trial held in Canada. What is in issue at this stage is no longer whether the actions of state agents outside Canada were consistent with the Charter, but whether they affect the fairness of a trial inside Canada.

26. On the online discussion board, students who had questions about this issue were directed to the SCC's decision in *Harrer*:

If you are looking for more information on what circumstances would render the trial unfair, I would check out the SCC decision in *Harrer*:

<http://www.canlii.org/en/ca/scc/doc/1995/1995canlii70/1995canlii70.html>

Check out, in particular, paragraphs 14-24 and 44-55.

27. In *Hape*, the SCC also went into some depth about the factors which determine whether the admission of evidence would render the trial unfair:

[108] Any individual tried in Canada for an offence under Canadian law has, pursuant to s. 11(d) and to centuries of common law, the right to a fair trial. In addition, everyone has the right to liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7). This Court has in fact held that the right to a fair trial is a principle of fundamental justice: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603. If evidence is gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may — regardless of where it was gathered — amount to a violation of either or both of those sections of the Charter. Judges have the discretion to exclude evidence that would result in an unfair trial. That discretion, long established at common law, has attained constitutional status by being entrenched in s. 11(d) of the Charter. However, it does not automatically follow that a trial will be unfair or that the principles of fundamental justice will be infringed if evidence obtained in circumstances that do not meet Charter standards is admitted: *Harrer*, at para. 14.

[...]

[111] Individuals can reasonably expect that certain basic standards will be adhered to in all free and democratic societies; where those standards are deviated from in gathering evidence, a Canadian trial that relies on that evidence may be unfair. In such instances, “[i]t may be that . . . notwithstanding the suspect’s submission to the law of the foreign jurisdiction, to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience” (*Harrer*, at para. 51). Whether the evidence was obtained in compliance with or in violation of the law of the foreign state may also be relevant. However, where commonly accepted laws are complied with, no unfairness results from variances in particular procedural requirements or from the fact that another country chooses to do things in a somewhat different way than Canada. Further, the failure to comply with a particular rule in a given case does not necessarily amount to an injustice. As *La Forest J.* noted in *Harrer*, at para. 15, “we must be mindful that a constitutional rule may be adopted to ensure that our system of obtaining evidence is so devised as to ensure that a guaranteed right is respected as a matter of course”. The rule is directed not at the individual case alone, but rather at systemic fairness — a concern that does not arise in foreign investigations under foreign systems. Instead, the concern is to preserve the fundamental values of the Canadian trial process.

APPLICATION TO THIS CASE

28. This is essentially a conclusion. Factum judges look for a concise (preferably one paragraph only) summary of the four issues argued above. Students who write persuasively, without exaggerating their case, do well here. Here is an example of a good concluding paragraph from one of the teams this year:

In conclusion, the Respondent [submits] that this appeal should be dismissed. The Charter does apply to this case because of the RCMP's direct involvement in the interrogation of Khan at the Afghanistan border. His rights were clearly infringed upon because he was a minor, was detained for over 24 hours, was not given legal counsel or a reason for his detainment, and his family was not informed. The evidence gathered in the questioning should be excluded because it was obtained illegally. The [Respondent submits] that if the evidence is deemed admissible, the administration of justice would fall into disrepute and the fundamental justice secured by the Charter would be breached significantly. We [ask that] the Crown's appeal be dismissed.

PART IV ORDER REQUESTED

29. It is respectfully requested that...
- This is a simple line – depending on whether they are the Appellant or the Respondent, students will specify:

“It is respectfully requested that the appeal be allowed.”

or

“It is respectfully requested that the appeal be dismissed.”

ALL OF WHICH is respectfully submitted by

Name of all four counsel

Of Counsel for the Appellant/Respondent

DATED AT (LOCATION) this ____th Day of (month), (year)

Some General Tips from the Factum Judges

Students do not need to cite a lot of case law to write a good factum. It is better to cite fewer, more relevant cases than it is reference a ton of random cases – just for the sake of filling out the “authorities cited” page. It is important to pick precedents wisely – otherwise the case can be weakened.

Whenever possible, break down each issue into sub-issues and then separate those out with additional sub-headings. This makes the argument easier to follow and it will also help students to organize their own thoughts on the case.

When it comes to the presentation of the issues, follow the format specified in the factum template. Often, the factum template has arranged the issues this way because it corresponds to the appropriate analysis of the issues. In this case, for instance, you would not want to present your arguments on issue two before your arguments on issue one because it is necessary to determine issue one before proceeding to any of the other issues.

Students should stick to their own issues; if they have been tasked with issue three, they shouldn't be talking about *Charter* application – this is for their colleague to argue. Students should focus on their own issues or else the factum as a whole is confusing and difficult to read.

In general, it is not wise to overstate your case! If a judge thinks you are trying to oversell your point, you risk losing your credibility with the court. You never want a judge reading your factum to stop and say, “Hey – wait a minute – is that right?” Exaggeration doesn't make for good advocacy.

Try to start from general principles of law and work out to the specifics of your case.

