

FEDERAL COURT

B E T W E E N:

OMAR AHMED KHADR

Plaintiff

- And-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

**AMENDED AMENDED AMENDED FRESH AS AMENDED
STATEMENT OF CLAIM TO THE DEFENDANTS**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Court Rules, 1998, serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Issued by _____
Registry Officer

Address of location office:

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CLAIM

1. The Plaintiff, Omar Ahmed Khadr ("Omar") claims:
 - a) Compensatory damages for negligence, negligent investigation, conspiracy either directly or as parties to a conspiracy with the United States Government through its agents or servants and other unknown parties in the arbitrary detention, torture, cruel, inhuman and degrading treatment, false imprisonment, intentional infliction of mental distress and assault and battery of the Plaintiff, failure to comply with domestic and international obligations with regard to treatment while confined, and misfeasance in public office, in the amount of \$20,000,000;
 - b) Further, and in the alternative, an award of damages pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter") in the amount of \$20,000,000 and an Order declaring that the Defendant has violated the Plaintiff's rights under ss.7, 8, 9, 10, 12 and 15 of the *Charter*.
 - c) Special damages in an amount to be determined with particulars provided prior to trial;
 - d) In addition to the amounts specified in paragraphs (a), (b) and (c) above, punitive, exemplary and aggravated damages in the amount of \$20,000,000;
 - e) Pre and post-judgment interest in accordance with ss. 36 and 37 of the *Federal Courts Act*, R.S.C., c. F-7₃;
 - f) Costs on a substantial indemnity basis; and
 - g) Such further and other relief as this Honourable Court deems just.

I. OVERVIEW OF THE CLAIM AND BACKGROUND

A. Overview of the Claim

2. Omar was a child of 15 when he was drawn into the war in Afghanistan and nearly killed in battle in July 2002. He was captured by American troops on July 27, 2002, and has spent every minute of his life since that moment as a prisoner, first in the American military base in Bagram, Afghanistan ("Bagram Air Base"), then in the American military base at Guantanamo Bay, Cuba ("GTMO" or "Guantanamo Bay") and now in Canada. His story is more than a sad

tale of a child soldier - it is the story of how Canada, his country of birth, not only failed to help him, but was complicit in, and a beneficiary of, the cruel and unusual treatment he received, and the torture he suffered, during his imprisonment.

3. Canada has made international and domestic commitments to ensure legal protections for all Canadians relating to:

- a) treatment of children and child soldiers as victims in situations of conflict, entitling them to special protections including rehabilitative and educational opportunities;
- b) conditions of custody for prisoners in situations of conflict, and that such conditions are not to be cruel or unusual, degrading or inhumane;
- c) methods of interrogation, and that such methods would not permit torture; and
- d) adjudication and the right to due process and a fair hearing.

4. Canada knew that Omar was deprived of all of these legal entitlements, and it took no steps to protect him, resisted all urging to extend assistance, and instead exploited the circumstances of his imprisonment, in violation of his *Charter* and other rights, for its own benefit.

B. Omar's Early Life

5. Omar is a Canadian citizen. He was born on September 19, 1986 at Centenary Hospital in suburban Toronto, and was raised in Canada, Pakistan and Afghanistan.

6. Omar's father, Ahmed Said Khadr ("Ahmed"), was an Egyptian Canadian who died in 2003 in a firefight with Pakistani military forces. He was married to Maha El-Samnah ("Maha"), and together they had seven children, including Omar, (from oldest to youngest): Zaynab, Abdullah, Abdulrahman, Ibrahim, Omar, Abdulkareem and Maryam.

7. In 1994, Ahmed moved his family to the Peshawar region of Afghanistan, where he became increasingly identified with militant groups in the area. Omar, a child of 8 at the time, understood only that his father wanted to be in Afghanistan in order to build relationships with other men. At around that same time, Omar's two oldest brothers, Abdullah and Abdurahman, at their father's direction, both went to a military training camp in Afghanistan.

8. The family moved again in September of 1997, this time to Jalalabad Afghanistan, after Ahmed was released from two years spent in custody in Pakistan following the 1995 attack on the Egyptian embassy in Pakistan. The move to Jalalabad coincided with a closer association between Ahmed and Osama Bin Laden.

9. In or around 1998, following the terrorist bombings of American embassies in Kenya and Tanzania, Pakistan renewed its claims that Ahmed had been involved in the bombing of the Egyptian embassy in Pakistan, as well as alleging that he had laundered money and engaged in smuggling in aid of terrorist activity. Pakistani authorities also suggested Ahmed may have been involved in the more recent bombings of the American embassies in August 1998.

C. Omar is Severely Wounded and Captured by the United States

10. In July 2002, Ahmed visited his family and arranged for Omar to join a group of Arab men to act as a Pashto translator. At his father's direction, Omar, then only 15 years old, traveled with them to the Afghan city of Khost. On approximately July 26, 2002, Omar was taken by the group to Abu Ykhiel, a village outside of Khost, where they stayed the night.

11. In the early morning of July 27, 2002, American soldiers went to Abu Ykhiel to search the home of a suspected explosives maker. No evidence was found at the home, but while there the Americans received a report that a monitored satellite phone had just been used 300-600 metres from their location. Seven soldiers went to investigate, including Sergeant Christopher Speer ("Sgt. Speer") of the 19th Special Forces.

12. The suspected site of the call was a series of mud huts and a granary surrounded by a 3 metre high stone wall with a metal gate approximately 100 metres from the main hut. This was the dwelling where Omar was staying. On their approach to the area, the soldiers saw people within the enclosure with AK-47 machine guns. The soldiers stood down and called for reinforcements and formed a perimeter around the wall.

13. Once reinforcements arrived, they sent an Afghan militiaman to demand that the inhabitants surrender. When the inhabitants did not respond, one or more of the Afghan militiamen entered through the gate in the wall, and were shot and killed. Immediately thereafter, the inhabitants began shooting at the soldiers surrounding the wall. The American and Afghan soldiers retreated to a safer position approximately 125 metres away before returning fire and calling for combat air support.

14. American military attack helicopters responded, dropping numerous bombs and pummeling the site indiscriminately with thousands of rounds of ammunition. They pulverized the enclosure and the surrounding area, leaving the site a smoldering heap. Although no one on the ground believed any of the inhabitants were still alive, Omar did survive, but was seriously wounded. Shrapnel from the American bombs had permanently blinded him in one eye and caused very serious wounds to his face, torso and legs.

