ONTARIO

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

361 University Avenue
Toronto, ON M5G 1T3

Telephone: (416) 327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: August 19, 2008

TO:	**FAX NO.:**
Mr. Howard Piafsky & Mr. Mathew Sullivan	416-973-8253
Mr. Dennis Edney	780-425-5247
Mr. Nathan Whittling	780-423-2870

FROM: Cathy Lanni, Secretary to The Honourable Mr. Justice Gary T. Trotter

TOTAL PAGES (INCLUDING COVER PAGE): 25

MESSAGE: **Reasons for Decision: USA v. Khadr**

Received Aug-19-2008 02:18pm From-416 327 5417 To-PARLEE McLAWS LLP Page 001

COURT FILE NO.: EX0037/05
DATE: 20080819

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE UNITED STATES OF AMERICA	Howard Piafsky and Matthew Sullivan, for the Extradition Partner/Respondent
Extradition Partner/Respondent	
- and -	
ABDULLAH AHMED KHADR, AKA ABU BAKR	Dennis Edney and Nathan J. Whitling, for the Person Sought/Applicant
Person Sought/Applicant	
	HEARD: August 6-8, 2008

TROTTER J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Abdullah Khadr is wanted in the United States to face allegations that he procured munitions and transported explosive components for use by Al-Qaeda against U.S. and Coalition forces in Afghanistan.

[2] Pursuant to a Provisional Arrest Warrant, Mr. Khadr was arrested in Canada on December 17, 2005. On December 23, 2005, my colleague, Molloy J., denied Mr. Khadr's application for bail pending these extradition proceedings. In reasons reported at (2006), 205 C.C.C. (3d) 109, Molloy J. found that Mr. Khadr's detention was warranted on the primary and tertiary grounds in s. 515(10)(*a*) and (*c*) of the *Criminal Code*, R.S.C. 1985, c. 46, respectively.

[3] Mr. Khadr seeks to review the decision of Molloy J., alleging that a material change in circumstances now justifies his release. For the reasons set out below, it is my view that, while Mr. Khadr's circumstances have changed somewhat, his detention in custody pending the extradition proceedings is still required.

THE FACTUAL BACKGROUND

(a) The Alleged Offences

[4] At the time Mr. Khadr was ordered detained by Molloy J., the Minister of Justice had yet to issue an Authority to Proceed, pursuant to s.15 of the *Extradition Act*, S.C. 1999, c. 18. On March 15, 2006, an Authority to Proceed was signed. This document identifies the following *Criminal Code* offences that correspond to the allegations made against Mr. Khadr by the U.S.: (i) knowingly making property available to a terrorist group (s. 83.03(*b*)); (ii) knowingly participating in or contributing to the activity of a terrorist group for the purpose of enhancing the ability of the terrorist group to carry out a terrorist activity (s. 83.18); (iii) conspiracy to traffic in weapons (ss. 99 and 465(1)(*c*)): (iv) possession of an explosive substance (s. 82(1)); and (v) commission of an indictable offence for the benefit of, at the direction of, or in association with a terrorist group (s.83.2).

[5] The case against Mr. Khadr is now set out in the Record of the Case (ROC) and a number of Supplemental Records of the Case (SROCs). It is accepted by both sides that the entire case against Mr. Khadr rests on statements that he allegedly made while detained in Pakistan and when he returned to Canada.

[6] Mr. Khadr was arrested and detained in Pakistan in October of 2004. It was believed that he had been involved in a plot to assassinate the Prime Minister of Pakistan. Mr. Khadr made certain admissions that he was involved with another in assessing the logistics and feasibility of this plan. Shortly after his arrest, U.S. officials obtained permission from Pakistani authorities to interview Mr. Khadr for intelligence purposes. These interviews were not conducted as part of a criminal investigation. The Extradition Partner does not rely on these statements as part of the evidence to justify Mr. Khadr's extradition.

[7] In July of 2005, Mr. Khadr was still in the custody of Pakistani authorities. He was interviewed by two agents from the Federal Bureau of Investigation (FBI). This interview was preceded by cautions and waivers concerning Mr. Khadr's right to retain counsel and his right to silence. Over the course of three days, Mr. Khadr discussed his family history, his experiences in an Al-Qaeda training camp and the time that he and his family spent at the family compound of Osama bin Laden. He said that his father, Ahmed Said Khadr, now deceased, who officials in the U.S. believe was a senior level member of Al-Qaeda and a direct associate of Osama bin Laden, asked Mr. Khadr to assist in procuring weapons for Al-Qaeda. In an affidavit filed in relation to another aspect of this extradition request, Mr. Khadr has denied that his father was a member of Al-Qaeda.

[8] During his July 2005 interview, Mr. Khadr stated that, over a six month period in 2003, he purchased AK-47 and PK machine gun rounds, rocket-propelled grenades, rockets, and 82mm and 120mm mortar rounds, which he delivered to another associate of Al-Qaeda. During this interview, he stated that he thought that half of the ammunition was used for training purposes, while the other half was used for fighting against the U.S. and Coalition Forces. Mr. Khadr also said that he delivered 45 containers of hydrogen peroxide (an explosive compound), which was used to make land mines for use against U.S. and Coalition Forces. Mr. Khadr described to the FBI officers how the land mines were prepared. He said that about 60 land mines were completed, some of which contained the hydrogen peroxide he provided.

[9] As his interview concluded with the FBI in Pakistan, Mr. Khadr said he would provide more information to them when he was back in Canada.

[10] Mr. Khadr was returned to Canada on December 2, 2005, after being in custody in Pakistan for roughly 14 months. After he returned, Mr. Khadr was interviewed on a number of occasions. He provided a brief statement to an RCMP officer at Pearson International Airport on the date of his arrival. Before speaking to the RCMP, Mr. Khadr was apprised of his rights. The interview was conducted in a relaxed manner. Counsel for Mr. Khadr submitted that no inculpatory information was obtained from Mr. Khadr. I find this submission difficult to accept. In this interview, Mr. Khadr spoke of helping other individuals "check" the quality and functionality of weapons purchased by someone else for the "Shura Council" (presumably the Mujahideen Shura Council in Afghanistan). He said he did this on two occasions. Even assuming that the statements Mr. Khadr made were not inculpatory in terms of the specific allegations faced by Mr. Khadr, they are highly relevant to the question of bail. I will return to this interview later in these reasons.

[11] Two days later, on December 4, 2005, Mr. Khadr agreed to meet with the two FBI agents who had interviewed him in Pakistan. The meeting took place in a hotel near the airport in Toronto. Prior to the interview, Mr. Khadr was advised of his rights under both Canadian and U.S. law. In this interview, Mr. Khadr confirmed a great deal of what he had told the FBI when he was detained in Pakistan. He told the agents that the money that he used to purchase munitions came from the Shura Council (of which his father was chairman), ultimately having originated from Osama bin Laden and Al-Qaeda. He admitted that shortly before his arrest by Pakistani forces in 2004, he had attempted to purchase surface-to-air missiles from a Pakistani source for re-sale to an Al-Qaeda weapons procurer.

