

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)**

BETWEEN:

**ESTATE OF THE LATE ZAHRA (ZIBA) KAZEMI and
STEPHAN (SALMAN) HASHEMI**

APPELLANTS

– and –

**ISLAMIC REPUBLIC OF IRAN, AYATOLLAH SAYYID AL KHAMENEI,
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MEMORANDUM OF ARGUMENT
OF AMICUS CURIAE

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MEMORANDUM OF ARGUMENT
OF AMICUS CURIAE

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns the interaction between the condemnation of torture as an international crime against humanity, and the fundamental and long-standing principle of sovereign immunity.

2. The Appellants, the Estate (“Estate”) of Zahra Kazemi (“Ms. Kazemi”) and her son, Stephan Hashemi (“Mr. Hashemi”), seek civil recourse in Canada for the 2003 torture and death of Ms. Kazemi while in Iranian custody. They seek damages before the Quebec Superior Court from the Islamic Republic of Iran and three individual Iranian citizens: its Head of State, Ayatollah Sayyid Ali Khamenei, and two state officials, Saeed Mortazavi and Mohammad Bakhshi (the “Defendants”).

3. The Defendants filed a motion to dismiss the Appellants’ claims pursuant to the *State Immunity Act* (the “SIA”), which prohibits lawsuits against foreign states before Canadian courts. The Quebec Superior Court ordered that the Estate’s claim with respect to the Defendants’ actions in Iran be struck; this judgment was upheld by the Quebec Court of Appeal, which further ordered that Mr. Hashemi’s claim with respect to damages suffered in Canada be struck. Leave to appeal the judgment of the Quebec Court of Appeal was then granted by this Court.

4. *Amicus curiae* (“Amicus”) has been appointed by the Court to exercise independent judgment and make submissions in response to issues raised by the Appellants on which the Attorney General of Canada takes no position. Amicus will therefore make submissions in

response to the following issue: are foreign public officials, sued in their individual capacity, immune from the jurisdiction of Canadian courts in civil proceedings for acts of torture?

5. It is the position of Amicus that foreign public officials acting outside of Canada and acting in an official capacity are immune from the civil jurisdiction of Canadian courts. This immunity flows directly from the provisions of the SIA, accords with Canadian common law and customary international law, and is consistent with the policy which underlies state immunity. The position of Amicus is also consistent with the decisions below, wherein the Courts refused to treat the individual defendants differently from the State of Iran or its Head of State.

6. If the Appellants' position that Mortazavi and Bakhshi are *not* immune in the circumstances were accepted by this Court, it would represent a significant departure from international practice, and a significant erosion of state immunity.

B. Facts Relevant to the Submissions of *Amicus Curiae*

7. Amicus adopts and relies on the Statement of Facts of the Attorney General of Canada, and sets out briefly below the additional facts it intends to rely on.

(i) Parties

8. The Defendant, Saeed Mortazavi ("Mortazavi"), was at the relevant time the Chief Public Prosecutor for Tehran. The Defendant, Mohammad Bakhshi ("Bakhshi"), was at the relevant time the Deputy Chief of Intelligence for Evin Prison in Tehran, one of the locations where it is alleged that Ms. Kazemi was detained. The civil liability claim (the "Claim") filed by Mr. Hashemi, on his

behalf and on behalf of the Estate, pleads that Mortazavi and Bakhshi are citizens and residents of the Islamic Republic of Iran.¹

9. The Claim makes the following further allegations with respect to Mortazavi and Bakhshi:

17. At the order of Tehran's Chief Public Prosecutor, Mr. Mortazavi, Ms. Kazemi was arrested and detained while taking photographs outside Evin Prison. [...]

101. The Defendant, Mr. Mortazavi, the Chief Public Prosecutor for Tehran, ordered, oversaw and actively participated in Ms. Kazemi's interrogation and torture;

102. The Defendant, Mohammad Bakhshi, in his former role as Deputy Chief of Intelligence for Evin Prison in Tehran, interrogated, physically assaulted and tortured Ms. Kazemi;

103. The Defendants all knew, or ought to have known, of the circumstances surrounding Ms. Kazemi's detention, torture and death, and have all participated, either actively or by virtue of their negligence, in the ongoing cover-up of the circumstances surrounding Ms. Kazemi's death;²

10. The Claim also alleges that the Defendant, Ayatollah Sayyid Ali Khamenei, "oversaw the appointment of key individuals to senior positions [...] in a manner that placed few or no restrictions on their ability to exercise power", and "was instrumental in creating the conditions in which wrongful arrest, unwarranted detention, interrogation and torture leading to death are acceptable tools of the Iranian State and of its officers". There is nothing in the pleadings to

¹ Re-Amended Motion to Institute Proceedings, October 31, 2007 ["Claim"], p. 2, 3, 12, paras. 10, 17, 101-102, Appellants' Record, p. 144, 145, 154

² Claim, p. 3, 12, paras. 17, 101-103, Appellants' Record, p. 145, 154

suggest that what the individuals are alleged to have done was either done in a purely private capacity, or that they were acting outside the scope of their official duties.³

11. There is also nothing in the pleadings to support the characterization of Mortazavi and Bakhshi by the Appellant as “low-level officials”. In fact, the Claim suggests that Mortazavi and Bakhshi are *not* “low-level officials”, alleging that “there is widespread concern that the arrests made in connection with Ms. Kazemi’s death have been of lower-level officials, and not of individuals who [...] would not [*sic*] have been in a position to order and orchestrate her arrest, detention, beating, rape and torture on their own”. Mortazavi and Bakhshi were not arrested in connection with Ms. Kazemi’s death.⁴

12. The Claim is for civil recovery in Canada of damages for the Defendants’ allegedly tortious acts. The Claim is plead as follows: “The defendants, both in their professional and personal capacities, are jointly and severally liable for the prejudice caused to both Ms. Kazemi and Mr. Hashemi through their intentionally wrongful acts as well as their negligence.”⁵

(ii) Quebec Superior Court

13. The Defendants were represented by counsel before the Quebec Superior Court, and argued that the Claim should be struck in its entirety pursuant to section 3 of the SIA. The Court held that Mr. Hashemi’s claim could not be struck, given the exception at section 6(a) of the SIA in respect of immunity in the context of harm suffered in Canada. The Estate’s claim was struck as against all four Defendants. The Court held that Iran and the Ayatollah as Head of State were clearly immune based on the wording in the SIA, and went on to find after a detailed analysis of the relevant law

³ Claim, p. 12, paras. 98-99, Appellants’ Record, p. 154

⁴ Claim, p. 10, para. 80, Appellants’ Record, p. 152

⁵ Claim, p. 12, para. 97, Appellants’ Record, p. 154

that Mortazavi and Bakhshi were also immune based on the wording of the SIA, finding that “To give immunity to a government department and to deny it to its functionaries would render the State Immunity Act ineffective and inoperative”.⁶

(iii) Quebec Court of Appeal

14. In a unanimous decision, the Quebec Court of Appeal upheld the decision of the lower court to strike the Estate’s claim as against all four Defendants, but overturned the decision of the lower court with respect to Mr. Hashemi’s claim, and therefore held that his claim as against all four Defendants should also be struck.

(iv) Supreme Court of Canada

15. The Appellants frame the questions in issue before this Court as follows:

- A. Does the application of s. 3(1) SIA in the circumstances of this case deprive the Appellants of their right to a fair hearing, as protected by s. 2(e) of the Bill of Rights?
- B. Does the application of s. 3(1) of the SIA in the circumstances of this case violate Mr. Hashemi’s right to security of the person, as protected by s. 7 of the Charter?
- C. In light notably of Canada’s obligation under Article 14(1) of the CAT, does the jurisdictional bar created by s. 3(1) SIA conform to the principles of fundamental justice enshrined in s. 2(e) of the Bill of Rights and s. 7 of the Charter?
- D. If s. 3(1) SIA breaches s. 2(e) of the Bill of Rights or s. 7 of the Charter, can it be justified in a free and democratic society?

