SCC File No. 35034

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

B E T W E E N:

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

Appellants

- and -

THE ISLAMIC REPUBLIC OF IRAN, AYATOLLAH SAYYID ALI KHAMENEI,
SAEED MORTAZAVI, MOHAMMAD BAKHSHI and
ATTORNEY GENERAL OF CANADA

Respondents

- and -

CHRISTOPHER D. BREDT

Amicus Curiae

- and -

CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS,
AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE,
REDRESS TRUST LTD., CANADIAN ASSOCIATION OF REFUGEE LAWYERS,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION,
CANADIAN CENTRE FOR INTERNATIONAL JUSTICE,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, and IRAN HUMAN RIGHTS DOCUMENTATION CENTER

Interveners

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto, ON M5K 1E6

Christopher A. Wayland
Simon Chamberland
Telephone: (416) 601-8109
FAX: (416) 868-0673
E-mail: cwayland@mccarthy.ca

Solicitors for the Intervener, Canadian Civil Liberties Association

Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, ON K2C 3T2

Colin S. Baxter
Telephone: (613) 569-8558
FAX: (613) 569-8668
E-mail: cbaxter@cwcb-law.com

Ottawa Agent for the Intervener

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Parties	Counsel	Ottawa Agent
Appellants	**Irving Mitchell Kalichman LLP** 2 Place Alexis Nihon, bur. 1400 3500, boul. Maisonneuve Ouest Montréal, Quebec H3Z 3C1 **Kurt A. Johnson** **Mathieu Bouchard** **Audrey Boctor** **David Grossman** Telephone: (514) 934-7727 FAX: (514) 935-2999	**Gowling Lafleur Henderson LLP** 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3 **Brian A. Crane, Q.C.** Telephone: (613) 233-1781 FAX: (613) 563-9869 E-mail: brian.crane@gowlings.com
Respondents, Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi	**Woods LLP** 1700 - 2000 McGill College Avenue Montreal, Quebec H3A 3H3 **James A. Woods** Telephone: (514) 982-4545 FAX: (514) 284-2046 E-mail: jwoods@woods.qc.ca	
Respondent, Attorney General of Canada	**Procureur général du Canada** 284, rue Wellington, T-6060 Ottawa, Ontario K1A 0H8 **Bernard Letarte** **René LeBlanc** Telephone: (613) 946-2776 FAX: (613) 952-6006 E-mail: bernard.letarte@justice.gc.ca	**Attorney General of Canada** 50 O'Connor Street, Suite 50, Room 557 Ottawa, Ontario K1P 6L2 **Christopher M. Rupar** Telephone: (613) 670-6290 FAX: (613) 954-1920 E-mail: christopher.rupar@justice.gc.ca
Intervener, Canadian Centre for International Justice	**Torys LLP** Suite 3000, Maritime Life Tower P. O. Box 270, Toronto-Dominion Centre Toronto, Ontario M5K 1N2 **John Terry** **Sarah R. Shody** Telephone: (416) 865-8245 FAX: (416) 865-7380 E-mail: jterry@torys.com	**McMillan LLP** 50 O'Connor Street Suite 300 Ottawa, Ontario K1P 6L2 **Jeffrey W. Beedell** Telephone: (613) 232-7171 Ext: 122 FAX: (613) 231-3191 E-mail: jeff.beedell@mcmillan.ca