15. Following the air strike, American soldiers (including Sgt. Speer) entered the area through a hole in the south wall. Reports differ on what exactly happened next, but it is clear that an unknown assailant lobbed a hand grenade towards the American soldiers. The grenade is alleged to have exploded near Sgt. Speer, seriously injuring him. Sgt. Speer died on August 6, 2002, from shrapnel wounds received from the explosion. The United States would eventually charge Omar with “murdering” Sgt. Speer.

16. Following the firefight, American soldiers secured the area. They removed Omar from the rubble to an open area, while Omar begged for death until he lost consciousness. Omar received onsite medical treatment and was then air lifted to Bagram Air Base, where he became a prisoner.

D. The World Knows about America's Treatment of Prisoners

17. In the wake of the 9/11 attack, the American government developed a policy that purported to justify the torture and cruel, inhumane and degrading treatment of detainees held in American custody, in order to support America's War on Terror. In so doing, the United States turned its back on international and domestic law, adopting a stance that the means-justify-the-end, which ignited a debate around American's commitment to basic human rights that continues to this day. This debate was no quiet controversy, but a publicly aired discussion involving not only politicians and citizens of the United States, but individuals and governments around the world. The entire world was aware of this new world order, and Canada was no exception.

18. In mid-2002, White House Counsel Alberto Gonzalez asked the Office of Legal Counsel of the United States' Department of Justice ("US-DOJ") to determine what interrogation methods were permitted by the United Nations Convention Against Torture (“UN-CAT”), to which both the United States and Canada are signatories. The UN-CAT itself includes a definition of “torture”. Article 1 provides:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

19. Assistant Attorney General Jay S. Bybee authored one of the US-DOJ opinions, which became known as the “Bybee Memo” and the principal source for future opinions from the US-DOJ to justify torture and other abusive interrogation techniques. The Bybee Memo, released around the time of Omar's capture, departed wildly from the clear language of the UN-CAT. The Memo stated that very harsh interrogation techniques were permissible so long as they did not cause “excruciating and agonizing” pain or suffering such as that which accompanies organ failure or death, notwithstanding the UN-CAT language which specifically refers to "severe" pain and suffering in prohibitive terms.

20. The Bybee Memo also asserted (again, despite the language of Article 1 of UN-CAT) that if the interrogator's objective was to obtain information rather than simply inflict pain, no legal liability would attach, even if severe pain and suffering were “reasonably likely to result”. The Bybee Memo became the legal façade behind which the United States hid, in its "justification" for the use of torture and/or cruel, inhuman and degrading treatment as it waged its War on Terror.

21. In October 2002, the military interrogation unit stationed at Guantánamo Bay sought the American government's approval to use more aggressive interrogation techniques on detainees. The request came just two months after the Bybee Memo, which had already ushered in a new era of abusive interrogation tactics.

22. On December 2, 2002, then-Secretary of Defense, Donald Rumsfeld (“Rumsfeld”), relying on a memo written by William Haynes of the US-DOJ, approved various harsh techniques, including:

- a) “interrogator identity” (where the interrogator impersonates a citizen or interrogator from a country known for harsh treatment of prisoners);
- b) stress positions, such as standing, for up to four hours;

- c) isolation for up to 30 days, with extensions beyond 30 days upon Commanding General approval;
- d) deprivation of all light and auditory stimuli;
- e) hooding during transportation and questioning;
- f) 20-hour interrogations; and
- g) the exploitation of a prisoner's individual phobias, such as fear of dogs, to induce stress.

23. In response to criticism that these techniques were illegal, the US-DOJ prepared another memo, written by Deputy Assistant Attorney General John Yoo and dated March 14, 2003, which is commonly referred to as the "Torture Memo". This memo was held out as providing "definitive guidance" on the line between torture and legal interrogation techniques.

24. The Torture Memo was nearly identical to the earlier Bybee Memo, which took the position that abuse does not rise to the level of torture unless it inflicts pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." A working group formed by Rumsfeld adopted, almost verbatim, the legal analysis of the Bybee Memo and the Torture Memo and recommended that the Defense Department endorse a set of 35 interrogation techniques.

25. On April 16, 2003, Rumsfeld approved 24 of those 35 techniques, including:

- a) dietary manipulation;
- b) hooding and other sensory deprivation techniques;
- c) environmental manipulation;
- d) "false flag" (leading prisoners to believe that they have been transferred to a country that permits torture); and
- e) isolation.

26. Canada, and indeed the entire international community, was aware that these techniques were being used on American held prisoners, including Omar. These "Enhanced Interrogation Techniques" were notorious. They have been discredited and disclaimed by other Western nations as cruel, inhumane, as well as ineffective. The American government rescinded the use

of these techniques by Presidential Order on January 22, 2009. By that point, Omar had spent approximately 7 years in American custody.

E. Omar is Interrogated and Tortured at Bagram Air Base

27. Omar's injuries were very serious. He did not regain consciousness for one week following his arrival at the Bagram Air Base. Omar's chest wounds were infected, swollen and still seeping blood for months following his capture. His injuries have since caused him severe, chronic pain and rendered him susceptible to painful infections and other related health problems.

28. Omar spent approximately 90 days at Bagram Air Base; the first two weeks in a tent hospital and the remainder of his time in a holding pen with adult detainees. From the outset, American personnel singled out Omar for particularly harsh treatment, taking the position that Omar had "murdered" Sgt. Speer.

29. While at Bagram Air Base, the Americans interrogated Omar approximately 42 times, employing many of the "Enhanced Interrogation Techniques" outlined by the Bybee Memo and the Torture Memo.

30. Once Canada became aware that Omar, a 15 year old Canadian citizen, was in the custody and control of US authorities abroad, it took no steps to prevent his ongoing abuse and torture, thereby condoning and facilitating blatant contraventions of international law, including the Convention on the Rights of the Child.

31. Despite having been denied consular access to Omar, Canadian intelligence and law enforcement officials began making plans to take advantage of Omar as an intelligence source and requested access to Omar in anticipation of his transfer to GTMO in the fall of 2002.

32. Canadian authorities worked in conjunction and consultation with US authorities to set up interviews with Omar for the express purpose of gathering incriminating evidence to be used against him in future criminal proceedings in Canada and the US. Omar's indefinite imprisonment provided both the US and Canada with the leverage necessary to effectuate their own intelligence and law enforcement common objectives. The US agreed to give Canadian authorities access to Omar in exchange for Canada's agreement to provide to the US authorities any self-incriminating or otherwise useful information extracted from him.

