

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

(Appellant)

- and -

RAHEEM KHAN

(Respondent)

RESPONDENT'S FACTUM

**Bunda, Cho, Paterson and Stanikowski Associates
367 Bloor Street**

**Kasia Bunda, Hannah Cho, Rachelle Paterson and Nicole Stanikowski
Of Counsel for the Respondent**

**Telephone: (416)788-2324
Fax: (416)788-7625
Email: bcps@lawfirm.com**

PART I:
INTRODUCTION

1. This case is about the breaches of Canadian Charter of Rights and Freedoms towards a Canadian minor on Afghanistan soil. Despite the fact that the investigation was taken place outside of Canada, the Canadian Charter of Rights and Freedoms applies due to the direct involvement of RCMP officers in Afghanistan. In this case it is seen that the Ontario Superior Court of Justice agrees that the Applicant's rights were denied in regards to section 9, (right not to be arbitrarily detained or imprisoned), section 10(a), (right on arrest or detention to be informed promptly of the reasons) as well as section 10(b), (right on arrest or detention to retain and instruct counsel without delay and to be informed of that right) which all had been violated due to the unknowing of his arrest as well as exceeding the time period of being detained. Justice Garcia rules that the Charter does apply to Raheem Khan's prosecution and subsequent trial here in Canada, as well as stating that the admission of the statements would violate the appellant's liberty interests in a manner that is contrary to the principles of fundamental justice or his fair trial rights under s. 11(d), the statements then were excluded. As the Appellant's we strongly stand behind Justice Garcia's decision.

PART II:
SUMMARY OF THE FACTS

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

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

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

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

13. The interview lasted approximately three hours. There was no evidence of torture or other oppressive circumstances. While the ABP did not explain to the Respondent the purpose of the interview or the reason for his continued detention, the trial judge found that it was clear that the Respondent suspected these reasons; he inquired, half-way through the interview, whether the questioning had anything to do with his family in Canada.
14. One year following his interview in Afghanistan, the Respondent was charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the *Criminal Code*. At trial, the Crown sought to introduce statements made by the Respondent to the ABP in Afghanistan. The Respondent opposed the introduction of these statements into evidence. He brought an application before the trial judge, arguing that his *Charter* rights had been violated and the statements had to be excluded. The trial judge granted his application and the statements were excluded.
15. Following his detainment in Afghanistan, Mr. Khan appealed for the statements he made while in custody of the ABP to be excluded from the evidence. Justice Garcia ruled in favour of Raheem Khan, and the evidence was deemed inadmissible because the Charter did apply in this case, and therefore the violation of Khan's rights implemented section 24(2) of the Charter. In regards to the application of the Charter, Justice Garcia justified going against precedent set by R v. Hape stating:
 16. The unique facts in this case compel me to conclude that the detention and questioning of the Applicant was, unlike the case in *Hape*, under control of the RCMP and therefore within the authority of the government of Canada.

Reasons for Decision, para. 22.

17. This supports and justifies that the Charter does apply in this case. In the inquiry as to whether there was a breach in the Charter, Justice Garcia remarks bluntly:

18. There is little doubt in my mind that if this detention and interrogation had taken place in Canada it would have breached the *Charter*.

Reasons for Decision, para. 27.

19. The breach in the Charter is almost undeniable, as sections 9, 10 a, b of the Charter were violated in the case of Raheem Khan, supported by Garcia. Under the circumstances, it is also expressed that the collected evidence should not be admitted, as it would bring the administration of justice into disrepute. Justice Garcia concurs, stating:

20. The unique circumstances of this case, the nature of the conduct of the Canadian government and the impact on the accused is sufficient for me to conclude that the admission of statements would bring the administration of justice into disrepute.

Reasons for Decision, para. 44.

21. In the event that the Charter was found not to apply to this case, Justice Garcia found that the admission of evidence would not threaten the right to a fair trial. Although irrelevant if it is found that the Charter does apply, Justice Garcia commented:

22. I would not have excluded the statements pursuant to either s. 7 or s. 11(d) of the *Charter* as their admission would not violate the Applicant's right to a fair trial.

Reasons for Decision, para. 50.

PART III GROUNDS OF APPEAL

ISSUE ONE: DOES THE CHARTER APPLY?