Intervener, Redress Trust Ltd.	**Norton Rose Fulbright Canada LLP** 79 Wellington Street West, Suite 2300 P.O. Box 128 Toronto, Ontario M5K 1H1 **Azim Hussain** **Rahool P. Agarwal** **Maureen Edwards** Telephone: (416) 216-3943 FAX: (416) 216-3930 E-mail: azim.hussain@nortonrosefulbright.com	**Norton Rose Fulbright Canada LLP** 1500-45 O'Connor Street Ottawa, Ontario K1P 1A4 **Sally Gomery** Telephone: (613) 780-8604 FAX: (613) 230-5459 E-mail: sally.gomery@nortonrose.com
Intervener, Amnistie internationale, Section Canada francophone	**CazaSaikaley LLP** 220 avenue Laurier Ouest Ottawa, Ontario K1P 5Z9 **François Larocque** Telephone: (613) 894-4783 FAX: (613) 565-2087 E-mail: francoislarocque@uottawa.ca	**CazaSaikaley LLP** 220 avenue Laurier Ouest Ottawa, Ontario K1P 5Z9 **Alyssa Tomkins** Telephone: (613) 564-8271 FAX: (613) 565-2087 E-mail: atomkins@plaideurs.ca
Interveners, Canadian Lawyers for International Human Rights, and Canadian Association of Refugee Lawyers	**Sack Goldblatt Mitchell LLP** 20 Dundas Street West Suite 1100, P.O. Box 180 Toronto, Ontario M5G 2G8 **Jill Copeland** **Daniel Sheppard** Telephone: (416) 977-6070 FAX: (416) 591-7333 E-mail: jcopeland@sgmlaw.com	**Sack Goldblatt Mitchell LLP** 500 - 30 Metcalfe St. Ottawa, Ontario K1P 5L4 **Colleen Bauman** Telephone: (613) 235-5327 FAX: (613) 235-3041 E-mail: cbauman@sgmlaw.com
Intervener, British Columbia Civil Liberties Association	**Branch, MacMaster** 1410 - 777 Hornby Street Vancouver, British Columbia V6Z 1S4 **Ward K. Branch** **Susan M. Precious** Telephone: (604) 654-2999 FAX: (604) 684-3429 E-mail: wbranch@branmac.com	**Michael J. Sobkin** 90 blvd. de Lucerne Unit #2 Gatineau, Quebec J9H 7K8 Telephone: (819) 778-7794 FAX: (819) 778-1740 E-mail: msobkin@sympatico.ca
Intervener	**Canadian Bar Association** 225 Vaughan Street Suite 602 Winnipeg, Manitoba R3C 1T7	**Gowling Lafleur Henderson LLP** 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3

	David Matas Telephone: (204) 944-1831 FAX: (204) 942-1494 E-mail: dmatas@mts.net	**Henry S. Brown, Q.C.** Telephone: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com
Interveners, David Asper Centre for Constitutional Rights, International Human Rights Program, University of Toronto Faculty of Law	**Simcoe Chambers** 100-116 Simcoe Street Toronto, Ontario M5H 4E2 **John Norris** **Carmen Cheung** Telephone: (416) 596-2960 FAX: (416) 596-2598 E-mail: john.norris@simcoechambers.com	**Norton Rose Fulbright Canada LLP** 45 O'Connor Street Ottawa, Ontario K1P 1A4 **Martha A. Healey** Telephone: (613) 780-8638 FAX: (613) 230-5459 E-mail: martha.healey@nortonrose.com
Intervener, Iran Human Rights Documentation Center	**Barin Avocats** 4435 Sherbrooke Street West Suite 7 Montréal, Quebec H3Z 1E5 **Babak Barin** Telephone: (514) 419-7519 FAX: (514) 221-4780 E-mail: bbarin@barinavocats.ca	**Cavanagh Williams Conway Baxter LLP** 1111 Prince of Wales Drive Suite 401 Ottawa, Ontario K2C 3T2 **Colin S. Baxter** Telephone: (613) 569-8558 FAX: (613) 569-8668 E-mail: cbaxter@cwcb-law.com
Amicus Curiae	**Borden Ladner Gervais LLP** Scotia Plaza 40 King Street West Toronto, ON M5H 3Y4 **Christopher D. Bredt** Tel : (416) 367-6165 Fax : (416) 361-7063 Email : cbredt@blg.com	**Borden Ladner Gervais LLP** 100 Queen Street Suite 1100 Ottawa, ON K1P 1J9 **Nadia Effendi** Tel : (613) 237-5160 Fax : (613) 230-8842 Email : neffendi@blg.com

Table of Contents

PART I – OVERVIEW AND STATEMENT OF FACTS……………………………….. 1

PART II – QUESTIONS IN ISSUE……………………………………………………… 1

PART III – ARGUMENT………………………………………………………………… 1

A. Section 3 of the SIA is not Clear and Unambiguous……………………………...... 1

B. Section 3 of the SIA Must be Interpreted in a Manner Consistent with the Charter, Charter values and Canada's international law obligations……………….. 3

C. Section 3 Does Not Confer Immunity for the Violation of Jus Cogens Obligation… 8

PARTS IV & V – COSTS SUBMISSIONS AND ORDER REQUESTED………………… 10

PART VI – TABLE OF AUTHORITIES………………………………………………… 11

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The CCLA relies on the facts set out in the Appellants' factum.

