
# Court of Queen's Bench of Alberta

**Citation: Khadr v Bowden Institution, 2015 ABQB 261**

**Date:**

**Docket:** 150056836X1

**Registry:** Edmonton

Between:

**Omar Ahmed Khadr**

Applicant

- and -

**Dave Pelham, Warden of Bowden Institution and Her Majesty the Queen**

Respondents

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**Memorandum of Decision**

**of the**

**Honourable Madam Justice J.M. Ross**

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## I. Introduction

[1] Omar Khadr (the Applicant) applies for bail pending his appeal in the United States. He brings this application by way of *habeas corpus*, or under s 24 of the *Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the *Charter*).

[2] The Applicant pleaded guilty on October 24, 2010 to five offences under the *Military Commissions Act of 2006* (*MCA*)): (1) murder in violation of the law of war; (2) attempted murder in violation of the law of war; (3) conspiracy; (4) providing material support for terrorism; and (5) spying. He received a sentence of eight years. On September 12, 2012 he was transferred to Canada pursuant to the *International Transfer of Offenders Act*, SC 2004, c 21 (*ITOA)*. As part of a Pre-Trial Agreement leading to the pleas and sentence, the Applicant waived his rights to appeal or collaterally attack the conviction or sentence.

[3] He was placed in the custody of the Correctional Service of Canada (CSC), which administers his sentence in accordance with the following dates:

| | |
|---|---|
| Sentence Commencement | 2010/10/31 |
| Unescorted Temporary Absence Eligibility | 2012/09/29 |
| Full Parole Eligibility | 2013/07/01 |
| Statutory Release Date | 2016/10/20 |
| Warrant Expiry Date | 2018/10/30 |

[4] The Applicant has an appeal pending before the Court of Military Commission Review (CMCR) in Alexandria, Virginia. There is unchallenged expert evidence before the Court that his appeal is not barred by his waiver of appeal rights, and that it has a strong probability of success. However, it is likely that the appeal, together with further appeals, will still be pending at the Applicant's statutory release date, and perhaps at his warrant expiry date. Thus, it is argued, if bail is not granted, the appeal will be rendered nugatory.

[5] The Applicant has put forward unchallenged evidence that he is a strong candidate for judicial interim release. He has a 12 ½ year track record as a model prisoner, and a release plan supported by educators, mental health professionals, and his lawyers.

[6] The Respondents have filed no evidence in response to the Applicant's case regarding the strength of his appeal or his suitability as a candidate for judicial interim release. The Respondents' position is that the Court should decline to exercise its jurisdiction in *habeas corpus* because granting bail pending appeal would constitute a breach of Canada's international treaty obligation to continue the enforcement of the Applicant's U.S. sentence, and is barred by the *ITOA*. The Respondents also argue that the Applicant has not established a *Charter* right to bail pending appeal.

## II. Jurisdiction to Grant Bail Pending Appeal

[7] The right to apply for bail pending appeal is provided by statute to offenders who have been convicted and sentenced under the *Criminal Code*, RSC 1985, c C-46 (s 679) and the *Youth Criminal Justice Act*, SC 2002, c 1 (s 37(1)) (*YCJA*). The Applicant is serving his sentence in Canada pursuant to s 13 of the *ITOA*, which provides that his sentence is continued "in accordance with the law of Canada". It might be argued that the Applicant has the right to seek judicial interim release pending appeal under the *Criminal Code* and *YCJA* provisions. However, the statutory right is to seek bail pending appeal from a single judge of the court of appeal in which the appeal has been commenced. The Applicant's appeal has not been and could not be commenced before a Canadian court, and therefore he does not rely on direct application of the statutory provisions. Rather, he submits that because the statutory provisions do not apply, he has the right to apply under "laws of Canada" relating to *habeas corpus* and the *Charter*.

### A. Bail Pending Appeal by *Habeas Corpus*

[8] The right to seek bail pending appeal by *habeas corpus* where there is no statutory right to do so, has been confirmed in a pre-*Charter* decision of the Alberta Court of Appeal.

[9] In ***Hicks v R*** (1981), 129 DLR (3d) 146, 63 CCC (2d) 547 (Alta CA) ("***Hicks***"), a serviceman convicted under the *National Defence Act*, RSC 1970, c N-4 appealed his conviction to the Court Martial Appeal Court. That Act contained no right to apply for bail pending appeal. A majority of the Court of Appeal held that, in the absence of a statutory right, bail pending appeal could be sought from the Court of Queen's Bench by way of *habeas corpus*.

[10] It had been argued in ***Hicks*** (and was held by McClung JA in dissent) that *habeas corpus* was available to review the legality of detention, but was not available where someone was detained following conviction by a competent court. Kerans JA (Harradence JA concurring) held that *habeas corpus* was available to free persons "unreasonably detained" (at paras 14-15):

> It is said that habeas corpus is available only to free those unlawfully detained. With respect, it would be more accurate to say that habeas corpus is available to free those who are unreasonably detained. These include, to be sure, those unlawfully detained, but also those lawfully but unnecessary detained. Habeas corpus was, in the 17th century, the instrument by which courts stopped oppressive detention by the arresting power. If an accused was not to be promptly tried, he would be freed, however lawful his arrest. One could say that the detention originally lawful became unlawful because it became oppressive, and become [sic] oppressive because it became unreasonably delayed. In any event, this use of the habeas corpus power was the foundation of the modern law of bail. Later, a bail application was a summary form of habeas corpus. I am much in debt for this analysis to The Law of Habeas Corpus (1976), by Professor R.J. Sharpe, Oxford, and I make particular reference to p. 131.
>
> Today, the rule is expressed the other way around: it is said that one has the right to reasonable bail, i.e., the right not to be detained unnecessarily pending hearing. And, while the fact of conviction bears heavily on the scales, it is an accepted idea today that there be a reasonable opportunity to seek bail pending appeal. In general, some provision for appeal has become (in this century) part of the system of criminal justice. Once this is so, the same danger of oppression by delay arises after as before trial, and the same need arises for a review of detention when bail is appropriate.

[11] Kerans JA held that, while *habeas corpus* is not available after conviction as a means of appeal, "... given the right of appeal, the question of reasonable bail again arises, and the need to resort to habeas corpus to ensure fairness again arises ..." (para 20). The issue arises rarely, because appeals are statutory and most statutes provide for a scheme of interim release. In rare cases where a statute provides for appeal, but not interim release, "... for the same reason habeas corpus became available to create bail before conviction, habeas corpus is available to create bail after conviction and pending appeal." (para 23).