⁶ Reasons for Judgment of Mongeon J. (January 25, 2011), 2011 QCCS 196, para. 112, Appellants’ Record, p. 37

E. Are foreign public officials, sued in their individual capacity, immune from the jurisdiction of Canadian courts in civil proceedings for acts of torture?⁷

16. Apart from their arguments with respect to the application of the Charter and the Bill of Rights, the Appellants have not challenged the decision of the Quebec Court of Appeal with respect to the application of the section 6(a) exception in the SIA to Mr. Hashemi's claim. It is also not contested that, if the SIA is constitutional, it grants immunity to Iran and the Ayatollah. Apart from their constitutional arguments, the Appellants therefore argue only that Mortazavi and Bakhshi are not entitled to immunity, and seek to have the judgment striking the Claim as against them overturned.

17. In an order dated July 19, 2013, Chief Justice McLachlin ordered that, given that the Attorney General did not intend to address all issues raised by the Appellants in this appeal, Mr. Bredt be appointed as *amicus curiae* to assist the Court.⁸

18. In correspondence from the Court dated July 23, 2013, the Registrar of the Supreme Court of Canada wrote to Mr. Bredt, advising as follows:

Your role will be to assist the Court in analysing the legal issues; you do not represent a party. The Court directs you to exercise your independent judgment on any issues raised by the Appellant on which the Attorney General of Canada takes no position, and to make submissions in response to the Appellant.⁹

⁷ Appellants' Factum, p. 4-5, para. 24

⁸ Order by the Chief Justice, July 19, 2013, Factum of Amicus Curiae, Christopher D. Bredt ("Factum of Amicus"), Tab A

⁹ Correspondence sent by the Court Registrar to Christopher D. Bredt re his appointment as amicus curiae, July 23, 2013, Factum of Amicus, Tab B

19. In its October 4, 2013 factum, the submissions of the Attorney General of Canada were limited to “the constitutional validity of the SIA and its integrity as a complete code defining the law of state immunity in Canada.”¹⁰

20. Amicus will therefore limit its submissions to the final issue framed by the Appellants; that is, whether foreign public officials are immune from the jurisdiction of Canadian courts in civil proceedings for acts of torture.

21. The submissions of the parties and the interveners, as well as the various relevant sources, refer to “public officials” (as they are referred to in the Appellants’ list of issues) in a number of different ways, such as civil servants, government employees, functionaries, etc.¹¹ In the interest of consistency, we will refer in this factum to “public officials acting in an official capacity”.

PART II: POSITION WITH RESPECT TO QUESTIONS IN ISSUE

22. The position of Amicus is that foreign public officials acting in an official capacity are immune from the jurisdiction of Canadian courts in civil proceedings for acts of torture. Our submissions are organized as follows:

- A. The SIA grants immunity to foreign public officials for acts performed in their official capacity;
- B. In the alternative, the common law (and customary international law) grant immunity to foreign public officials for acts performed in their official capacity; and
- C. Strong policy reasons support the granting of immunity to foreign public officials for acts performed in their official capacity.

¹⁰ Factum of the Respondent, Attorney General of Canada, p. 6, para. 19

¹¹ For example, in the leading Canadian case on point, *Jaffe v. Miller*, the Ontario Court of Appeal refers to officials as “functionaries”, and adopts a dictionary definition: “a person who functions in a specified capacity, esp. in government service, an official, civil servants, bureaucrats and other functionaries”. *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 (QL) (C.A.) (“*Jaffe*”), paras. 32-33, Appellants’ Book of Authorities (“Appellants’ B.O.A.”), Vol. III, Tab 44, p. 315

PART III: STATEMENT OF ARGUMENT

A. The SIA grants immunity to public officials for acts performed in their official capacity

23. The principles of state immunity in Canada have been comprehensively codified in the *State Immunity Act*, which clearly grants immunity to public officials acting in an official capacity. In particular, foreign public officials acting in an official capacity outside of Canada fall within the definition of “government” in the SIA, and therefore are immune from Canadian jurisdiction pursuant to the SIA. Our submissions are organized as follows:

- (i) The language of the SIA clearly grants immunity to public officials acting in an official capacity.
 - (ii) “Government” action under the Charter includes acts of public officials.
 - (iii) “Government” in other contexts includes acts of public officials.
 - (iv) The SIA has always been interpreted to extend immunity to public officials acting in an official capacity.
 - (v) There is no support for the Appellants’ arguments with respect to the non-applicability of the SIA to foreign public officials acting in an official capacity.
- (i) The language of the SIA clearly grants immunity to public officials acting in an official capacity

24. The SIA provides a complete codification of the law of state immunity in Canada pursuant to section 3, which provides:

3. (1) Except as provided by this Act, a *foreign state is immune from the jurisdiction of any court in Canada.*[emphasis added]¹²

¹² *State Immunity Act*, R.S.C., 1985, c. S-18 (“*State Immunity Act*”), s. 3(1), Factum of Amicus, p. 42; *Bouzari v. Iran*, [2004] O.J. No 2800 (QL) (C.A.), paras. 56-58 (“*Bouzari CA*”), Appellants’ B.O.A., Vol. III, Tab 42, p. 294; *Arar v. Syrian Arab Republic*, [2005] O.J. No 752 (Sup Ct), paras. 25, 28, 30, Book of Authorities of Attorney General of

25. “Foreign state” is defined at section 2 of the SIA:

“foreign state” includes

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(c) any political subdivision of the foreign state; [emphasis added]¹³

26. Therefore, pursuant to the SIA, any “government” of a foreign state is immune from the jurisdiction of any court in Canada, subject to the exceptions set out therein. The parties appear to be in agreement that none of the exceptions to immunity set out in the SIA apply in the circumstances of the within appeal.

27. “Government” is not defined in the SIA. However, the use of the term elsewhere in the act supports an interpretation of “government” in the context of the SIA as including public officials.

Section 14 of the SIA provides:

14. (1) A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,

(a) whether a country is a foreign state for the purposes of this Act,

Canada (“Respondent’s B.O.A.”), Vol. I, Tab 11, p. 155, 156; *Steen v. Islamic Republic of Iran*, 2013 ONCA 30 (CanLII), paras. 25-28, Respondent’s B.O.A., Vol. III, Tab 60, p. 95-96

¹³ *State Immunity Act*, s. 2, Factum of Amicus, p. 41

(b) whether a particular area or territory of a foreign state is a political subdivision of that state, or

(c) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,

is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person's authorization by the Minister of Foreign Affairs. [emphasis added]¹⁴

28. The clear implication of section 14(1)(c) of the SIA is that the definition of government of a foreign state includes individuals – government employees or public officials. The purpose of section 14(1)(c) is to give the government of Canada the right to conclusively determine, through the issuance of a certificate, the issue of whether any particular individual is to be regarded as a public official and thus entitled to the immunity granted to foreign governments pursuant to the SIA.

29. The principles of statutory interpretation provide that “a section or enactment [of a statute] must be construed as a whole, each portion throwing light, if need be, on the rest.”¹⁵ As *Sullivan on the Construction of Statutes* puts it: “In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive

¹⁴ *State Immunity Act*, s. 14, Factum of Amicus, p. 42-43

¹⁵ *Greenshields et al. v. The Queen*, [1958] S.C.R. 216, p. 225, Book of Authorities of Amicus Curiae, Christopher D. Bredt (“Amicus’s B.O.A.”), Tab 2

problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted”.¹⁶

30. The language of section 14(1)(c) of the SIA, which makes clear that the term “government” includes public officials, clearly indicates that the use of the term “government” – including at sections 2 and 3(1) of the SIA, which extend immunity to “governments” of foreign states – must be interpreted as including public officials.

31. Logically this makes sense. A state can only act through its head of state or through its public officials. The definition of head of state at section 2(a) of the SIA includes its sovereign or head of state. By implication, the term government in section 2(b) of the SIA must include public officials, including prime ministers, ministers, deputy ministers, and other public officials.

(ii) “Government” action under the Charter includes acts of public officials

32. The interpretation of “government” as inclusive of public officials is consistent with the interpretation of the term by Canadian courts in the context of determining what constitutes “government” action under the Canadian Charter of Rights and Freedoms (the “Charter”). Although the SIA is a statute with a particular legislative purpose, and the Charter is part of the Constitution, Canadian courts have had the opportunity to interpret the scope of the term “government” most frequently in the context of Charter jurisprudence. In the absence of case law interpreting the scope of “government” in the SIA, the Charter jurisprudence is of assistance.