PART II – QUESTIONS IN ISSUE

2. The CCLA contends that section 3 of the *State Immunity Act*, when correctly interpreted, does not confer immunity for violations of *jus cogens* obligations. In a nutshell, the CCLA's argument is as follows:

i. Section 3 of the SIA is not clear and unambiguous. It does not explicitly state that immunity is conferred even in instances where violations of *jus cogens* obligations have occurred. For this reason, this Court must interpret this legislative provision;

ii. Section 3 of the SIA must be interpreted in a manner consistent with the *Canadian Charter of Rights and Freedoms*, Charter values, and Canada's international law obligations;

iii. The interpretation of s. 3 that is most consistent with the Charter, Charter values, and Canada's international law obligations is one hereby s. 3 does not confer immunity for violations of *jus cogens* obligations. This interpretation, which is also consistent with sound policy, must prevail.

PART III - ARGUMENT

A. Section 3 of the SIA is not Clear and Unambiguous

3. As this Court has made clear, when interpreting a statute, regard may be had to Charter values.[1] It is respectfully submitted that the Charter and Charter values should guide this Court's interpretation of s. 3 of the SIA.

4. The SIA came into force on July 15, 1982, merely three months after the *Charter*. At that time, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[2] had not yet entered into force.

5. Since 1982, the corpus of international law has evolved, so as to clarify the status of *jus cogens* as a peremptory norm of international law from which no derogation is permitted, which

---

[1] *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 at p. 558.

[2] 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987, ratified by Canada 24 June 1987).

is applicable *erga omnes*, and which requires domestic courts to take universal jurisdiction.[3]

6. Therefore, it is hardly surprising that, during the course of the legislative debates held at the time of the adoption of the SIA, no discussion addressed the issue as to whether the SIA shielded states even in cases where violations of *jus cogens* obligations had occurred.

7. As this Court stated in *Kuwait Airways Corp. v. Iraq*, the issue of the completeness of the exceptions set out in the SIA is not settled in our law:

> "[T]he SIA represents a clear rejection of the view that the immunity of foreign states is absolute. It reflects a recognition that there are now exceptions to the principle of state immunity and in so doing reflects the evolution of that principle at the international level. But I need not determine here whether the SIA is exhaustive in this respect or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution [...]. It will suffice to determine whether the commercial activity exception applies in the case at bar."[4]

8. In considering this issue, one must take into consideration the presumption that Canadian statutes are consistent with the Charter[5] and the presumption that the Charter protects human rights in Canada at least to the same extent as the protection afforded by international human rights treaties which Canada has ratified.[6] Like other interpretive presumptions, this "presumption of minimum protection" is rebuttable.[7] However, the CCLA's argument is that, to rebut this presumption, clear legislative language is required and such language is absent in this case.[8]

---

[3] Alexander Orakhelashvili, *Peremptory Norms in International Law*, (New York: Oxford University Press, 2006) at p. 2; Lorna McGregor, "State Immunity and *Jus Cogens*" (2006) 55 Int'l & Comp. L.Q. 437 at p. 438; Antônio Augusto Cançado Trindade, Jus Cogens*: The determination and gradual expansion of its material content in contemporary international case-law*, New Developments of International Law in the Americas: XXXV Course on International Law (2008) at p. 10; Mads Andenas and Thomas Weatherall, "International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012" (2013) 62 Int'l & Comp. L.Q. 753 at p. 1 and 7.

[4] *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40 at para 24 [emphasis added].

[5] Peter W. Hogg, *Constitutional Law of Canada*, (Toronto: Thomson Carswell, 2007) at pp. 795-96.

[6] Gibran van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at p. 343; *Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 59; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at p. 1056.

[7] Van Ert, id 6 at p. 343.

[8] By analogy, on the "strict interpretation" to be given to statutes infringing fundamental rights and freedoms, see: P.-A. Côté, *Interprétation des lois*, 4th ed., Montreal, Themis, 2009 at pp. 540-46.