[12] The Applicant submits that, with the adoption of the *Charter,* the right to *habeas corpus* recognized in ***Hicks*** has now been constitutionalized under s 10(c):

> 10. Everyone has the right on arrest or detention ...
>
> > (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[13] This depends on whether s 10 applies within the context of an appeal, a proposition that was doubted in relation to s 10(b) in ***R v PC***, 2014 ONCA 577, 121 OR (3d) 401, leave denied [2014] SCCA No 463, at para 16. Assuming that s 10 is inapplicable in an appeal context, the ***Hicks*** principle may nonetheless be constitutionalized as a principle of fundamental justice under s 7 of the *Charter*. That issue is addressed in the next section of these reasons.

**B. Bail Pending Appeal as a Principle of Fundamental Justice**

[14] A number of post-*Charter* cases have concluded that the right to bail pending appeal is a *Charter* right, although without a clear consensus regarding which section of the *Charter* applies: ***R v Hinds*** (1983), 147 DLR (3d) 730 at paras 14-15, 4 CCC (3d) 322 (BCSC) ("***Hinds***") (s 11(e)); ***R v Muise*** (1984), 16 CCC (3d) 285, 13 WCB 136 (Ont HCJ) (ss 7, 9, 10 and 11); ***Glowczeski v Canada (Minister of National Defence)***, [1989] 3 FC 281, 27 FTR 112 (ss 7, 9, 11(e) and 15(1)); ***R v Farinacci*** (1993), 109 DLR (4th) 97, 86 CCC (3d) 32 at paras 17-29 (Ont CA) (s 7) ("***Facinacci***"); ***R v Phillion***, [2003] OJ No 3422, (SCJ) (s 7).

[15] The Respondents submit that bail pending appeal is not a *Charter* right, noting that Arbour JA (as she then was) in ***Farinacci*** found it "... unnecessary ... to express an opinion as to the exact foundation or scope of any right to bail pending appeal which may be contained in s. 7" (at para 20). She merely assumed that "... s. 7 [could] provide [the applicants] with a basis upon which to anchor a constitutional entitlement to bail pending appeal" (at para 17), for the purpose of assessing the constitutionality of the term "public interest" in the test for bail pending appeal in s 679(3)(c) of the *Criminal Code*.

[16] Arbour JA spoke on behalf of a unanimous five-person panel of the Ontario Court of Appeal. While the finding of a constitutional right to bail pending appeal was only conditional, the decision did engage in a rather detailed exploration of the constitutional foundation for such a right. It clarified that the right was <u>not</u> found in s 11(e) of the *Charter*, which applies only to persons "charged with an offence", and provides pre-trial and trial rights that are exhausted upon conviction (paras 7-8). In particular, the pre-trial right to bail is rooted in the presumption of innocence, which is spent when there is an enforceable finding of guilt (para 8).

[17] Nonetheless, the Court held that there is "a sufficient residual liberty interest at stake in the post-conviction appellate process to engage s 7 in some form", citing ***R v Gamble***, [1988] 2 SCR 595, 89 NR 161. The Respondents do not question this aspect of ***Farinacci***, and concede that the "continued enforcement of the Applicant's U.S. sentence constitutes a continuation of his deprivation of liberty."

[18] The Court in ***Farinacci*** went on to discuss principles of fundamental justice, specifically whether "reviewability" of convictions for serious crimes is a principle of fundamental justice. The Court suggested that at least some form of reviewability, for example of the constitutionality of provisions under which a person was convicted, or of the fairness of the trial in a constitutional sense, would appear to be required by the *Charter*. It follows that, "[i]f reviewability, even in some minimum form, of convictions leading to imprisonment does constitute a principle of fundamental justice, then some ancillary right to bail pending review would have to follow, if only to prevent the review from being nugatory." (at para 25).

[19] The Court at para 26 also noted that, where there is a right of appeal by statute, access to bail or some equivalent relief has been provided by the courts, absent a statutory entitlement. Examples provided (paras 27-29) were ***Hicks*** (*habeas corpus*), ***R v Gingras*** (1982), 4 CACM

225, 70 CCC (2d) 27 (Ct Martial App Ct) (stay of execution of sentence), and ***Hinds*** (application under s 24 of the *Charter*). The Court summarized its observations at para 30 regarding these decisions:

> Although there are decisions denying the availability of each of the procedures employed in these cases, the desirability, in non-constitutional terms, for the existence of a right to bail pending appeal is undeniable if a statutory right of appeal is not to be rendered nugatory by inevitable appellate delays. Similarly, if reviewability, in broad terms, is a principle of fundamental justice, then access to bail pending review would have to be incorporated into an effective right of review. As indicated earlier, I am prepared to assume that such a constitutional right exists ...

[20] For purposes of this application, I do not find it necessary to rely on ***Farinacci*** as support for reviewability as a principle of fundamental justice. If a *Charter* right to review exists, it would not extend to review of foreign decisions and so would not assist the Applicant. Further, the weight of authority is that appeals are created by statute, and are not constitutionally guaranteed. The Alberta Court of Appeal in ***R v Robinson*** (1989), 63 DLR (4th) 289, 100 AR 26, held that there is no *Charter* right to state funded counsel on appeal, and no "unqualified right of appeal from convictions for offences tried by indictment" (at p 308). The Supreme Court of Canada stated in ***Kourtessis v MNR***, [1993] 2 SCR 53 at 69-70, 102 DLR (4th) 456.

> Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a wide-spread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

[21] The lack of a constitutionally guaranteed right to an appeal does not, however, mean that the *Charter* has no application where a right to appeal is provided by statute. In ***R v PC***, the Ontario Court of Appeal commented on ***R v Robinson*** at para 18:

> *Robinson* points out that the *Charter* does not contain specific reference to appeals. I do not read *Robinson* as saying the fact that there is no constitutionally protected right of appeal does not mean that the *Charter* has no application to s. 684. As I have said, ss. 10(b), 7 and 11(d) together protect an accused's right to fair treatment from the point of arrest or detention through to the end of the adjudicative process. The liberty interests protected by s.7 would also encompass appeals. ... The *Charter*'s silence respecting the right to an appeal therefore does not mean that the underlying value of fair treatment of an accused enshrined in the *Charter* does not apply to appeals.

[22] In other words, while there is no right to an appeal, if there is an appeal mechanism present then it should operate in a *Charter*-compliant manner.