33. Section 32 of the Charter provides that it applies to the federal and provincial “governments”:

¹⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis, 2008), p. 360, Amicus’s B.O.A., Tab 12

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. [emphasis added]¹⁷

34. “Government” in the context of the Charter has been consistently interpreted to include an individual person or persons acting on behalf of government. In their text on Canadian constitutional law, Patrick Monahan and Byron Shaw state, “It is clear that government, for the purposes of section 32 [of the Charter], includes the entire executive branch, including ministers, civil servants, and regulatory agencies appointed by government.” In Professor Hogg’s text on constitutional law, he writes: “What is included in the term “government”? Obviously, it includes action taken by the Governor General in Council or the Lieutenant Governor in Council, by the cabinet, by individual ministers, and by public servants within the departments of government.”¹⁸

35. For example, in *Schreiber v. Canada*, this Court considered whether the preparation and sending of a letter of request by Canadian officials to Swiss officials fell within the scope of “government” for the purpose of applying section 32 of the Charter. Chief Justice Lamer, writing his own reasons, which concurred in result with the majority, stated:

The impugned conduct in this case is the letter of request, which was prepared and sent by Canadian officials. These officials are clearly subject to Canadian law, including the Charter, within Canada, and in most cases, outside it. They fall squarely within the purview of s. 32

¹⁷ *Canadian Charter of Rights and Freedoms*, s 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11., s. 32, Factum of Amicus, p. 38

¹⁸ Patrick J. Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto, ON: Irwin Law, 2013), p. 431, Amicus’s B.O.A., Tab 10; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto, ON: Carswell, 2007) at Vol. 2, 37.2(e), 37-18.1, Amicus’s B.O.A., Tab 11

of the Charter, as an arm of the executive branch, or the “government of Canada”. Moreover, because they are Canadian, there is no reason to be concerned with comity. They can be expected to have knowledge of Canadian law, including the Constitution, and it is not unreasonable to require that they follow it. This is especially true for officials who perform functions in the name of the Attorney General, who may indeed have additional responsibilities that flow from the special nature of that office. [emphasis added]¹⁹

(iii) “Government” in other contexts includes acts of public officials

36. Where “government” has been considered in the context of judicial independence, it has been held to include persons within the government. For example, in *R. v. Lippé*, Chief Justice Lamer stated the following:

I do not intend, however, to limit this concept of "government" to simply the executive or legislative branches. By "government", in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state. This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include any person or body within the judiciary which has been granted some authority over other judges; for example, members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice. (emphasis in original)²⁰

37. Defining “government” as including public officials acting in a public capacity is consistent with the dictionary definition of “government”. Webster’s defines “government”, *inter alia*, as follows: “All the people or agencies that administer or control the affairs of a nation”.²¹

¹⁹ *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, para. 16, Amicus’s B.O.A., Vol. III, Tab 5

²⁰ *R. v. Lippé*, [1991] 2 S.C.R. 114, p. 138, Amicus’s B.O.A., Tab 3

²¹ *Webster’s New World Dictionary*, 2d college ed, *sub verbo* “government”, p. 605, Amicus’s B.O.A., Tab 14

- (iv) The SIA has always been interpreted to extend immunity to public officials acting in an official capacity

38. Canadian courts have had relatively few opportunities to consider whether the immunity provided by the SIA extends to individuals acting in an official capacity, but in every case have answered this question in the affirmative. The leading case is *Jaffe v. Miller*, wherein the Ontario Court of Appeal interpreted the SIA to extend immunity to individuals where they are sued civilly for acts performed in their public capacity.²²

39. In that case, Mr. Jaffe commenced a claim in Ontario against a number of individual Florida officials for alleged torts arising from criminal charges laid against Mr. Jaffe in Florida, and for his arrest in Florida. The defendants, including the Florida Attorney General, a State Attorney, a number of Assistant State Attorneys, and an investigator for the office of the State Attorney, sought to strike Mr. Jaffe's claim, relying on the immunity provided by section 3 of the SIA. The plaintiff argued that the individual defendant state employees did not fall within the scope of s. 3.

40. The Court of Appeal held that the SIA must apply to individual state "functionaries", because the state can only act through individuals. The Court adopts a dictionary definition of "functionary" as being "a person who functions in a specified capacity, esp. in government service, an official, civil servants, bureaucrats and other functionaries", and holds "it will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state" and therefore immune pursuant to the SIA. In *Jaffe*, it was clear that the defendants were functionaries of the State of Florida, given that their positions are created

²² *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 (C.A.) ("*Jaffe*"), Appellants' B.O.A., Vol. III, Tab 44

by the state and they were acting within the scope of their duties when performing the acts alleged in Mr. Jaffe's claim.²³

41. Other courts in Canada have reached this same conclusion²⁴, and the approach taken in Canada is consistent with the interpretation of similar legislation in other jurisdictions.²⁵

(v) There is no support for the Appellants' arguments with respect to the non-applicability of the SIA to foreign public officials acting in an official capacity

42. The Appellants have advanced several arguments in support of their position that the SIA does not extend immunity to Mortazavi and Bakhshi in the circumstances, including:

- A further exception to state immunity should be read into the SIA for acts of torture, and/or for acts which are criminal or contrary to principles of international law; and
- The SIA should not be applied to public officials acting in an official capacity, based on the decision of the United States Supreme Court in *Samantar v. Yousuf*.

These arguments are not well-founded.

- ***Torture is By Definition an Official Act***

43. There is nothing in the SIA to distinguish between different types of official acts. Despite the Appellants' submissions before the courts below to the effect that a further exception to state

²³ *Jaffe*, paras. 32-33, Appellants' B.O.A., Vol. III, Tab 44, p. 315

²⁴ *Ritter v. Donell*, [2005] A.J. No 958 (QL) (Q.B.), para. 34, Amicus's B.O.A., Tab 4; *St-Laurent v. Sterling*, [2011] JQ No 729 (QL) (Q.C.C.S.), paras. 42-50, Amicus's B.O.A., Tab 6; *Brown v. Spagnuolo*, 2013 ONSC 5178 (CanLII), paras. 34-37, Amicus's B.O.A., Tab 1; *United States of America v. Friedland*, 46 O.R. (3d) 321, [1999] OJ No 4919 (QL) (C.A.), paras. 28-29, Amicus's B.O.A., Tab 7; *Walker v. Bank of New York*, [1994] O.J. No 126 (QL) (C.A.), para. 10, Amicus's B.O.A., Tab 8

²⁵ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 ("*Jones*"), Appellants' B.O.A., Vol. V, Tab 60; *Zhang v. Zemin*, [2010] NSWCA 255, Amicus's B.O.A., Tab 9. But see *Samantar v. Yousuf*, 560 U.S. 210 (2010), Appellants' B.O.A., Vol. VI, Tab 65, *contra*, discussed below.

immunity should be read into the SIA for acts of torture, and/or for acts which are criminal or contrary to principles of international law, the language of the SIA is clear: it extends immunity to public officials acting in an official capacity, regardless of the nature of the official act which is undertaken.²⁶

44. Further, torture is universally defined as including only actions taken by a public official acting in an official capacity; acts by individuals acting in a private capacity clearly fall outside of the definition of torture. For example, the United Nations Convention defines torture as an act “inflicted by or at the instigation or of with the consent or acquiescence of a public official or other person acting in an official capacity”. The Canadian Criminal Code offence of torture is aimed at “[e]very official, or every person acting at the instigation of or with the consent or acquiescence of an official.”²⁷

45. It is therefore clear that, by definition, the SIA extends immunity to foreign public officials with respect to allegations of torture.²⁸

- ***The Decision of the United States Supreme Court in Samantar v. Yousuf***

46. The Appellants rely on the decision of the U.S. Supreme Court in *Samantar v. Yousuf* in support of their argument that the SIA does not apply to individual public officials. However, *Samantar* is clearly distinguishable, on the basis that:

²⁶ *Jaffe*, paras. 37, 41, Appellants’ B.O.A., Vol. III, Tab 44, p. 316, 317

²⁷ *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1485 U.N.T.S. 85 (“Torture Convention”), art 1, Respondent’s B.O.A., Vol. I, Tab 3, p. 22; *Criminal Code*, R.S.C., 1985, c. C-46, s. 269.1, Factum of Amicus, p. 39

