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“THE MELANCHOLY TRUTH”:[†] CORRECTIVE AND EQUITABLE JUSTICE FOR OMAR KHADR

Andrew Stobo Sniderman*

ABSTRACT

Omar Khadr stands for the melancholy proposition that Canadian courts will recognize a rights violation without demanding an effective remedy. Over the years, Khadr secured many legal remedies, but not the one he sought most: a repatriation order. Why? This paper ventures explanations by viewing the final five Khadr judgments through the lenses of corrective and equitable justice. The final section of the paper recasts the case for the repatriation of Omar Khadr based on two principal arguments. First, a context of structural injustice suggests the application of equitable remedial principles rather than corrective justice, even in the transnational context in which Canada cannot impose structural remedies. Second, the Khadr case suggests that declaratory relief is not an appropriate remedy when delay may cause irreparable harm and where the government may be credibly suspected of bad faith.

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[†] *Rahmatullah v Secretary of State*, [2012] EWCA 182 CA (Eng) at para 16 [*Rahmatullah*].

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Omar Khadr, onetime Canadian child combatant turned constitutional metaphor, stands for the melancholy proposition that Canadian courts will recognize a rights violation without demanding an effective remedy. Over the years, Khadr secured many legal remedies—an injunction against further interrogations in 2005, fuller disclosure of evidence in 2008, a declaration of the ongoing violation of his section 7 rights in 2010—but not the remedy he sought most: a repatriation order. Why? This paper ventures explanations by viewing Khadr’s proceedings through the lenses of corrective and equitable justice. After brief treatments of corrective and equitable justice in remedial theory, supplemented by Paul Gewirtz’s conception of a “Rights Maximizing” equitable judge, I proceed with preliminary commentary on a quintet of Khadr judgments: the *Canada v Khadr (Khadr II)* trilogy in the Federal Court, Federal Court of Appeal and the Supreme Court, as well as the subsequent Zinn J. judgment in Federal Court and the Blais J. response in the Federal Court of Appeal. The decisions of Federal Court judges O’Reilly and Zinn embody a robust practice of equitable “Rights Maximizing,” but higher courts did not share their enthusiasm for a judicial repatriation order.

The final section of this paper recasts the case for the repatriation of Omar Khadr. Two principal arguments emerge. First, equitable remedial principles are more appropriate than corrective justice in a context of structural injustice, even in the transnational setting in which Canada cannot impose structural remedies. Second, the Khadr case suggests that declaratory relief is not appropriate when delay may cause irreparable harm or where the government may be credibly suspected of bad faith.

FACTS

Fifteen-year-old Omar Khadr was wounded and captured in a battle with American soldiers in Afghanistan in 2002. An American soldier shot him nearly dead, and then an American medic saved his life.¹ Later, Americans interrogated him, first in Bagram prison in Afghanistan and later at Guantanamo prison in Cuba. Canada was initially denied consular access, but in 2003 and 2004 two Canadian officials from CSIS and Foreign Affairs interrogated Khadr. This was done without offering legal counsel, while he was being subjected to a questionable detention regime. Khadr claimed he was tortured and pleaded: “Promise you’ll protect me from Americans.”² The information from the Canadian interrogations was shared with his American captors.

CORRECTIVE JUSTICE

Corrective justice insists on symmetry between a wrong and its remedy. For an individual subjected to a wrongful transfer, Aristotle said corrective justice would consist

¹ After the firefight, some of the American soldiers had to be restrained while the medic tended to Khadr. One soldier said: “It’s worse for him to live.” See Michelle Shephard, *Guantanamo’s Child: The Untold Story of Omar Khadr* (Toronto: John Wiley & Sons Canada, 2008).

² *Ibid* at 124.

“in having an equal amount before and after the transaction.”³ As in private law, where a tortfeasor or breaching party of a contract can be asked to restore the plaintiff to a pre-tort or pre-breach status quo, corrective justice in the constitutional context is guided by a “make-whole aspiration.”⁴ Corrective justice looks to a pre-wrong past for remedial guidance: “Full correction means restoration of a notional *status quo ante*, by which the victims of illegal conduct are returned to the position they occupied before the wrong, and those responsible for the wrong are made to bear the burden of the restoration.”⁵ As a remedial approach, corrective justice offers two advantages: “determinacy and unambiguous moral force.”⁶ It measures the harm caused by a wrong and matches it with an equivalent remedy—no more and no less.

In “The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies,” Kent Roach explores the merits of corrective justice in constitutional settings. In rectifying past wrongs, corrective justice seeks to prescribe retrospective remedies. It looks to right past wrongs, not address present needs.⁷ It is concerned with the present only insofar as it is tainted by a past wrong. Corrective justice also prefers temporary remedial intervention.⁸ The prolonged and forward-looking jurisdictional oversight of a case like *Doucet-Boudreau v Nova Scotia (Minister of Education)*, in which a court committed to overseeing future educational reforms, is anathema to the corrective tradition. Finally, corrective justice disregards the interests of the wrongdoer asked to bear the remedial burden.⁹ His perspective is—at least according to the tenets of corrective justice—irrelevant; it is not an appropriate limit to the scope of a remedy, which is measured solely by the scope of the harm. There is no legitimate discretion to deny corrective justice if a determinate harm and its remedy can be identified.

Corrective justice, Roach notes, has a disadvantage in constitutional cases: its strict causation requirements can imperil an appropriate remedy.¹⁰ Absent an ironclad and identifiable causal chain flowing from a given wrong to its eventual harm, corrective justice will not sanction an adequate remedy. Khadr’s situation raises a number of causation issues. If the wrong was an unlawful interrogation by Canadian agents, what exactly did this cause? Khadr was already in detention before a visit by Canadian officials and the sharing of extracted “Canadian evidence” with American officials. Absent the additional material from the Canadian interrogations, the United States (US) may have kept him in detention anyway. The US had already gleaned evidence from the scene of Khadr’s capture, including images of Khadr allegedly assembling bombs.¹¹ In addition to the uncertain role the Canadian evidence played in his continued detention, it is also unclear what weight the Canadian evidence was given in the subsequent military proceedings against him. It is not clear what causal threshold corrective justice demands. In addition, the intervening actions of a third party, the US, complicate the causal story

³ Aristotle, *The Nicomachean Ethics*, rev ed by J.L. Acryll & J.D. Umson, translated by D. Ross (Oxford: Oxford University Press, 1925) at 117.

⁴ Kent Roach, “The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies” (1991) 33 *Ariz L Rev* 859 at 867 [Roach, “Limits”].

⁵ *Ibid* at 859.

⁶ *Ibid*.