[23] The governing test by which principles of fundamental justice are identified was discussed in ***R v DB***, 2008 SCC 25 at para 46, [2008] 2 SCR 3, and recently summarized in ***R v Anderson***, 2014 SCC 41 at para 29, [2014] 2 SCR 166. A principle of fundamental justice must:

(1) be a legal principle,

(2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and

(3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person

[24] The legal principle, with its roots in the law of *habeas corpus*, is that persons subject to legal proceedings should not be unreasonably detained pending hearing. In the context of pre-trial delay, this developed into the *Charter* right to reasonable bail. There are differences in the appeal context. There is no presumption of innocence and no presumption of a right to bail; the onus is on the applicant; and the relevant factors include an assessment of the merits of the appeal and a weighing of the public interest in immediate enforcement of the conviction: ***Farinacci*** at paras 14 and 41-44. But there are important similarities, too. Once the criminal justice system has made provision for an appeal, "... the same danger of oppression by delay arises after as before trial, and the same need arises for a review of detention when bail is appropriate." (***Hicks*** at para 15).

[25] There is consensus that this principle is fundamental to the way in which the legal system ought fairly to operate. As stated in ***Hicks***, it is "... an accepted idea today that there be a reasonable opportunity to seek bail pending appeal ..." (para 15). As noted earlier, this accepted idea has found its way into a number of post-*Charter* determinations that there is a *Charter* right to bail pending appeal.

[26] ***Farinacci*** elaborates on the fundamental importance of the principle at para 44:

> There may have been a time when appellate delays were so short that bail pending appeal could safely be denied, save in exceptional circumstances, without rendering the appeal illusory. Such is no longer the case. In both civil and criminal cases, appellate court judges are often required to balance two competing principles of justice: reviewability and enforceability. Ideally, judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires be considered in the determination of entitlement to bail pending appeal.

[27] The principle is sufficiently precise to yield a manageable standard. The parties to this application agree that an appropriate test is found by adopting and applying s 679(3) of the *Criminal Code* as that test has been explained and clarified in the case law.

[28] I conclude that the right to seek bail pending appeal is a principle of fundamental justice. When an applicant's liberty is at stake, as in this case, the right to seek bail pending appeal is guaranteed under s 7 of the *Charter*.

## III. Impact of the *ITOA* and the *Treaty*

[29] The Respondents have submitted that the Court should decline to grant bail pending appeal because this would breach Canada's obligation under the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences* (*Treaty*) to continue the enforcement of Khadr's U.S. sentence, and is barred by the *ITOA*.

### A. Relevant *Treaty* and *ITOA* Provisions

[30] Several provisions in the *Treaty* comment on how an offender's sentence may or may not be varied.

[31] It is a condition of transfer of an offender that there be no appeal or collateral attack on conviction or sentence pending, and that the time for appeal has expired:

> **Article II(e)**
>
> The application of this Treaty shall be subject to the following conditions: ...
>
> (e) That no proceeding by way of appeal or of collateral attack upon the Offender's conviction or sentence be pending in the Sending State and that the prescribed time for appeal of the Offender's conviction or sentence has expired.

[32] This language was reflected in the United States communication approving the Applicant's transfer to Canada, which stated that his sentence was "final at the present time since there are no appeals or post-judgment collateral proceedings pending."

[33] The *Treaty* provides that the Receiving State will carry out the Offender's sentence according to its own laws, but will have no jurisdiction to set aside or modify the conviction or sentence.

[34] Even after a transfer, the Sending State may pardon an offender and reserves jurisdiction over "collateral attacks" on the conviction or sentence. The Receiving State will release pardoned Offenders and will take "appropriate action" if a conviction or sentence is set aside or modified:

> **Article IV(1)**
>
> 1. Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Sending State shall, in addition, retain a power to pardon the Offender and the Receiving State shall, upon being advised of such pardon, release the Offender.
>
> **Article V**
>
> Each Party shall regulate by legislation the extent, if any, to which it will entertain collateral attacks upon convictions or sentences handed down by it in the cases of Offenders who have been transferred by it. Upon being informed by the Sending State that the conviction or sentence has been set aside or otherwise modified, the

> Receiving State shall take appropriate action in accordance to such information. The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside, or otherwise modify convictions or sentences handed down in the Sending State.

[35] The *ITOA* implements treaties on the international transfer of offenders, including the *Treaty* between the United States and Canada. The purpose of the Act is set out in s 3:

> The purpose of this Act is to enhance public safety and to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.

[36] A "Canadian offender", who may be eligible to serve his foreign sentence in Canada under the *ITOA* is defined in s 2 as someone "...whose verdict and sentence may no longer be appealed."

[37] Section 5(1) deals with the effect of a transfer on the foreign conviction and sentence:

> A transfer may not have the effect of increasing a sentence imposed by a foreign entity or of invalidating a guilty verdict rendered, or a sentence imposed, by a foreign entity The verdict and the sentence, if any are not subject to any appeal or other form of review in Canada.

[38] Section 13 and subsection 29(1) deal with the continued enforcement of a Canadian offender's sentence, and the application of Canadian laws:

> The enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada.
>
> ...
>
> > Subject to this Act, a Canadian offender who is transferred to Canada is subject to the *Corrections and Conditional Release Act*, the *Prisons and Reformatories Act* and the *Youth Criminal Justice Act* as if they had been convicted and their sentence imposed by a court in Canada.

[39] The only *ITOA* provision that deals with the potential for a post-transfer pardon or collateral attack is s 30(1):

> A Canadian offender shall benefit from any compassionate measures — including a cancellation of their conviction or shortening of their sentence — taken by a foreign entity after the transfer.

## B. Parties' Positions

[40] The Respondents submit that the *ITOA* and Canada's international obligations bar this application for bail pending appeal. As stated in the Respondents' written submission (para 52):

> The Applicant was sentenced to eight years of confinement prior to his transfer to Canada. His transfer was premised upon an agreement that Canada would continue enforcement of this sentence. Unless and until this sentence is varied or vacated by an American court of competent jurisdiction, Canada and the CSC must continue to enforce it.

[41] The Respondents submit that the laws of Canada apply to the Applicant only in respect of continued enforcement of his sentence, and not in respect of an appeal of conviction or sentence. This is made clear in the definition of a Canadian offender as someone "whose verdict and sentence may no longer be appealed", and in the provision in s 5(1) that the verdict and sentence "are not subject to any appeal *or other form of review in Canada*" (emphasis added). The Crown contends that an application for bail pending appeal constitutes a form of review of conviction and sentence.

[42] The Applicant submits that, while the *ITOA* and the *Treaty* do not explicitly contemplate an application for bail pending appeal, they do not prohibit it either, and that the *ITOA* should be interpreted consistently with the Applicant's *Charter* right to seek bail pending appeal.