²⁸ The Appellants’ argument that the common law of state immunity provides an exception for acts of torture, and/or otherwise “illegal” acts, on the basis that they cannot be done in an “official capacity”, is explored at length in the next section of this factum

- Although the U.S. Foreign Sovereign Immunities Act of 1976 (the “FSIA”) contains some language which is similar to section 3 of the SIA, it does not contain a definition of “foreign state” which includes “government”;
- The FSIA does not contain a section equivalent to section 14(1)(c) of the SIA, which, as set out above, makes clear that the term “government” in the SIA includes public officials;
- The Supreme Court observed that “[e]lsewhere in the FSIA Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term ‘foreign state’”. On the basis of this finding, the Supreme Court held in *Samantar* that, “Reading the FSIA as a whole, there is nothing to suggest we should read ‘foreign state’ [...] to include an official acting on behalf of the foreign state, and much to indicate that this meaning is not what Congress enacted”;
- In contrast, there is no language in the SIA to suggest that officials are not included within the definition of “foreign state”; in fact, as set out above, the language at section 14 of the SIA supports that, reading the SIA as a whole, the term “government” at section 2 of the SIA must be interpreted to include individuals.²⁹

(vi) The SIA is not unconstitutional

47. Amicus adopts and relies on the Attorney General’s argument with respect to the constitutionality of the SIA.

(vii) Conclusion.

48. In summary:

- The SIA extends immunity to foreign “governments”.
- The principles of statutory interpretation require that “government” in the SIA be interpreted to include public officials acting in an official capacity.
- It is clear from the pleadings in this case that Mortazavi and Bakhshi were acting in an official capacity when performing the acts they are alleged to have done.
- Torture by definition is an official act.

²⁹ *Samantar v. Yousuf*, 560 U.S. 210 (2010), pp. 11, 13, Appellants’ B.O.A., Vol. VI, Tab 65, p. 188, 190

- There is no basis to exclude the acts that Mortazavi and Bakhshi are alleged to have committed from immunity under the SIA.

Therefore, the SIA applies in the circumstances of this case, and the Claim as against Mortazavi and Bakhshi must be struck.

B. In the alternative, Mortazavi and Bakhshi are immune from civil suit in Canada pursuant to the common law and/or customary international law

49. Should this Court determine that the SIA does not apply to public officials acting in an official capacity, it is then necessary to consider the scope of state immunity at common law. The Appellants argue as follows:

- a. At common law, state immunity does not extend to protect public officials who commit torture. In particular, there is a further exception to state immunity for civil actions for damages for torture by a foreign state. This exception flows from the argument that the United Nations Convention Against Torture obliges Canada to provide a civil remedy for victims of torture which is alleged to have been perpetrated in a foreign jurisdiction.
- b. In the alternative, the prohibition against torture in international law is *jus cogens*, which overrides state immunity.

50. We disagree. To the contrary, customary international law has consistently confirmed that there is no common law exception to state immunity for civil proceedings based on alleged acts of torture committed abroad by foreign public officials.

51. Other than the *Jaffe* decision of the Ontario Court of Appeal referred to above, there do not appear to be any relevant Canadian decisions. In the absence of common law on point, the Canadian common law on this issue should be guided by customary international law, consistent with Justice LeBel's majority decision in *R. v. Hape* that "the doctrine of adoption operates in

Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.”³⁰

52. Our submissions are organized as follows:

(i) Review of International Treaties and Conventions; and

(ii) Review of International Case Law.

(i) Review of international treaties and conventions

- ***The Immunity Convention***

53. The 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (the “Immunity Convention”) was adopted by the UN General Assembly in 2004, but is not yet in force.³¹ However, the House of Lords has described it as “the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases”. The Immunity Convention is consistent with the position of Amicus that common law and customary international law extend immunity to individuals acting in an official capacity, regardless of the nature of their actions.³²

54. The definition of “state” in the Immunity Convention clearly includes public officials acting in an official capacity:

³⁰ *R v Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, para. 39, Appellants’ B.O.A., Vol. II, Tab 32, p. 200. As the High Court of New Zealand put it in *Fang v. Jiang*, [2007] NZAR 420 (“*Fang*”), para. 69, Appellants’ B.O.A., Vol. V, Tab 57, p. 160: “New Zealand’s common law on this subject will usually be reflective of international law gathered from the established sources of international practice, treaties, conventions, judicial decisions and scholarly writings”.

³¹ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, G.A. Res. 59/38, annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (“Immunity Convention”), Respondent’s B.O.A., Vol. I, Tab 7. The Immunity Convention has 28 signatories, including the United Kingdom and Iran

³² *Jones*, para. 26, Appellants’ B.O.A., Vol. V, Tab 60, p. 325-326

State means:

- (i) the State and its various organs of government;
- (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
- (ii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
- (iii) representatives of the State acting in that capacity. [emphasis added]³³

55. The definition of “state” in the Immunity Convention does not include any consideration of the nature of the sovereign authority exercised by individuals (i.e., it does not limit immunity to “legal” state actions), nor does the Immunity Convention provide for a torture exception among the enumerated exceptions to state immunity.

- ***The Torture Convention***

56. The 1987 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (the “Torture Convention”), to which Canada, the United States and the United Kingdom (but not Iran) are signatories, contains separate sections with respect to civil and criminal remedies for acts of torture. Article 14 provides for a civil remedy for acts of torture:

14.(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a

³³ Immunity Convention, art 2, Respondent’s B.O.A., Vol. I, Tab 7, p. 68

result of an act of torture, his dependants shall be entitled to compensation.³⁴

57. Article 14 has been interpreted consistently as requiring signatories to assume *civil* jurisdiction only with respect to proceedings which allege torture committed *within* that signatory's own territorial jurisdiction. As stated by the House of Lords in *Jones*:

Article 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction.³⁵

58. In its responses to the list of issues adopted by the Committee against Torture in advance of the examination of Canada's Sixth Periodic Report on the Torture Convention, Canada confirmed its view that Article 14 establishes an obligation to ensure redress "where an act of torture took place within the State's own jurisdiction" and "[does] not require States to assert jurisdiction in their domestic courts over acts occurring outside the forum State". The issue of jurisdiction over acts of torture committed abroad was expressly dealt with in the Convention's provisions on criminal jurisdiction.³⁶

³⁴ Torture Convention, art 14, Respondent's B.O.A., Vol. I, Tab 3, p. 25

³⁵ *Jones*, para. 25, Appellants' B.O.A., Vol. V, Tab 60, p. 325; *Al-Adsani v. United Kingdom*, [2001] ECHR 751 ("*Al-Adsani*"), para. 61, Appellants' B.O.A., Vol. III, Tab 50, p. 403

³⁶ Summary Record of the Second Part of the Meeting of the Committee Against Torture in Consideration of the fourth and fifth periodic reports of Canada, 34th Sess, 646th Mtg, UN Doc CAT/C/SR.646/Add.1 (May 13, 2005), paras. 41, 42, Amicus's B.O.A., Tab 13

59. In contrast to Article 14, Article 5 of the Torture Convention creates an explicit obligation on signatories to institute *criminal* proceedings for certain acts of torture occurring *outside* of their own territorial jurisdiction:

5.(1) Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate;

(2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the states mentioned in paragraph 1 of this article. [emphasis added]³⁷

60. Therefore, in cases such as this one, where the only connection to Canada results from the nationality of the alleged victim, the Torture Convention does not impose any obligation to institute criminal proceedings, but leaves this decision entirely to the signatory's discretion.³⁸

(ii) Review of international case law

61. Courts in Canada and abroad have affirmed consistently that the customary international law of state immunity provides no exception for acts of torture committed by public officials outside the forum state. The leading cases are summarized below.