9. In the case at bar, the Court of Appeal held that "[t]he existence of a 'genuine ambiguity' is a precondition for interpreting a statute in a manner consistent with values or legal principles (including, where appropriate, principles of international law) extrinsic to the text itself"[9]. It then went on to state that the fact that the rules of customary international law which came into existence after the passing of the SIA recognize another exception to state immunity does not make the statute ambiguous.[10]

10. The CCLA respectfully submits that this latter statement of the Court of Appeal is wrong. The Court of Appeal should have recognized that, given the particular nature of *jus cogens* norms in international law, s. 3 of the SIA should explicitly mention whether immunity is conferred in instances of breaches of *jus cogens*. Given the fundamental importance of *jus cogens* in international law, in the absence of such unequivocal language, s. 3 of the SIA must be considered ambiguous and must be interpreted by this Court.

B. Section 3 of the SIA Must be Interpreted in a Manner Consistent with the Charter, Charter Values and Canada's International Law Obligations

11. As stated above, there is a presumption that Canadian statutes are consistent with the Charter. This stems from the general rule pursuant to which Canadian statutes must be given an interpretation that makes them constitutional rather than unconstitutional.[11]

12. The Charter is part of the constitution and, as such, is interpreted according to the same principles as those applied to other constitutional documents. It must be construed in a flexible and progressive manner, so that it can be adapted over time to societal developments.[12] Moreover, Charter provisions must receive a "large and liberal"[13] and "generous"[14] interpretation.

13. Furthermore, the Charter must be interpreted in light of international law. The Charter is

---

[9] Judgment of the Court of Appeal at para. 40.

[10] Id.

[11] Hogg, *supra* note 5 at pp. 795-96.

[12] Hogg, id. at p. 727.

[13] *Edwards v. Attorney-General for Canada*, [1930] AC 124 (JCPC) at p. 136.

[14] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 117; Hogg, *supra* note 5 at p. 729.

rooted in the realization of human rights.[15] Its drafters looked to Canada's international treaty obligations, especially as embodied in the *International Covenant on Civil and Political Rights*, for guidance.[16] The content of the Charter reflects this reality, as many of its provisions correspond to provisions of the Universal Declaration of Human Rights, the ICCPR, and the European Convention on Human Rights.[17]

14. Not only did the Charter originate in international human rights law, but it serves as guarantor of international human rights in Canada. In its reports to the Human Rights Committee and other UN treaty bodies, the Canadian government presents the Charter as an important means by which Canada's human rights obligations are implemented in domestic law.[18]

15. Overall, the Charter is interconnected with the realization of international human rights and continues to be a portal through which international human rights are secured in Canada.[19] This Court has held that "the Charter protects human rights in Canada <u>at least</u> to the same extent as they are protected in international human rights treaties which Canada ratified."[20]

16. Furthermore, in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, this Court rejected objections to using post-Charter international law sources for the interpretation of the Charter, stating that "the Charter, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus, Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."[21]

17. The *Charter* requires that Canadian statutes comply with Canada's most important international law obligations, namely legally binding treaty obligations and *jus cogens*

---

[15] Van Ert, *supra* note 6 p. 325.

[16] Id. at p. 333.

[17] Id.

[18] Canada, Core document forming part of the reports of States Parties: Canada (1998) UN Doc. HRI/CORE/1/Add.91 at para 137; Canada, Fourth Periodic Report of Canada to the UN Human Rights Committee, 15 October 1997, UN Doc. CCPR/C/103/Add.5 at para 22.

[19] Van Ert, *supra* note 6 at p. 335.

[20] Id. at 343 [emphasis added].

[21] *Health Services and Support-Facilities Subsector Bargaining Assn. v B.C.*, 2007 SCC 27 at para 78.

obligations. Just as there is a presumption that Canadian statutes are consistent with the *Charter*, there is a presumption that Canadian statutes are consistent with Canada's international law obligations.[22] Canada ratified the *Convention Against Torture* on June 24, 1987.[23] It follows that the *Charter* provides at least as much protection as afforded by the *Convention Against Torture*.

18. When *jus cogens* norms are engaged, Canada must comply to them without derogation, as they are the highest norms in the international legal order.[24] In *Bouzari v. Iran*, the Court of Appeal for Ontario held that the general presumption of conformity with international law applies more strenuously in cases involving *jus cogens* norms.[25]

19. As a norm of *jus cogens*, the prohibition against torture gives rise to *erga omnes* obligations, that is, obligations that are by their very nature "the concern of all States" and owed to the international community as a whole.[26]

20. Moreover, it is significant that Canada's international obligations oblige it not only to refrain from participating in acts of torture on its own territory, but also to provide redress to victims of torture, regardless of where such acts have been committed.