F. Omar is Interrogated, Tortured and Held Without Charge at GTMO

33. On approximately October 29, 2002, Omar was moved to GTMO, where his torture continued. He was transported in shackles, wearing goggles, earplugs and a mask over his face. Soldiers half dragged and half carried Omar off the plane, causing the shackles to cut in to his ankles. Disoriented and confused, Omar was greeted by military officers with “Welcome to Israel”.

34. Omar, now just 16 years old, was stripped and subjected to a body cavity search. Two soldiers then took charge of Omar. They pinned him against the wall. One pushed Omar’s back hard against the wall with his elbow while the other pushed his face into the wall. Although the goggles and earphones had been removed, Omar still had on a mask which made it difficult for him to breathe. When Omar would pass out from lack of oxygen, the two soldiers would relax their grip until he woke up again, and then pin him back against the wall until he passed out again. They repeated this treatment three or four times.

35. Following further administrative processing, Omar was then taken to the American hospital located on the military base where he stayed for two days. While in hospital, two Americans interrogated him for six hours each day. Frightened and weary, Omar tailored his answers according to what he thought the interrogators wanted to hear, hoping to avoid further abuse.

36. After these first interrogations, Omar was segregated in a small cell with no human contact. He was moved in and out of isolation depending on how he answered questions during successive interrogations. The isolation cells were always small, barren and often kept extremely cold.

37. When not in solitary confinement, Omar was held with adult detainees; despite the fact the Americans maintained separate facilities for juvenile detainees, as required by international law. Since Omar had turned 16 while in Bagram Air Base, the Americans deemed him to be an adult and housed him with the adult prisoners.

38. In the early spring of 2003, a military interrogator told Omar, “Your life is in my hands”. The interrogator then spat on him, tore out some of his hair, and threatened to send him to a country like Jordan, Syria, or Egypt, where he would be tortured

more thoroughly, possibly to death. The interrogator also told Omar the Egyptians would send in *Askri raqm tisa* (“Soldier Number Nine”), who was known to enjoy raping prisoners.

39. The interrogator then shackled Omar’s hands and ankles together and made him sit on the floor. The interrogator ordered him to stand up, which was difficult for Omar to do because of the shackles. After Omar managed to stand, the interrogator ordered him to sit down again and then get back to his feet. When Omar could not stand, the interrogator called in two military police officers who lifted him up and then dropped him to the floor. They did this approximately five times at the interrogator’s instruction. At the end of the meeting, the interrogator told Omar that the Americans would throw his case in a safe and that he would never leave GTMO.

40. Because of these detention conditions and interrogation methods, Omar succumbed to bouts of depression and would collapse crying during interrogations. He was terrified and confused. Omar was offered no future or hope of any kind. He was met with hostility and aggression from all who surrounded him, and he was isolated and bereft of any supportive or trustworthy human companionship. He was only 16.

41. The Americans did not provide Omar with any educational opportunities, adequate medical treatment, or any psychological or psychiatric attention at any time during his imprisonment. Indeed, that was the point: to use every means possible to break and destroy him. Under international law, children deprived of their liberty have the right to special care and assistance, including the right to education and recreation. The United States provided other children detained at GTMO with access to specialized tutors, a designated social worker, and recreational opportunities, but not Omar.

42. Although the United States’ international commitments oblige it to provide children deprived of liberty with prompt access to legal and other appropriate assistance, Omar was not provided with any access to legal counsel, or any kind of assistance, until much later on during his detention. Omar was held without charge until early 2005.

43. Even after the initial charges were laid, Omar would periodically be held without charge for significant periods of time as the American government withdrew and then later re-laid charges in response to legal challenges to the adjudicative process implemented for prisoners at GTMO. In total, the Americans held Omar at GTMO without charge for 1,197 days, or three years, three months and nine days.

44. Moreover, the United States took the position publicly that it had the right to imprison people at GTMO indefinitely, even after the expiry of a warrant or an acquittal. Until he entered into the plea agreement, discussed below, the Americans constantly threatened Omar with the prospect of indefinite imprisonment at GTMO. Given the tremendous psychological impact this had on Omar, this threatening constituted torture under international norms. At the very least, it was cruel, inhuman and degrading treatment.

45. Canada was aware of the abuses taking place at GTMO including those acts specifically perpetrated against Omar. Regardless of whether the Americans shared this information with Canada directly, the abuses within the prison and the Enhanced Interrogation Techniques were well known, and indeed notorious. Omar himself advised Canadian agents of the abuse he was subjected to while imprisoned. Rather than seeking protection for Omar, Canada sought to exploit the situation by using Omar as an intelligence source. Canada should have protected Omar as a minor, as a child soldier and as a Canadian citizen.

G. Omar Learns that His Brother Abdurahman is at Guantanamo Bay

46. In or around January 2003, Omar's brother Abdurahman was transferred to GTMO. He was released later that year and eventually returned to Canada. During Abdurahman's time in GTMO, Omar and Abdurahman shouted to each other between the two camps where they were detained in an attempt to communicate, but the distance made the words indiscernible.

47. Under international law, detained children have the right to maintain contact with their families through correspondence and visits. Omar's attempt at contact with his brother was the closest he came to receiving a visit from his family during his imprisonment at GTMO. As Canada was well aware, the Americans refused to permit Omar to have any contact with his family.

H. Canada Interrogates Omar in February 2003

48. President George W. Bush established a military commission process by Executive Order in Guantanamo Bay, in order to "adjudicate" the cases against the prisoners. These military commissions were notorious and Canada knew that the system radically departed from basic international and domestic norms of due process.

49. Notwithstanding this, agents of the Canadian government interrogated Omar on approximately six separate occasions while the Americans detained him at GTMO. These visits were not for the purposes of providing Omar with consular assistance, though the early delegations of Canadian agents each included a member of the Department of Foreign Affairs and International Trade (“DFAIT”) so as to give the visits a veneer of legitimacy. Instead, Canada used these visits to extract information from Omar for Canada’s own intelligence purposes and to provide this information to the Americans for use in the military proceedings against Omar. In short, Canada knowingly participated in a process that placed Omar’s life and future liberty in jeopardy.

50. The first Canadian visit included four interrogations over four days beginning on February 13, 2003. The Canadian delegation included three people: two men and one woman. They told Omar they knew his mother and grandmother. They met him in a special conference room, which was more comfortable than the normal interrogation room.

51. Omar initially believed these Canadians were really American agents so he told them the same stories he had told the Americans. However, his suspicions eventually relented and he accepted that these new interrogators were in fact Canadian.

52. Omar was initially hopeful that the Canadians were there to assist him. He told the Canadians that he was scared and that the Americans had tortured him. He tried to cooperate so that the Canadians would take him home and, initially at least, he tailored his answers to their questions accordingly. When Omar explained to the Canadians that he had told his American interrogators whatever he thought they wanted to hear in order to avoid further torture, the Canadians berated him and told him there was nothing they could do for him.