[12] Finally, Mr. Khadr was interviewed after he was arrested on the Provisional Warrant of Arrest on December 17, 2005. After consulting with counsel, Mr. Khadr declined to provide any further information.

(b) Background of the Person Sought

[13] Mr. Khadr was born in Ottawa, Canada on April 20, 1981. Mr. Khadr has lived in Canada only sporadically. For many years, he and his family have lived at various locations, mostly in Pakistan and Afghanistan.

[14] On this bail review application, counsel for the Extradition Partner relied on a good deal of material relating to Mr. Khadr's family. As noted above, Mr. Khadr's relationship with his father is relevant to the allegations against him. The role of his father was explicitly referenced in some of Mr. Khadr's inculpatory statements. Moreover, Mr. Khadr proposes that he be released to live with his maternal grandparents. The evidence disclosed that Mr. Khadr's grandparents are in frequent contact with other members of Mr. Khadr's immediate family. Accordingly, it is my view that some of the following material related to Mr. Khadr's family is relevant on this application.

[15] As part of the ROC, the Extradition Partner relies on statements attributed to Mr. Khadr in a documentary entitled, "Son of Al-Qaeda," presented by the American Public Broadcasting Corporation (PBS).[1] The program was broadcast on April of 2004, prior to Mr. Khadr's capture in Pakistan. In an interview for this documentary, Mr. Khadr answered a number of questions related to his father, one of his brothers, Abdurahman, and the activities of Al-Qaeda. Throughout the interview, he claimed not to be a member of Al-Qaeda, although he did say it is his wish to die as a martyr for Islam. At one point, when asked if he was ever sympathetic to Al-Qaeda. Mr. Khadr answered: "To what they do? Building a homeland for Muslims, yes. Their way, not that much." Asked about the U.S. Embassy bombings in Kenya and Tanzania, believed to be Al-Qaeda's first major military operation, Mr. Khadr would not commit to whether he approved of the operation or not, saying it was "a hard question." While he expressed some concern for some of the victims, he said he did not feel sorry for the Americans because "they cause enough deaths." Particularly disturbing are Mr. Khadr's remarks about the 9/11 attacks in the United States. Mr. Khadr said:

> Like, I think itself very amazing. It was very wild to see a person seeing a building in front of him and he's going 900 kilometers per hour straight in the building.

Asked whether he felt admiration for the people who carried out the attacks, Mr. Khadr said:

> Yes. Because they did some things that stunned the entire world. Everybody for entire, like months, was only talking about that.

[16] The ROC specifically refers to a statement attributed to Mr. Khadr in which he refers to Osama bin Laden as a "saint." However, I am satisfied that this answer may have been taken out of context. The statement concerns Mr. Khadr's observations, as a younger person, when his

---

[1] This documentary, presented under a different title, was previously run by the Canadian Broadcasting Corporation.

family lived in bin Laden's compound. They seem to capture Mr. Khadr's impressions of the way bin Laden interacted with others, and not with his political and terrorist activities.

[17] The Extradition Partner alleges that, while he was in hiding, Mr. Khadr purchased a fraudulent Pakistani passport. Mr. Khadr acknowledged that he had hoped to smuggle himself out of Pakistan to a country that did not have an extradition treaty with the U.S., such as China or Iran. He said that he believed the passport was with his sister, Zaynab, who was back in Canada by that time. This passport has never been found.

[18] When Mr. Khadr's sister Zaynab entered Canada most recently, the police seized a laptop computer from her. In one of his interviews with the FBI, Mr. Khadr admitted that the laptop was his. The laptop contained a number of Al-Qaeda videos. Mr. Khadr had also used the computer to download information about various weapons. The police also seized two containers that were shipped from Pakistan to Canada at Zaynab Khadr's direction. A mobile hard drive was located, which contained, among other things, extremist propaganda videos and a 1300-page file of terrorist training materials (including instructions for making explosives and chemical weapons).

[19] Other members of Mr. Khadr's family were also interviewed as part of the documentary. Abdurahman Khadr told the interviewer that his is an "Al-Qaeda Family." He also said that, because he did not believe in the ways of Al-Qaeda, he was considered the "black sheep" of the family. Abdurahman Khadr told the interviewer that he was raised to be Al-Qaeda, but he rejected that life. He said he wants to be "a good, strong, civilized and peaceful Muslim." Abdurahman Khadr now lives in Canada.

[20] Mr. Khadr's mother, Maha, and his sister Zaynab were also interviewed. Both said that they were proud that Ahmed Said Khadr died a martyr for Islam. Maha Khadr hoped that all of her children would die that way. Zaynab Khadr said she would like to die as a martyr and have her daughter die that way as well. Both approved of the 9/11 attacks on the U.S., but expressed some concern for the innocent people who were killed. Both Maha and Zaynab Khadr have since returned to Canada.

THE REASONS OF MOLLOY J.

[21] As noted above, Molloy J. detained Mr. Khadr on both the primary and tertiary grounds. It is not necessary to review the thorough reasons of Molloy J. in their entirety. Instead, I take note of those aspects of her decision that Mr. Khadr suggests have been overtaken by changed circumstances.

[22] A number of factors were important to Molloy J.'s decision to detain Mr. Khadr on the primary ground. In particular, she was clearly unimpressed with the proposed surety, Mrs. Fatmah Elsamnah, Mr. Khadr's maternal grandmother. At the previous bail hearing, Mrs. Elsamnah testified that she had no knowledge of the allegations against Mr. Khadr or any knowledge of her family's connections to Al-Qaeda and the well-known statements that other

members of her family had made during interviews in the media. Molloy J. described Mrs. Elsamnah's evidence as "highly improbable", "incredible" and "internally inconsistent." More specifically, Molloy J. said at pp. 132-133:

> I did not find Mrs. Elsamnah to be a truthful or reliable witness. She was, in my view, deliberately tailoring her evidence to avoid saying anything that could be potentially harmful to her grandson's case. I therefore find Mrs. Elsamnah's evidence to be of no assistance in determining whether her grandson Abdullah has Al-Qaeda connections. My concerns about her credibility also cause me to have great reluctance to trust her to abide by her obligations as a surety.

[23] In addition to being concerned about the adequacy of the proposed surety, Molloy J. placed reliance on the fact that Mr. Khadr may have access to a fraudulent Pakistani passport. In summing up her views on the primary ground, Molloy J. said at p. 135:

> Finally, the evidence demonstrates that Mr. Khadr has direct and high level connections to Al Qaeda, a terrorist organization without scruples. There is a real risk that he has the kind of criminal connections that would be able to assist in secreting him within this jurisdiction or engineering his removal from Canada to a place beyond the reach of the United States. He has very little connection to this country and very little connection to his grandmother. This is an individual who has expressed his admiration for suicide bombers and indicated his hope and dream of becoming a martyr. How can any surety control the conduct of such a person? If he is prepared to die for his cause, he surely will not be deterred by the terms of any order I might issue, or by the fact that his grandparents might lose their home.