21. Article 14(1) of the *Convention Against Torture* provides that "[e]ach 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."[27] Article 14(2) further provides that "[n]othing … shall affect any right of the victim […] to compensation which may exist under national law."[28]

---

[22] *R. v Hape,* 2007 SCC 26 at para 53.

[23] Status of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants>.

[24] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at Article 53 (entered into force 27 January 1980, ratified by Canada 14 October 1970).

[25] *Bouzari v Iran* (2004), 243 DLR (4th) 406 (Ont CA) at para 65.

[26] *Barcelona Traction, Light and Power Company, Limited*, (*Belgium v Spain*), [1970] ICJ Rep 3 at para 33.

[27] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987, ratified by Canada 24 June 1987) [*Convention Against Torture*] at Article 14(1).

[28] Id. at Article 14(2).

22. Article 14(1) does not expressly dispense with territorial jurisdiction. However, such a reading is consistent with the inherent meaning of the text and with the ICCPR. This reading is also supported by the drafting history of Article 14, since the phrase "committed in any territory under its jurisdiction" was added to, and then deleted from, the relevant text.

23. The UN Committee Against Torture in its General Comment No. 2 has urged states to take positive steps to end impunity, eliminate "legal loopholes" that impede the eradication of torture, and to respect the "obligatory" right of victims and of their families to obtain redress.[29]

24. This Committee has also interpreted Article 14 post-*Bouzari*. The Committee noted with concern Canada's "absence of effective measures to provide civil compensation to victims of torture in all cases" and recommended that Canada "review its position under Article 14 of the *Convention Against Torture* to ensure the provisions of compensation through its civil jurisdiction to all victims of torture".[30]

25. The obligation to provide a civil remedy to victims of torture was articulated in a strong dissenting opinion of the European Court of Human Rights in *Al-Adsani v. The United Kingdom*.[31] In that case, a Kuwaiti national sued Kuwait before British courts for torture he endured in Kuwait. At the European Court of Human Rights, Al-Adsani argued that the UK had denied his right to access justice under Article 6 of the European Convention on Human Rights. The European Court of Human Rights considered whether the UK's finding of immunity for Kuwait had deprived Al-Adsani of his right to bring a civil claim, and in turn to seek redress under Article 6. The issue split the court 9:8. While acknowledging that the *jus cogens* nature of the torture prohibition entailed that immunity was not to be granted to individuals prosecuted in criminal trials, the majority observed that no such rule had emerged with regards to immunity of states in the context of civil proceedings. The eight dissenting judges strongly disagreed with the majority's approach of distinguishing between criminal and civil proceedings for the purpose of

---

[29] UN Committee Against Torture, *General Comment No. 2, Implementation of Article 2 by State Parties*, 24 January 2008, CAT/C/GC/2, at paras 1, 4, 6, 9, and 15.

[30] UN Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention – Conclusions and Recommendations of the Committee Against Torture*, 7 July 2005, CAT/C/CO/34/CAN, at paras 4(g), 5(f) [emphasis added].

[31] *Al-Adsani v The United Kingdom* [GC], No 35763/97, [2001] XI ECHR 79, online: ECHR <http://echr.coe.int/Documents/Reports_Recueil_2001-XI.pdf>.

determining whether immunity should be granted for violations of peremptory norms.

26. Further evidence of state practice in support of the obligation to provide civil redress is found in Italian jurisprudence, more specifically in the *Ferrini* set of cases.[32]

27. Additionally, in the United States, Justice Breyer of the Supreme Court issued a concurring opinion in the landmark case *Sosa v. Alvarez-Machain*,[33] endorsing the principle of universal civil jurisdiction.