⁷ Roach, “Limits”, *supra* note 4 at 860.

⁸ *Ibid* at 868.

⁹ *Ibid* at 881.

¹⁰ *Ibid* at 875.

¹¹ “Omar Khadr: The Youngest Terrorist?”, *60 Minutes* (16 Nov 2007), online: CBS News <<http://www.cbsnews.com>>.

between Canada's violation and the harm of detention. Corrective justice is bipolar, but Khadr's interrogation by Canadian officials involved at least 3 parties—the US, Canada, and Khadr.

EQUITABLE JUSTICE

Equitable justice is characterized by the wide remedial discretion it grants to trial judges. It distinguishes itself from corrective justice with its increased flexibility on causation and restoration standards, as well as its capacity to look beyond the wrongdoer-victim paradigm. Here, the scope of an equitable remedy is not dictated by the scope of harm. A concern with equity may lead to a looser causal standard, or a disregard for causation altogether. As Roach notes, equity “allows courts to order remedies for harms that the state may not have caused,” as when the complex phenomenon of segregation cannot be blamed on given public actors.¹² At this point, the dualistic relationship between the wrongdoer and the wronged breaks down. “Enriched” equitable remedies may extend beyond what corrective justice requires.¹³ This can be justified by shifting the remedial focus from past wrong to present needs.

Charter remedial jurisprudence seems to draw more on the tradition of equitable justice than its corrective counterpart. Section 24(1) of the *Charter* empowers judges to grant “such remedy as the court considers appropriate and just in the circumstances” to “[a]nyone whose rights or freedoms...have been infringed or denied.”¹⁴ The majority in *Doucet-Boudreau* noted that it is “difficult to imagine language which could give the court a wider and less fettered discretion.”¹⁵ This includes the discretion *not* to grant a remedy. It is common to speak of a right to a corrective remedy, but no such equivalent right is recognized in equity. This can partly be explained by equity's mandate to weigh the interests of the wrongdoer as it fashions an appropriate remedy. In the context of segregation cases, an equitable approach to remedies was responsible for much inaction, delay, and inadequate vindication of victims' rights in confronting entrenched racial injustice.¹⁶ This is the same kind of approach that guides courts in delaying declarations of invalidity under section 52(1) of the *Constitution Act, 1982*¹⁷ with rights violations continuing in the interim. Judges can thus use equity to “blunt remedial claims.”¹⁸ Beyond concerns about non-victim interests, equity may also concern itself with enforceability of a remedy. Hence the maxim that “equity will not act in vain.”¹⁹

Not all equitable judges share such prudence about enforcement. In “Remedies and Resistance,” Gewirtz describes two kinds of equitable judges. The first kind are “Interest Balancing,” since they consider the social interests beyond the victim in selecting an

¹² Roach, “Limits”, *supra* note 4 at 887.

¹³ *Ibid* at 880.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

¹⁵ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 50, [2003] 3 SCR 3 [*Doucet-Boudreau*].

¹⁶ Roach, “Limits”, *supra* note 4 at 887.

¹⁷ *Constitution Act, 1982*, *supra* note 14, s 52(1).

¹⁸ Roach, “Limits”, *supra* note 4 at 895.

¹⁹ Normann Witzleb, “Equity Does Not Act in Vain: An Analysis of Futility Arguments in Claims for Injunctions” (2010) 32 *Sydney LR* 503.

appropriate remedy. For the “Rights Maximizer,” on the other hand, “the only question a court asks once it finds a violation is which remedy will be the most effective for the victims.”²⁰ This type of judge only recognizes “unavoidable limits;” imperfect remedies are only acceptable if better alternatives are impossible. In the absence of insurmountable barriers, a Rights Maximizing judge is “committed to full remedial effectiveness at whatever cost.”²¹ And if one remedy proves ineffective, such a judge would order a potentially effective alternative: “indeed, a Rights Maximizing judge would be required to do so unless no further remedial effectiveness were possible.”²² On this view, the only way to meaningfully vindicate a right is to provide the most effective remedy, even in cases where enforcement is uncertain.

THE KHADR QUINTET

1. *Khadr* 2009 FC 405

Khadr’s quest for repatriation began with O’Reilly J.’s favourable judgment in Federal Court. His repatriation order was upheld on appeal, set aside by the Supreme Court, then resurrected in Federal Court by Zinn J., and finally stayed by the Federal Court of Appeal. O’Reilly J. adopts an equitable approach without explicitly invoking equity. His recognition of expansive harm underlies his expansive remedy. Much of his reasoning was later narrowed or rejected in subsequent decisions of higher courts.

O’Reilly J. recognizes existing international jurisprudence on diplomatic representations in England, Australia, and South Africa and the trend that states are not always required to take all steps to protect their citizens abroad. However, he concludes, per *Kaunda and Others v President of the Republic of South Africa*, that judges are obliged to accord “particular weight” to executive discretion without surrendering the power of judicial review altogether.²³ Following the holding of *Operation Dismantle v The Queen*, O’Reilly J. does not recognize any Canadian doctrine that would shield the executive from constitutional scrutiny, even in the field of foreign affairs.²⁴ Ultimately, he finds that the requisite deference to executive discretion does not prohibit his remedial demand for repatriation.

O’Reilly J. finds that Canada’s “knowing involvement” in the Guantanamo operation constituted a violation of Khadr’s section 7 *Charter* right.²⁵ At Guantanamo Bay, Khadr was denied his *habeas corpus* right to challenge the legality of his detention, his status as a minor was ignored, and he was subjected to a detention regime that violated Canada’s obligations under the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.²⁶ O’Reilly J. supplements his identification

²⁰ Paul Gewirtz, “Remedies and Resistance” (1983) 92:4 Yale LJ 585 at 591.

²¹ *Ibid* at 596.

²² *Ibid*.

²³ *Kaunda and Others v President of the Republic of South Africa*, [2004] ZACC 5 (S Afr Const Ct).

²⁴ *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481 (SCC).

²⁵ *Khadr v Canada (Prime Minister)*, 2009 FC 405 at para 52, [2010] 1 FCR 34 at para 52 [*Khadr* FC].

²⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, arts 15, 19, 37, 39, 40, Can TS 1987 No 36 (entered into force 26 June 1987); *Khadr* FC, *supra* note 25 at para 34.

of the rights violation with a consideration of Khadr's vulnerability. He notes Khadr's youth, precarious health, limited education, sparse access to consular assistance and legal counsel, "inability to challenge his detention or conditions of confinement in a court of law...and his presence in an unfamiliar, remote and isolated prison, with no family contact."²⁷ The discussion of vulnerability serves to enlarge the characterization of harm. Drawing on Canada's international obligations under three international treaties, O'Reilly conjures a new narrow principle of fundamental justice: "a duty to protect persons in Mr. Khadr's circumstances."²⁸

We arrive at the central puzzle of the judgment: why did O'Reilly J. believe repatriation was the only appropriate remedy? In addressing the appropriate remedy, he concludes: "no other remedy would appear to be capable of mitigating the effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration."²⁹ This sentence's first half draws a conclusion about the shortcomings of unnamed alternatives. The second half implies that Canada cannot repair its wrong without getting Khadr out of Guantanamo and actively rehabilitating him. The harm to be undone is Khadr's detention and its effects, not simply Canada's contribution to his detention. O'Reilly's remedial purpose is to protect Khadr from possible torture, illegal detention, and the trauma of detention as a child—all the harms Khadr endured, not simply the harm Canada caused.

Corrective justice would condemn repatriation as excessive remedial compensation unless Khadr's detention and its connected harms could be causally connected to the Canadian evidence. Rather, O'Reilly J. displays three telltale signs of an equitable disposition. First, he implicitly holds Canada responsible to remedy violations it did not commit. For example, the US held Khadr despite his youth. Canada's diplomatic correspondence expressed concerns related to Khadr's age and conditions of detention, but O'Reilly J. finds these measures inadequate because they were insufficiently effective in delivering protection. Second, he considers the impact of the remedy on the wrongdoer—that is, any harm that may flow to Canada from a repatriation order. Given that the government submitted no evidence of any "particular harm" that would flow from repatriation, he assigns no weight to this concern.³⁰ Finally, he evinces a clear intention to fashion a forward-looking remedy, specifically a desire to rehabilitate Khadr from his experience as a child combatant and the trauma of his detention. This extends beyond restoring Khadr to his position prior to Canadian involvement.

O'Reilly J. raises three further issues that recur in future judgments. First, he acknowledges the government's concern that Khadr would not face prosecution in Canada, but he merely views this possibility as further proof that Khadr's detention is illegitimate. Second, O'Reilly J. is undeterred by the possibility of the US rejecting a diplomatic request for repatriation, concluding that American assent was "likely."³¹ Finally, he notes that the repatriation remedy constitutes an intrusion on executive prerogative power, but deems it "minimally intrusive."³²

²⁷ *Khadr FC*, *supra* note 25 at para 70.

²⁸ *Ibid* at para 71.

²⁹ *Ibid* at para 78.

³⁰ *Ibid* at para 84.

³¹ *Ibid* at para 88.

³² *Ibid* at para 89.

2. *Khadr* 2010 FCA 246

While the majority of the Federal Court of Appeal upheld O'Reilly J.'s remedy, Nadon J.A.'s dissent draws on principles of corrective justice to criticize the repatriation order. Two of the majority's arguments merit review. First, the majority argues that the repatriation order does not constitute a "serious intrusion" on the Crown prerogative over foreign affairs because there was no evidence that the remedy would cause harm to Canadian-American relations. The argument hinges on O'Reilly J.'s interpretation of *United States v Burns*,³³ which seemed to condone judicial intrusions on executive prerogative in cases where evidence of harm to "good relations" with other states was lacking.³⁴ At trial in the *Khadr* case, Crown counsel conceded in oral argument that the Crown "was not alleging that requiring Canada to make such a request would damage its relations with the US."³⁵ Indeed, the majority cites testimony suggesting the US even preferred the return of *Khadr* to Canada because a repatriation request could bode well for the bilateral relationship. The Supreme Court would later avoid this kind of inquiry.

The majority also explores the relevance of predictions about American compliance with Canadian remedial requests. At trial, the Crown assessed the probability of Americans releasing *Khadr* at "one chance in a million."³⁶ O'Reilly J. previously called American assent "likely."³⁷ Here, the majority notes past American compliance with repatriation requests of other western countries and finds no evidence to support the Crown's gloomy assessment. In the following paragraph, the majority acknowledges that the factual record does not provide a "basis for predicting with certainty" the potential American response, but they deem such conjecture to be irrelevant.³⁸ The remedy should be guided by principle, not probability of success: "the fact that Canada has no control over the response of the US does not mean that it is inappropriate to order the request to be made."³⁹ This approach is echoed in the British judgment *Rahmatullah v Secretary of State*⁴⁰ (as explained further below), but it would elicit no sympathy from the Canadian Supreme Court.

Nadon J.A.'s dissent, by contrast, displays undertones of corrective justice. By invoking the need for proportionality between remedy and harm—he calls repatriation "totally disproportionate"—he aligns himself with the corrective tradition.⁴¹ However, Nadon J.A.'s application of corrective principles is curious. He suggests that an order prohibiting use of the evidence gathered in the 2003-2004 interrogations could be an adequate remedy for any future *Canadian* prosecution of *Khadr*. This remedy, he says, "would have at least some connection to the alleged breach."⁴² However, Nadon J.A. ignores the connection between the Canadian rights breach and the potential use of the evidence in *American* legal proceedings. Nadon J.A. concludes that the 2005 remedial order by the Supreme Court to terminate further Canadian interrogation of *Khadr* effectively remedied the breach. "That breach, in my respectful view," Nadon J.A. says of

³³ *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

³⁴ *Khadr* FC, *supra* note 25 at para 84.

³⁵ *Canada (Prime Minister) v Khadr*, 2009 FCA 246 at para 59, [2010] 1 FCR 73 [*Khadr* FCA 2009].

³⁶ *Ibid* at para 69.

³⁷ *Khadr* FC, *supra* note 25 at para 84.

³⁸ *Khadr* FCA 2009, *supra* note 35 at para 70.

³⁹ *Ibid*.

⁴⁰ *Rahmatullah*, *supra* note †.

⁴¹ *Ibid* at para 114.

⁴² *Ibid*.

the 2003–2004 *Charter*-violating interrogations, “has been remedied” by the 2005 order.⁴³ The order did indeed prevent any further direct violation of Khadr’s rights by Canadian officials. However, Nadon J.A. ignores the role played by the sharing of the intelligence with American officials on Khadr’s continued detention. The Supreme Court would later dismiss such reasoning, but it nevertheless demonstrates a skepticism of the causal connection between the wrongful Canadian interrogations and the harm of Khadr’s detention. Nadon J.A.’s effort to restrict the remedy by applying strict causal analysis is informed by a corrective approach. However, Nadon resiles himself from the transnational implications of Canada’s wrong.

Finally, Nadon J.A.’s judgment is noteworthy because he invokes the institutional concerns that would guide the outcome of the subsequent Supreme Court judgment. He could not accept the intrusion on executive prerogative required by a judicial repatriation order.