## C. International Treaties as an Interpretative Tool

[43] Treaties are interpreted in a manner analogous to statutes. In ***Thomson v Thomson***, [1994] 3 SCR 551, 119 DLR (4th) 253, La Forest J indicates the correct approach to interpreting treaties is, itself, provided by a treaty, the *Vienna Convention on the Law of Treaties*, Can TS 1980 No 37. Article 31 provides:

> Article 31. General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> > (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> >
> > (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

[44] The Article 31(3) rule that the manner in which parties who are subject to a treaty have then conducted themselves "... establishes the agreement of the parties regarding its interpretation" was recently cited and applied by Rothstein J in ***Yugraneft Corp. v Rexx Management Corp.***, 2010 SCC 19 at para 21, [2010] 1 SCR 649.

[45] The general rule is that Canadian legislation that implements an international treaty should be interpreted on the presumption the legislation conforms to international law. A recent restatement of this approach is found in ***R v Hape***, 2007 SCC 26, [2007] 2 SCR 292, where LeBel J explains at para 53:

> One final general principle bears on the resolution of the legal issues in this appeal. It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. ...

## D. The Charter as an Interpretative Tool

[46] The proper approach to employing the *Charter* as an interpretive tool is concisely formulated in ***R v Sharpe***, 2001 SCC 2 at para 33, [2001] 1 SCR 45, citing ***Slaight Communications Inc v Davidson***, [1989] 1 SCR 1038 at 1078.

> ... If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted ...

[47] A more detailed restatement of the test is found in ***R v Rodgers***, 2006 SCC 15, [2006] 1 SCR 554. This was a challenge of the constitutionality of DNA seizure provisions that operated in an *ex parte* manner, arguably a breach of a principle of fundamental justice. Charron J at paras 18-19 reviews the correct approach to using the *Charter* as a tool to interpret legislation:

> In my respectful view, Doherty J.A. effectively pre-empted any judicial review of the constitutional validity of the statutory provision by infusing *Charter* principles as part of the interpretative process. In doing so, he exceeded the proper limits of *Charter* values as an interpretative tool. It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the Charter: ... However, it is equally well settled that, in the interpretation of a statute, Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result ...
>
> If this limit were not imposed on the use of the Charter as an interpretative tool, the application of Charter principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the Charter of its more powerful purpose — the determination of the constitutional validity of the legislation ...

## E. Interpretation of the *Treaty* and the *ITOA*

[48] The *Treaty* does not specifically contemplate a post-transfer appeal in the Sending State. The Sending State may pardon a transferred offender, and reserves jurisdiction over collateral attacks on conviction or sentence (Articles IV and V). Collateral attacks are not defined but would seem to be distinct from appeals in that Article II(e) provides that a transfer is conditional on there being no pending "proceeding by way of appeal or of collateral attack". Perhaps post-transfer appeals are not mentioned because the transfer is conditional upon there being both no appeal and the prescribed time for appeal having expired, so that a post-transfer appeal would only occur in unusual circumstances. Nonetheless, in this case, there is a post-transfer appeal, and there is no suggestion that this puts the United States in breach of the *Treaty*. In fact, the Respondents in this application indicate an intention to respond appropriately, if and when the Applicant's sentence is "varied or vacated by an American court of competent jurisdiction".

[49] In interpreting the *Treaty*, I have regard to the text and context of the *Treaty*, and the subsequent actions of American and Canadian authorities. The question of whether the *Treaty* precludes a post-transfer American appeal is not directly in issue in this application, but the question of whether it precludes a Canadian application for bail pending appeal is, and in my

view, these questions are related. The American appeal provides the factual context for the Canadian application. Further, the *Treaty*'s treatment of both the appeal and the application is similar: neither proceeding is specifically allowed; neither is specifically prohibited.

[50] It is significant that the *Treaty* does not explicitly preclude a post-transfer appeal in the United States. If the parties had desired to do this, they could have used explicit language, like that found in Article V regarding proceedings in the Receiving State: "the Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside, or otherwise modify convictions or sentences handed down in the Sending State" (Article V). Only the Receiving State is denied "jurisdiction over any proceedings, regardless of their form" to set aside or vary conviction or sentence. This suggests that the Sending State retains a broad jurisdiction over any proceedings in any form brought for this purpose. I conclude that the *Treaty* does not prohibit the Applicant's post-transfer appeal in the United States. The United States as Sending State retains jurisdiction over proceedings intended to challenge, set aside, or otherwise modify the Applicant's conviction and sentence, whether in the form of appeals or otherwise.

[51] While the Sending State retains jurisdiction over the conviction and sentence; the Receiving State is given jurisdiction over the "completion of a transferred Offender's sentence" which is to be "carried out" according to the laws and procedures of the Receiving State, including provisions that reduce the term of confinement by "parole, conditional release or otherwise" (Article IV). The language of the *Treaty* does not restrict applicable laws and procedures to the listed examples. There is an express limitation on applicable laws and procedures of the Receiving State: they cannot seek to challenge, set aside or modify a conviction or sentence. The Respondents argue and I accept that there is also an implicit limitation in that the applicable laws must relate to the completion or carrying out of the offender's sentence.

[52] The Respondents have emphasized that, in considering whether the *Treaty* and Canada's other international law obligations preclude this application, I should put significant weight on Canada's obligation to respect the sovereignty of the United States (and potentially other sending states) and the exclusive rights of foreign states to administer their own systems of criminal justice. While state sovereignty is not absolute, its only limits are those to which the state consents or that flow from international law: ***R v Hape***, 2007 SCC 26 at para 43, [2007] 2 SCR 292. In consenting to the international transfer of offenders, states are allowing an intrusion into their sovereign criminal law jurisdiction. As explained in ***Divito v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 47 at para 40, [2013] 3 SCR 157:

> ... requiring the return of an offender to his or her home state infringes the doctrine of state sovereignty; it violates the territoriality of the criminal law and the exclusive right of a state to administer criminal justice. ...