28. In *Sosa*, the European Commission filed an *amicus* brief, arguing that, to the extent that universal civil jurisdiction was recognized, it should be aimed at ending impunity for violations of the most fundamental norms of international law.[34] This position is consistent with the work of the Hague Conference on Private International Law. Article 18(3) of the 2001 Preliminary Draft Convention on Jurisdiction and Foreign Judgments provides that states may exercise universal civil jurisdiction "in respect of conduct which constitutes […] a grave violation […] of non-derogable fundamental rights established under international law, such as torture."[35]

29. Moreover, the concept pursuant to which States cannot be granted immunity for acts violating international criminal law was articulated as early as the 1940s, by the International Military Tribunal at Nuremberg: "[T]he doctrine of the sovereignty of the State cannot be applied to acts which are condemned as criminal by international law. […] He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[36]

30. As is more fully explained below, the CCLA respectfully submits that Canada's

---

[32] François J. Larocque, *Civil actions for uncivilized acts: the adjudicative jurisdiction of common law courts in transnational human rights proceedings* (Toronto: Irwin Law, 2010) at pp. 278-279.

[33] *Sosa v Alvarez-Machain*, 542 US 692 (2004).

[34] *Brief of the European Commission as Amicus Curiae Supporting Neither Party in Sosa v Alvarez-Machain*, 542 US 692 (2004), cited in Donald Francis Donovan & Anthea Roberts, "Emerging Recognition of Universal Civil Jurisdiction", (2006)100 AJIL 142 at p. 147.

[35] Hague Conference on Private International Law, *Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No 11 of August 2000 at 10.

[36] Judgment and Opinion, International Military Tribunal (Nuremberg), (Oct. 1. 1946), as cited in Jordan Paust, "The Absolute Prohibition Against Torture and Necessary and Appropriate Sanctions" (2009) 43 Valparaiso University Law Review 1535 at p. 1551.

international law and Charter obligations preclude it from extending state immunity to violations of the prohibition against torture. The present appeal affords the opportunity for this Court to interpret the SIA so as to uphold Canada's legal obligation under Article 14 of the *Convention Against Torture* to provide civil remedies to torture victims, and to contribute to ending impunity; doing otherwise could deprive victims and families of their only legal recourse and remedy.

C. Section 3 Does Not Confer Immunity for the Violation of *Jus Cogens* Obligations

31. As a preliminary point, the CCLA wishes to indicate that its argument does not depend for its validity on any finding that the Canadian government has violated the Charter. The CCLA Canadian government did not participate in the alleged acts of torture against Ms. Kazemi. Nor does it argue that the SIA authorizes torture.

32. Instead, the CCLA submits that the Charter must be used to assist this Court to select the correct interpretation of s. 3 of the SIA. This Court should select the interpretation most consistent with, and that gives the fullest and most liberal effect to, the prohibition against torture. The interpretation of this section that is most consistent with the Charter and with Charter values is an interpretation that does not extend state immunity to torture.

33. It is submitted that the prohibition against torture is reflected in ss. 9 and 12 of the Charter, and within the "principles of fundamental justice" in s. 7 of the *Charter*.

34. Section 12 of the Charter most clearly displays similarity with provisions of other international human rights instruments prohibiting torture, such as Art. 5 of the *Universal Declaration of Human Rights*, Art. 3 of the ECHR, and Art. 7 of the ICCPR.

35. Furthermore, the right to be free from arbitrary detention is engaged in proceedings involving the prohibition against torture. As noted by the UN Special Rapporteur on Torture, torture is predominantly inflicted on persons deprived of their liberty in any context and therefore rendered particularly vulnerable to abuse.[37] Section 9 of the *Charter* incorporates the

---

[37] UN Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on Torture*, 9 February 2010, A/HRC/13/39, at para 37.

right to be free from arbitrary detention and is in turn a legal safeguard against torture.

36. Torture is an egregious violation of security of the person. The *jus cogens* prohibition against torture is also reflected in the "principles of fundamental justice" in s. 7 of the *Charter*.

37. To summarize, the *jus cogens* prohibition against torture is reflected in ss. 9 and 12 of the Charter and in the principles of fundamental justice in s. 7. The Charter is intertwined with international human rights and serves as a portal for the reception and protection of such rights in Canadian law. This has Court clearly established that Charter interpretation is subject to a presumption of minimum protection according to which the Charter protects human rights in Canada at least to the same extent as they are protected in international human rights treaties which Canada has ratified. This presumption is all the more important when hierarchically superior peremptory norms of international law, such as the prohibition of torture, are engaged.