3. *Khadr* 2010 SCC 3

The 2010 Supreme Court judgment torpedoed O’Reilly J.’s repatriation remedy with its concerns about the judiciary overstepping its institutional role. The Supreme Court substitutes a remedy of declaratory relief recognizing the infringements on Khadr’s *Charter* rights, but defers to the discretion of the executive in shaping a further response. The unanimous Court invokes the remedial principles articulated in *Doucet-Bondreau* to buttress its prudent approach. Though the majority in *Doucet-Bondreau* noted that section 24(1) gave wide and virtually unfettered discretion to design a remedy that “meaningfully vindicates” rights, it also noted that courts must only fashion remedies that are appropriate to the “framework of a constitutional democracy” and that do not exceed the “function and powers of the court.”⁴⁴

From the standpoint of corrective justice, the judgment is significant because it brushes aside Nadon’s skepticism concerning causation and settles enough of the causal story to tie Canada’s rights violations to Khadr’s ongoing detention. The Court concludes “that the causal connection...between Canadian conduct and the deprivation of liberty and security of person is established,” given the contribution of “significant” Canadian evidence to Khadr’s “continued detention.”⁴⁵ The wrongful interrogation caused the continuing harm of detention, at least from a legal perspective of the facts. The Court also determined that the “significant” Canadian evidence was “potentially admissible” in US proceedings.⁴⁶ Roach calls the Supreme Court’s causal findings “generous” for Khadr.⁴⁷ Presumably, the Court could have invoked a higher standard of causation to save themselves the trouble of finding a section 7 violation for which they had to find a respectable remedy.

Corrective justice seems to demand a clear remedy for Omar Khadr: exclusion of the Canadian evidence in legal proceedings against Khadr. Suppose that Canada persuaded the Americans to exclude the evidence garnered by Canadian officials in the

⁴³ *Ibid* at para 101.

⁴⁴ *Doucet-Bondreau*, *supra* note 15 at paras 56–57.

⁴⁵ *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 20–21, [2010] 1 SCR 44 [*Khadr* SCC].

⁴⁶ *Ibid* at para 20.

⁴⁷ Kent Roach, “The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases” (2010) 28 NJCL 115 at 20 [Roach, “Supreme Court”].

2003 and 2004 interrogations. Canada's wrongful act would be expunged, along with its causal harm. As Roach notes, "[e]xclusion of unconstitutionally obtained evidence...can nullify the wrongdoing and ensure that the victim [does] not suffer further harms from the violation."⁴⁸ Insofar as the Canadian evidence contributed to Khadr's detention or might contribute to a military tribunal verdict, its effect would thereby be nullified. Of course, it is possible that Khadr would still find himself in detention (the same position he was in before Canadian involvement) after he is restored from Canadian harm, but this would not be on account of any Canadian wrongdoing, at least theoretically.

The Court's crucial phrase in the judgment's second last paragraph—"at this point"—deserves special attention. The Court settles for prudence and declaratory relief "at this point."⁴⁹ Those three words suggest the Court is only temporarily paying deference, not promising abstinence. The Court acknowledges its power to order a more robust remedy should the need arise. Despite its discussion about relative institutional competence and separation of powers, the Court does not surrender the field altogether. It anticipates the potential for further litigation in the absence of an acceptable remedial response by the executive. The alternative would have been for the court to retain supervisory jurisdiction to oversee the sufficiency of the executive's response. Rather, the Supreme Court settled for declaratory relief. In *Little Sisters v Canada*, Iacobucci J.'s dissent notes that declaratory relief has the disadvantage of requiring future litigation to be enforced.⁵⁰ Here, the Supreme Court sets the framework for an adequate remedy, reserving the right to further review the executive's response within its "narrow power" to do so.⁵¹

Arguably, the Supreme Court's prudence is guided by an equitable concern for remedial enforceability. However, it eschews the Rights Maximizing approach Gewirtz describes. The Supreme Court seems to draw on the more prudent strain of equity, refusing to demand a transnational remedy that could not necessarily be enforced. Equitable justice offers a range of answers for Omar Khadr, and the Supreme Court's deference to the executive was one among them.

Yet the judgment is ambiguous about what would constitute an adequate remedy. The judgment does not articulate a minimum remedy or a remedial goal with sufficient precision to guide an assessment of the government's response. It does not invoke a phrase like "best efforts" to commit the government to exhausting all possible options, should initial remedial efforts prove fruitless. It does not retain jurisdiction over the matter, which the Court could have done in order to update the evidentiary record and oversee the adequacy of the government's discretionary response. This ambiguity has consequences.

The Government Remedy

Sixteen days after the Supreme Court's decision, the Harper government sent the US a diplomatic note requesting that the Canadian evidence be excluded. The decisive sentence in this note reads as follows:

⁴⁸ Roach, "Limits", *supra* note 4 at 870.

⁴⁹ *Khadr SCC*, *supra* note 45 at para 47.

⁵⁰ *Little Sisters Book and Art Emporium v Canada*, 2000 SCC 69, [2000] 2 SCR 1120.

⁵¹ *Ibid* at para 38.

The Government of Canada therefore respectfully requests assurances that any evidence or statements share [sic] with US authorities as a result of the interviews with Mr. Khadr by Canadian agents and officials not be used against him by US authorities in the context of proceedings before the Military Commission or elsewhere.⁵²

Besides the regrettable spelling error in the sentence most crucial to Khadr's fate, we see a government remedy befitting the demands of corrective justice. On this view, the exclusion of the Canadian evidence would undo Canada's wrong. However, the request was ignored by the US, which proceeded to use the evidence against Khadr.⁵³

4. *Khadr* 2010 FC 715

Zinn J.'s decision of the Federal Court resurrects the repatriation order. His judgment focuses on effectiveness, not enforceability. He reviews the government's remedial decision, finding that Khadr had been denied procedural fairness.

In keeping with Gewirtz's "Rights Maximizing" equitable approach, Zinn J.'s judgment is guided by the imperative for an effective remedy to respond to Khadr's present needs—namely, a return to Canada.⁵⁴ He notes that the *Charter* obliges Canada to "cure" Khadr's detention.⁵⁵ On a corrective justice view, as I indicated earlier, this conclusion does not necessarily follow. Even if the US had accepted the conditions of Canada's diplomatic note and kept Khadr in detention, Zinn J. would have maintained the same position: Canada must exhaust "all reasonably practical steps" to secure his return.⁵⁶ As it happened, since the proffered remedy proved inadequate, "the best possible remedy" was required.⁵⁷ In a case with multiple possible remedies of uncertain effectiveness, Zinn J. requires all options to be exhausted until a breach is remedied.