[24] On the tertiary ground, Molloy J. addressed all of the factors listed in s. 515(10)(*c*) of the *Criminal Code*, as interpreted by the Supreme Court of Canada in *Regina v. Hall* (2002), 167 C.C.C. (3d) 449 (S.C.C.). Molloy J. found that there were very compelling reasons to detain on the tertiary ground. Of particular interest on this review is the emphasis Molloy J. placed on the strength of the Crown's case, as captured in the following excerpts from her judgment at pp. 137-138:

> Canada has signed an extradition treaty with the United States. Our extradition partner seeks to have Mr. Khadr sent there to face charges of the most heinous nature imaginable. ***There is a strong extradition case against Mr. Khadr.*** There is extensive evidence of his connections to the Al-Qaeda terrorist organization. There is some evidence that he may have access to a fraudulent Pakistani passport....***Mr. Khadr is not a person who can be trusted or***

> ***controlled by court orders, or by his grandmother.*** He admires the bombers who massacred hundreds of people on September 11, 2001. His stated dream is to die as a martyr for Islam. In my view, it would shock public conscience if this Court were to grant him bail pending the extradition hearing. I therefore find there is a strong basis for ordering Mr. Khadr's detention on the tertiary ground. [emphasis added][2]

MATERIAL CHANGE OF CIRCUMSTANCES

[25] In support of the application, Mr. Khadr relies upon an assortment of purported changed circumstances. A new surety arrangement has been put forward, augmented by the prospect of electronic monitoring. Additionally, Mr. Khadr suggests that the case against him is not as strong as would appear in the ROC. This assertion is based on the disclosure of new information relating to Mr. Khadr's detention and interrogation while in Pakistan. Finally, counsel for Mr. Khadr rely upon the amount of time that Mr. Khadr has spent in detention, suggesting that the extradition proceedings will not be completed for a long time. Counsel also submit that this time spent in custody has extinguished any ties that Mr. Khadr is alleged to have had with members of Al-Qacda.

(a) The New Surety Arrangement

[26] The surety arrangement that is proposed on this bail review is both old and new. Mr. Khadr's grandmother, Mrs. Fatmah Elsamnah, is again put forward as a surety. Her husband, and Mr. Khadr's grandfather, Mohamed Elsamnah, is also offered as a surety. Lastly, Mr. Abdulwhab Ibrahim, a person working at the Salaheddin Islamic Centre is offered as a surety. I will briefly review the evidence of each of these individuals.

[27] Mrs. Elsamnah, 68 years old, filed an affidavit and testified before me at the review hearing. As she did before Molloy J., Mrs. Elsamnah testified that she and her husband are prepared to pledge the value of their home, worth roughly $300,000, to secure Mr. Khadr's release.

[28] Mrs. Elsamnah testified that she was nervous when she testified at the previous bail hearing. She admitted to knowing that Mr. Khadr is facing terrorism-related offences by allegedly selling weapons. She agreed that the charges Mr. Khadr faces are serious. Mrs. Elsamnah said that she speaks to Mr. Khadr every other day. She also indicated that she speaks with or sees her daughter, as well as her other grandchildren, quite frequently.

---

[2] Molloy J. also refers to the strength of the case at p. 136.

[29] Mrs. Elsamnah described Mr. Khadr as a "good boy" who respects her and who would listen to her. She testified that she and her husband live in a big house and that they need someone around to help them around the house and to provide them with companionship. Interestingly, Mrs. Elsamnah's 33-year-old son lives at home with her and her husband. She could not really answer why he could not provide the help and company they desire.

[30] Mr. Elsamnah, 78 years old, is also a proposed surety. While he was not offered as a surety on the first application, it was contemplated that he would assist his wife in supervising Mr. Khadr. He described a close relationship with his daughter, whom he said he saw every day. I note that Mrs. Elsamnah reported seeing her daughter's family less frequently.

[31] Mr. Elsamnah described his grandson as a good person whom he was prepared to supervise. However, he admitted that Mr. Khadr has spent most of his life outside of Canada. Mr. Elsamnah had some appreciation of the charges facing his grandson. However, he claimed to have little knowledge of the activities of some of the other members of his family. For instance, he first said he had no knowledge of how Ahmed Said Khadr, Mr. Khadr's father, died. More troubling was the fact that Mr. Elsamnah seemed to have no knowledge of how his other grandson, Adulkareem Khadr, was injured and paralyzed.[3] In fact, Mr. Elsamnah said that he had not asked his grandson how he was so seriously injured and why he requires a wheelchair.

[32] Mr. Elsamnah was asked about Mr. Khadr's previous application for bail. He appeared to have no knowledge of the prior proceeding, let alone being able to explain why he was not previously offered as a surety. Mr. Elsamnah said that he and his wife have a son living with them. He said that his son was working on the day of the application before me. More importantly, he said that their son does not want to get involved with this case.

[33] Mr. Abdulwhab Ibrahim was also put forward as a potential surety. Mr. Ibrahim has spent the last 10 years as the Manager/Administrator of the Salaheddin Islamic Centre (hereafter "the Centre"), located at 741 Kennedy Road in Scarborough. The Centre runs a school, grades one through eight, with an emphasis on Islamic teachings. Classes for adults are run in the evening. Lastly, the Centre offers prayers five times a day and Friday prayer. The Centre is also involved in significant charitable works.

[34] Mr. Ibrahim testified that the Centre is prepared to offer Mr. Khadr full-time employment and supervision. Mr. Ibrahim testified that he is prepared to drive Mr. Khadr to and from work each day and that he would call the police if Mr. Khadr did not comply with the conditions of his release. While Mr. Ibrahim does not know Mr. Khadr and has had "little or no contact" with the Khadr family, he is aware that Mr. Khadr's grandfather prays at the Centre and that Mr. Khadr's sister, Zaynab, drops her daughter off in the morning to attend school.

[35] Significantly, Mr. Ibrahim testified that the Centre was able to raise $50,000 in cash in support of Mr. Khadr's release. The Centre is also prepared to fund the cost of electronic

---

[3] It is well known to the public that he was injured at the same time his father was killed in Pakistan in 2003.

monitoring, as discussed below. These monies came from various donations made over the previous year. In cross-examination, Mr. Ibrahim was unable to say how many people contributed, and in what amounts. Mr. Ibrahim was not able to contribute any of his own funds. Also, it was never really clarified through Mr. Ibrahim's evidence as to what would happen to the pledged money at the conclusion of the proceedings (assuming that everything went fine and there was no defalcation on the part of Mr. Khadr). I was advised by counsel that it was their understanding that the money would not be returned to the individual donors. Instead, the money would go into the general revenue fund of the Centre.