53. During these visits, agents from the Canadian Security Intelligence Service (“CSIS”) and DFAIT actively extracted information from Omar, but refused him any kind of assistance, even when Omar pleaded for help. Canada used these interrogations in an attempt to obtain intelligence for its own purposes and not to assist Omar. Yet Canada knew that Omar was 15 years old when he was captured and thus qualified as a “child” or “child soldier” under international law. Canada also knew that Omar had been successively and brutally interrogated without any access to counsel or even to any adult or guardian who would have his best interests in mind.

54. In conducting their interviews, CSIS and DFAIT officials had control over the questions asked and the subject matter of the interviews. Canadian officials also knew that the American authorities would have full access to the contents of the interrogations because the Americans were recording their interrogations of Omar. Despite this, Canada did not seek any restrictions on the Americans' use of the information or statements Canada obtained through its interrogations of Omar, knowing that Omar was likely to be charged with an offence for which American prosecutors might seek the death penalty (i.e. the offence of murder) as a result.

55. Knowing the jeopardy in which they placed him, Canadian officials questioned Omar on matters that provided important evidence relating to future criminal proceedings against him. They did so knowing that Omar was subject to nothing better than a Star Chamber adjudicative process, having had no charges laid against him and stripped of the basic right to challenge his indefinite imprisonment by way of *habeas corpus*. Through their questioning, the Canadians helped build both their own case and the U.S. case against Omar.

56. After the Canadians left and Omar told the Americans that his previous statements to them were untrue, his treatment deteriorated further. He was shackled during interrogations and left for hours in painful positions. They also took away everything except his mattress; he did not even have a blanket or a Qur'an.

I. Canada Interrogates Omar in September 2003

57. In or around late September 2003, two different Canadian agents visited Omar. These two men aggressively berated and belittled Omar as part of the collective effort to extract more information from him. They also told him there was nothing the Canadian government could or would do against the power of the United States, which reinforced a point well known to Omar by this time - he was entirely on his own with no end to his ordeal in sight.

58. Once again, Canada controlled these interviews and shared the fruits of these investigations with the Americans, with no restrictions placed on their use.

J. Canada Interrogates Omar in March 2004

59. In or around March 2004, a Canadian agent returned to Guantanamo Bay to interrogate Omar. Prior to that agent's arrival, the Americans subjected Omar to what is known as the "frequent flyer program". This meant that Omar's captors moved him from cell to cell every

three hours each day for the 21 days prior to the Canadian agent's arrival in Guantanamo Bay. The Americans used this technique to "soften up" prisoners prior to interrogations.

60. The "frequent flyer program" was used on Omar in coordination with the arrival of the Canadian interrogator who capitalized on Omar's mental and physical exhaustion by engaging in an in depth and wide-ranging interrogation, which included asking Omar about his brother, Abdullah. The Canadian left Omar with no illusions about what he was doing there. He told Omar, "I'm not here to help you. I'm not here to do anything for you. I'm just here to get information".

61. Once again, at the time of this interrogation, Omar was an unrepresented "child" or "child soldier" who was, at that point, being imprisoned indefinitely.

62. Shortly thereafter, the Americans increased Omar's security level from Level 1 to Level 4 minus. Again, his captors took everything away from him except for a mattress. He spent a month in isolation, in frigid conditions.

II. US PROCEEDINGS AGAINST OMAR

K. The First Military Commission

63. The Americans continued to hold Omar without charge until November 7, 2005, when they formally charged him with Murder by an Unprivileged Belligerent, Attempted Murder by an Unprivileged Belligerent, Aiding the Enemy, and Conspiracy with Bin Laden and various other members of the al Qaeda organization. It was in or around this time that Omar was permitted to speak to counsel for the first time, though not counsel of choice.

64. On December 1, 2005, the United States appointed the military officers to adjudicate Omar's case; however, the commission process was ultimately deemed unlawful by the United States Supreme Court in *Hamden v. Rumsfeld*, which struck down as unconstitutional the military commissions established by then-President George W. Bush's Executive Order. The majority of the Court concluded, among other things, that "The military commission at issue lacks the power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the four Geneva Conventions signed in 1949". The commissions were also deficient as they lacked Congressional authorization.

L. The Second Military Commission

65. Congress then enacted the *Military Commissions Act of 2006* (“MCA”) in or around October 2006, and new charges were brought against Omar on or around February 2, 2007. This time Omar was charged with Murder in Violation of the Law of War, Attempted Murder in Violation of the Law of War, Conspiracy, Providing Material Support for Terrorism, and Spying.

66. The military commissions established pursuant to the MCA are highly deficient when compared to domestic and international norms of due process. Among other reasons, the military commissions are defective because:

- a) The MCA permits the introduction of evidence obtained through the use of cruel, inhumane and degrading treatment, subject to tests to consider reliability and the “interests of justice”;
- b) The MCA allows convictions based on unsubstantiated and unreliable hearsay evidence. Although the MCA permits exclusion of hearsay evidence, it places the burden on the defendant to demonstrate that the evidence is “unreliable or lacking in probative value”. Challenging the admission of hearsay evidence in this context is extremely difficult because the defendant may be denied access to classified information necessary to test the reliability of hearsay evidence, such as sources, methods or activities by which the information was obtained. This challenge is exacerbated by a defendant’s limited access to counsel and conditions of confinement;
- c) The MCA affords the American government wide latitude to restrict a defendant’s access to information considered “classified”. The government is permitted to withhold exculpatory evidence it has classified as confidential based on purported national security concerns. These limitations on access to classified evidence extend to the discovery stage, preventing the defendant and his attorney from obtaining production of evidence from the government;
- d) The MCA restricts a defendant’s right to choose a particular lawyer. Defendants may only be represented by American civilian attorneys and their assigned military defense attorney. Additionally, the MCA only provides a right to counsel after the swearing of charges. This means that the American government is free

to delay charging a defendant so it may conduct extensive interrogation without the presence of counsel. Finally, defense counsel are restricted in their ability to see and discuss classified information with their clients. In Omar's case, his requests to be represented by Canadian counsel were denied, and American military officials at Guantánamo Bay interfered with his right to consult with his counsel;

- e) Many of the substantive crimes defined in the MCA have never been considered offenses triable under the international law of war or American law before a military tribunal;
- f) The MCA strips the right of detainees to seek a speedy determination of the lawfulness of their confinement through the writ of *habeas corpus* one of the most fundamental rights in American, Canadian and international law. Accordingly, Omar was denied the fundamental right to challenge the lawfulness of his confinement through a writ of *habeas corpus*. He petitioned the United States Supreme Court to review the legality of the military commission and his prolonged imprisonment, but his request was denied in or around April 2007.