Zinn J. acknowledges the transnational context for the remedial enterprise, including the American veto over any proposed Canadian remedy: "Canada can propose, but the US must consent."⁵⁸ Zinn J. similarly recognizes that the repatriation order intrudes on the royal prerogative, but gives this consideration little weight in a situation where there is only "one remedy available."⁵⁹ Zinn J., having watched the failure of the government's diplomatic note, concludes that the "court is required to order that it be done."⁶⁰

5. *Khadr* 2010 FCA 199

Ironically, Blais J. of the Federal Court of Appeal draws on the equitable doctrine of a stay of proceedings to stymie Zinn J.'s effort to fashion a maximally equitable remedy. He returns to the Supreme Court's concern about the appropriate division of

⁵² *Khadr v Canada (Prime Minister)*, 2010 FC 715 at Annex A, [2010] 4 FCR 36 [*Khadr FC 2010*].

⁵³ *Ibid* at para 52.

⁵⁴ *Ibid* at para 23.

⁵⁵ *Ibid* at para 50.

⁵⁶ *Ibid* at para 51.

⁵⁷ *Ibid* at para 76.

⁵⁸ *Ibid* at para 90.

⁵⁹ *Ibid* at para 91.

⁶⁰ *Ibid*.

powers, calling Zinn J.'s order a usurpation of legitimate executive prerogative. It is instructive to contrast Blais J. and O'Reilly J.'s use of the concept of harm. Whereas O'Reilly J. could adduce no evidence of any "particular harm" to the Crown by the repatriation order, Blais J. concludes that such a judicial move would cause "unequivocal" harm to the Crown's discretionary power.⁶¹ One judge sees no harm, while the other sees unequivocal harm. Perhaps the judges have different types of harm in mind. O'Reilly's conception of harm admits evidence; a judicial intrusion either causes harm or it does not. Blais J. has conceptual institutional harm in mind; to him, a categorical intrusion necessarily harms gravely.

Blais J.'s judgment is particularly obtuse when he says: "[I]t is too hard at this point in time to even determine how the Canadian evidence might be used (if at all) in the US trial and if remedies could potentially be available later on in the process."⁶² The first half of this sentence is badly misleading in two respects. First, by the time this judgment was written, the Canadian evidence had already been used in Khadr's trial by military tribunal (as Blais J. acknowledges in the *next* paragraph). Second, it is reasonable to presume the Canadian evidence would be used to establish Khadr's guilt. If the Canadian evidence was exculpatory, it is unlikely that there would have been such a fuss over its exclusion. With regards to the second half of the sentence ("remedies could potentially be available later on in the process"), it is not at all clear what Blais J. is suggesting. The possibility of an effective remedy for Khadr was decreasing with time as his American trial progressed. The "later" in the process, the less relevant Canadian remedies would become, with the exception of damages. If Blais J. is referring to American remedies, then he misjudged the nature and practice of American remedies in the national security and Guantanamo context. As Roach notes in "Substitute Justice," "the record of American courts in providing actual remedies for national security abuses is weak."⁶³

The American executive is largely insulated from judicial review by a sophisticated and nearly comprehensive system of extra-legalism. Roach defines "extra-legalism" as "a process where legalistic and positivistic claims of legal authority are used to prevent courts from reviewing state actions on their merits."⁶⁴ A host of American legal doctrines⁶⁵ have insulated the United States from claims about extraordinary rendition, indeterminate detention without trial, targeted killing, and torture. For example, Khalid El-Masri tried and failed to sue CIA officials who assisted in his extraordinary rendition from Macedonia to Afghanistan, where he was allegedly tortured.⁶⁶ He was eventually released on the grounds that his capture was a mistake. He later noted: "it seems the only place in the world where my case cannot be discussed is in a U.S. courtroom."⁶⁷ El-Masri's case exemplifies a trend whereby those harmed by American counter-terrorist efforts have been denied judicial review in American courts.

⁶¹ *Canada (Prime Minister) v Khadr*, 2010 FCA 199 at para 29, 2012 1 FCR 396 [*Khadr FCA 2010*].

⁶² *Ibid* at para 26.

⁶³ Roach, "Supreme Court", *supra* note 47 at 11.

⁶⁴ *Ibid* at 4.

⁶⁵ These doctrines include the political questions doctrine, a practice of deference towards Congress and the military, qualified immunity doctrines, the *Ker/Frisbie* doctrine on rendition, a narrow standing doctrine, and a broad state secrets doctrine among others. See Roach, "Supreme Court", *supra* note 47 at 8.

⁶⁶ *El Masri v United States*, 479 F (3d) 296 (4th Cir 2007).

⁶⁷ Khaled El-Masri, "I am not a state secret", *LA Times* (3 March 2007), online: LA Times <<http://www.latimes.com>>.

Blais J.'s focus on the uses of the Canadian evidence suggests a narrow corrective view of justice. By raising causation issues with respect to the evidence's continuing importance, he limits the Canadian connection to Khadr's evolving predicament.

Finally, Blais J. acknowledges that the staying of the repatriation order would result in Khadr's military trial commencing and perhaps ending without any further Canadian remedy.⁶⁸ But he cites the "rapidly evolving" situation as further reason to respect the executive's discretion to do as it saw fit.⁶⁹ In my view, it is precisely when time is of the essence that judicial deference is least appropriate.

THE CASE FOR REPATRIATION

Omar Khadr pled guilty to murder before an American military tribunal in August 2010, an outcome of questionable legitimacy⁷⁰ given the nature of the proceedings, and was transferred in September 2012 to Canada to serve the remainder of his sentence. Canada now dutifully respects and enforces a sentence obtained with the help of unconstitutionally obtained evidence. This outcome is unacceptable. Canada did not take sufficient steps to meaningfully vindicate Khadr's rights. What follows is the strongest case that could have been made for a repatriation order in 2010.

There are two principal arguments. First, the context of structural injustice suggests the application of equitable remedial principles rather than corrective justice. Second, Khadr's case demonstrates that declaratory relief is not an appropriate remedy when delay may cause irreparable harm and where the government may be credibly suspected of bad faith.

The case for repatriation begins with the argument that corrective justice and its proposed remedy to exclude the Canadian evidence is not appropriate to a context of structural injustice. In "The Supreme Court at the Bar of Politics," Roach asks whether American agreement to exclude the Canadian evidence would have sufficed as a remedy for Khadr. I think not, even though it would have "broken the causal" link between the Canadian wrong and Khadr's detention.⁷¹ Canadian courts can attempt to correct the determinate harms by a Canadian actor, but this overlooks additional harms being committed by third parties outside the bilateral litigation. In Khadr's case, a single third party looms: the US government, which supervised detention at Guantanamo.