23. In the *Charter of Rights and Freedoms 1982*, Section 32(1) reads:
24. 32. (1) This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
25. The basic interpretation of this section is that the *Charter* applies to any event conducted within the authoritative powers of Parliament or the Canadian Government. It does not state specific geographical parameters in which this section applies, but the application to any Canadian officials is emphasized. In terms of this case, it is essential to note the circumstances under which Raheem Khan was detained. The RCMP did not take precedential legal measures to retrieve the information they wanted from the imprisoned minor, but secretly manipulated the Afghan Border Police to do the inquiries for them. Therefore, although the ABP were, in fact the persons who questioned Khan, they did not do so on their own accord. Since they were only the pawns used by the RCMP to conduct the investigation, they should not be held responsible for the portion of the investigation circled around terroristic issues. Given that everything had taken place as a result of the RCMP's authority, Section 32(1) distinctly communicates that the *Charter* does apply to the actions taken abroad.

Reasons for Decision, para. 19.
Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s 8, 24.
(the "*Charter*")

26. The main grounds of the Applicant's argument directly concern the application of section 32(1) of the *Charter* to this case because "should the *Charter* not apply to the conduct of the investigation, the admission of statements would violate his right to a fair trial in Canada." Since his rights were infringed upon overseas, he wants to enforce justice on this basis.

Reasons for Decision, para. 2.

27. Although the government did have reason to believe that Khan was involved in terrorist related activities, there is no justification to the illegal events that took place, for example, "the Applicant was not given access to any consular officials or legal counsel." Assuming that the evidence was crucial to the ongoing investigation about the suspected relations between his family and Al Qaida, the RCMP should have acted as interveners in the seizure of Khan and engaged in a legal investigation. However, given this is not what happened, he should have the right to a fair trial fulfilled because it was at the fault of Canadian authorities that his rights were denied.

Reasons for Decision, para. 13.

28. The territorial boundaries of countries are irrelevant in this case since it was the Canadian authorities that were exercising their power over the ABP. Given it was the ABP that was conducting the lengthy investigation; the Applicant would have no grounds on which to be tried in the Canadian courts. However, that is not the case, and the *Charter* would likewise apply if the RCMP would be violating a Canadian's rights in any other country. In the case of R v. Cook, the accused murderer was

arrested in the United States before being brought back to Canada for interrogation and was clearly stated that:

29. The *Charter* is not absolutely restricted in its application to Canadian territory. It applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32(1) of the *Charter* on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state.

***R v. Cook*, [1998] 2 S.C.R. 597**

30. “The RCMP instructed the ABP not to tell the Applicant that they were questioning him in respect of a criminal prosecution against his father and brother in Canada,” which clearly identifies that the RCMP did not want to be held accountable for the investigation and is proof that they had thoroughly organized the ordeal. However, the mere arrest and initial detainment of Khan cannot be bound by the *Charter*, since it was based solely on the judgment of the ABP. Nonetheless, everything that happened once the RCMP were informed of his confinement and elongated his time in captivity by manipulating the Afghan Border Police is fully covered by the *Charter of Rights and Freedoms*.

***Reasons for Decision*, para. 14.**

31. The controversial debate about whether or not Canadian administrative forces implemented abroad should be bound by the *Charter* is not a new issue. The case of *R v. Hape* deals with the application to extraterritorial searches and seizures by Canadian police officers. It was distinctly conveyed that:

32. While the terms of s. 32(1) do not extend the application of the *Charter* to the actions of foreign officials, they do not imply that the *Charter* cannot apply to Canadian police officials acting abroad. Section 32(1) defines who acts, not where they act. Since s. 32(1) does not distinguish between actions taken on Canadian soil and actions taken abroad, it includes all actions of Canadian police officers. Canadian officers conducting an investigation in another country must abide by standards set for actions taken in Canada where the foreign state takes no part in the action and does not subject the action to its laws.

R v. Hape, [2007] 2 S.C.R. 292

33. Furthermore, because the RCMP was directly involved in employing the ABP to conduct the interrogation of Khan, they are held fully responsible for the violation of the minor's rights. Given the ABP conducted the inquisition on their own accord, the *Charter* would clearly not apply, such as in the case of *R v. Harrer*, where U.S officials questioned a Canadian within the United States. It was said that:

34. The *Charter* had no direct application to the interrogations in the U.S. because the U.S. authorities were not acting on behalf of any Canadian government. An entirely different issue would have arisen had the interrogation about a Canadian offence been made by Canadian police officers in the United States or by U.S. authorities acting as agents of the Canadian police ...