67. Omar's trial pursuant to the MCA began in June 2007. Peter Brownback, the officer presiding over Omar's new trial, dismissed the charges against Omar almost immediately on the basis that Omar had been previously classified as an "enemy combatant" by his Combatant Status Review Tribunal in 2004, while the MCA only granted Brownback jurisdiction to rule over "unlawful enemy combatants".

68. On or around September 25, 2007, the Court of Military Commission Review overturned Brownback's dismissal, stating that the tribunal could determine the legality of a prisoner's status for itself, and reinstated the charges against Omar.

III. LEGAL CHALLENGES IN CANADA

M. The Federal Court Enjoins Canada from Interrogating Omar Further

69. Omar's family commenced various legal proceedings on his behalf in Canada. On March 15, 2004, Omar's grandmother, Fatmah, commenced an action on Omar's behalf in the Federal Court seeking a declaration that Omar's *Charter* rights had been breached, damages, and an

injunction preventing further interrogation by Canadian officials. This is the same action that forms the basis for this Amended Amended Amended Fresh as Amended Statement of Claim.

70. On February 8, 2005, as part of the action commenced in March 2004, Omar's family sought an injunction to prevent Canadian officials from conducting further interrogations of Omar in Guantanamo Bay. On August 10, 2005, the Federal Court granted the interim injunction enjoining Canadian authorities from continuing to interrogate Omar. Justice von Finckenstein held that an injunction was necessary to prevent a grave injustice.

71. He found that the evidence indicated, *inter alia*, that:

- a) The conditions at Guantánamo Bay do not meet *Charter* standards;
- b) Omar was in poor mental and physical shape;
- c) The DFAIT and CSIS visits were not welfare visits, but rather purely information-gathering visits with a focus on intelligence and law-enforcement;
- d) Canadian agents took a primary role in the interviews, were acting independently, and were not under instructions from U.S. authorities;
- e) Summaries of the information gathered were passed on to U.S. authorities and the RCMP;
- f) There was no evidence that Omar had been advised of his *Charter* rights;
- g) There was no evidence that Canada sought or received assurances from the U.S. that the interviews would not be taped or that the evidence would not be used against Omar; and
- h) CSIS refused to undertake to inform itself of how the information gathered from Omar would be used.

72. Following the injunction, Canada did not return to interrogate Omar. Instead, it began to attend infrequently at GTMO to conduct "welfare" visits with Omar.

N. Omar's Family Tries to Compel Consular Assistance for Omar

73. On or around March 31, 2004, members of Omar's family brought an application before the Federal Court, seeking in part to compel the government to extend consular assistance and

diplomatic services to Omar. Despite the many requests from Omar and his family, Omar had not been provided with any such services.

74. Canada resisted. It sought an order striking the Notice of Application claiming that the application violated the *Federal Court Rules*, constituted an abuse of process because of its similarity to the Statement of Claim commenced on March 15, 2004, and disclosed no cause of action.

75. Although some duplicative paragraphs were struck, Justice von Finckenstein ordered that the portions of the application relating to Canada's failure to provide consular and diplomatic services be continued. He found that there was a persuasive case that the *Department of Foreign Affairs and International Trade Act* and government publications created a legitimate and reasonable expectation that a Canadian citizen detained abroad would receive many of the services which Omar had requested and alleged he was denied. Omar's family did not pursue this application further.

O. Supreme Court of Canada Orders Canada to Disclose Records

76. On November 21, 2005, shortly after the Military Commission charges against him were first laid, Omar sought from Canada disclosure of all information within the Crown's possession or control which was relevant to the charges. On the same day, Omar also brought an application under the *Access to Information Act* for similar information.

77. In or around early January 2006, Canada refused Omar's information request and he promptly brought an application for judicial review. Although the Federal Court initially dismissed Omar's application, the Federal Court of Appeal overturned the decision, and ordered that Canada produce to Omar unredacted copies of all relevant documents in the Crown's possession.

78. The Supreme Court of Canada unanimously dismissed Canada's appeal. The Court ordered Canada to disclose the records of their interviews with Omar, and the information given to U.S. authorities as a direct consequence of conducting the interviews.

79. The Court found that Canada had participated in a process which constituted a clear violation of the fundamental human rights obligations to which Canada subscribes and that the *Charter* applied to the Canadian officials who interviewed Omar. With Omar's present and future liberty interests at stake, s.7 of the *Charter* required that CSIS conduct itself in conformity

with the principles of fundamental justice. CSIS had a duty to provide Omar with disclosure of the materials in its possession arising from its participation in a foreign process which violated international law and jeopardized the liberty of a Canadian citizen.

P. The Supreme Court Declares Canada Breached Omar's Charter Rights

80. From the moment that prisoners landed at GTMO, governments from their home countries sought their repatriation. The United States honoured all of these requests, often without requiring continued detention. Canada could have requested Omar's return as well, particularly on the strength of the UN Convention on the Rights of the Child, and the "Riyadh Guidelines" relating to imprisonment of minors. Canada should have done so, knowing that Omar was a child, a child soldier and subject to torture and degrading and inhumane treatment while imprisoned. Canada alone among Western nations chose not to request the repatriation of its citizen.

81. Omar repeatedly requested that Canada seek his repatriation. He did so in March 2005, during a Canadian consular visit, again on December 15, 2005 through a welfare report, and finally in a formal written request through counsel on July 28, 2008. Canada resisted. On July 10, 2008, the Prime Minister made the government's position public when he announced that Canada would not seek Omar's repatriation.

82. On August 6, 2008, Omar applied to the Federal Court seeking judicial review of Canada's decision, and on April 3, 2009, the Federal Court allowed his application. The Court found that Canada's ongoing refusal to request Omar's repatriation violated Omar's rights under s.7 of the *Charter*. Justice O'Reilly ordered Canada to present a request to the United States seeking Omar's repatriation as soon as practicable.

83. The Federal Court of Appeal dismissed Canada's appeal, and so too did a unanimous Supreme Court. The Court declared that Canadian officials had breached Omar's s.7 *Charter* rights. It held that Canada's conduct violated the most basic Canadian standards relating to the treatment of detained youth suspects. Canada had interrogated a youth in order to elicit inculpatory statements about grave criminal charges while he was detained in deplorable conditions without access to counsel, and knew that the products of these interrogations would be shared with U.S. prosecutors. The Court deferred to the Canadian Executive to craft a remedy in conformity with the *Charter* within the legal framework it had set out.