[53] The Respondents also emphasize that sending states retain an interest in the continued enforcement of an offender's sentence post-transfer, as a means of protecting the integrity of their judgments. They point to the following explanation by Michal Plachta in *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Frieburg im Bresgau, Germany: Eigenverlag Max-Planck-Institut für ausländisches und internationals Strafecht, 1993) at p 423:

> A country does not want its domestic laws and court decisions altered in effect when a prisoner leaves its control, because to do so impinges upon the *sovereignty* of that country and lessens the extent of control it enjoys over the fate of the prisoner who offended against its laws before he was transferred. Moreover, it is important for the sake of justice and domestic equality before the law that those transferred not benefit unfairly from the transfer in the sense that others convicted under the same domestic laws remain behind with their sentences unaltered. (original italics)

[54] While I accept these observations, I note that potential infringements on state sovereignty apply to both sending and receiving states involved in the transfer of prisoners. Michal Plachta also comments on the sovereignty concerns of a receiving state, at pp 426-7:

> The prisoner transfer scheme is based on a commonly accepted understanding that once the convicted persons [sic] is transferred, the administering state, that is, the country of his residence or nationality, is responsible for enforcement of the sentence underlying a transfer. It is assumed that, through an international arrangement, the sentencing state expressly relinquishes its right of execution in its territory of a sanction imposed by its court. As the receiving country assumes enforcement of the judgment, execution of the sanction shall be governed by the provisions which would have been applicable if the sanction had been imposed in that state…
>
> Although the basic principle seems to be firmly established, there still exist *some controversies and uncertainties* as to what extent the competence of the sentencing state can be preserved concerning enforcement of the sentence imposed. Some countries might require as a condition of transfer that they maintain an active role in supervising the mode of punishment in the enforcing state. Some of them might even require that the prisoner perform heavy labour or live in solitary confinement…The enforcing states would certainly find these conditions an unacceptable interference with their sovereignty. Some restrictions would likely be forbidden by their constitutions…
>
> [T]he general principle should be that a *transferred prisoner be assimilated, for purposes of prison treatment, to the position of one sentenced in the enforcing country.* This provision would extend to remission, release on parole or life licence and supervision while on licence. (original italics)

[55] Both sending and receiving states have potential concerns regarding interference with sovereignty, and both determine what limits on their respective sovereignty to accept when entering into treaties for the transfer of prisoners. Thus, the issue is really the proper interpretation of the terms on which both the United States and Canada agreed to limit their sovereignty as either Sending State or Receiving State under the provisions of the *Treaty*.

[56] In my view, the issue is really one of characterization: is an application for bail pending appeal incidental to, or included within the category of proceedings "intended to challenge, set aside, or otherwise modify convictions or sentences"? If so, it would come within the category of

proceedings reserved to the exclusive jurisdiction of the Sending State. Or, is it more properly characterised as a proceeding related to the completion or carrying out of sentence and thus subject to the laws and procedures of the Receiving State?

[57] As this Court's jurisdiction is subject primarily to the *ITOA*, and only secondarily to the *Treaty* and international law, I will turn to the provisions of the *ITOA* before reconsidering this statement of the issue and its resolution.

[58] In interpreting the *ITOA*, I commence with the words of the provisions in the context of the scheme and object of the *Act*. As the *ITOA* implements the *Treaty*, the *Treaty* provides the scheme and objects of the *Act*. The *ITOA* is presumptively interpreted to comply with the *Treaty* and other international laws, but that presumption may be displaced by an unequivocal legislative intent.

[59] The Respondents place heavy reliance on the definition of a "Canadian offender" in s 2 of the *ITOA* as someone "whose verdict and sentence may no longer be appealed." This term appears in s 13, which provides that the "enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada". The Respondents submit that, as a Canadian offender is a person whose verdict and sentence may no longer be appealed, the applicable laws of Canada do not extend to laws relating to appeals, including laws relating to bail pending appeal. Further, s 5 provides that the verdict and sentence "are not subject to any appeal or other form of review in Canada." The Respondents submit that the reference to "other form of review" extends to review in the context of a bail application.

[60] I have concluded that under the *Treaty*, the United States retains jurisdiction over the Applicant's appeal. Denying this jurisdiction, by not recognizing the fact or the outcome of the appeal, would constitute a failure to respect the sovereignty of the United States and its rights under the *Treaty*. I hasten to add that there is no suggestion by the Respondents that Canada has any such intention; to the contrary, the Respondents have acknowledged the fact of the appeal and indicated that Canada will respect the outcome of the appeal.

[61] The definition of "Canadian offender" in s 2 of the *ITOA* does not demonstrate "an unequivocal legislative intent to default on an international obligation" (***R v Hape***, at para 53) and should not, therefore, be interpreted to have this effect. It does not purport to regulate the Applicant's access to an American appeal or the response of Canadian authorities to the outcome of an American appeal.

[62] The term "Canadian offender" appears in provisions of the *ITOA* that deal with the transfer process itself. In this context, the definition is simply reflecting the *Treaty* conditions that, at the time of the transfer, there is no appeal pending in the Sending State and the prescribed time for appeal has expired. The term "Canadian offender" also appears in post-transfer provisions including s 13 and s 29(1). In this context, the definition reflects the transfer conditions and the stipulation in s 5 that the Canadian offender's verdict and sentence are not subject to appeal in Canada. I do not view the definition as having any impact beyond reflecting those substantive provisions of the *Treaty* and *ITOA*.

[63] I reject the Respondents' argument that an application for bail pending appeal constitutes a form of review directly prohibited by s 5. Guidance to the meaning of the prohibition in s 5 of "any appeal or other form of review in Canada" is found in Article V of the Treaty: "the Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside, or otherwise modify convictions or sentences handed down in the Sending State." An application for bail pending appeal does not entail such an intention.

[64] As counsel for the Applicant observed, s 5 cannot have been intended to preclude a "review" in the sense of an examination of a foreign conviction or sentence. Such an examination may be crucial in the context of proceedings that are specifically provided to be subject to Canadian law, including parole proceedings. The Alberta Court of Appeal embarked on a detailed examination of the Applicant's sentence when considering whether the sentence should be served in a provincial correctional facility or a federal penitentiary: ***Khadr v Edmonton Institution***, 2014 ABCA 225, 577 AR 62 ("***Khadr Alta CA***")

[65] An application for bail pending appeal involves no more than an examination of the strength of a pending appeal. Where an appeal is governed by foreign law, which is a question of fact in Canadian courts, the examination is conducted through an assessment of the evidence provided on this point. This type of "review" is not prohibited by s 5.

[66] While I conclude that an application for bail pending appeal is not a "review" directly prohibited by s 5, that does not necessarily mean that it comes within the category of applicable Canadian laws under s 13 of the *ITOA*. The issue under the *ITOA*, like the issue under the *Treaty*, is one of characterization. Is an application for bail pending appeal incidental to the appeals and other forms of review excluded from Canadian jurisdiction by s 5? Or, is it more properly characterised as a proceeding related to the continued enforcement of a Canadian offender's sentence, and thus subject to the laws of Canada under s 13?

[67] To the extent that the purpose of bail pending appeal is to ensure that an appeal is not rendered nugatory, as indicated in ***Farinacci***, this may suggest that the application is incidental to the appeal and therefore not available in a Canadian court.