35. Consequently, it is distinctly implied that the *Charter* would, in fact, apply to had Canadian officials been the direct cause of the interrogation, which they were in the case of *R v. Khan*.

R v. Harrer, [1995] 3 S.C.R. 562

36. Raheem Khan's rights were clearly infringed upon while he was detained in Afghanistan by the ABP. Since the lengthy interrogation was implemented by

RCMP officials, Khan is obligated to receive a fair trial because he is protected by the *Charter*.

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

37. In regards to Raheem Khan and his rights as a Canadian youth the Applicant strongly believes those rights under the Canadian Charter of Rights and Freedoms have been breached by the RCMP as well as the Afghan Border Police. The ABP failed to inform Mr. Khan's family on his whereabouts and also arbitrarily detained him for a period of time that exceeded what he would have experienced for the immigration violation including the lack of evidence to why he was detained Mr. Khan's rights guaranteed under s.9 of the Charter have been infringed upon.
38. In the case of R v. Clayton 2007 judges Binnie, LeBel and Fish JJ clear state "Individuals going about their ordinary business should not be blocked by the police and required to account for themselves unless there exists legal authority for the detention...The accused were arbitrarily detained within the meaning of s. 9 of the Charter"
39. The case of R v. Clayton 2007 strongly relates to our case because Mr. Khan was going about his ordinary business and was detained by the ABP without legal authority for the detention. In March of 2008 the Crown's prosecution was focused on the activities of the Applicant's father and older brother, Mr. Khan was not charged with any offence nor was he a suspect in the investigation which brings up the point that there was no legal authority for the detention and therefore was a breach of s.9 of the Charter.

Everyone has the right on arrest or detention to be informed promptly of the reasons (s 10a)

40. There is no evidence that the ABP ever informed the Applicant that he was being detained in respect of a criminal investigation into the activities of his brother, or of his right to retain and instruct counsel therefore his rights under section 10 (a) were infringed upon.
41. Not only in the case of Raheem Khan did the officers fail to inform promptly of the reason for arrest but also in the case of R. v. Nguyen, 2008 where the informational requirement of s. 10(a) were further analyzed
42. The common law right was essentially described as follows: a person is entitled to be informed of the reason why he or she is being restrained, unless the circumstances are such that he or she knows why. The reasons do not need to be expressed in technical or precise language, but must, in substance, inform the person as to the reason why the restraint is being imposed.

***Christie v. Leachinsky*, [1947]**

43. Within the Nguyen 2008 case it was conceded that the appellant's s. 10(a) right was violated. The violation of that right gave rise to the very evidence that resulted in the appellant's conviction. Had the information required by s. 10(a) been conveyed to the appellant, he may not have answered the police officer's questions, and the police thus may not have obtained the evidence relied on by the Crown to obtain the appellant's conviction. Which in the case of Mr. Khan he may not have answered the Afghan Border Police questions and his rights under section 10a was breached.

Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. (s.10b)

44. When the Applicant's detention came to the attention of officials at the Canadian embassy in Kabul, no Canadian consular official intervened on the Applicant's behalf or took any measures to assist him. A detainee is entitled under the information component of s. 10(b) of the Charter to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction and how such advice can be

accessed. Police are obliged to inform all detainees fully of their right to try to contact counsel immediately on detention, and that the right to do so is not restricted to persons who can afford private counsel. The caution given here did not satisfy the minimum requirements.

45. In relation to Mr. Khan's rights under section 10b being breached, multiple other cases and judges testimonies have agreed with this very breach. In the R v. Harper 1994 case Justice McLachlin states:

46. The violation occurred even before the failure by the police to inform the appellant of the existence and availability of duty counsel. The violation of the informational component of s. 10(b) was complete once the police failed to convey properly to the appellant that he had a right to have an opportunity to consult counsel immediately, even if he could not afford the services of a private lawyer. As there was a system of duty counsel in the jurisdiction at the time of the appellant's detention, the police were under the additional duty to inform the appellant of the existence and availability of free and immediate, preliminary legal advice.