Q. The Executive's Response Fails to Cure the Breach of Omar's Charter Rights

84. On February 16, 2010, in response to the Supreme Court's declaration, Canada sent a diplomatic note to the U.S. Government asking that the U.S. not use any of the information Canada had provided to it in Omar's prosecution. On or around February 17, 2010, Omar filed an application for judicial review of Canada's tepid efforts on his behalf.

85. The Federal Court held that the Executive owed Omar a duty of procedural fairness when making its decision as to how to respond to the Supreme Court's declaration, and that it had failed to provide him with the required level of fairness. Justice Zinn held that it was clear that the Executive had not cured the breach of Omar's *Charter* rights, and he ordered that Canada continue advancing potential curative and ameliorative remedies until the breach of Omar's rights had either been cured, ameliorated or all possible remedies had been exhausted.

86. Eventually the Federal Court of Appeal dismissed Canada's appeal for mootness after a plea agreement was reached, addressed in detail below.

IV. THE COERCED GUILTY PLEA

87. Omar remained in custody at Guantanamo Bay during all of the legal proceedings described above. After having been detained in GTMO for more than eight years, many of them without charge, Omar faced the impossible choice between indefinite detention in GTMO (even were he to be found innocent) or accepting a pre-trial agreement admitting guilt in exchange for being able to eventually return to his family and home in Canada. Omar chose to return home.

88. On October 13, 2010, Omar accepted the Offer for Pre-Trial Agreement (the "Pre-Trial Agreement"). Omar pleaded guilty to all five charges against him. As part of the Pre-Trial Agreement, Omar was also required to:

- a) enter into a Stipulation of Fact;
- b) waive any request for any forensic or scientific testing of physical evidence in the U.S. government's possession;
- c) permit the U.S. government to destroy any evidence in its possession;
- d) waive any claim to confinement credit;

- e) sign a Waiver/Withdrawal of Appellate Rights, through which he waived his right “to appeal this conviction, sentence, and/or detention to the extent permitted by law, or to collaterally attack my conviction, sentence, and/or detention in any judicial forum (found in the United States or otherwise) or proceeding, on any grounds, except that I may bring a post-conviction claim if any sentence is imposed in excess of the statutory maximum sentence or in violation of the sentencing limitation provisions contained in this agreement”; and
- f) agree “[n]ot [to] initiate or support any litigation or challenge, in any forum in any Nation, against the United States or any official in their personal or official capacity with regard to my capture, detention, prosecution to include discovery practice, post-conviction confinement and/or detainee combatant status.”

89. In exchange for Omar’s coerced plea, the Convening Authority, which is the authority in charge of the military commission system at Guantanamo Bay, agreed not to approve a sentence of confinement of greater than eight years, and to take all appropriate actions to support Omar’s transfer from the U.S. to Canada after one year of custody.

90. Under the Pre-Trial Agreement, the Convening Authority also agreed that it:

is a condition precedent to this agreement that duly authorized officials of the United States and Canada exchange diplomatic notes reflecting United States and Canadian Government support for my transfer to Canada to serve the remainder of my approved sentence after completing no less than one additional year in United States custody after the date of approval of [the] sentence.

91. The Canadian government was aware of the circumstances of the so-called negotiations surrounding the Pre-Trial Agreement, and in particular, that the essence of the bargain for Omar was to ensure that he returned to Canada promptly after the expiry of the one further year of confinement as stipulated in the Pre-Trial Agreement.

92. On October 23, 2010, the Canadian and American governments exchanged the diplomatic notes, which were a condition precedent to the Pre-Trial Agreement, and two days later the military judge responsible for Omar’s Military Commission entered findings of guilt on the record against Omar.

93. On or around October 31, 2010, in the presence of a representative from Canada, the military commission sentencing panel sentenced Omar to be confined for 40 years, even though

the prosecution had sought a 25-year sentence. Pursuant to the Pre-Trial Agreement, Omar's approved sentence of confinement could not exceed eight years.

V. THE DELAYED REPATRIATION

94. At the time Omar entered into the Pre-Trial Agreement, he was the last citizen of any Western democracy who remained imprisoned in Guantánamo. More than 20 other detainees from Western countries had already been released upon request by their countries of origin. Canada alone refused to request Omar's repatriation, notwithstanding the fact that, unlike many of the other detainees, Omar was a "child" and a "child soldier".

95. Following the Pre-Trial Agreement, The Americans transferred Omar to a maximum security detention facility restricted for prisoners convicted of offenses. Omar was thrown back into solitary confinement and continued to be subjected to months of prolonged interrogations consisting of a sequence of 9 hours of interrogation per day for 9 days at a time.

96. On or around February 1, 2011, Omar completed an application to be transferred from Guantánamo Bay to a prison facility in Canada. A few months later, on or around May 9, 2011, Omar completed an application with the American government stating that he wished to be transferred to a Canadian prison. Each of these requests was submitted to the appropriate government, in the proper form, all in anticipation of Omar's prompt transfer after the one-year deadline of October 31, 2011 had passed.

97. A memorandum dated October 7, 2011, on the letterhead of the Deputy Minister of Public Safety Canada, sought the Minister's consideration of Omar's request for transfer under the *International Transfer of Offenders Act*. The memorandum explained that the department had received the Correctional Service of Canada's assessment of Omar's request for a transfer, that the file was complete and ready for the Minister's review and decision, and that the Minister should render his decision as soon as possible. In or around March 24, 2012, the Minister's spokesman stated in the media that Omar's file had not yet come to the Minister's office for review, and that its current status was unknown.

98. Ultimately, on September 29, 2012 almost one year after he otherwise should have been qualified to return to Canada, and almost one year after the Minister received his completed application package for consideration, Omar was repatriated. He was initially imprisoned at Millhaven Institution, a maximum security penitentiary located in Bath, Ontario, and is currently

imprisoned at Edmonton Institute, a maximum security penitentiary located in Fort Saskatchewan, Alberta.