[68] The Respondents point to the following comments of the Alberta Court of Appeal in ***Khadr Alta CA*** at paras 61-62 as indicating that this application is barred by the *ITOA* and the Treaty:

> [O]ne of the offences for which Khadr was charged in 2007 and plead guilty, providing material support for terrorism, is not a crime under international laws of war: Hamdam v United States, 696 F3d 1238, 1248-1252 (DC Cir 2012) [Hamdam II]. Though it is now an offence under the MCA, Guantanamo detainees whose offence date, like Khadr's, preceded 2006 have had their convictions in the United States vacated on the grounds that it was not until the 2006 MCA that this offence was criminalized and the MCA does not apply retroactively: Hamdan II, supra.
>
> However, under the ITOA, Khadr cannot now raise these arguments to challenge the validity of the verdict any more than the AGC can now raise arguments to

> challenge the validity of the sentence the Convening Authority imposed on Khadr. Both the ITOA and the Treaty leave no room for controversy on this point. It is improper for Canadian courts, the AGC, the CSC or the offender to sidestep the continued enforcement procedure that Parliament has laid down.

[69] In my view the Court of Appeal's comment was directed to the issue of jurisdiction over proceedings that seek to set aside or modify convictions or appeals, that are clearly excluded from Canadian jurisdiction under the *ITOA* and the *Treaty*. It does not address the issue before me, as to the proper characterization of an application for bail pending appeal.

[70] The purpose of bail pending appeal, as explained in ***Hicks***, is to prevent unreasonable and oppressive detention during the delay entailed by appeal proceedings. I have concluded that this is a principle of fundamental justice. Considered from this perspective, an application for bail pending appeal is not primarily concerned with the preservation of the right to appeal, but with the reasonableness of the offender's continued detention in the prevailing circumstances.

[71] The Respondents filed the affidavit of Lee Redpath, a Director with CSC, in these proceedings. She discusses the principle of continued enforcement of foreign sentences, as distinct from sentence conversion, which is not a part of Canadian law. She refers to the *Handbook on the International Transfer of Sentenced Persons* published by the United Nations Office on Drugs and Crime, for guidance to these concepts. At p 52, the Handbook states that laws governing release are included within the concept of enforcement:

> The enforcement of a sentence relates also to release from it. The general rule, subject to important exceptions for pardons and amnesties discussed below, is that release is also governed by the law of the administering State.

[72] I am assisted regarding this interpretive issue by the impact of *Charter* values as an interpretative tool. I have concluded that the *Charter* guarantees the opportunity to seek bail pending appeal as a principle of fundamental justice. The *ITOA* is not clearly inconsistent with this right. The *ITOA* permits two different and equally plausible interpretations:

1. that an application for bail pending appeal is not permitted in Canada because it is incidental to an appeal, which is not permitted; or

2. that an application for bail pending appeal relates to release which is an aspect of continued enforcement of a sentence and therefore subject to Canadian law.

[73] Given this ambiguity, the interpretation that accords with *Charter* principles is preferred. I conclude that the *ITOA*, so interpreted, does not prevent the Applicant from seeking bail pending appeal in this Court.

[74] If I am incorrect in finding that the *ITOA* is ambiguous, and the *ITOA* properly interpreted prohibits this application for bail pending appeal, it is necessary to consider the "more powerful purpose" of *Charter* in determining the constitutional validity of the *ITOA* (***Rodgers*** at para 19). The Applicant has filed a *Charter* notice challenging the validity of the *ITOA* if it is found to have this effect, and served it on the provincial and federal Attorneys General as required by the *Judicature Act*, RSA 2000, c J-2, s 24. Counsel for the Respondents communicated on behalf of the

Attorneys General a reservation of the right to call evidence and make submissions regarding s 1 of the *Charter*, in the event that the Court should find a breach. It is my view that, if my interpretation of the *ITOA* is incorrect, the *ITOA* does violate the Applicant's s 7 *Charter* right to apply for bail pending appeal. In the interests of providing a complete record on this application, I am directing the parties to arrange a continuation of the hearing, and to arrange for counsel to attend on behalf of the provincial and federal Attorneys General, to provide their evidence and/or submissions regarding s 1 of the *Charter*.

## IV. Additional Submissions of the Respondents

[75] The Respondents submit that the Court should exercise its discretion to decline *habeas corpus* jurisdiction, citing ***May v Ferndale Institution***, 2005 SCC 82, [2005] 3 SCR 809 ("***May***"), at para 39. I reject this submission for several reasons. First, as I have held that the Applicant has a *Charter* right to seek bail pending appeal, I am not satisfied that I have discretion to decline to exercise jurisdiction. The Applicant is entitled, under s 24 of the *Charter*, to a remedy that is appropriate and just in the circumstances. Further, the grounds upon which the Respondents submit that the Court should decline jurisdiction relate to the impact of the *ITOA* and Canada's obligation under the *Treaty* to continue enforcement of the Applicant's sentence. I have held that neither the *ITOA* nor the *Treaty* bar this application.

[76] In addition, the grounds on which Courts have declined *habeas corpus* are limited. One is that *habeas corpus* is not a substitute for an appeal: ***May***, at para 36. Otherwise, the only grounds on which Courts have declined *habeas corpus* jurisdiction fall into two general categories:

1. where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be; and

2. where there is an alternative complete, comprehensive and expert procedure in place.

(***May***, at para 44, ***Mission Institution v Khela***, 2014 SCC 24 at para 55, [2014] 1 SCR 502).

[77] None of the recognized grounds applies here. The application for bail pending appeal is not a substitute for an appeal. Further, there is no alternative procedure available to the Applicant. The Applicant submits, and the Respondents do not dispute this, that there is no mechanism in the United States under which the Applicant could seek bail pending appeal, as an American court cannot release a prisoner on bail who is not in their jurisdiction. If the Applicant cannot seek bail pending appeal in this Court, there is no alternative forum in which he can seek a remedy.

[78] The Respondents also submit that the application is barred, or the Court should decline to exercise its jurisdiction, because the Applicant waived his right to collaterally attack his detention in any forum as a part of his Pre-Trial Agreement with American authorities. The Pre-Trial Agreement provided that the Applicant would sign and execute a "Waiver/Withdrawal of Appellate Rights" form, and agreed that he would thereby waive his rights to appeal or "to collaterally attack [the] conviction, sentence, and/or detention in any judicial forum (found in the United States or otherwise) or proceeding, on any grounds". The Applicant did sign a waiver form as identified in the Pre-Trial Agreement. That waiver form refers only to appellate review by the CMCR, and not to collateral attacks in any other judicial forum.