The argument for equitable justice for Khadr rests partly on the "inappropriateness of corrective theory in structural contexts."⁷² Canadian courts were not in a position to provide Khadr with structural remedies, such as shutting down or changing conditions at Guantanamo. Still, the case for the more expansive equitable remedy of repatriation is built on the "moral foundation" of "uncompensated injuries" by third parties—in this case, by the US.⁷³ In my view, O'Reilly J. adopts this approach implicitly. He enlarges the harm that Canada must be asked to remedy by emphasizing the wrongness of the

⁶⁸ *Khadr FCA 2010*, *supra* note 61 at para 25.

⁶⁹ *Ibid.*

⁷⁰ Kent Roach, "Uneasy Neighbours: Comparative American and Canadian Counter-Terrorism" (2012) 38 *Wm Mitchell L Rev* 1701 at 1767.

⁷¹ Roach, "Supreme Court", *supra* note 47 at 21.

⁷² Roach, "Limits", *supra* note 4 at 886.

⁷³ *Ibid.*

structural regime in which Khadr was placed. Equitable justice “allows courts to order remedies for harms that the state may not have caused,” Roach observes.⁷⁴ In Khadr’s case, Canada could rightly be asked to remedy a detention for which it is not solely responsible. The alternative of corrective justice—here, a request for exclusion of evidence, which even if granted would not have guaranteed release—offers only a “hypocritical promise” of justice to someone who has “suffered and continue[s] to suffer from structural wrongs that cannot be easily or quickly rectified.”⁷⁵

Equitable justice can turn to present needs to broaden the remedial claim. Need is an admittedly “broad and indeterminate concept.”⁷⁶ The point is to move beyond corrective justice’s focus on undoing past wrongs to a fuller consideration of present needs which only the wrongdoer may be able to remedy. The more sensitive a court allows itself to be to Omar Khadr’s present needs—including his vulnerability to harm due to his former status as a child soldier or due to the questionable nature of American military justice at Guantanamo—the more open it would become to the repatriation remedy. Corrective justice had no adequate answer for Khadr’s pressing needs.

Second, declaratory relief is an inappropriate remedy in cases when ongoing violations pose a significant risk of irreparable harm to the wronged, and the wrongdoer has evidenced bad faith. Declaratory relief, as Roach notes in *Constitutional Remedies*, has the advantages of flexibility, little need for continued judicial supervision, and deference to other government branches.⁷⁷ Yet declaratory relief was inappropriate for Khadr for the same reason the Supreme Court gave in *Doucet-Boudreau*: remedial delay was likely to result in irreparable harm. In *Doucet-Boudreau*, the French language was in a vulnerable and degenerating position in Nova Scotia due to a governmental failure to respect minority language education rights. Existing legislation formally recognized such rights subject to a “numbers warrant” clause. This provision left “minority language education rights particularly vulnerable to government delay or inaction.”⁷⁸ Every year that passed without rights being respected diminished the likelihood that such rights would continue to exist and have relevance. “If delay is tolerated,” the majority noted, “governments could potentially avoid the duties imposed on them” by the *Charter*.⁷⁹ The majority felt an urgency to deliver an effective remedy, which is one important reason they felt justified in fashioning an expansive remedy, institutional concerns notwithstanding.

The facts of *Khadr II* and *Doucet-Boudreau* share pertinent similarities. Time was not on Khadr’s side. The more time that passed, the further his military proceedings progressed, and the more likely his legal fate would be sealed. As it happened, Khadr’s military proceedings terminated before Canada managed to make any effective remedial intervention on his behalf. Canada could be said to have managed to successfully “avoid” duties imposed by the *Charter*, and the harm to Khadr caused by his conviction is irreparable. The end of Khadr’s American proceedings was plainly foreseeable in 2009 and 2010. Remedial delay is not appropriate when the prospect of irreparable harm is significant. In other contexts, such a situation would call for an injunction. However, Canadian courts could not order Americans to suspend their own legal pro-

⁷⁴ *Ibid* at 887.

⁷⁵ *Ibid* at 882.

⁷⁶ *Ibid* at 899.

⁷⁷ Kent Roach, *Constitutional Remedies in Canada*, loose-leaf release no 18 (Aurora, Ont: Canada Law Book, 1994) at 12.30 [Roach, *Constitutional Remedies*].

⁷⁸ *Doucet-Boudreau*, *supra* note 15 at para 29.

⁷⁹ *Ibid*.

cess while Canada fashioned an appropriate remedy. The Supreme Court cited the rapidly evolving nature of the case as a reason for remedial deference.⁸⁰ However, in the face of irreparable harm to Khadr, this was the opposite of what was required.

Blais J. failed to grasp this crucial point in his reasoning regarding the stay of proceedings. In considering a balance of harms, he contrasted the “unequivocal” harm to the Crown’s discretion in foreign affairs to the uncertain harm that the Canadian evidence might do to Khadr. Blais J. was faced with a situation in which possible irreparable harm to Khadr had to be balanced against an abstract institutional harm to executive discretion. In my view, Blais J. gave insufficient weight to the risk of irreparable harm to Khadr by comparing the uncertain harm done by Canada’s unconstitutionally obtained evidence relative to the harm that would befall Khadr from the “total prosecution” by the US.⁸¹ Still, the larger problem with Blais J.’s analysis is his inappropriate pursuit of corrective remedies in a context of structural injustice.

To carry the disagreement further, Blais J. arguably overvalues the harm done to executive discretion. In *Canada (Attorney General) v PHS Community Services Society*, the Supreme Court intruded on executive discretion through a mandamus order from the Minister, but noted that a given constitutionally-required intrusion “does not fetter the Minister’s discretion with respect to future applications for exemptions, whether for other premises, or for Insite.”⁸² In other words, an intrusion to remedy an unconstitutional exercise of discretion does not fetter future constitutional exercise of discretion. Blais J. does not recognize such an argument, preferring instead to vaguely gesture toward a categorical restriction on judicial intrusion into foreign affairs. This is not consistent with the 2010 Supreme Court decision in *Khadr*, which continues to recognize a “narrow power” for the courts in foreign affairs, and further contemplates a judicial role in Khadr’s transnational remedy with its “at this point” phrase. The alternative is to adopt a “de facto political questions doctrine” with respect to remedies in foreign affairs and to cede the field altogether.⁸³

The Supreme Court’s deferential declaration was also ill-suited to a situation in which the executive had demonstrated *bad faith* by failing to take steps to ensure an effective remedy. Roach notes that “declaratory relief...may not be effective where governments do not take prompt and good faith steps to comply with the declaration.”⁸⁴ As it happened, the Harper government responded to the Court’s declaration within two weeks, but it proceeded with a minimalist remedy: a request that the Americans exclude the evidence in American proceedings. Once this remedy proved ineffective, the government took no further steps.⁸⁵ Earlier, a 2008 Conservative Party response to a Senate report made it clear that the government had no intention to make a repatriation request and would pay deference to the American military judicial process. It feared that Khadr could not be held accountable by a Canadian court, suggesting it was “unlikely [Khadr] will ever face conviction in Canada.”⁸⁶ This, apparently, would be

⁸⁰ *Khadr SCC*, *supra* note 45 at para 45.