[36] Mr. Ibrahim was cross-examined about the association of certain individuals with the Centre. Mr. Ibrahim admitted that Mr. Khadr's father, Ahmed Said Khadr, had attended at the Centre for prayers and that the Centre had, on more than one occasion, paid him money for his charity. Mr. Ibrahim pointed out that Mr. Khadr's father raised money from many mosques.

[37] Mr. Ibrahim was also asked about other individuals connected to the Centre. In particular, he was asked about two men, Mohammed Ali Dire and Fahim Ahmed, both of whom have been charged with terrorism offences, and who are presently awaiting trial in Brampton, Ontario. Mr. Ibrahim had some awareness that Mr. Ahmed came to the mosque to pray. Initially, when asked about Mr. Dirie, Mr. Ibrahim said he had never heard of him before. In cross-examination, he was confronted with a document that showed that, in 2004, he had signed Mr. Diric's passport application as a guarantor, claiming to have known him for two years. Having been confronted with this document, Mr. Ibrahim admitted to knowing Mr. Dirie, but said that he did not know him beyond being a person who prays at the mosque. As discussed below, I find this aspect of Mr. Ibrahim's evidence troubling.

[38] Mr. Ibrahim was questioned about the role of Hassan Farhat, one of the founding members of the Centre. Mr. Farhat is believed to have links with Al-Qaeda, and left Canada a number of years ago to fight on behalf of this organization. Mr. Ibrahim produced a letter from 1996 that indicated that Mr. Farhat had been removed from the Board of Directors and was barred from holding any position with the Centre. Mr. Ibrahim said that the last time he saw Mr. Farhat was in 1998. Documents establishing the Centre as a registered charity still show Mr. Farhat as a director. However, after the questioning and submissions of counsel for Mr. Khadr and the Extradition Partner, I am satisfied that Mr. Farhat's name appears on these documents as a "first director" (akin, perhaps to a "Past President"), and not as an active director.

(b) Electronic Monitoring

[39] Mr. Khadr now proposes that he be subject to electronic monitoring if released on bail. In support of this proposal, the affidavit of Leonard E. Beagley was filed. Mr. Beagley is the President of Trace Canada, a company that provides electronic monitoring and GPS offender tracking systems. Trace Canada is an authorized sales agent of ProTech Monitoring, operating out of Odessa, Florida, said to be a leading manufacturer of GPS electronic monitoring products around the world. The technology relating to GPS monitoring is detailed in Mr. Beagley's

affidavit. I do not propose to summarize this detailed and relatively technical account of the technology.

[40] In his evidence Mr. Beagley fairly acknowledged that if a person is bound and determined to abscond, they can do so. However, he pointed out that the device provides a "wonderful head start" in pursuing an absconding individual. This accords with the view expressed in the affidavit of Patrick O'Byrne, contained in the record of the Extradition Partner. Mr. O'Byrne is a Regional Program Advisor (systems/technology) at the Greater Toronto Enforcement Centre of the Canada Border Services Agency. Mr. O'Byrne sets up and manages electronic monitoring devices that use GPS technology to supervise the community release of individuals subject to Security Certificates under the *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

[41] In his affidavit, Mr. O'Byrne also describes how GPS technology works. He also identifies certain problems with the technology in para. 18 of his affidavit:

> **18.** GPS has several technical limitations. The equipment can break down. The relatively short battery life can lead to disrupted service. The satellite signals may not be able to penetrate through thick building materials, so that the client may or may not give off a location when he is indoors. The system does not have pinpoint accuracy. The GPS tracker unit has additional problems when the client is in an urban environment with tall buildings.

[42] More fundamentally, Mr. O'Byrne outlines the limitations the system when working optimally, at paras. 22 and 23 of his affidavit:

> **22.** Electronic monitoring only assists the authorities in monitoring the physical location of a client. It does not provide any information about what the client is doing or whom he is meeting. It has no audio or visual surveillance capabilities. It does not ensure that the client is accompanied by his sureties.
>
> **23.** Electronic monitoring does not physically restrain the client in any way or prevent him from traveling. It merely provides the authorities with an alert when the individual enters or leaves certain predetermined zones.

[43] In his evidence, Mr. Beagley endorsed a brand new one-piece device that is secured to a person's ankle with a strap containing a fibre-optic cable that will sound an alarm if severed. He said the device has a battery life of 72 hours after a two-hour charge. He also indicated that, if a person is indoors, cellular phone systems allow for proper triangulation and tracking of the monitored individual. After consulting with Mr. O'Byrne, who did not testify, counsel for the Extradition Partner took issue with some of these assertions. Instead of calling Mr. O'Byrne as a

witness, counsel agreed that there is conflicting evidence on some aspects of the GPS technology offered by Trace Canada. As discussed below, the result of this application does not turn on this dispute. I am prepared to proceed on the assumption that this technology, while recently improved and no doubt helpful, is not infallible.

(c) The Strength of the Crown's Case

[44] A critical part of Mr. Khadr's argument in favour of release concerns the apparent strength of the case against him. At the core of this submission is the claim that the statements that will be relied upon by the Extradition Partner are the product of torture or mistreatment of Mr. Khadr by the Pakistani authorities. It is further argued that the U.S., having orchestrated his capture and detention in Pakistan, was complicit in such poor treatment of Mr. Khadr. Mr. Khadr will argue that these circumstances render the evidence against him so defective or unreliable that it would be dangerous and unsafe to convict him or, in the alternative, that the evidence ought to be excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms* because its admission would render the proceedings against him unfair: see *United States of America v. Ferras; United States of America v. Latty* (2006), 209 C.C.C. (3d) 353 (S.C.C.), at paras. 54 and 60 and *United States of America v. Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.).[4]

[45] In an effort to bolster this position, Mr. Khadr brought a motion for the disclosure of Canadian and U.S. documents relevant to his claim. The application was heard by my colleague, Speyer J.: see *United States of America v. Khadr*, [2007] O.J. No. 3140 (S.C.J.). In disposing of this application, Speyer J. made a number of important findings. First, he concluded that there was no need to make an order against Canadian authorities. He observed that, having accepted that there was an "air of reality" to Mr. Khadr's claim of mistreatment, the Attorney General of Canada had provided "voluminous" disclosure on the issue. As Speyer J. found at para. 25: "[N]o requirement exists to order further disclosure with respect to materials in the possession of Canadian government departments or agencies. It has already been disclosed."[5] As discussed

---

[4] Mr. Khadr also relies upon s. 269.1(4) of the *Criminal Code*, the provision that criminalizes torture, which provides:

> **(4)** In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

[5] I note that disclosure of materials beyond the ROC is generally not required in the extradition context: *United States of America v. Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.), at p. 524. However, in *United States of America v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), in which the Court establishes a threshold for obtaining disclosure in the context of allegations of state misconduct resulting in a breach of a person's s.7 rights and/or an abuse of process.

below, some of these documents were extensively redacted and were the subject of proceedings in the Federal Court.[6]

[46] Speyer J. declined to order that the U.S. make further disclosure of materials relating to Mr. Khadr's claim of mistreatment. Read as whole, his reasons suggest that he was doubtful of his jurisdiction to do so.[7] Nevertheless, in the discussion of these issues, Speyer J. made a finding that is important to Mr. Khadr's position on this application (at para. 40):

> In coming to the conclusion that there is a justiciable issue to be determined, I am satisfied Khadr's claim of abusive treatment throughout his detention has an air of reality. ***That is, there is a realistic possibility that the applicant's claims of abuse can be substantiated.*** [emphasis added]

[47] After Speyer J. ruled on the disclosure motion, counsel for Mr. Khadr commenced proceedings in the Federal Court under s. 38.04(2)(c) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, seeking disclosure of information over which the Attorney General of Canada sought to resist disclosure, based on the claim that disclosure would be "injurious to international relations or national defence or national security." This application related largely to the redacted portions of the documents already disclosed by the Attorney General of Canada.