VI. THE PRIME MINISTER AND MINISTER MAKE INFLAMMATORY STATEMENTS

99. Throughout his detention at Guantanamo, the Prime Minister and members of the Executive have made inflammatory and often inaccurate public statements about Omar, both in the press and in Parliament during Question Period. These statements demonstrate Canada's ongoing disregard for Omar's legal rights and Canada's own obligations to him. Specific examples of such statements made to the media include:

- a) On or around July 10, 2008, the Prime Minister stated that Canada had no real alternative but to defer to the U.S. legal process to arrive at the truth concerning the accusations against Omar, and that this process should continue;
- b) On or around August 9, 2008, in response to Omar's application for judicial review of the decision not to seek his repatriation, the Prime Minister's director of communications dismissed the application as predictable, and little more than an attempt by Omar's lawyers to avoid a trial;
- c) On or around April 24, 2009, during question period, the Foreign Minister cited video footage of Omar's allegedly building and planting of explosive devices in Afghanistan, and stated that these devices were the devices that had taken away the lives of young Canadian men and women, including Karine Blais, a soldier who had been killed the week before;
- d) On September 29, 2012, on announcing Omar's return to Canada, the Public Safety Minister described Omar as a "known supporter of the Al Qaeda terrorist network and a convicted terrorist"; and
- e) Notwithstanding International Conventions clearly to the contrary, on or around October 21, 2012, the Public Safety Minister stated that Omar was not a child soldier, but rather a convicted murderer and a terrorist.

100. In contrast to the statements made by the Canadian government, international organizations have been consistent in their support for Omar's repatriation and rehabilitation in

Canada. These organizations have also publicized the breaches of Omar's rights relating to his status as a child soldier and the conditions of his imprisonment. These statements include:

- a) On June 1, 2007, a Human Rights Watch report condemned the U.S. for failure to implement juvenile justice standards. Human Rights Watch stated, “According to the US’ own policies, Khadr’s recruiters should be held responsible for exploiting Khadr as a child combatant, and ongoing efforts should be made to educate and rehabilitate him, and prepare for his eventual reintegration into society. But virtually no effort has been expended to this end”;
- b) On November 20, 2007, the United Nations launched a formal protest with the U.S. over its decision to try Omar Khadr. It stated that the decision runs contrary to the Optional Protocol of the UN Convention on the Rights of the Child, which states that persons under the age of 18 who are enlisted or conscripted into armed conflict “are entitled to special protection” under the law;
- c) On July 15, 2008, Amnesty International called for Omar’s immediate repatriation to Canada, stating: “The US has violated international standards by refusing to recognize Omar Khadr’s status as a minor and treating him accordingly”;
- d) On January 18, 2009, the United Nations Special Representative for Children in Armed Conflict, Radhika Coomaraswamy (the "UN Child Representative"), issued an urgent appeal to the Obama administration that the trial of Omar would be a bad precedent, and undermine international legal protection for children. She said “The Obama administration will become the first U.S. administration to prosecute a child soldier for war crimes, flouting international standards that recognize children used as soldiers should be treated first as victims in need of rehabilitation, not abused and prosecuted by an unjust and discredited military commission”;
- e) On February 4, 2009, Amnesty International wrote an open letter to Stephen Harper calling for Omar’s repatriation so that his case would be dealt with under Canadian law in a manner that recognizes his status as a child soldier;

- f) On May 5, 2010, the UN Child Representative called for Omar's release into U.S. custody. She urged U.S. and Canada to treat Omar as a child soldier and take measures needed to rehabilitate him;
- g) On August 10, 2010, the UN Child Representative issued a statement that Omar's trial set a dangerous precedent jeopardizing the status of child soldiers around the world;
- h) On October 27, 2010, the UN Child Representative stated that Omar should not be imprisoned in the U.S. but rather returned to Canada to be rehabilitated. She said Omar's story represents a "classic child soldier narrative: recruited by unscrupulous groups to undertake actions at the bidding of adults to fight battles they barely understand";
- i) On November 2, 2010, Lawyers Rights Watch Canada issued a statement supporting the position taken by the UN Child Representative, stating: "There was never any factual doubt that Khadr was recruited, indoctrinated, trained, deployed as a soldier when he was a child";
- j) In a report issued in or around June 2012, the United Nations Committee Against Torture expressed: "Serious Concerns" About Canada's Compliance with UN Convention Against Torture in relation to Omar. Specifically:

The Committee is seriously concerned at the apparent reluctance on part of the State party [Canada] to protect rights of all Canadians detained in other countries, by comparison with the case of Maher Arar. The Committee is in particular concerned at (parts. 2, 5, 11 and 14) "Canadian officials' complicity in the human rights violation of Omar Khadr while detained at Guantanamo Bay (Canada (Prime Minister) v. Khadr, 2010 SCC 3; and Canada (Justice) v. Khadr, 2008 SCC 28) as well as the delay in approving his request to be transferred to serve the balance of his sentence in Canada;
- k) On July 25, 2012, Amnesty International Secretary-General Alex Neve published an editorial in the *Globe and Mail* calling for Omar's return to Canada, describing him as a child soldier;
- l) On July 27, 2012, the UN Child Representative renewed her call to transfer Omar to Canada, as he was the last child soldier being held at GTMO;

- m) In a report issued in or around October 2012, the United Nations Convention on the Rights of the Child Committee urged Canada to “promptly provide a rehabilitation program for Omar Khadr that is consistent with the Paris Principles for the rehabilitation of former child soldiers and ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada ruled he experienced.”

VII. CANADA IS NOT MEETING ITS OBLIGATIONS TO REHABILITATE OMAR

101. Since Omar’s repatriation, Canada has failed to meet its obligations under the UN Convention on the Rights of the Child in the following ways:

- a) by maintaining custody in a high security facility, Canada has limited Omar’s access to rehabilitation programs;
- b) by maintaining custody in a high security facility, Canada has placed Omar in close proximity to dangerous inmates, which has led to threats and assaults;
- c) Canada has held Omar in segregation for substantial periods of time, in and of itself detrimental, but particularly psychologically harmful to a known victim of torture;
- d) Omar has not received any educational programs;
- e) Omar has not received appropriate medical, psychological or psychiatric treatment since his repatriation;
- f) Omar has been prohibited access to visitors, U.S. counsel, and the media; and
- g) Canada has failed to adequately protect Omar from other inmates.

VIII. CANADA'S FAILINGS

102. This case is not about the acts of terrorism and war that brought on the clash between Omar and his American captors, but about Canada's responsibility to its citizens and its children to respect their rights and protect their interests in keeping with the obligations it has made. At almost every turn, Canada made the wrong choices. Unlike every other western nation with

detainees at GTMO, Canada chose to leave its own citizen imprisoned. Canada did not just sit by while the United States stretched and molded the meaning of pain and torture to justify its tactics, and tossed away previously deeply held commitments to due process and fairness. Rather, Canada facilitated the gathering of information from Omar, knowing that he was a child without the aid or protection of an adult, legal counsel or a fair and balanced legal process. Moreover, Canada knew that Omar was being subjected to harsh and degrading treatment, physical and psychological torture, and that his rights as a child, a child soldier and prisoner were being violated. Canada did not seek to remedy Omar's plight. It sought to take advantage of it.