³⁷ Torture Convention, art 5, Respondent's B.O.A., Vol. I, Tab 3

³⁸ Torture Convention, art 5, Respondent's B.O.A., Vol. I, Tab 3

- *Pinochet No. 3 (House of Lords, 1999)*

62. The Appellants rely on *Pinochet No. 3* in support of their argument that torture, for international law purposes, is not an act that can be recognized as an official state function, and, therefore, that state immunity for official acts of individuals cannot apply to allegations of torture. This argument has been made before a number of national courts around the world and has been rejected in every instance. As the House of Lords observed in *Jones*, the argument that *Pinochet No. 3* stands for the proposition that torture is not an official function is both incorrect and inconsistent with internationally accepted definitions of torture.³⁹

63. The issue in *Pinochet No. 3* was whether the United Kingdom could extradite the defendant to Spain to face *criminal* allegations that he “organized and authorized” torture in Chile. Whether he could be extradited hinged in part on whether the alleged torture was a crime in the United Kingdom at the time that it was alleged to have occurred, based on the application of the *criminal* jurisdiction over torture at article 15 of the Torture Convention.

64. The state immunity issue in *Pinochet No. 3* was stated by Lord Browne-Wilkinson as follows:

The issue is whether international law grants state immunity in relation to the *international crime of torture* [as set out in the Torture Convention] and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore ‘contractually’ bound to give effect to its provisions from 8 December 1988 at the latest.⁴⁰

³⁹ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.) (“*Pinochet No. 3*”), Appellants’ B.O.A., Vol. VI, Tab 62

⁴⁰ *Pinochet No. 3*, p. 111g, Appellants’ B.O.A., Vol. VI, Tab 62, p. 15

65. Lord Browne-Wilkinson's judgment with respect to this issue was as follows:

[...]f, as alleged, Senator Pinochet organised and authorised torture after 8 December 1998 he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the convention) even if such torture were committed in Chile.”

This contractual argument is not available in the instant case given that Iran is not a party to the Torture Convention.⁴¹

66. The within appeal is not a criminal proceeding in respect of “the international *crime* of torture”; the allegations in the statement of claim are of a domestic, *civil* nature. As outlined above, civil allegations relating to torture (governed by article 14) are clearly distinct in the Torture Convention from allegations of criminal torture (governed by article 5). *Pinochet No. 3* considers only the latter and may not be relied on in respect of the former, as affirmed by the House of Lords in *Jones*, a decision subsequent to *Pinochet No. 3*.⁴²

- *Al-Adsani v. Kuwait (European Court of Human Rights, 2001)*

67. In *Al-Adsani*, the plaintiff instituted legal proceedings in the United Kingdom against the Kuwaiti government and its Head of State with respect to alleged torture inflicted on him in Kuwait. The courts of the United Kingdom held that the action as against Kuwait should be struck, based on the application of the United Kingdom state immunity legislation. The matter was then brought before the European Court of Human Rights, which considered whether extending immunity to

⁴¹ *Pinochet No. 3*, p. 115d, Appellants' B.O.A., Vol. VI, Tab 62, p. 19

⁴² *Fang*, para. 64, Appellants' B.O.A., Vol. V, Tab 57, p. 159-160; *Jones*, Appellants' B.O.A., Vol. V, Tab 60; See also *Al-Adsani*, Appellants' B.O.A., Vol. III, Tab 50.

public officials acting in an official capacity was contrary to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”, and Article 6, which provides that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

68. A majority of the ECHR found that there had been no violation of Article 3 of the Convention by the United Kingdom granting immunity to the defendants. The majority distinguished *Pinochet*, and held that, given that the alleged acts themselves had been carried out in Kuwait, Article 6 does not preclude the extension of state immunity to public officials accused of torture:

While the Court accepts...that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in [...] *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.⁴³

69. The ECHR went on to make some important observations with respect to the state of international law, concluding: “The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet

⁴³ *Al-Adsani*, para. 61, Appellants’ B.O.A., Vol. III, Tab 50, p. 403

acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”⁴⁴

- *Jones v. Saudi Arabia (House of Lords, 2006)*

70. *Jones v. Saudi Arabia* is the leading case on the application of customary international state immunity principles to public officials acting in an official capacity. In *Jones*, the House of Lords considered whether individual defendants who were alleged to have tortured the plaintiffs in the course of their official duties on behalf of Saudi Arabia were immune pursuant to the United Kingdom’s State Immunity Act 1978. In the course of their analysis, both Lord Bingham and Lord Hoffman conducted an extensive review of international law on this issue.

71. The Court in *Jones* held that article 14 of the Torture Convention does not provide a universal civil jurisdiction in cases of alleged torture, and that the *jus cogens* prohibition against torture cannot take precedence over international law, including the rules with respect to state immunity for the official acts of individuals. The House of Lords clearly rejected the proposition that torture may be an exception to the principle of state immunity for the purposes of the potential civil liability of individual state officials.

72. The House of Lords also affirmed that it is inconsistent with the definition of torture in the Torture Convention to argue that torture is not an official state function:

It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting an official capacity. The claimants’ argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture

⁴⁴ *Al-Adsani*, para. 66, Appellants’ B.O.A., Vol. III, Tab 50, p. 404

Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity.⁴⁵

- ***Fang v. Jiang (New Zealand High Court, 2006)***

73. In *Fang v. Jiang*, the High Court of New Zealand considered whether a civil proceeding alleging the torture in China of New Zealand residents should be stayed pursuant to the common law governing state immunity. Relying heavily on *Jones*, the High Court held that article 14 of the Torture Convention is aimed at providing civil remedies for acts of torture committed within the territory of the forum state, and rejected the plaintiffs' argument that the prohibition against torture, as a norm of *jus cogens*, creates an exception to the principles of state immunity.⁴⁶

- ***Bouzari v. Iran (Ontario Court of Appeal, 2004)***

74. In *Bouzari*, the Ontario courts considered whether an Ontario civil proceeding alleging the torture in Iran of a Canadian landed immigrant should be struck pursuant to section 3 of the SIA. The plaintiff in *Bouzari* made the same argument being advanced by the Appellants in this case: "that a further exception should be read into s. 3 with respect to a civil action for damages for torture by a foreign state", based on the argument that the Torture Convention obliges Canada to provide a civil remedy for victims of torture which is alleged to have been perpetrated in a foreign jurisdiction, or, alternatively that the prohibition against torture as *jus cogens* overrides state immunity in the context of torture.

75. Swinton J. did not accept either argument. First, after having heard expert evidence, she found that "state practice, both at the time the [Torture Convention] was signed and since, indicates

⁴⁵ *Jones*, para. 19, Appellants' B.O.A., Vol. V, Tab 60, p. 322-323

⁴⁶ *Fang*, para. 69, Appellants' B.O.A., Vol. V, Tab 57, p. 160

that no state interprets Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state”, and therefore held that “Article 14 does not require a state to provide a civil remedy for acts of torture by a foreign state outside the forum, nor is it inconsistent with the Convention if Canada continues to provide immunity for such acts”.⁴⁷

76. Second, despite finding (in reliance on this Court’s decision in *Suresh v. Canada*, 2002 SCC 1, [2002] 1 SCR 3) that the prohibition on torture is an accepted norm of *jus cogens*, Swinton J. held that the scope of this norm does not provide an exception from state immunity where an act of torture has been committed outside the forum.⁴⁸

77. The decision of Swinton J. was upheld by the Ontario Court of Appeal, which held (1) the SIA is a complete code with respect to the law of state immunity in Canada, (2) there is no exception in the SIA for acts of torture, (3) the Torture Convention creates no obligation on Canada to provide access to the courts so that a litigant can pursue a civil action for torture committed outside of Canada, and (4) *Pinochet* is distinguishable on the basis that there is a distinction between civil and criminal remedies for torture pursuant to the Torture Convention.⁴⁹

- ***Germany v. Italy (International Court of Justice, 2012)***

78. In the International Court of Justice’s decision in *Jurisdictional Immunities of State (Germany v Italy: Greece Intervening)*, the Court addressed the issue of a potential conflict between the rules of state immunity, and other *jus cogens* rules of the law (of armed conflict which prohibit

⁴⁷ *Bouzari v. Iran*, [2002] O.J. No 1624 (QL) (Sup. Ct.), paras. 49, 50 (“*Bouzari Sup Ct*”), Appellants’ B.O.A., Vol. III, Tab 47, p. 353

⁴⁸ *Bouzari Sup Ct*, paras. 60-63, Appellants’ B.O.A., Vol. III, Tab 47, p. 355

⁴⁹ *Bouzari CA*, paras. 56-58, Appellants’ B.O.A., Vol. III, Tab 42, p. 294

the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour, and the deportation of prisoners of war to slave labour). The Court explained:

[T]here is no conflict [...] The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. [...] R]ecognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation[...]⁵⁰

(iii) Conclusion

79. As set out above, the relevant international sources confirm the following principles of customary international law:

- Customary international law extends state immunity to public officials acting in an official capacity in the context of civil litigation;
- The common law with respect to immunity of public officials from civil suit is not limited to legal acts, but extends to illegal acts (such as torture), provided that the public official is acting in an official capacity;
- The Torture Convention distinguishes between criminal responsibility and civil responsibility;
- States have civil jurisdiction at international law and under the Torture Convention only over torture that takes place within the state, not for torture that is alleged to have occurred elsewhere.
- Torture is, by definition, an official act; and

⁵⁰ *Jurisdictional Immunities of State (Germany v. Italy: Greece Intervening)*, Judgment of February 3, 2012, International Court of Justice, para. 93, Appellants' B.O.A., Vol. IV, Tab 52, p. 98. See also *Bouzari CA*, para. 94, Appellants' B.O.A., Vol. III, Tab 42, p. 299 and *Al-Adsani*, para. 61, Appellants' B.O.A., Vol. III, Tab 50, p. 403.

- The prohibition against torture is a principle of *jus cogens*, but is not inconsistent with state immunity for civil allegations of torture.

80. As set out by Justice Swinton in the Superior Court judgment in *Bouzari*, customary international law, which guides and shapes the Canadian common law, arises out of the general practice of states: “In determining whether there is a rule of customary international law, one must consider whether there is a widespread and consistent state practice and whether states accept that they have a legal obligation to follow that practice.” Customary international law does not support the Appellants’ argument that state immunity should not apply to Mortazavi and Bakhshi in the circumstances of this case.⁵¹

81. In summary, Canadian common law and customary international law confirm that Mortazavi and Bakhshi, who, as pled, were both public officials acting in their public capacity, are immune from suit in Canada.

C. There are strong public policy reasons which underlie the SIA and support granting immunity.

82. The principle that states must treat each other as equals and not be subjected to each other’s jurisdiction is a fundamental one. As set out in *Pinochet*, there are two types of state immunity recognized by international law: immunity *ratione personae* and immunity *ratione materiae*. Amicus agrees with the Appellants that, in the circumstances, it is immunity *ratione materiae* – subject matter immunity, which “operates to prevent the official and governmental acts of one state from being called into question before the courts of another” – that is engaged.⁵²

⁵¹ *Bouzari* Sup Ct, para. 58, Appellants’ B.O.A., Vol. III, Tab 47, p. 354

⁵² *Pinochet* No. 3, p. 171h, Appellants’ B.O.A., Vol. VI, Tab 62, p. 75

83. In *Pinochet*, the House of Lords described the policy which underlies immunity *ratione materiae*:

The immunity finds its rationale in the equality of sovereign states and the doctrine of noninterference in the internal affairs of other states. [...]he courts of one state cannot sit in judgment on the sovereign acts of another. The immunity is also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences [...] [citations omitted]⁵³

84. As the ECHR put it, in *Al-Adsani*:

[S]overeign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.⁵⁴

85. The fundamentally important principles which underlie state immunity support granting immunity in the circumstances to Mortazavi and Bakhshi. Given this importance, and the fundamental nature of the principle of state immunity in national and international law, there are strong policy reasons which support the extension of state immunity to Mortazavi and Bakhshi in the circumstances of this case. These policy reasons are:

- (i) Failure to extend state immunity to foreign public officials acting in their official capacity fundamentally undermines the principle of state immunity.
- (ii) Recognition of an exception to the immunity of public officials acting in their public capacity where torture is alleged would also fundamentally undermine the principle of state immunity.

⁵³ *Pinochet No. 3*, p. 171j, Appellants' B.O.A., Vol. VI, Tab 62, p. 75

⁵⁴ *Al-Adsani*, para. 54, Appellants' B.O.A., Vol. III, Tab 50, p. 401

- (i) Failure to extend state immunity to foreign public officials acting in their official capacity fundamentally undermines the principle of state immunity

86. To give immunity to a government but deny it to public officials acting in an official capacity would render the SIA ineffective and inoperative, and does not make common sense, given that states may only act through individuals. As the House of Lords put it in *Jones*: “A state can only act through servants and agents; their official acts are the acts of the state; and the state’s immunity in respect of them is fundamental to the principle of state immunity”.⁵⁵

87. This policy rationale for extending state immunity to public officials was also discussed by the Ontario Court of Appeal in *Jaffe*:

What is the point of the state having immunity if its personnel have none when carrying out their official duties in the host country? [...T]he immunity, once operative, must apply to at least some employees of a foreign state or it becomes no immunity at all. [...]

[T]o confer immunity on a government department of a foreign state but to deny immunity to the functionaries, who in the course of their duties performed the acts, would render the State Immunity Act ineffective. To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act.⁵⁶

⁵⁵ *Jones*, para. 30 – see also para. 68, Appellants’ B.O.A., Vol. V, Tab 60, p. 326, 335

⁵⁶ *Jaffe*, paras. 30-31, Appellants’ B.O.A., Vol. III, Tab 44, p. 315

- (ii) Recognition of an exception to the immunity of public officials acting in their public capacity where torture is alleged would also fundamentally undermine the principle of state immunity.

88. The basic principle which underlies state immunity is that, where applicable, the immunity is an absolute preliminary bar to proceedings, precluding any inquiry into the merits of a claim. This was recognized by the House of Lords in *Jones*, and by the Ontario Court of Appeal in *Jaffe*.⁵⁷

89. Therefore, the only inquiry which is appropriate in the context of state immunity is whether (a) the activity alleged was in fact committed by a public official (as opposed to a private individual), and (b) the activity alleged was in fact committed in an official capacity (as opposed to being private in nature).

90. If the Appellants' arguments were accepted, it would only be necessary to plead torture and the essential character of state immunity as a preliminary bar would be lost. Courts in Canada would be conducting inquiries into the internal affairs of a foreign state – exactly what the doctrine of state immunity is designed to preclude.

D. Conclusion

91. In summary,

- The SIA grants immunity to foreign public officials for acts performed in their official capacity;
- In the alternative, the common law (and customary international law) grant immunity to foreign public officials for acts performed in their official capacity; and
- Strong policy reasons support the granting of immunity to foreign public officials for acts performed in their official capacity.

⁵⁷ *Jones*, paras. 33, 35-37, Appellants' B.O.A., Vol. V, Tab 60, p. 327

For these reasons, state immunity should be extended to Mortazavi and Bakhshi in the circumstances of this case.

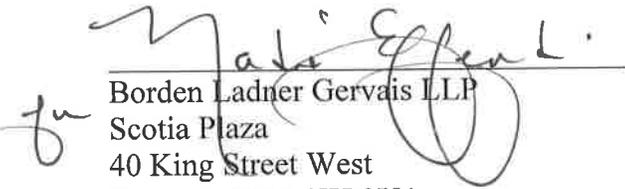
PART IV: SUBMISSIONS ON COSTS

92. Amicus does not seek costs and takes no position with respect thereto.

PART V: ORDER REQUESTED

93. Amicus seeks no order and takes no position with respect thereto.

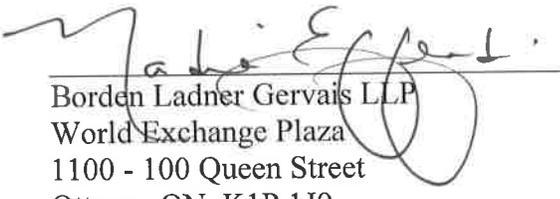
All of which is respectfully submitted, this 7th day of November, 2013.