[48] In *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 770, Justice Mosley of the Federal Court heard the application and provided some relief to Mr. Khadr. He ordered that information relating to the fact that the U.S. paid the Pakistani authorities $500,000 for the capture of Mr. Khadr could be publicly disclosed. This information had already been inadvertently disclosed during the extradition proceedings. As Mosley J. said at paras. 107 and 108 of his reasons:

> **107** The information in question refers to the payment of a bounty of USD $500,000 for Mr. Khadr's capture in Pakistan. The Pakistani authorities had reasons of their own for wanting to arrest Mr. Khadr given his alleged activities in that country. The information does not say that the bounty was actually paid or, if it was paid, by whom. The originating source of the information is not disclosed in the document. But it is clear that Canadian officials were told that a bounty had been paid shortly after the applicant's capture and included that information, presumably considered reliable, in briefing their superiors, in this instance the RCMP Commissioner.

---

[6] As Speyer J., held at para. 23 of his reasons, jurisdiction to address these claims is reposed in a judge of the Federal Court: see s.38 of the *Canada Evidence Act*.

[7] Speyer J. acknowledged that disclosure directly from a requesting state was ordered in *United States of America v. Tollman*, [2006] O.J. No. 5588 (S.C.J.).

> **108** It is a reasonable inference from the public evidence filed in this application that the bounty was offered and paid by the US Government. Counsel for *The Globe and Mail* led evidence that the payment of bounties by the US has been freely disclosed in comparable contexts and, indeed, celebrated by US officials as a valuable tactic in apprehending suspected terrorists in the region. General Musharraf, the Head of State of Pakistan, published memoirs in which he writes of the receipt of US bounties by his country as an illustration of its contribution to the so-called "Global War on Terror".

[49] Justice Mosley also ordered the disclosure of summaries of a number of previously released documents that were heavily redacted. These summaries were ordered released to counsel for the parties, and to the judges of this Court involved in this extradition proceeding. These summaries, along with the Private Reasons for Order and Order of Mosley J. (referred to in his public reasons, *supra*), were received by me *in camera*. Submissions on the significance of these documents were also made during a short *in camera* session of this bail review hearing.[8]

[50] The question of whether these summaries should be disclosed unconditionally to the public will be addressed by the extradition judge, Speyer J., later this year. Accordingly, it would be inappropriate for me, in these reasons, to discuss these documents in a way that would frustrate the terms of Mosley J.'s order. Suffice it to say at this point, counsel for Mr. Khadr relied upon a handful of the document summaries to support their attack on the statements taken from Mr. Khadr, focusing on the manner in which he was treated while in Pakistan, the length of time he was kept in Pakistan, and the role of the U.S. authorities in, at the very least, taking advantage of this allegedly poor treatment: see *Khadr v. Attorney General*, *supra*, per Mosley J., at para. 55.

JURISDICTION AND NATURE OF THE REVIEW

[51] A preliminary issue arises as to my jurisdiction to review the bail decision of another judge of this Court. An application for bail pending extradition is provided for in s.18 of the *Extradition Act*. By virtue of s.19, the provisions of the *Criminal Code* that relate to bail in Part XVI apply to bail applications in extradition proceedings "with any modifications that the circumstances require."

[52] The *Extradition Act* provides a right of review of the decision to grant or deny bail pending proceedings under this Act. Section 18(2) provides:

---

[8] On August 7, 2008, I ruled and provided reasons for my conclusion that part of the hearing should be conducted *in camera*. Section 27 of the *Extradition Act* permits all or part of the proceedings to be held *in camera* if the judge is satisfied that "it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude the person."

> (2) A decision respecting judicial interim release may be reviewed by a judge of the court of appeal and that judge may
>
> (a) confirm the decision;
>
> (b) vary the decision; or
>
> (c) substitute any other decision that, in the judge's opinion, should have been made.

According to the plain wording of this section, any review of the bail decision of a judge of this Court must be considered by a single judge of the Court of Appeal for Ontario. In the domestic criminal law context, the reviewing function of the Court of Appeal in the pre-trial bail context is typically restricted to decisions concerning offences listed in s. 469 of the *Criminal Code*: see Cr. Code, ss. 522(4) and 680. The procedure envisaged by s. 18(2) of the *Extradition Act* is not restricted to offences that would otherwise be s. 469 offences if prosecuted in Canada: see *United States of America v. Le*, [2004] O.J. No. 3105 (C.A., per Lang J.A., In Chambers) and *United States of America v. Pannell* (2005), 193 C.C.C. (3d) 414 (Ont. C.A.).

[53] Despite the plain wording of s.18(2) of the *Extradition Act*, a practice seems to have developed, at least in some provinces, whereby the parties may return to the same level of court that addressed the initial bail application. As Watt J. (as he then was) held in *Germany (Federal Republic) v. Schreiber* (2000), 147 C.C.C. (3d) 404 (Ont. S.C.J.),[9] s.18(2) does not confer exclusive jurisdiction in a judge of the Court of Appeal to consider a review of an order made under s. 18(1). See also *United States of America v. Pannell*, [2004] O.J. No. 5715 (S.C.J.), at paras. 15-19[10] and *United States of America v. Ruggeberg*, [2005] B.C.J. 152 (S.C.).

[54] Counsel for the Extradition Partner did not take issue with the forum in which this review application was pursued. Based on the authorities referred to above, I am prepared to consider the case on its merits. However, I wish to make the following observations. Interpreting s.18(2) of the *Extradition Act* as conferring concurrent jurisdiction on judges of this Court and the Court of Appeal may at times result in the excessive use of judicial resources. This is demonstrated by the *Pannell* case. After an unsuccessful review application before this Court, the person pursued a further review in the Court of Appeal. On the other hand, when the review application is based on a purported change of circumstances, and it is contemplated that *viva voce* evidence will be adduced, it may be preferable to return to this Court, a trial court, which may be better situated to accommodate cases involving extensive *viva voce* evidence. I note that a good deal of *viva voce*

---

[9] This case involved an application to vary a single term of bail.