103. The first obligation of government is to protect its citizens. Over the course of his imprisonment, Canada has repeatedly failed Omar, shirking its legal responsibilities to him as a citizen, and in so doing, failing all Canadian citizens.

104. During the period of Omar's captivity in Guantánamo Bay, Canada knew Omar:

- a) was in jeopardy of being charged by the government of the United States of America for acts he allegedly committed when he was 15 years old, and for which he could face the penalty of death;
- b) faced trial before military commissions convened by the government of the United States of America according to a process which constituted a gross departure from recognized principles of fairness, natural justice and fundamental justice and which would shock the Canadian conscience;
- c) was initially prohibited from receiving any advice from legal counsel, and later was still prohibited from receiving counsel of his choice in respect of his criminal prosecution;
- d) was prohibited from contact with members of his family;
- e) was regularly and rigorously interrogated by officials of the United States government;
- f) was never brought before an independent judicial authority for the purpose of determining his legal status or the validity of his detention;
- g) was held for a total of 1,197 days (or 3 years, 3 months, and 9 days) without charge and was to be detained apparently indefinitely;

- h) was generally deprived of all the legal rights conferred upon him by international law, including those reflected in the *United Nations Convention on the Rights of the Child* and the *Geneva Conventions*;
- i) was the victim of criminal offences committed against him by officials of the government of the United States of America contrary to s. 3(10) of the *Geneva Conventions Act of Canada* and s. 6 of the *Crimes Against Humanity and War Crimes Act of Canada*;
- j) was tortured by officials of the United States of America, including through the infliction of a sleep deprivation program known as the “frequent flyer program”;
- k) was effectively forced to plead guilty, under duress, and as part of a fundamentally flawed legal process, to offences not known to law (indeed, one of the charges upon which he was convicted was later declared unconstitutional) as the only means available to him to attempt to secure his liberty from GTMO; and
- l) was facing evidence obtained through Canada's unlawful interrogations.

105. Canada's knowledge of Omar's circumstances was described in *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44 at paragraph 24, in which the Supreme Court of Canada wrote:

We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of habeas corpus. It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in Khadr 2008, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (Khadr 2008, at paras. 23-25; Hamdan v. Rumsfeld). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hooper, Exhibit “GG” to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (CSIS's Role in the Matter of Omar Khadr, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in Jawad as

designed to “make [detainees] more compliant and break down their resistance to interrogation”

106. The Court further found at paragraph 31:

The acts that perpetrated the Charter breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr’s liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

107. Contrary to Canada’s legal obligations, throughout his incarceration in Afghanistan, GTMO, and continuing on his return to Canada, Omar has not been provided with any meaningful rehabilitative opportunities, including education, counseling, medical attention and other therapy, which should be afforded to him, given that he was a child when he allegedly committed the offences and his status as a “child soldier” as defined by international convention. In fact, rather than pursuing Omar’s rehabilitation since his repatriation to Canada, government leaders have spoken out against Omar, labeling him a terrorist, and wrongly denying his status as a child soldier.

108. Furthermore, since his repatriation, Omar has suffered from a restrictive security classification. He has been incarcerated in a federal penitentiary for adults, which has resulted in assaults, threats, exposure to dangerous situations and persons and has included significant periods of segregated custody. In addition to the damages sustained as a result of this treatment, Omar was directly assaulted on June 14, 2013.

109. Through the above noted acts and omissions, Canada and its agents have engaged in deliberate and unlawful conduct in the course of exercising their functions, knowing that such conduct is contrary to international and domestic law, and that it would and in fact has caused damages to Omar.

110. Canada owed Omar a duty of care which it breached, in the manner and through the means identified above, resulting in damages to Omar.

111. Omar was deprived of his liberty, against his will and without an opportunity to test the legality of it, as a result of Canada's failures towards him.

112. Canada and her agents acted in concert with American agents pursuant to an express or, in the alternative, tacit agreement to procure evidence from Omar both for the purpose of its own potential prosecution of Omar and to aid in the U.S. prosecution of Omar contrary to his rights

and in an unlawful manner, knowing that it was likely to cause damages to Omar, and that it was in fact causing damages to Omar.

113. Canada's conduct was flagrant and outrageous and calculated to produce harm, and in fact did produce harm, all of which is particularized below.

IX. DAMAGES

114. As a result of the torture at the hands of his American captors, in which Canada was complicit, Omar has suffered the following damages:

- a) severe and permanent psychological, physical and emotional trauma;
- b) loss of educational opportunities;
- c) loss of social development, leading to permanent social impairments;
- d) worsening physical health because of inadequate medical support, including degeneration of eyesight
- e) threats and assaults while in custody, both in Canada and during the prior detention;
- f) loss of sleep;
- g) loss of trust in others;
- h) loss of self-confidence;
- i) loss of income;
- j) loss of opportunity for future income; and
- k) post-traumatic stress disorder.

115. As confirmed by the declaration of the Supreme Court of Canada, and as is clear from domestic and international law, Canada not only failed to come to Omar's aid, in violation of his rights, but Canada actively, knowingly and willfully participated in harming Omar, all of which justifies the imposition of a substantial award of punitive, exemplary and *Charter* damages, both to repair the Plaintiff and to deter future similar actions by Canada.

X. STATUTES & INTERNATIONAL INSTRUMENTS RELIED UPON

116. The Plaintiff pleads and relies on the following international conventions which Canada has ratified:

- a) United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (defined above as UN-CAT);
- b) International Covenant on Civil and Political Rights;
- c) United Nations Convention on the Rights of the Child.

117. The Plaintiff pleads and relies on the following international instruments:

- a) United Nations Rules for the Protection of Juvenile Delinquency (The Riyadh Guidelines);
- b) United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); and
- c) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- d) Standard Minimum Rules for the Treatment of Prisoners; and
- e) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

118. In addition, the Plaintiff pleads and relies upon the provisions of the *Canadian Charter of Rights and Freedoms*, including ss.7, 8, 9, 10, 12, 15 and 24.

119. The Plaintiff proposes that this action be tried in Toronto.

March 15, 2004 amended November 8, 2004,
Amended Amended May 15, 2009

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OMAR AHMED KHADR
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v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
Defendant

Court File No. T-536-04

FEDERAL COURT

Proceeding commenced at
EDMONTON

**AMENDED AMENDED AMENDED
FRESH AS AMENDED STATEMENT OF CLAIM**

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