⁸¹ *Khadr FCA 2010*, *supra* note 61 at para 28.

⁸² *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 151, [2011] 3 SCR 134.

⁸³ Roach, “Supreme Court”, *supra* note 47 at 28.

⁸⁴ Roach, *Constitutional Remedies*, *supra* note 77 at 12.100.

⁸⁵ *Khadr FC 2010*, *supra* note 52 at para 52.

⁸⁶ Conservative Party of Canada, “Dissenting Opinion” in House of Commons, Standing Committee on Foreign Affairs and International Development, *Omar Khadr* (June 2008) (Chair: Kevin Sorenson).

inconsistent with the government's "commitment to impeding global terrorism."⁸⁷ The Conservatives dismissed committee testimony that "Khadr could be tried and convicted" in Canada on the basis that it came "from a group of well-intentioned, yet inexperienced, law students."⁸⁸ The document suggests a government belief that the repatriation of Khadr would not be "in the long-term interest of the country."⁸⁹ In sum, the government never had any intention of taking steps to repatriate Khadr before he received American sentencing. It decided it was better for Khadr to be convicted with unconstitutionally obtained Canadian evidence than for Khadr to return to Canada and potentially walk free.

The Supreme Court deferred to a government that had no intention of pursuing the full range of remedial options. Specific instructions are more suited for the recalcitrant. McLachlin J., as she then was, has expressed support for "complementary roles" between the legislature and courts, but this requires good faith.⁹⁰ We might, as Sirois J. did in *Marchand v Simcoe (Count) Board of Education*, support more expansive remedies on observance of "a negative attitude" toward the rights of the litigant.⁹¹

Even as declaratory relief goes, the Supreme Court's remedy for Khadr is wanting. It fails to provide general guidance about what may be required to remedy the rights violation. In *Mabe v Alberta*, another case when declaratory relief was proffered while rights violations were ongoing, the trial judge said that the court should "not become involved with preparing or drafting methods of achieving *the required objective*."⁹² In *Khadr II*, not only does the Supreme Court not specify a method for compliance; it does not specify the remedial objective either. It fails to "declare in general terms what is necessary to achieve compliance with the Constitution."⁹³ Instead, we are left to speculate what corrective and equitable justice might require. By contrast, in a minority language case that followed *Mabe*, the judgment had the virtue of specifying the "essential elements" in an "appropriate scheme," while the precise details were left to the government.⁹⁴ In *Abdelrazik v Canada (Minister of Foreign Affairs)*, the Court established that which was owed to Mr. Abdelrazik "at a minimum."⁹⁵ For Khadr, the Court did not design a particular remedy, stipulate required elements of a remedy or articulate a broad remedial objective.

Finally, a distinction between the Khadr case and other diplomatic representation cases merits attention. Such cases involve judicial consideration of the appropriateness of issuing orders to executive branches to make a representation on behalf of individuals detained by other governments. As O'Reilly J. notes in his trial judgment, British and South African cases do not establish a rule that executives must always take all steps to protect their residents or citizens abroad. What distinguishes *Khadr* from these cases, however, is that Canada played a contributing role in its citizen's foreign detention and, in doing so, violated that citizen's constitutional rights. Zinn J. was also alive to this

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 *Alta L. Rev.* 540 at 558.

⁹¹ *Marchand v Simcoe (Count) Board of Education* (1986), 55 OR (2d) 638 at 660, 29 DLR (4th) 596 (Ont H Ct J).

⁹² *Mabe v Alberta* (1985), 39 *Alta LR* (2d) 215 at para 116, 22 DLR (4th) 24 (AB QB) [emphasis added].

⁹³ Roach, *Constitutional Remedies*, *supra* note 77 at 12.630.

⁹⁴ *Arsenault-Cameron v Prince Edward Island* (1997), 149 Nfld & PEIR 96, 69 ACWS (3d) 611 (PEI Sup Ct TD).

⁹⁵ *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580 at para 160, [2010] 1 FCR 267.

distinction.⁹⁶ It may be appropriate for a court to grant “particular weight” to a given exercise of executive discretion, but the executive’s involvement in rights violations abroad also merits considerable weight.

The case for repatriation still confronts opposition from separation of powers concerns and notions of relative institutional competence. Principles are not rules, and as such do not dictate determinate judgments. In *Doucet-Boudreau*, the Supreme Court of Canada identified a non-closed list of four principles to guide remedial decision-making: first, a remedy should meaningfully vindicate a claimant’s rights and freedoms; second, a remedy should employ legitimate means within the framework of Canada’s constitutional democracy; third, a remedy should invoke the “function and the powers of a court;” and finally, a remedy should be “fair to the party against whom the order is made.”⁹⁷ The majority and minority judgments in that case invoked the same principles relating to the separation of powers, but the majority gave more weight to competing principles in order to justify a more sweeping remedy.

Similarly, judgments in the Khadr quintet raise the issue of an appropriate separation of powers, but they accord the principle different weights. O’Reilly J. and Zinn J. would likely agree with the following proposition from *Doucet-Boudreau*: “[a] remedy may be appropriate and just notwithstanding that it might touch on the functions that are principally assigned to the executive.”⁹⁸ Blais goes furthest in the opposite direction, blocking an intrusive remedy that would do “unequivocal harm” to the executive discretionary power. And yet we know from *The United States of America v Khadr*,⁹⁹ in which a court denied the executive the power to extradite a Canadian to the United States, that the executive does not have exclusive jurisdiction over all decisions relating to foreign affairs.