[10] In this case, my colleague, Nordheimer J., heard and dismissed the original application for bail. He then heard and dismissed an application to review his own decision which was based on a purported change of circumstances. This decision was affirmed on the merits by the Court of Appeal: see (2005), 193 C.C.C. (3d) 414 (Ont. C.A.). In disposing of the case, MacPherson J.A. noted (at p.420) that the first review was heard in the Superior Court of Justice, but made no comment on the propriety of the procedure.

evidence was heard on this application. However, if the moving party wishes to allege that the judge who made the original decision erred in principle or law, resort should be made to a judge of the Court of Appeal: see *United States of America v. Pannell*, (Ont. C.A.), *supra* and *United States of America v. Chan* (2002), 144 C.C.C. (3d) 93 (Ont. C.A.).

[55] In their submissions on behalf of Mr. Khadr, counsel did not argue that Molloy J. erred in her decision to deny bail, nor could they have in my respectful view. Had counsel alleged an error in principle, it would have been more appropriate for this case to have been heard by a judge of the Court of Appeal. Given that the entire thrust of the applicant's case is focused on changes that have occurred since Molloy J. made her decision, I conclude that it is appropriate for me to conduct this review.

ANALYSIS

(a) The Primary Ground

[56] I am not satisfied that the changed circumstances presented on behalf of Mr. Khadr displace the validity Molloy J.'s assessment of the primary ground.

[57] Little has changed to alleviate the concerns with Mrs. Elsamnah as a surety. While Mrs. Elsamnah admitted to knowing at least something of her grandson's legal situation, I am not satisfied that her evidence during the proceedings before me gives much greater comfort in entrusting her with the supervision of Mr. Khadr. Considering her evidence on this hearing, her evidence at the previous hearing, and the findings of Molloy J., I am not satisfied that Mrs. Elsamnah would be an effective surety.

[58] Unfortunately, the addition of Mr. Elsamnah as a proposed surety does not improve the situation. Mr. Elsamnah had only a very limited understanding of Mr. Khadr's situation, or the situation of his family as a whole. With respect, I have no confidence that he would be able to fulfill the duties of a surety. Mr. Edney submitted that some of the shortcomings in Mr. Elsamnah's evidence might have been due to his age and problems with his memory. Without knowing more about Mr. Elsamnah, and out of respect for him as a witness, I am not prepared to speculate about the reasons for the shortcomings in his evidence. The point is that the shortcomings exist and they render him unsuitable to be a surety.

[59] Mr. Edney asked me to consider the fact that these are the only family members who are available to act as sureties for Mr. Khadr. For reasons that may be obvious from my discussion of the background of Mr. Khadr and his family, other family members could not realistically be offered as sureties. In determining whether a surety arrangement is suitable, the focus must be on whether the release plan realistically provides assurance that the goals of the bail system will be met, not on whether the person applying for bail has put together the best plan available. In my view, as far as these two sureties are concerned, the goals of the bail system would not be adequately addressed on the primary ground.

[60] I have different concerns with Mr. Ibrahim as a surety. Through the auspices of the Centre, Mr. Ibrahim purports to pledge $50,000 in bail money in support of Mr. Khadr's release.

As outlined above, many contributed towards this fund, in varying amounts. None of the contributors expects to be reimbursed at the end of the proceedings against Mr. Khadr. What is most significant is that Mr. Ibrahim has not pledged any money of his own. Essentially, Mr. Ibrahim is being put forth as a "representative surety" – something that does not exist in Anglo-Canadian law. There are good reasons for this. The purpose of a recognizance (and the prospect of forfeiture) is to motivate sureties to discharge their obligations effectively. The fact that a surety might suffer financially is meant to motivate the accused person to comply with the conditions of release. As Lord Widgery, CJ. observed in *Regina v. Southampton Justices, ex parte Corker* (1976), 120 S.J. 214:

> The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort.

This "pull" is absent in Mr. Ibrahim's situation. Since Mr. Ibrahim pledged none of his own funds, and because those who contributed to the fund do not expect to ever see the return of their donation, nobody stands to lose anything, from a monetary point of view, if Mr. Khadr absconds or does not otherwise comply with the terms of his release. This reality dilutes the desired coercive effect of the surety relationship, on both Mr. Ibrahim and Mr. Khadr.

[61] This is not to suggest that Mr. Ibrahim's evidence is not helpful in certain respects. It demonstrates to me that Mr. Khadr has some support in the greater community, extending beyond his family. It is also impressive that someone has come forward and offered to provide a job for Mr. Khadr. Subject to my concerns about Mr. Ibrahim's testimony concerning his association with Mr. Dirie, in other circumstances he might be a suitable surety for somebody in need of employment. However, in this case, the proposed arrangement is not reasonable. As I have already indicated at the outset of the reasons, Mr. Khadr should not be released pending the extradition proceedings against him. If he were to be released, strict house arrest, with minimal exceptions, would be the only reasonable circumstances of release. Allowing Mr. Khadr to work outside the house everyday is simply not realistic.

[62] In concluding my appraisal of Mr. Ibrahim's evidence, I wish to address an issue that arose on a couple of occasions during the course of this hearing. Counsel on behalf of the Extradition Partner strongly urged me to find that the Centre should not be involved in the supervision of Mr. Khadr because of its association with certain individuals alleged to be connected to terrorist groups. I accept that, over the years, there may have been persons, involved in questionable activities, with questionable associations, who have passed through the Centre from time to time. In my view, this in itself is not sufficient to taint the Centre in any way. During the bail review application, P.C. Tarek Mokdad of the RCMP testified. He agreed with the proposition, put to him in cross-examination, that, based on all of the materials he has unearthed in his investigation, no reasonable person could draw the conclusion that the Salaheddin Islamic Centre is involved in terrorism. I agree.

[63] Lastly, I am not satisfied that the electronic monitoring plan that is proposed pushes this case over the line in favour of release. As Mr. Edney made clear in his submissions, electronic monitoring is just one part of the plan to secure Mr. Khadr's release. Some judges have considered the availability of electronic monitoring to be a helpful adjunct to supervision by sureties while on release. However, as Lang J.A. observed in *United States of America v. Le*, *supra*, at para. 8, "the sureties retain primary responsibility" for the person released; electronic monitoring is "merely a means of taking advantage of modern technology to implement maximum safeguards."