38. Therefore, in choosing among competing interpretations of s. 3 of the SIA, it is submitted that this Court must take into account the values that underlie these Charter provisions, and which give the fullest effect to Canada's international law obligation to provide redress: namely, an interpretation by which immunity is not extended to acts, such as torture, that violate *jus cogens*.

39. It is true that the SIA also incorporates the principle of state immunity into the Canadian domestic legal order. However, as this Court has recognized, the SIA codified only a particular meaning of state immunity; that is, restrictive immunity, where the shield protecting foreign states is not absolute.[38] This understanding was recently affirmed in *Kuwait Airways*.[39]

40. Furthermore, the values of comity and respect for the sovereign immunity of foreign states do not trump *jus cogens* obligations. In *Burns*, this Court, in considering whether extradition of two Canadians to the United States to face the death penalty was justifiable under s. 1, observed that "there is no doubt that it is important for Canada to maintain good relations

---

[38] *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at paras 13-17.

[39] *Kuwait Airways*, *supra* note 4 at para 24 [emphasis added].

with other states."[40] Yet this Court held that the means employed in that case (extradition with no assurance that the death penalty would not be sought) were not necessary to further the objective of comity. As this Court emphasized in *Hape*, deference towards another state's procedures "ends where clear violations of international law and fundamental human rights begin."[41]

41. It is respectfully submitted that in *Bouzari* and in its recent decision in *Steen*,[42] the Court of Appeal for Ontario missed the opportunity to interpret the SIA in accordance with the foregoing principles – an opportunity which this Court may take now.

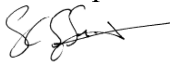
42. In conclusion, the CCLA submits that, because s. 3 of the SIA does not contain language expressly conferring immunity to *jus cogens* violations, it is open to this Court's interpretation. Of the interpretations that are reasonably available, the CCLA urges this Court to adopt the one that is *most* consistent with the Charter and Charter values (and by extension with both the letter and spirit of Canada's international law obligations): namely, that s. 3 does not confer immunity for acts that violate *jus cogens*. This interpretation is most consistent with Parliament's intent, as it is congruous with the doctrine of restrictive immunity which underpins the SIA. Finally, this interpretation does not prejudice the goal of comity, as properly understood. In short, such interpretation is consistent both with the requirements of the Charter and with sound policy.

PARTS IV & V – COSTS SUBMISSIONS AND ORDER REQUESTED

43. The CCLA does not seek costs and asks that no costs be awarded against it. The CCLA also respectfully requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2013.

Christopher A. Wayland



Simon Chamberland
Counsel to the Intervener,
Canadian Civil Liberties Association

---

40 *United States v. Burns*, 2001 SCC 7 at para 136.

41 *R v. Hape,* 2007 SCC 26 at para 52. ; see also *Canada v. Khadr,* [2008] 2 SCR 125 at para 3.

42 *Bouzari*, *supra*, note 25; *Steen v. Islamic Republic of Iran*, 114 OR (3d) 206.

PART VI - TABLE OF AUTHORITIES

Tab	*Cases*	*Paragraph(s) Referenced in Memorandum of Argument*
1.	*Al-Adsani v The United Kingdom* [GC], No 35763/97, [2001] XI ECHR 79, online: ECHR <http://echr.coe.int/Documents/Reports_Recueil_2001-XI.pdf>	25
2.	*Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)*, [1970] ICJ Rep	19
3.	*Bouzari v Iran* (2004), 243 DLR (4th) 406 (Ont CA)	18, 24, 41
4.	*Canada v. Khadr*, [2008] 2 SCR 125	40
5.	*Edwards v. Attorney-General for Canada*, [1930] AC 124 (JCPC)	12
6.	*Health Services and Support-Facilities Subsector Bargaining Assn. v B.C.*, 2007 SCC 27	16
7.	*Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 J. at	3
8.	*Kuwait Airways Corp. v. Iraq, 2*010 SCC 40	7, 39
9.	*R. v Hape, 2007 SCC 26*	17, 40
10.	*R. v. Big M Drug Mart Ltd*., [1985] 1 SCR 295	12
11.	*Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313	8
12.	*Schreiber v. Canada (Attorney General)*, 2002 SCC 62	39
13.	S*laight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038	8
14.	*Sosa v Alvarez-Machain*, 542 US 692 (2004).	27, 28
15.	*Steen v. Islamic Republic of Iran*, 114 OR (3d) 206	41
16.	*United States v. Burns*, 2001 SCC 7	40
Other		
17.	Alexander Orakhelashvili, *Peremptory Norms in International Law*, (New York: Oxford University Press, 2006) at p. 2	5