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PART VI: ALPHABETICAL TABLE OF AUTHORITIES

LEGISLATION

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|--|------------------------|
| <i>Canadian Charter of Rights and Freedoms</i> , s 2, Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11 | 33 |
| <i>Criminal Code</i> , R.S.C., 1985, c. C-46 | 44 |
| <i>State Immunity Act</i> , R.S.C., 1985, c. S-18 | 24, 25, 27 |

CASES

| | Cited in paras. |
|---|----------------------------|
| <i>Al-Adsani v. United Kingdom</i> , [2001] ECHR 751 | 57, 66, 68, 69, 84 |
| <i>Arar v. Syrian Arab Republic</i> , [2005] O.J. No 752 (QL) (Sup Ct) | 24 |
| <i>Bouzari v. Iran</i> , [2004] O.J. No 2800 (QL) (C.A.) | 24, 77 |
| <i>Bouzari v. Iran</i> , [2002] O.J. No 1624 (QL) (Sup. Ct.) | 75, 76, 80 |
| <i>Brown v. Spagnuolo</i> , 2013 ONSC 5178 (CanLII) | 41 |
| <i>Fang v. Jiang</i> , [2007] NZAR 420 | 51, 66, 73 |
| <i>Greenshields et al. v. The Queen</i> , [1958] S.C.R. 216 | 29 |
| <i>Jaffe v. Miller</i> (1993), 13 O.R. (3d) 745 (QL) (C.A.) | 21, 38, 40, 43, 87 |
| <i>Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)</i> , [2006] UKHL 26 | 41, 53, 57, 66, 72, 86, 88 |
| <i>Jurisdictional Immunities of State (Germany v. Italy: Greece Intervening)</i> , Judgment of February 3, 2012, International Court of Justice | 78 |
| <i>R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)</i> , [1999] 2 W.L.R. 827 (H.L.) | 62, 64, 65, 82, 83, |
| <i>R v. Hape</i> , 2007 SCC 26, [2007] 2 S.C.R. 292 | 51 |
| <i>R. v. Lippé</i> , [1991] 2 S.C.R. 114 | 36 |
| <i>Ritter v. Donell</i> , [2005] A.J. No 958 (QL) (Q.B.) | 41 |

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| <i>Samantar v. Yusuf</i> , 560 U.S. 210 (2010) | 41, 46 |
| <i>Schreiber v. Canada (Attorney General)</i> , [1998] 1 SCR 841 | 35 |
| <i>St-Laurent v. Sterling</i> , [2011] JQ No 729 (QL) (Q.C.C.S.) | 41 |
| <i>Steen v. Islamic Republic of Iran</i> , 2013 ONCA 30 (CanLII) | 24 |
| <i>United States of America v. Friedland</i> , 46 O.R. (3d) 321, [1999] OJ No 4919 (QL) (C.A.) | 41 |
| <i>Walker v. Bank of New York</i> , [1994] O.J. No 126 (QL) (C.A.) | 41 |
| <i>Zhang v. Zemin</i> , [2010] NSWCA 255 | 41 |

DOCTRINE

| | Cited in paras. |
|--|------------------------|
| Patrick J. Monahan & Byron Shaw, <i>Constitutional Law</i> , 4th ed (Toronto, ON: Irwin Law, 2013) | 34 |
| Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5th ed Supplemented (Toronto, ON: Carswell, 2007) at Vol. 2, 37.2(e), 37-18.1 | 34 |
| Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5th ed (Markham, ON: LexisNexis, 2008) | 29 |

UN DOCUMENTS

| | Cited in paras. |
|---|------------------------|
| Summary Record of the Second Part (Public) of the Committee Against Torture in Consideration of the fourth and fifth periodic reports of Canada, 34th Sess, 646th Mtg, UN Doc CAT/C/SR.646/Add.1 (May 13, 2005) | 58 |
| <i>United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , 10 December 1984, 1485 U.N.T.S. 85 | 44, 56, 59, 60 |
| <i>United Nations Convention on Jurisdictional Immunities of States and Their Property</i> , G.A. Res. 59/38, annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) | 53, 54 |

OTHER

| | Cited in paras. |
|--|------------------------|
| <i>Webster's New World Dictionary</i> , 2d college ed, <i>sub verbo</i> "government" | 37 |

PART VII: STATUTES, REGULATIONS, RULES, ORDINANCE, BY-LAWS

Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11., s. 32

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| <p>32. (1) This Charter applies</p> <ul style="list-style-type: none">○ (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and○ (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. <p>Marginal note: Exception</p> <p>(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.</p> | <p>32. (1) La présente charte s'applique:</p> <ul style="list-style-type: none">○ a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;○ b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature. <p>Note marginale: Restriction</p> <p>(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.</p> |
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Criminal Code, R.S.C., 1985, c. C-46, s. 269.1

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| <p>Torture 269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.</p> <p>Definitions (2) For the purposes of this section,</p> <p>“official” “official” means</p> <p>(a) a peace officer, (b) a public officer, (c) a member of the Canadian Forces, or (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada;</p> <p>“torture” “torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person</p> <p>(a) for a purpose including</p> <p>(i) obtaining from the person or from a third person information or a statement, (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and (iii) intimidating or coercing the person or a third person, or</p> <p>(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.</p> | <p>Torture 269.1 (1) Est coupable d’un acte criminel et passible d’un emprisonnement maximal de quatorze ans le fonctionnaire qui — ou la personne qui, avec le consentement exprès ou tacite d’un fonctionnaire ou à sa demande — torture une autre personne.</p> <p>Définitions (2) Les définitions qui suivent s’appliquent au présent article.</p> <p>« fonctionnaire » « fonctionnaire » L’une des personnes suivantes, qu’elle exerce ses pouvoirs au Canada ou à l’étranger :</p> <p>a) un agent de la paix; b) un fonctionnaire public; c) un membre des forces canadiennes; d) une personne que la loi d’un État étranger investit de pouvoirs qui, au Canada, seraient ceux d’une personne mentionnée à l’un des alinéas a), b) ou c).</p> <p>« torture » « torture » Acte, commis par action ou omission, par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne :</p> <p>a) soit afin notamment :</p> <p>(i) d’obtenir d’elle ou d’une tierce personne des renseignements ou une déclaration, (ii) de la punir d’un acte qu’elle ou une tierce personne a commis ou est soupçonnée d’avoir commis, (iii) de l’intimider ou de faire pression sur elle ou d’intimider une tierce personne ou de faire pression sur celle-ci;</p> <p>b) soit pour tout autre motif fondé sur quelque forme de discrimination que ce soit.</p> <p>La torture ne s’entend toutefois pas d’actes qui résultent uniquement de sanctions légitimes, qui sont inhérents à celles-ci ou occasionnés par elles.</p> |
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| <p>No defence</p> <p>(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.</p> <p>Evidence</p> <p>(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.</p> <p>R.S., 1985, c. 10 (3rd Supp.), s. 2.</p> | <p>Inadmissibilité de certains moyens de défense</p> <p>(3) Ne constituent pas un moyen de défense contre une accusation fondée sur le présent article ni le fait que l'accusé a obéi aux ordres d'un supérieur ou d'une autorité publique en commettant les actes qui lui sont reprochés ni le fait que ces actes auraient été justifiés par des circonstances exceptionnelles, notamment un état de guerre, une menace de guerre, l'instabilité politique intérieure ou toute autre situation d'urgence.</p> <p>Admissibilité en preuve</p> <p>(4) Dans toute procédure qui relève de la compétence du Parlement, une déclaration obtenue par la perpétration d'une infraction au présent article est inadmissible en preuve, sauf à titre de preuve de cette infraction.</p> <p>L.R. (1985), ch. 10 (3^e suppl.), art. 2.</p> |
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State Immunity Act, R.S.C., 1985, c. S-18, ss. 2, 3(1), 14

| Definitions | Définitions |
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| <p>2. In this Act,</p> <p>“agency of a foreign state”</p> <p>“agency of a foreign state” means any legal entity that is an organ of the foreign state but that is separate from the foreign state;</p> <p>“commercial activity”</p> <p>“commercial activity” means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;</p> <p>“foreign state”</p> <p>“foreign state” includes</p> <p>(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,</p> <p>(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and</p> <p>(c) any political subdivision of the foreign state;</p> <p>“political subdivision”</p> <p>“political subdivision” means a province, state or other like political subdivision of a foreign state that is a federal state.</p> | <p>2. Les définitions qui suivent s’appliquent à la présente loi.</p> <p>« activité commerciale »</p> <p>« activité commerciale » Toute poursuite normale d’une activité ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature.</p> <p>« activité terroriste »</p> <p>« activité terroriste » S’entend au sens du paragraphe 83.01(1) du Code criminel dans les cas où l’acte ou l’omission en cause est commis, le 1er janvier 1985 ou après cette date, par un État étranger inscrit sur la liste visée au paragraphe 6.1(2).</p> <p>« État étranger »</p> <p>« État étranger » Sont assimilés à un État étranger :</p> <p>a) le chef ou souverain de cet État ou d’une subdivision politique de celui-ci, dans l’exercice de ses fonctions officielles;</p> <p>b) le gouvernement et les ministères de cet État ou de ses subdivisions politiques, ainsi que les organismes de cet État;</p> <p>c) les subdivisions politiques de cet État.</p> <p>« organisme d’un État étranger »</p> <p>« organisme d’un État étranger » Toute entité juridique distincte qui constitue un organe de l’État étranger.</p> |