R. v. Harper, [1994] 3 S.C.R. 343

47. This may relate only to the facts of the Harper case but in comparison to the police officers failure to inform the appellant, the ABP failed to inform Khan of the existence and availability of counsel which breach Charter section 10b.

ISSUE THREE: SHOULD THE STATEMENTS BE EXCLUDED FROM EVIDENCE?

48. Under Section 24(2) of the Charter, there is an expectation that evidence obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. Considering the surrounding suspicion of the Government of

Canada and the RCMP's actions, the evidence obtained and the circumstances surrounding it would bring the public to question the justice system, throwing it into disrepute.

Canadian Charter of rights and Freedoms, Schedule B, Constitution Act, 1982 s. 24(2),
24. (the "Charter")

49. Revisions were made to the structure of evaluating section 24(2) formed by R. v. Collins, [1987] after the case of R v. Grant was heard in 2009. Considerations for three specific issues determine whether evidence should be excluded from a trial in the *Grant Test*:

1. The Seriousness of the Charter-infringing state conduct
2. The impact on the Charter-protected interests of the accused
3. Society's interest in an adjudication on the merits

50. The following arguments support that this appeal by the Crown should be dismissed, all following the guidelines put forth by the *Grant test*.

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

51. The RCMP aggressively pursued Mr. Khan on such an extensive level that it raises question about their suspicious conduct in this case. When informed of Mr. Khan's detainment, the RCMP based in Afghanistan felt it was right to seize the opportunity to question a minor in need of assistance. For a government agency to act against a citizen by not providing their right to legal counsel, not respecting their status as a minor and detaining them for an extended amount of time would fall into a severe category of infringement.

52. A lack of several of these key factors led to evidence admissibility in the case of R v. Harrison [2009]. Having these certain breaches would have been much

favourable to the accused, and these are present in the case against Mr. Raheem Khan.

53. Thus, it is clear from the objective facts and the circumstances of this case that the violation of the rights of the accused did not have a serious impact on the *Charter*-protected interests. The trial judge's rejection of the officer's testimony is irrelevant to the protection against unreasonable search and seizure. The accused was not detained longer, nor were his rights infringed further during the stop and the search, because of this testimony.

R. v. Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494 (para 7)

54. Based on this previously decided on criteria, this case has had a serious Charter infringement conducted by the RCMP based in Afghanistan. In *Harrison*, there was an absence of lengthy detainment and no further infringements past the initial violation. Continued breaches and an unreasonable detainment contrive Mr. Khan's case to be far more serious due to multiple infringements, and this give a logical determination that the Charter violations were quite serious in this case.

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

55. In the case summary, Justice Garcia commented that "the impact of the Charter breach on the accused is severe." [Trial Decision paragraph 43.] The evidence that is under dispute is a direct result of these Charter infringements and without them would never have materialized. Mr. Khan was a minor in this stress-inducing situation and without the protection of the Charter exposed to him, left him completely vulnerable.
56. Questioning took place that was completely irrelevant to the original detainment of Mr. Khan, concerning the actions of his family, not his own person. Intruding into familial matters which a minor may have skewed and easily penetrable thoughts on invades an expected level of privacy and comfort. In Mr. Khan's interests, the

protections under the Charter were imperative to keeping his person secure and his statements reliable.

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

57. The circumstances surrounding Raheem Khan and his case also apply to the 'community shock test', established by *Rothman v. The Queen* [1981]. As well, *R v. Collins* [1987] instituted that "The threshold for exclusion under s. 24(2) is lower than that under the "community shock test" enunciated in *Rothman v. The Queen*." Under this decision, any evidence garnered under the following techniques would result in tarnishing the administrative' system's image to the point of disrepute:

58. There first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes for necessity resort to tricks or other means of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.

***Rothman v. The Queen*, [1981] 1 S.C.R. 640 [page 641-2]**

59. The RCMP acted in a way to disassociate themselves from the investigation, employing ABP officers to use their scripted questions. This raises the sense that the RCMP knew their investigation would be radically intrusive and shocking to the public, as they initially tried to mask their true intentions and sever ties. As Raheem Khan is by no means a "sophisticated criminal", it is impossible to justify resorting to 'trickery', such as questioning without allowing legal counsel or changing the focus of an investigation from a border issue in Afghanistan to alleged funding of terrorism in Canada.