Tab	***Cases***	***Paragraph(s) Referenced in Memorandum of Argument***
18.	Antônio Augusto Cançado Trindade, Jus Cogens*: The determination and gradual expansion of its material content in contemporary international case-law*, New Developments of International Law in the Americas: XXXV Course on International Law (2008) at p. 10	5
19.	Brief of the European Commission as Amicus Curiae Supporting Neither Party in Sosa v Alvarez-Machain, 542 US 692 (2004) cited in Donald Francis Donovan & Anthea Roberts, "Emerging Recognition of Universal Civil Jurisdiction", (2006)100 AJIL 142 at p. 147	28
20.	Canada, Core document forming part of the reports of States Parties: Canada (1998) UN Doc. HRI/CORE/1/Add.91 at para 137	14
21.	Canada, Fourth Periodic Report of Canada to the UN Human Rights Committee, 15 October 1997, UN Doc. CCPR/C/103/Add.5 at para 22	14
22.	*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987, ratified by Canada 24 June 1987) at Article 14	21, 30
23.	François J. Larocque, Civil actions for uncivilized acts: the adjudicative jurisdiction of common law courts in transnational human rights proceedings (Toronto: Irwin Law, 2010) at pp. 278-279	26
24.	Gibran van Ert, Using International Law in Canadian Courts, 2d ed (Toronto: Irwin Law, 2008) at pp. 325, 335, 343	8, 13, 15
25.	Hague Conference on Private International Law, Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Prel. Doc. No 11 of August 2000 at p. 10	28
26.	Judgment and Opinion, International Military Tribunal (Nuremberg), (Oct. 1. 1946), as cited in Jordan Paust, "The Absolute Prohibition Against Torture and Necessary and Appropriate Sanctions" (2009) 43 Valparaiso University Law Review 1535 at p. 1551	29
27.	Lorna McGregor, "State Immunity and *Jus Cogens*" (2006) 55 Int'l & Comp. L.Q. 437 at p. 438	5
28.	Mads Andenas and Thomas Weatherall, "International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012" (2013) 62 Int'l & Comp. L.Q. 753 at pp. 1, 7	5

Tab	*Cases*	*Paragraph(s) Referenced in Memorandum of Argument*
29.	P.-A. Côté, Interprétation des lois, 4th ed., Montreal, Themis, 2009 at pp. 540-546	8
30.	Peter W. Hogg, Constitutional Law of Canada, (Toronto: Thomson Carswell, 2007) at pp. 795-96.	5, 11, 12
31.	Status of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants>	4, 24
32.	UN Committee Against Torture, Consideration of Reports Submitted by State Parties under Article 19 of the Convention – Conclusions and Recommendations of the Committee Against Torture, 7 July 2005, CAT/C/CO/34/CAN, at paras 4(g), 5(f)	24
33.	UN Committee Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, 24 January 2008, CAT/C/GC/2, at paras 1, 4, 6, 9, and 15	23
34.	UN Office of the High Commissioner for Human Rights, Report of the Special Rapporteur on Torture, 9 February 2010, A/HRC/13/39	35
35.	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 at Article 53 (entered into force 27 January 1980, ratified by Canada 14 October 1970)	18

PART VII - STATUTE, REGULATIONS, RULES, ETC.

N/A

B E T W E E N :

Estate of the Late Zahra Ziba Kazemi et al. Appellant	-and-	The Islamic Republic of Iran, et al. Respondents	-and-	Christopher D. Bredt *Amicus Curiae*	-and-	CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS et al Interveners	Court File No. 35034

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

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
Pursuant to Rules 37 and 42
of the *Rules of the Supreme Court of Canada*)

McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto, ON M5K 1E6

Christopher A. Wayland LSUC# 42381O
Tel: 416-601-8109
Fax: 416-868-0673
cwayland@mccarthy.ca

Simon Chamberland BQ# 282551-1
Tel: 514-397-4430
Fax: 514-875-6246
schamberland@mccarthy.ca

Counsel for the Intervener,
Canadian Civil Liberties Association

Doc #12816310