[64] The benefits and drawbacks of electronic monitoring are captured in the dueling affidavits and evidence of Mr. Leonard Beagley and Mr. Patrick O'Byrne, summarized above. I accept that, with the addition of GPS technology, electronic monitoring has the potential to be more efficacious than previous electronic monitoring technology. I am also satisfied that, assuming the electronic monitoring system that is proposed in this case functions flawlessly, it is not an infallible safeguard against defalcation on the part of the person monitored. As Nordheimer J. said in *United States of America v. Pannell*, *supra*, at paras. 40 and 42:

> **40** The simple fact is that electronic monitoring does not ensure the attendance of an accused person in court. To the contrary, all it does is alert JEMTEC, and thereafter the authorities, that the subject has possibly fled or otherwise disappeared. If that occurs, electronic monitoring does not assist in locating the subject nor does it reveal his or her plans. In other words, if there are concerns under the primary ground, electronic monitoring does not alleviate those concerns. It merely informs of the breach in much the same way that a capable surety would. Admittedly, electronic monitoring does work twenty-four hours a day. It could also be said that electronic monitoring will not be susceptible to emotional pleas to ignore a breach but, then, a proper and capable surety ought not to be either.
>
> ...
>
> **42** By making these observations, I do not mean to suggest that electronic monitoring may not have its uses. It may be an effective tool, for example, in ensuring compliance with house arrest as part of a conditional sentence where the concern is restricting the person's movements to make that aspect of the sentence efficacious. It may be similarly effective in temporary absence or parole situations. However, in all such cases, the concerns that are being addressed are not concerns that the person will flee the jurisdiction in order to avoid prosecution, or in this case, extradition.

[65] A significant aspect of Molloy J.'s consideration on the primary ground was her finding, at p. 123, that Mr. Khadr has "direct and high level connections to Al-Qaeda, a terrorist organization without scruples." Counsel for Mr. Khadr argue that, given the passage of time since his initial bail application, during which time Mr. Khadr has been out of circulation and in jail, it is not tenable to conclude that these connections still exist. They placed great reliance on the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, a case dealing with detention under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Court held that certain provisions of that *Act* did not violate ss. 7 and 12 of the *Charter* if regular opportunities for review of detention are provided, which take into account all relevant factors, including the length of detention. On the issue of the length of detention, the Chief Justice wrote the following at paras. 112 and 113:

> **112** The length of the detention to date is an important factor, both from the perspective of the individual and from the perspective of national security. The longer the period, the less likely that an individual will remain a threat to security: "The imminence of danger may decline with the passage of time": *Charkaoui (Re)*, 2005 FC 248, at para. 74. Noël J. concluded that Mr. Charkaoui could be released safely from detention because his long period of detention had cut him off from whatever associations with extremist groups he may have had. Likewise, in Mr. Harkat's case, Dawson J. based her decision to release Mr. Harkat in part on the fact that the long period of detention meant that "his ability to communicate with persons in the Islamic extremist network has been disrupted": *Harkat*, 2006 FC 628, at para. 86.
>
> **113** A longer period of detention would also signify that the government would have had more time to gather evidence establishing the nature of the threat posed by the detained person. While the government's evidentiary onus may not be heavy at the initial detention review (see above, at para. 93), it must be heavier when the government has had more time to investigate and document the threat.

[66] These words are very specific to the type of procedure used under the *Immigration and Refugee Protection Act*. Moreover, the question of whether delay has severed ties highly fact-specific. In this case, I am asked to assume that, because of the mere passage of time, Mr. Khadr's links to the Al-Qaeda network which, by his own admissions, he was alleged to have been previously involved with, have been severed. On the record before me, particularly having regard to the evidence suggesting that the connections between Al-Qaeda and the Khadr family extend beyond Abdullah Khadr alone, I am not prepared to make that assumption.

[67] Lastly, counsel for Mr. Khadr submitted that the concerns expressed by Molloy J. about Mr. Khadr accessing a fraudulent passport are no longer valid. A good deal of time has passed

since Mr. Khadr and the rest of his family have returned to Canada. Despite searches of Zaynab Khadr and her shipment of belongings, the passport was never located. At this point in time, it is my view that this passport is no longer of specific concern. As discussed in the previous paragraph, of more concern is the connections of Mr. Khadr and his family to members of Al-Qaeda.

[68] In conclusion, in all of the circumstances, the evidence presented on this review application is not capable of dislodging the conclusion of Molloy J. that Mr. Khadr still poses a "serious flight risk."

(b) The Tertiary Ground

[69] As detailed above, Molloy J. concluded that there was a "strong basis" for Mr. Khadr's detention on the tertiary ground. In my view, even on the basis of the material placed before me on this review application, this conclusion is still warranted.

[70] In her reasons, Molloy J. reviewed the leading case of *Regina v. Hall*, *supra* in which the Supreme Court of Canada prescribed the proper approach to s.515(10)(*c*) of the *Criminal Code*, the current version of which provides:

> **s.515(10)** For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> ...
>
> (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all of the circumstances, including
>
> **(i)** the apparent strength of the prosecution's case,
>
> **(ii)** the gravity of the offence,
>
> **(iii)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
>
> **(iv)** the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum term of imprisonment for a term of three years or more.

This version of s.515(10)(*c*) is the result of a recent amendment: S.C. 2008, c. 6, s. 37. The newly crafted provision removes some of the language that the Supreme Court in *Hall* found to be unconstitutional.[11] The section also specifically focuses on the presence or role of firearms in the offence(s) for which bail is sought.

[71] It is helpful to stand back and consider the essence of s. 515(10)(*c*) of the *Criminal Code*. The factors enumerated in this provision should not be approached as if they are free-standing thresholds, each capable of justifying detention. Similarly, the section does not require that all of the enumerated factors be triggered before detention is justified. Instead, they are designed to be a collection of factors to be used in determining whether detention is "*necessary* to maintain public confidence in the administration of justice." Weakness with respect to any one of the factors may be compensated for by strength in others: see *Regina v. Morduc* (2007), 223 C.C.C. (3d) 407 (Ont. C.A.), at p. 415.

[72] There can be no doubt about the gravity of the alleged offences and the circumstances surrounding their commission. As Mr. Piafsky said in his closing submissions, Mr. Khadr is alleged to be an arms supplier for Al-Qaeda. In one of his interviews with the authorities, Mr. Khadr said that he knew that some of the weapons he was supplying would be used to murder U.S. and Coalition Forces in Afghanistan. I am hard pressed to think of a more serious set of offences. Mr. Khadr is alleged to have supplied weapons to a notorious and ruthless terrorist organization, with a proven record of killing innocent individuals on a massive scale. In an interview that preceded his capture by Pakistani authorities, Mr. Khadr expressed admiration for the members of Al-Qaeda who carried out the unspeakable 9/11 attacks in the United States.

[73] In her reasons, Molloy J. concluded that there was a strong case against Mr. Khadr. As she said at p. 136 of her reasons:

> In determining the strength of the case against Mr. Khadr in this jurisdiction, the question is not whether he is going to be convicted in the United States, but rather, whether this Court is likely to order his extradition. On that point, the evidence is very strong....There is evidence which if accepted could support a finding of guilt. There may be issues raised as to the admissibility of some of that evidence, and there may be constitutional arguments about abuse of process. However, on the state of the record before me, the Crown's case for extradition is a strong one.

In reaching this conclusion, Molloy J. was aware of the allegations that Mr. Khadr was tortured by Pakistani authorities. However, she did note, at p. 130, that Mr. Khadr had failed to provide any direct evidence of this fact. Since that time, in the context of the disclosure application before Speyer J., Mr. Khadr submitted an affidavit in which he claims to have been tortured.