60. If the outcome led to a support of the misguided government officials, the administration of justice would fall into disrepute. Ignoring the mistakes made, added to the initial breach of guaranteed Charter rights would bring about public outrage. As said in R v. Grant, “[R. v. Grant, 2009 SCC 32 [2009] 2 S.C.R 353] paragraph 11]. The fact of the *Charter* breach means damage has already been done to the administration of justice.”
61. To cause complete distrust would only take an exposure of suspicious activity, as conducted here in the case of Mr. Khan.
62. Raheem Khan's statements were made under irresponsible conduct by the RCMP in a unique circumstance. Based on these precedent cases and the trial decision to exclude the evidence, the evidence should not be admissible. The unreliability directly caused by the Charter infringements and the suspicious actions by the Canadian officials would cause disrepute to the justice system and therefore the statements are inadmissible.

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

63. In the case the Charter does not apply, the admission of the statements nonetheless violates the Applicant’s right to a fair trial. Under s. 7 of the Charter, everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Examining the circumstances of how the evidence was obtained shows Mr. Khan’s deprivation of his security.

Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s 7, 24.
(the “Charter”)

A) Mr. Khan was deprived of his Security

64. Determining the “serious state-imposed psychological stress,” as stated by Dickson C.J. in the case *R v. Morgentaler*, concerns two specific requirements that must be met in order for one’s security be considered to be deprived of:

- 1) The psychological harm must be imposed by the state
- 2) The psychological prejudice must be serious

65. The following arguments support that this appeal by the Crown should be dismissed, all following the previous guidelines.

1) The psychological harm must be imposed by the state

66. Although the members of the Afghan Border Police were the ones directly questioning the respondent, the RCMP were the ones controlling the investigation. The RCMP in Canada, who were conducting the investigation against Mr. Khan’s father and brother, ordered that the RCMP in Afghanistan question the applicant to find affiliations between the respondent and his father and brother’s financing terrorism charges. The ABP was also provided with an audio recording device by the RCMP to record their interview with Mr. Khan.

R. v. Morgentaler, [1988] 1 S.C.R. 30

2) The psychological prejudice must be serious

67. The RCMP’s decision to question and interview Mr. Khan, a minor at that time, in Afghanistan through a foreign police force is quite discomfoting. It brings up the issue of the RCMP’s intention of taking advantage of the Canadian legal system and the ABP to obtain financing terrorism links between Mr. Khan and his father and brother. It is reasonable to believe that the RCMP wanted to escape the application of the Charter during the interview or did not want the respondent to know who was asking

the questions. The ABP's lack of action, under the control of the RCMP, to give the respondent any consular officials or legal counsel is a serious infringement, along with their dismissal of contacting the respondent's family members.

Reasons for Decision, para. 25.

68. The respondent was interrogated far longer than he should have been. Evidence proved that the ABP would have released the respondent within 24 hours after establishing his identity and confirming he was not involved in illegal schemes. However, since the RCMP intervened and decided to take advantage of using him to find out more information of his family's financing terrorism charges, he was detained for another two days. The respondent's psychological stress and vulnerability is due to the delay in the human rights process.

Reasons for Decision, para. 15.

B) This deprivation was not in accordance with the principles of fundamental justice.

69. The case of *R v. Big M Drug Mart Ltd.*, gives the court the opportunity to interpret "the principles of fundamental justice" when it states:

70. The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter's* protection."

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

71. As the court stated in the case of *R v. Big M Drug Mart Ltd.*, it is imperative for the court to examine s. 7 of the Charter with a thoughtful approach. The purpose of the Charter is further explained when it states:

72. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

73. This statement is fully supported by the examinations made in the case of *R v. Hape* when Justice declares:

74. The purpose of the *Charter* is not simply to serve as a basis for an *ex post facto* review of government action. The *Charter's* primary role is to limit the exercise of government and legislative authority in advance, so that breaches are stopped before they occur.