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| <p>“terrorist activity”</p> <p>“terrorist activity” in respect of a foreign state has the same meaning as in subsection 83.01(1) of the Criminal Code, provided that a foreign state set out on the list referred to in subsection 6.1(2) does the act or omission on or after January 1, 1985.</p> <p>R.S., 1985, c. S-18, s. 2; 2012, c. 1, s. 3.1.</p> | <p>« subdivision politique »</p> <p>« subdivision politique » Toute province, tout état ou toute autre subdivision politique similaire d’un État étranger à régime fédéral.</p> <p>L.R. (1985), ch. S-18, art. 2; 2012, ch. 1, art. 3.1.</p> |
| <p>State immunity</p> <p>3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.</p> | <p>Immunité de juridiction</p> <p>3. (1) Sauf exceptions prévues dans la présente loi, l’État étranger bénéficie de l’immunité de juridiction devant tout tribunal au Canada.</p> |
| <p>Certificate is conclusive evidence</p> <p>14. (1) A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,</p> <p>(a) whether a country is a foreign state for the purposes of this Act,</p> <p>(b) whether a particular area or territory of a foreign state is a political subdivision of that state, or</p> <p>(c) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,</p> <p>is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person’s authorization by the Minister of Foreign Affairs.</p> | <p>Certificat du ministre des Affaires étrangères</p> <p>14. (1) Le certificat délivré par le ministre des Affaires étrangères ou en son nom par la personne qu’il autorise est admissible en preuve et fait foi pour toute question touchant :</p> <p>a) la qualité d’État étranger, au sens de la présente loi, d’un pays donné;</p> <p>b) la qualité de subdivision politique d’une région ou d’un territoire donnés d’un État étranger;</p> <p>c) la ou les personnes à considérer comme chefs d’un État étranger ou d’une de ses subdivisions politiques, ou comme formant leur gouvernement.</p> <p>Il n’est pas nécessaire de prouver l’authenticité de la signature apposée sur ce certificat ni l’autorisation accordée au signataire.</p> |

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| <p>Idem</p> <p>(2) A certificate issued by the Deputy Minister of Foreign Affairs, or on his behalf by a person designated by him pursuant to subsection 9(2), with respect to service of an originating or other document on a foreign state in accordance with that subsection is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that service, without proof of the signature of the Deputy Minister of Foreign Affairs or other person or of that other person's authorization by the Deputy Minister of Foreign Affairs.</p> <p>R.S., 1985, c. S-18, s. 14; 1995, c. 5, ss. 25, 27.</p> | <p>Idem</p> <p>(2) L'attestation délivrée par le sous-ministre des Affaires étrangères ou en son nom par la personne qu'il désigne en vertu du paragraphe 9(2) est admissible en preuve et fait foi de son contenu en ce qui a trait à la signification d'un acte introductif d'instance ou d'un autre acte à un État étranger, sans qu'il soit nécessaire de prouver la signature qui y est apposée ni l'autorisation accordée au signataire.</p> <p>L.R. (1985), ch. S-18, art. 14; 1995, ch. 5, art. 25 et 27.</p> |
|--|--|



July 19, 2013

Le 19 juillet 2013

ORDER
MOTION

ORDONNANCE
REQUÊTE

ESTATE OF THE LATE ZAHRA (ZIBA) KAZEMI AND STEPHAN (SALMAN) HASHEMI v. ISLAMIC REPUBLIC OF IRAN, AYATOLLAH SAYYID ALI KHAMENEI, SAEED MORTAZAVI, MOHAMMAD BAKHSHI AND ATTORNEY GENERAL OF CANADA
(Que.) (35034)

THE CHIEF JUSTICE:

IT IS HEREBY ORDERED THAT:

Given that the respondent, the Attorney General of Canada, has advised the Court that they do not intend to address all issues which may be raised by the appellants in this appeal, Mr. Christopher D. Bredt is accordingly appointed as *amicus curiae* to assist the Court by filing a factum of no more than 40 pages and a book of authorities on or before November 8, 2013. Mr Bredt is permitted to be assisted by a junior counsel.

The reasonable fees and disbursements of Mr. Bredt, and any junior counsel, shall be paid by the Attorney General of Canada.

A handwritten signature in black ink, appearing to be 'D. Bredt'.

C.J.C.
J.C.C.



SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA

FACSIMILE TRANSMISSION/TRANSMISSION PAR TÉLÉCOPIEUR

July 25, 2013

NUMBER OF PAGES (including this page) / NOMBRE DE PAGES (y compris cette page) :

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TO/DESTINATAIRE :

| | | |
|--------------------------|-------------------------------|----------------|
| Mr. Kurt A. Johnson | Irving Mitchell Kalichman LLP | (514) 935-2999 |
| Mr. Brian A. Crane, Q.C. | Gowling Lafleur Henderson LLP | (613) 563-9869 |
| Me James A. Woods | Woods LLP | (514) 284-2046 |
| Me Bernard Letarte | Procureur général du Canada | (613) 952-6006 |
| Mr. Christopher M. Rupar | Attorney General of Canada | (613) 954-1920 |
| Mr. Christopher D. Bredt | Borden Ladner Gervais LLP | By mail |
| Ms. Nadia Effendi | Borden Ladner Gervais LLP | (613) 230-8842 |

SENDER/EXPÉDITEUR :

Michel Jobidon - Senior Registry Officer, Registry Branch
Agent principal du greffe, Direction générale du greffe

35034 Estate of the Late Zahra (Ziba) Kazemi, et al. v. Islamic Republic of Iran, et al.
(Que.) (Civil) (By Leave)

COMMENTS/REMARQUES :

Letter of the Registrar

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July 23, 2013

Christopher D. Bredt
Borden Ladner Gervais LLP
Scotia Plaza, Suite 4400
40 King Street W.
Toronto, Ontario
M5H 3Y4

Dear Mr. Bredt,

RE: *Estate of the Late Zahra (Ziba) Kazemi, et al.*
v.
Islamic Republic of Iran, et al.
File No.: 35034

I am writing further to the order of Chief Justice McLachlin, dated July 19, 2013, appointing you as *amicus curiae* (with the assistance of one junior counsel) in the above-captioned appeal.

Your role will be to assist the Court in analysing the legal issues; you do not represent a party. The Court directs you to exercise your independent judgment on any issues raised by the Appellant on which the Attorney General of Canada takes no position, and to make submissions in response to the Appellant.

The Court directs that you file a factum of no more than 40 pages and make oral submissions at the hearing of the appeal. As set out in the order of the Chief Justice, your factum and book of authorities must be served and filed by November 8, 2013. The time allocation for oral submissions will be determined once the materials of the parties have been filed.

Your reasonable fees and disbursements will be paid by the Attorney General of Canada. In order to make the necessary arrangements in that regard, please contact:

Mr. Ted McNabb
Department of Justice Canada
Legal Aid Directorate
284 Wellington Street, Room 6139
Ottawa, ON K1A 0H8
Telephone: 613-952-5620
Facsimile: 613-954-9423
E-mail: ted.mcnabb@justice.gc.ca

- 2 -

If you have any questions concerning this matter do not hesitate to contact me at (613) 996-8666.

Yours truly,



Roger Bilodeau, Q.C.
Registrar

- c.c.: Mr. Kurt A. Johnson
- Mr. Brian A. Crane, Q.C.
- Me Bernard Letarte
- Mr. Christopher M. Rupar
- Me James A. Woods