

Federal Court of Appeal Stays Order to Remedy Violation of Omar Khadr's Rights; Warns of "Affront" to Separation of Powers

Following the Supreme Court of Canada's declaration that Omar Khadr's rights were breached by actions of the Canadian government, the spheres of power claimed by Canada's government and Canada's courts have clashed.

In that decision, the Supreme Court confirmed that the Canadian government breached Khadr's *Charter* rights by questioning him in the absence of a lawyer or a parent, and despite knowing that he had been subjected to sleep deprivation to render him more susceptible to interrogation. However, the Court ruled that it was inappropriate for a court to order the government to request Khadr's repatriation. Instead, the Court issued a declaration that his *Charter* rights had been breached and left it to the government to provide an appropriate remedy. Following the Supreme Court's decision, the government sent a diplomatic note to the United States requesting that the evidence obtained through the interrogations by Canadian officials not be admitted in Khadr's trial. The United States responded to the note by stating that the admissibility of the evidence would be determined by the military tribunal. The matter came to a head on July 5, 2010, when Justice Zinn of the Federal Court of Canada determined that the government had not done enough to remedy the breach of Khadr's rights. As a result, he ordered the government to compile a list of potential remedies and to advise Khadr's lawyers and the court accordingly within seven days. Justice Zinn also indicated that if the government failed to provide a reasonable remedy within that time period, then he would be willing to order the government to request that Khadr be repatriated. While the government is appealing Justice Zinn's decision, the seven-day period for compliance put the government between a rock and a hard place. It seemingly forced the government to choose either to comply before an appeal could be heard, or to be in contempt of a court order. The government responded by applying for a stay of enforcement of the July 5 judgment, pending the conclusion of its appeal.

On July 22, Chief Justice Blais of the Federal Court of Appeal ruled on the government's application for a temporary stay of the order until the appeal can be heard. Chief Justice Blais considered the government's application for a stay by applying the three-part test established by the Supreme Court of Canada.^[1] The first step is to establish that the issue at stake is serious. Here, he concluded that the question of whether a court has the power to supervise the exercise of the Crown's prerogative power over foreign relations is a serious question.^[2]

The second part of the test is to determine if irreparable harm will result if the order is not stayed. Here, Chief Justice Blais emphasized that if the government was forced to comply with Justice Zinn's order, the "balance between the executive and the courts" would be affected. Even if the government eventually succeeded in its appeal of Justice Zinn's order, an "improper interference ... in the conduct of foreign relations" would - in the meantime - cause irreversible harm to the government.^[3]

The final part of the test is to determine "which party will suffer the greatest harm from the granting or refusal of the stay."^[4] Chief Justice Blais pointed out that the potential harm to Khadr is difficult to assess since we cannot know before his trial in the U.S. how the evidence may be used against him, or even if it will be used at all.^[5] Chief Justice Blais stated that he could not consider the potential outcome in the U.S. tribunal (i.e., conviction and imprisonment). Instead, he could only consider the harm that could result from the potential use of evidence obtained by Canadian officials in the trial.^[6] In contrast to the uncertain potential harm to Khadr, Chief Justice Blais said that the harm to the government would be "unequivocal."^[7] This, he said, is because, "if we enforce the Federal Court's decision, the executive's capacity to decide and execute Canada's international and diplomatic duties would be restrained and somehow usurped by the monitoring capacity of the court."^[8] Chief Justice Blais reiterated the Supreme Court's concern, in its January 2010 judgment, for "the constitutional responsibility of the executive to make decisions on matters of foreign relations in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."^[9] He concluded that the overall "balance of convenience and the interest of justice" tips in favour of the government's position that its choices in foreign relations should not be subject to court supervision - at least until the appeal of Justice Zinn's decision has been fully considered.^[10] As a result, the government will not be forced to provide any further diplomatic assistance to Khadr unless Justice Zinn's decision is eventually upheld on appeal. Such a decision, however, may have no impact on Khadr's fate as it will likely come after his trial in the United States is complete.

^[1][Canada \(Prime Minister\) v. Khadr](#), 2010 FCA 199 at para. 10. ^[2] *Ibid.* at para. 14. ^[3] *Ibid.* at para. 19. ^[4] *Ibid.* at para. 23. ^[5] *Ibid.* at para. 26. ^[6] *Ibid.* at para. 28. ^[7] *Ibid.* at para. 29. ^[8] *Ibid.* at para. 32. ^[9] *Ibid.* at para. 31, quoting [Canada \(Prime Minister\) v. Khadr](#), 2010 SCC 3 at para. 39. ^[10] *Ibid.* at para. 33.