[79] The effectiveness of the waiver is an issue in the Applicant's appeal. It is the Applicant's position that the waiver, because it was not filed as required under the *MCA*, does not bar his appeal. Expert opinion evidence on behalf of the Applicant indicates that the Applicant's position is likely to succeed. That opinion is supported by the subsequent decision in ***Hicks v USA***, CMCR 13-004 (2015) (***Hicks USA***), in which a similar waiver, which was not filed as required, was found by the CMCR to be ineffective.

[80] The Applicant did not enter into a waiver agreement with Canadian authorities at the time of his transfer to Canada. His signed waiver was not included with his transfer application, although a copy of the Pre-Trial Agreement was. The Respondents are asking this Court to give effect to a waiver that was given to American authorities, even though it is unlikely to be given effect in relation to the Applicant's American appeal. Further, the waiver itself refers only to appellate review in the Court of Military Commission Review. It is certainly not a clear waiver by the Applicant of his *Charter* rights in Canada.

[81] The degree to which a *Charter* right may be waived varies with the nature of that right. In ***R v Richard***, [1996] 3 SCR 525, 140 DLR (4th) 248 this was described as a spectrum, but one factor is critical for any valid waiver, that waiver must be voluntary and informed:

> This Court has already recognized that there are circumstances in which a right or freedom conferred by the Charter can be waived. However, the possibility of waiving certain constitutional rights, the manner in which such a waiver may be made, the extent to which such rights can be waived and the effect of a waiver may vary with the nature and scope of the right in question .... That is why, for example, the right to be tried within a reasonable time ... is not necessarily waived in the same way and to the same extent as the right to counsel ... and why it may sometimes even be impossible to waive a constitutional right .... It is clear, however, that where it is possible to waive a given right or freedom, this Court has always stressed that the conduct of the holder of the right or freedom amounting to waiver must be <u>voluntary</u> and that he or she must <u>have full knowledge of the consequences</u> of that waiver. [Citations omitted, emphasis in original.]

[82] Even if the waiver was voluntary, the language and circumstances of the waiver make obvious that the Applicant did not make that waiver with the full knowledge that it would extinguish his *Charter* right to bail pending appeal in Canada.

[83] The Alberta Court of Appeal dealt with a similar submission in ***Khadr Alta CA***. It was argued that, in the course of the transfer process, Khadr had understood and agreed that he would serve his remaining sentence in a federal penitentiary. The Court of Appeal rejected that submission, and further held, at para 92:

> In any case, even if an offender agreed to accept a transfer knowing in advance that the Minister had taken a position under the *ITOA* with which the offender did not agree, there is nothing in the law that precludes that offender's agreeing to the transfer and later challenging state action on return to Canada. Estoppel has no application in circumstances such as these. An offender is not required to choose

> between returning to Canada by consenting to a transfer and enforcing his or her rights under the *Treaty* and the *ITOA*. Consent to a transfer does not equal surrender of rights. Under the rule of law, all Canadians are entitled to challenge the state's alleged improper interpretation of Canadian law in the courts in this country.

[84] In my view, the Respondents' argument in this case raises similar issues. The Applicant did not waive his *Charter* rights and did not enter into any agreement to do so with Canadian authorities. While his Pre-Trial Agreement with American authorities was included with his transfer application, that does not give rise to an estoppel preventing him from pursuing his rights under the *Charter* in this application. I conclude that the Applicant's waiver agreement does not bar the application.

## V. Merits of the Application

[85] The parties agree that the applicable test is the test that applies to an application for bail pending appeal under s 679(3) of the *Criminal Code*:

a. the appeal or application for leave to appeal is not frivolous;

b. he will surrender himself into custody in accordance with the terms of the order; and

c. his detention is not necessary in the public interest.

[86] It is also agreed that the onus to establish that these criteria have been met is on the Applicant.

### A. The Appeal is not Frivolous

[87] The Applicant's appeal is described and evaluated in the affidavits of his American appeal counsel, Samuel T. Morison, and independent expert witnesses, David W. Glazier and Gary D. Solis.

[88] A preliminary issue is whether the appeal is barred by the Applicant's waiver. The Applicant's position is that the waiver is ineffective because it was not filed within 10 days following the sentencing of the Applicant (referred to in the *MCA* as the "action"). Under the *MCA* review of convictions is automatic unless the accused waives or withdraws his right to appeal by submitting a written waiver within 10 days following the action. "The rationale for this system of judicial oversight is to ensure 'that the [trial] produce[s] an accurate result and not merely one that an accused is willing to accept'" (Solis Affidavit, at para 7).

[89] Professor Solis is a law professor and former military judge, and the author of *The Law of Armed Conflict: International Humanitarian Law in War*, published by Cambridge University Press. His expert evidence was accepted by the Court of Appeal in ***Khadr Alta CA***, at para 14. His unchallenged opinion is that the Applicant has a "strong" prospect of success on the waiver issue. As I noted earlier, the subsequent decision of the CMCR in ***Hicks USA*** supports that opinion.

[90] The merits of the appeal relate to the non-retroactivity of the *MCA* and the question of whether the subject offences constituted international war crimes at the time they were committed. This is essentially the issue described in ***Khadr Alta CA*** at para 61. The argument is that not only material support for terrorism, but also the other offences of which the Applicant was convicted; namely murder and attempted murder in violation of the law of war, conspiracy, and spying, were not crimes under international laws of war in 2002. The legal argument regarding each of these offences is set out in detail in an article published by Professor Glazier, "A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr", *Loyola Law School Legal Studies Paper No. 2010-37*. Professor Solis also discusses the issues in a draft chapter of the second edition of his text. Both Professor Glazier and Professor Solis are of the opinion that the Applicant's position on the merits of the appeal is "correct in law". Their opinions are unchallenged in this application.

[91] It is clear that the Applicant has met the first branch of the test; his appeal is not frivolous. The Respondents do not suggest otherwise. I have reviewed the evidence on this point because the strength of the appeal is also a consideration on the third branch of the test.

**B. The Offender will Surrender Himself into Custody**

[92] The Applicant's Affidavit includes an undertaking to turn himself into custody in accordance with the terms of any order for release issued by this Court. The Respondent does not take issue with the Applicant's position that he will surrender himself as required. The Applicant's position is supported by his release plan. The Applicant has met the second branch of the test.

**C. Detention is Not Necessary for the Public Interest**

[93] Courts have taken different approaches to the third element of the *Criminal Code*, s 679(3) procedure, and whether the s 679(3)(a) strength of an appeal is also relevant to determine whether "detention is not necessarily in the public interest." (s 679(3)(c)).