R v. Hape, [2007] 2 S.C.R. 292

75. However, in the case of *R v. Khan*, it seems acceptable to imagine that the RCMP believed that they would be able to escape the restrictions placed on them by the *Charter*. The issue before the court is whether the admission of the evidence obtained will cause unfairness to the trial of the respondent. In the case *R v. Piraino*, O'Leary J. formulates the test under the Charter as an "individual rule that is so unfair that it will result in an unfair trial being had will be struck down."

R v. Piraino, [1982], 67 C.C.C. (2d) 28

76. The deprivation of Mr. Khan's security was not in accordance with the principles of fundamental justice. The detainment of Mr. Khan, a minor during that time, is very unnerving. The government's decision was not to protect the young citizen, but abuse the case's extraterritorial setting to hamper the citizen's rights further to continue their investigation. By admitting the evidence obtained by the ABP through their interview with the respondent, it is violating Mr. Khan's right to a fair trial, which is described by Justice McLachlin when he states:

77. At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community...A fair trial is one which satisfies

the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

R v. Harrer, [1995] 3 S.C.R. 562

78. The case of R v. Khan does not comply with the public's interest at getting at the truth. Hearing the word 'terrorism' immediately creates a reasonable apprehension of prejudice against the respondent. The process of creating judicial impartiality in the mind of a fully informed person would not be successful. Therefore, the evidence should be immediately considered inadmissible.
79. Under section 11(D) of the Charter, any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Section 7 of the Charter is fundamental to this section as the presumption of innocence preserves one's liberty and human dignity.

**Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s 11(d),
24.
(the "Charter")**

A) Presumption of innocence

80. According to the case of R v. Oakes, one's presumption of innocence is taken in very high regard. This is shown when it states:
81. The Canadian *Charter* jurisprudence on the presumption of innocence in s. 11(d) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the *Charter*, they are reasonable and demonstrably justified in a free and democratic society.

R. v. Oakes, [1986] 1 S.C.R. 103

82. In R v. Khan, it is clearly seen that Mr. Khan, a minor during this event, had not been presumed innocent before his detainment. When the detention of the respondent came to the attention of the Canadian embassy in Kabul, no Canadian officials were there to aid him. Instead, the RCMP made plans to ignore the respondent's status as a minor and use this opportunity to interrogate and search for possibilities of financial terrorism connections between the respondent and his family.

Reasons for Decision, para. 11.

B) Fair and Public Hearing

83. By admitting the evidence obtained during the respondent's detainment and interview by the ABP, it would render the trial unfair. Mr. Khan, a minor during the time of his detainment, was taken advantage of by the RCMP. His detainment and interview by the ABP were controlled by Canadian officials in order to obtain possible evidence and connections between him and the financial terrorist connections of his family. Previously, Mr. Khan was neither charged with any offence nor a suspect in the Crown's investigation against his father and brother. However, the respondent was put through psychological stress and harm without the aid of legal counsel and the notification of his parents. Moreover, admitting the evidence would fail the purpose of judicial impartiality as a reasonable apprehension of prejudice would be formed in the mind of a fully informed person. Therefore, the evidence obtained is unfair and should be deemed inadmissible.

APPLICATION TO THIS CASE

84. In conclusion, the Respondents find that this appeal should be dismissed. The *Charter* does apply to this case because of the RCMP's direct involvement in the interrogation of Khan at the Afghanistan border. His rights were clearly infringed upon because he was a minor, was not detained for over 24 hours, was not given legal counsel or a reason for his detainment, and his family was not informed. The evidence gathered in

the questioning should be excluded because it was obtained illegally. The defence suggests that if the evidence is deemed admissible, the administration of justice would fall into disrepute and the fundamental justice secured by the Charter would be breached significantly. Lastly, Khan was deprived of his right to fair trial because his rights to security of Section 7 of the *Charter* were breached, and was not presumed innocent. As a final request, we would like for the Crown's appeal to be dismissed.

PART IV
ORDER REQUESTED

85. It is respectfully requested that the appeal be dismissed and that the judge be persuaded to deem the evidence inadmissible.

ALL OF WHICH is respectfully submitted by

Kasia Bunda, Hannah Cho, Rachelle Paterson and Nicole Stanikowski
Of Counsel for the Respondent

DATED AT TORONTO this 19th Day of **April, 2011**

APPENDIX A

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