---

[11] In *Hall*, the Court held that two phrases in the previous version of the provision, "without restricting the generality of the foregoing" and "on any other just cause being shown," were unconstitutional.

More importantly, Speyer J. found that there was an "air of reality" to this claim. However, in my view, none of the materials made available to me through the order of Mosley J. on the application under the *Canada Evidence Act* diminish the strength of Molloy J.'s assessment of the strength of the Crown's case. Indeed, since Molloy J. denied Mr. Khadr's original bail application, the Extradition Partner has submitted a SROC with a detailed denial of many of Mr. Khadr's claims of mistreatment while being questioned by U.S. authorities in Pakistan.

[74] In pursuing his claim for a *Charter* remedy (exclusion of evidence or a stay based on an abuse of process) at the extradition hearing, Mr. Khadr will face a significant hurdle of proof. Claims of this nature, whether *Charter*-based, or at common law, succeed only exceptionally, in "the clearest of cases": see *United States of America v. Cobb*, *supra*, at pp. 285-287. In other words, the finding of an "air of reality" by Speyer J. is a long way from actual success on these claims. Similarly, it remains to be seen how broadly courts will interpret the power to refuse to commit individuals on the basis that the evidence is so manifestly defective or unreliable: see *United States of America v. Latty*, *supra*, at p.374.

[75] These are matters that will be fully addressed at the upcoming extradition hearing. It is not necessary for me to resolve these difficult issues. There is conflicting evidence. I pause to note one example. One of Mr. Khadr's claims concerning his treatment by those questioning him has already been refuted. In his affidavit filed on the disclosure motion before Speyer J., Mr. Khadr described his interview with the RCMP on December 2, 2005, the day he returned to Canada. He said that, during the interview, people from the Canadian Embassy entered the room. As Mr. Khadr said in his affidavit: "Sgt. Shourie got upset with them and told them that he was going to report them because they should not be interfering with the interview. The Canadian Embassy left without a word of assistance to me." This statement is completely contradicted by the videotape of the December 2, 2005 interview (which forms part of the record on this application). The interviewing officer does not use a harsh tone. He utters none of the words attributed to him by Mr. Khadr. He is polite and accommodating with a woman from the Canadian High Commission who interrupted the meeting and had a brief chat with Mr. Khadr. She then provided him with money for transportation home. I find Mr. Khadr's statement on this issue to be false.

[76] Of course, it will be up to the extradition judge to assess the impact of this contradiction on the general credibility of Mr. Khadr's claims of mistreatment. From my perspective as a bail judge attempting to assess the strength of the prosecution's case, it causes me concern. In all of the circumstances, I am not prepared to deviate from Molloy J.'s conclusion that the case against Mr. Khadr is strong.

[77] Even if it could be said that the case against Mr. Khadr has weakened since he was denied bail by Molloy J., s. 515(10)(c) must still be approached holistically, as mentioned above. At the end of the day, I must consider all of the factors in s. 515(10)(c) in determining whether Mr. Khadr's detention is necessary to maintain confidence in the administration of justice. I conclude that it is. By way of summary, in reaching this conclusion, I rely on the following factors: (1) the gravely serious nature of the offences; (2) the fact that the offences were for the benefit of the Al-Qaeda organization; (3) the connection of Mr. Khadr and his family members to

Al-Qaeda and, in the past, to Osama bin Laden himself; (4) Mr. Khadr's interview with the media in which he expressed his desire to die a martyr for Islam; (5) his stated admiration for those involved in the 9/11 attacks on the U.S.; and (6) the inadequate release plan. Mr. Khadr's release in these circumstances would seriously undermine public confidence in the Canadian justice system.

[78] In assessing public confidence in the justice system, the extradition context adds another dimension. As Justice Nordheimer said in *United States of America v. Pannell*, *supra*, at para. 49:

> Superimposed over all of those considerations in an extradition case are Canada's obligations to its international treaty partners. This case is not restricted to matters affecting only the administration of justice in this country. It also involves the ability of another country to administer its system of justice. Canada must be seen as fulfilling its obligations to other countries with which it has treaties if it is to expect that those countries will fulfill their obligations to us.

These observations apply to the case before me. The extradition context is one dimension and Canada's obligations to its extradition partners fall within "all of the circumstances" referred to in s. 515(10)(c) of the *Criminal Code*.[12] Of course, this consideration alone is not enough to warrant detention on this basis: see *Regina v. Chan*, *supra*, at p. 96.

(c) Future Delay

[79] Mr. Khadr was arrested in Canada on December 17, 2005. He has been in custody ever since. The proceedings have been complex and protracted, involving judges of this Court and the Federal Court. Mr. Endey, on behalf of Mr. Khadr, submits that the delay is not at an end. In addition to counsel availability and scheduling problems, there may be another motion for disclosure and a return visit to the Federal Court. Counsel for the Extradition Partner submits that the primary reason for the delay, the proceedings in the Federal Court, are now complete and there is no reason why the case cannot proceed expeditiously.

[80] Given the history of this case, the prospect of future delay does not tip the balance in favour of release. Given that disclosure is generally not required in the extradition context, Mr. Khadr has received extraordinary disclosure from the Attorney General of Canada. While it was

---

[12] In reaching the conclusion that this factor is relevant, I rely upon s.19 of the *Extradition Act*, which provides:

> s.19. Part XVI of the Criminal Code applies, with any modifications that the circumstances require, in respect of a person arrested under section 13 or 16 or to whom a summons has been issued under section 16.

subjected to substantial redactions, he had some success in the Federal Court on an application under s.38 of the *Canada Evidence Act*. He chose not to appeal that decision.

[81] Most, if not all, of the legal heavy lifting has already been done in this case. As set out in paragraph 46 above, it is my view that Speyer J.'s reasons on the disclosure motion reflect doubt about his jurisdiction to order the U.S. to provide disclosure to Mr. Khadr. This raises the question of whether a further disclosure motion would be prudent and, from Mr. Khadr's perspective, worth the extra delay. Furthermore, if a further application under s.38 of the *Canada Evidence Act* is necessary, it is likely that the matter could move quickly, especially given the fact that Mosley J. ordered that he remain seized of the case pending the extradition proceedings. In short, from a procedural perspective, the case can now move ahead expeditiously.

CONCLUSION

[82] For all of the reasons set out above, I am satisfied that, even in the light of the new evidence that has been adduced before me, Mr. Khadr's release from custody pending his extradition hearing is not justified. His detention is strongly justified on both the primary and tertiary grounds. The decision of Molloy J. is confirmed.

[83] I wish to thank all counsel for their excellent preparation and submissions on this application.

TROTTER J.

Released: August 19, 2008

COURT FILE NO.: EX0037/05
DATE: 20080820

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

UNITED STATES OF AMERICA

Extradition Partner/Respondent

- and –

ABDULLAH AHMED KHADR, AKA ABU BAKR

Person Sought/Applicant

REASONS FOR JUDGMENT

TROTTER J.

Released: August 19, 2008