Broad statements of your conclusions should be used sparingly (i.e. at the conclusion of a section), but another really good place to use them is in a heading. For example:

- The Charter Does Not Apply to the Questioning of a Canadian Citizen by Foreign Authorities in a Foreign Country

In place of:

- Issue One: Does the Charter Apply?

When there isn't a lot of helpful case law for your issue – argue the facts. When the cases don't say what you'd like them to say, distinguish the facts in your case from the facts in these cases.

The best facts are both persuasive and concise. To avoid rambling and talking around the issues, draft an outline before you begin writing and ensure that each paragraph makes one specific point.

Additional Helpful Information

The following information was posted on the Charter Challenge Online Discussion Board when the OJEN program ran in April of 2011. It has been included as background information for teachers who may choose to use this fact scenario in their classrooms outside of the Spring 2011 Charter Challenge OJEN program.

A Note on the Procedural Context for this Appeal

Some of you may be asked by your students about the procedural context for this session's Charter Challenge. I've asked the scenario writer to elaborate on how this appeal would come before the Ontario Court of Appeal. Here is his explanation:

He initially conceived of the trial judge's decision as a "blended voir dire" (un voir-dire mixte) which is a hearing within a trial; often, it arises when someone challenges the admissibility of evidence. What follows is not explicitly stated anywhere in the decision, but is a hypothetical explanation for what happened.

In our scenario, Raheem Khan is accused of financing terrorism. The government lawyers (the Crown) who are prosecuting this case wish to rely on evidence that was gathered overseas by the Afghan Border Police more than a year before Raheem was charged with the criminal offence. (The evidence here being the statements Raheem made during the interview in Afghanistan.) When the Crown tried to introduce this evidence (the recording, the testimony of the RCMP officers, etc.), Raheem's lawyers oppose this. They take issue with the way in which the evidence was gathered (arguing that Raheem's Charter rights were breached) and seek to exclude the evidence.

At this point, the blended voir dire occurs; the trial judge hears from the witnesses, the recording of the interview, and the lawyers' arguments. (The benefit of a blended voir dire is that once the evidence is heard by the judge and he admits it, you can carry on with the trial and the evidence forms part of the record of that trial. If the judge does not admit the evidence, he does not consider it when determining Raheem's guilt or innocence.)

What the students have before them is a decision of the judge on the blended voir dire - his decision on whether the Charter applies, whether Raheem's rights were violated and whether the evidence should be excluded. The decision does not speak to Raheem's guilt or innocence; at this point, he is still an "accused" because the judge has not heard all of the evidence.

The reason why we went with a decision of a blended voir dire (rather than a trial decision which decides Raheem's guilt or innocence) is that the issues and the evidence are more narrow this way. If students ask whether Raheem was convicted of the financing terrorism charges, it is likely that he wasn't - otherwise the Crown would not bother to appeal the decision. Once the evidence from the interview in Afghanistan was excluded, it is possible that this weakened the Crown's case to the point that they could not prove that Raheem

was guilty of the offence beyond a reasonable doubt. Raheem would be acquitted of the charge and the Crown would appeal the trial judge's decision on the blended voir dire - in the hope that the Court of Appeal would find that the trial judge improperly excluded the evidence. If the Court of Appeal found that the trial judge made a mistake, they could order that a new trial take place so that the evidence could be considered.

Clarification about the terms "Appellant, Respondent and Applicant"

The lawyers who act for the Accused, Raheem Khan, are known as the "Respondent" for the purposes of the Appeal. At the trial level, they argued on behalf of the "Applicant", because Khan made an application to have the evidence excluded at trial. At the appeal, Khan is known as the "Respondent" because it is the government who is appealing the trial judge's decision; Khan (and his lawyers) are "responding" to the appeal. Students/lawyers who are on the Respondent's side, are seeking to uphold the trial judge's decision, but they will take issue with the judge's finding on the fourth issue, because they believe that the admission of the evidence violates Khan's fair trial rights. If you are for the Respondent (Khan) your team's arguments are going to look like this:

Respondent (Mr. Khan's lawyers)

Issue 1 - agree with the trial judge - Charter should apply

Issue 2 - agree with the trial judge - His rights were breached

Issue 3 - agree with the trial judge - the evidence should be excluded

Issue 4 - disagree with the trial judge - the admission of the evidence violates his fair trial rights

The lawyers who act for the government - or "Crown" - are known as the Appellant for the purposes of the Appeal. They are the Appellant because they are appealing the trial judge's decision. (This can be confusing if you remember that at the trial level, the Crown was known as the "Respondent" - because it "responded" to Mr. Khan's application to exclude evidence.) At the appeal, the students/lawyers who argue this side are going to take the following positions:

Appellants (The Government of Canada, aka "Crown")

Issue 1 - disagree with the trial judge - the Charter does not apply

Issue 2 - disagree with the trial judge - Mr. Khan's rights were not breached

Issue 3 - disagree with the trial judge - the evidence should be admitted

Issue 4 - agree with the trial judge - the admission of the evidence does not violate Mr. Khan's rights to a fair trial.