The proponent of repatriation must also confront what may be called the emergent “control theory” of transnational remedies. In *Khadr II*, the Supreme Court distinguished *United States v Burns*,¹⁰⁰ in which the court had demanded a diplomatic request to the US for assurances regarding the death penalty, from Khadr’s situation. In *Burns*, Canadian officials had the litigant in custody, but no such control existed over Khadr and his American jailors. This distinction becomes a pattern with *United States of America v Khadr*, where the Ontario Court of Appeal stayed the extradition of Omar’s brother Abdullah to the United States. The court could be confident that their order would be effective. This order could hardly avoid characterization as a judicial intrusion in foreign affairs, and it may indeed have had deleterious consequences for Canadian-American relations. Yet judges felt entitled to intervene and provide a robust remedy because Abdullah Khadr was in Canadian control.

The control theory is coherent but unprincipled. The fact of control is not relevant from a moral point of view. It is, however, germane to considerations of effectiveness of enforcement. Canadian officials cannot ignore a judicial remedy from a Canadian court. The same cannot be said for Americans. Yet since judges readily admit they are not experts on foreign affairs, why should they be trying to make strategic judgments

⁹⁶ *Khadr FC 2010*, *supra* note 52 at para 77.

⁹⁷ *Doucet-Boudreau*, *supra* note 15 at paras 55-58.

⁹⁸ *Ibid* at para 56.

⁹⁹ *United States of America v Khadr*, 2011 ONCA 358, 106 OR (3d) 449.

¹⁰⁰ *Burns*, *supra* note 33.

about what *will* work for Omar Khadr? Rather, their job might to candidly recognize what *could* work.

The British handling of the *Rahmatullah* case was exemplary. Yunus Rahmatullah was a Pakistani originally captured by British forces in Iraq in 2004. He was subsequently handed over to the US on conditions established in memorandums of understanding between the US and Britain, including requirements that the United States respect the Geneva conventions and international humanitarian law. The Americans subsequently transported Rahmatullah to an American prison in Afghanistan where he was held without charge or trial. In 2012, the Court of Appeal of England and Wales ordered British officials to produce Rahmatullah, who had been detained in US custody since 2004, to honour the ancient writ of *habeas corpus*. The court did so even though Rahmatullah was under American control in a prison in Afghanistan. The US refused the British request. The Master of the Rolls subsequently recognized the “melancholy truth” that the order had proved “futile.”¹⁰¹ But, he maintained, it was not “pointless.” It had the salutary benefit of forcing “the UK Government to account for its responsibility for the applicant’s detention, and to attempt to get him released.”¹⁰² The same cannot be said of Canada for Omar Khadr. The Master of the Rolls acknowledged the limits of British courts in a transnational context, but lauded the judicial effort to “ensure that the executive complies, *as far as it can*, with its legal duties to individuals.”¹⁰³ Thus, the Canadian government had one card it never played for Khadr: a repatriation request.

O’Reilly J. and Zinn J. shared the Court of Appeal’s approach in *Rahmatullah*. However, the equitable “Rights Maximizing” approach did not survive in more senior courts. In the end, after the American rejection of Canada’s request for an exclusion of evidence, Omar Khadr received neither the minimalist remedy recommended by corrective justice nor the maximalist remedy of repatriation permitted by equitable justice.

CONCLUSION

A statement by the Harper government about repatriating Omar Khadr said it is “important that a balance be struck between individual rights and national security considerations.”¹⁰⁴ Presumably, one is supposed to accept that in this case Khadr’s rights were rightly sacrificed in the name of national security. Jack Hooper, Canada’s former CSIS chief, made the point more candidly:

I’ll tell you what our choices are. We can talk to Omar Khadr in Guantanamo knowing that probably the Americans would be fools if they weren’t taping our interview...will they use that information...in the context of a prosecution? Possibly. Does Omar Khadr possess information for an investigation or that allows the prevention of an act of terrorism in Canada? Possibly. So we have the choice, talk to Omar, don’t talk to Omar. Well, excuse me if my decision falls on the side of the greater good and the greater good is for the

¹⁰¹ *Rahmatullah*, *supra* note † at para 16.

¹⁰² *Ibid* at para 17.

¹⁰³ *Ibid* [emphasis added].

¹⁰⁴ Conservative Party of Canada, *supra* note 86.

majority of Canada. Omar has rights, he's entitled to certain rights, but so are the thirty-three million Canadians who are vulnerable.¹⁰⁵

The problem with the statements by Hooper and the Harper government is fundamental: Canada has a final arbiter capable of adjudicating between rights and security, and it is not the executive branch. It is section 1 of the *Charter of Rights*, as interpreted by judges. The government is welcome to point to security challenges from terrorism as a compelling rationale to limit section 7 rights. Indeed, the majority in *Re BC Motor Vehicle Act* noted exceptional circumstances, such as “natural disasters, the outbreak of war, epidemics, and the like” that might justify such an action.¹⁰⁶ The government could argue that a war against global terrorism required ignoring Khadr's rights for the common good. In *Suresh v Canada (Minister of Citizenship and Immigration)*, we see judicial recognition of “extraordinary circumstances” that might warrant the violation of a deportee's section 7 rights.¹⁰⁷ A section 1 argument could be brought forward to justify the denial of Omar Khadr's section 7 rights. Indeed, it was, and it failed.¹⁰⁸ It failed partly because the Crown made a half-hearted evidentiary effort,¹⁰⁹ but mostly because “there is generally little scope for the kind of balancing exercise required under section 1” for section 7 rights.¹¹⁰ If Canada wants to defend its behaviour toward Khadr as an unpalatable but necessary lesser evil, it must win the argument in court.

Perhaps there was another alternative foregone: subject to a section 24(2) *Charter* analysis about the role of unconstitutionally obtained evidence in Khadr's conviction and detention, Canada could potentially have annulled Khadr's conviction upon his return to Canada in September 2012. A re-trial might have been appropriate. This would have broken the terms of an international convention governing prisoner transfers,¹¹¹ irritated our American allies and flouted the principle of international comity, but it also would have terminated the connection between unconstitutionally obtained evidence and Khadr's section 7 rights violation. Lest we forget: this violation continues. Khadr is sitting in a Canadian prison today partly because of unconstitutional evidence. The power to provide an effective remedy is now finally under Canadian control.

As it stands, the longstanding failure to provide Omar Khadr with an effective remedy after recognizing a serious wrong besmirches the *Charter*. This is Canada's melancholy truth.

¹⁰⁵ Shephard, *supra* note 1 at 167.

¹⁰⁶ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 85, 24 DLR (4th) 536 [emphasis added].

¹⁰⁷ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 76, [2002] 1 SCR 3.

¹⁰⁸ *Khadr FCA 2009*, *supra* note 35 at para 63.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Convention on the Transfer of Sentenced Persons*, 21 March 1983, ETS No 112, arts 9-10, Can TS 1985 No 9 (entered into force 1 July 1985).