[94] This specific issue was the subject of a recent judgment of the British Columbia Court of Appeal, ***R v Gingras***, 2012 BCCA 467, 330 BCAC 102 ("***Gingras***") by a panel of five judges. Certain Canadian appeal courts had concluded that the strength of an appeal is essentially irrelevant to determine whether detention is in the public interest: para 5. Other courts had concluded that the strength of an appeal is relevant only to balance a s 679(3)(c) concern for public safety: para 6. However, the British Columbia Court of Appeal in ***Gingras*** concluded that 679(3)(a) and 679(3)(c) form counterweights, "...balancing of the principle of enforceability with the opposing principle of reviewability. ...": para 8. The function of s 679(3)(a) is that it sets a threshold: that judicial interim release is not appropriate unless the applicant can demonstrate that a ground of appeal is not frivolous: para 37.

[95] If that threshold is met then the court in the s 679(3)(c) step balances the strength of the appeal and factors that favour detention. This is a variation on the approach taken by Berger JA in ***R v Rhyason***, 2006 ABCA 120, 384 AR 146 ("***Rhyason***"). ***Rhyason*** states that the strength of an appeal is balanced against public *safety*, rather than public *interest*. The British Columbia Court of Appeal in ***Gingras*** concluded that is too narrow an approach, and should therefore

include consideration of "... not only public safety but also "confidence in the administration of justice" ...": para 42. At para 47 the Court summarizes the balancing arrangement:

> ... There is no need to go beyond the frivolous threshold in cases unlikely to arouse a concern about public confidence. Creating categories of seriousness for this analysis might introduce rigidity and lead to unintended consequences. Instead, we should expect Crown counsel to recognize that the continuum runs from petty theft to first degree murder and to exercise good judgment in raising public confidence only in those cases where the offence is at the serious end of the scale. ... [Emphasis added.]

[96] The ***Gingras*** analysis has subsequently been adopted by the Nova Scotia, Saskatchewan, and Prince Edward Island Courts of Appeal: ***R v Rahman***, 2013 NSCA 100, 334 NSR (2d) 77, confirming 2013 NSCA 93; ***R v Will***, 2013 SKCA 4 at para 12, 405 Sask R 270; ***R v Hogg***, 2013 PECA 4, 335 Nfld & PEIR 227. Recent Alberta cases have also adopted the ***Gingras*** interpretation of s 679(3). Watson JA explicitly follows the ***Gingras*** line of appeal judgments in ***R v Knapczyk***, 2014 ABCA 255 at para 7, 577 AR 381 and ***R v Donszelmann***, 2014 ABCA 258 at para 10. ***R v K.D.L.***, 2014 ABCA 248 implicitly takes the same approach. Justice Watson at para 8 observes s 679(3)(c) involves a balancing of two aspects of public interest: enforceability and reviewability.

[97] Justice Slatter in ***R v Sigglekow***, 2014 ABCA 450 cites ***Gingras*** and ***R v Knapcyzk*** for the correct approach to the s 679(3)(c) "public interest" element. Here the appeal was not frivolous but judicial interim release was denied because the offender had not advanced his appeal in a timely manner, specifically as he had not ordered transcripts even though the offender had funds to execute long-distance travel plans: para 16. This obviously goes far outside the ***Rhyason*** "public safety" test when evaluating "public interest".

[98] I therefore will apply the ***Gingras*** approach to the s 679(3)(c) step. There is no dispute that the offences for which the Applicant has pled guilty are serious. As I have previously reviewed, the Applicant has a strong basis for his appeal. A useful discussion of how to balance these two factors is found in ***R v Hogg*** at paras 38-42: A weak appeal to a serious offence favours detention to protect public safety and maintain public confidence in the administration of justice. Where serious offences and a strong appeal balance then there are two considerations: the effect of the delay on the offender, and public safety:

> 39 On the other hand, when there is a serious offence and the grounds of appeal appear strong indicating the conviction was entered as the result of an error, a delay in the enforcement of the penalty while the conviction is reviewed will enhance confidence in the administration of justice. Provided of course the court is satisfied public safety is not jeopardized with the release of the convicted person.
>
> 40 Another factor which may be relevant in tipping the balance in favour of reviewability is the length of the sentence and the time it will take to bring the appeal before the court. If considering the time it will take to bring the appeal before the court is such that the sentence will be all or for the most part served by the time the appeal is decided, the appellant would be denied an effective appeal. In these

> circumstances and considering the merits of the grounds of appeal, public confidence in the administration of justice would not be enhanced if the enforceability prevailed over reviewability.

[99] The Applicant argues he is a low risk to public safety and that his appeal in the United States has faced an indeterminate delay. He submits that that a failure to grant pre-appeal judicial interim release will make his strong appeal nugatory. The Applicant has provided affidavit evidence that he has been entirely cooperative and a model prisoner during his detention by United States and Canadian authorities, that he has strong community support, and is therefore a low risk to public safety. The Respondents do not challenge this affidavit evidence.

[100] The Applicant is considered to be an offender sentenced under the *YCJA*: ***Khadr Alta CA***. That legislation in s 3 explicitly sets policy considerations for youth offenders, including a different requirement for enhanced procedural protection (s 3(1)(b)(iii) and timely judicial action (s 3(1)(b)(iv)). I consider those factors that also favour release to avoid the Applicant's United States appeal being rendered meaningless.

[101] This is a circumstance where balancing a strong appeal and the public confidence in the administration of justice favour the same result. Even though the Applicant has pled guilty to serious offences he should be granted judicial interim release because he has a strong basis for an appeal, and the risk to public safety is not such that it is in the public's best interest that he remain in pre-appeal detention in a manner that could render his appeal irrelevant. As Watson JA observed in ***R v MacPherson***, 2012 ABCA 246 at para 4, 536 AR 85, that last factor "… is not itself automatically decisive …" but "… is still a weighty factor counted on the whole." That shifts the balance in favour of judicial interim release.

## VI. Conclusion

[102] I therefore order that the application for judicial interim release be granted, on appropriate terms. The Respondents have requested the opportunity to make submissions on the terms of release, and the parties will therefore return on the agreed date of May 5, 2015 at 2:00 pm to address that remaining issue.

Heard on the 24th and 25th days of March, 2015.

**Dated** at the City of Edmonton, Alberta this 24th day of April, 2015.

**J.M. Ross**
**J.C.Q.B.A.**

**Appearances:**

Nathan J. Whitling and Dennis Edney Q.C.
Beresh Aloneissi O'Neill Hurley O'Keeffe Millsap
for the Applicant

Bruce Hughson and Cameron Regehr
for the Respondents