Court File No. 35034

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

BETWEEN:

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

APPELLANTS

-and-

ISLAMIC REPUBLIC OF IRAN, AYATOLLA 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, AMISTIE 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 INTERVENERS THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW

John Norris (john.norris@simcoechambers.com)
116 Simcoe Street, Suite 100
Toronto, ON M5H 4E2
Tel: 416-596-2960 Fax: 416-596-2598
Carmen Cheung (carmenk.cheung@utoronto.ca)
University of Toronto Faculty of Law
39 Queen's Park Cres. East
Toronto, Ontario M5S 2C3
Tel: 416-946-8730 Fax: 416-978-8894

Counsel for the Interveners,
David Asper Centre for Constitutional Rights and International Human Rights Program University of Toronto Faculty of Law

Martha Healey
Norton Rose Fulbright Canada LLP
1500-45 O'Connor Street
Ottawa, ON K1P 1A4
Tel: 613-780-8638
Fax: 613-230-5459
E-mail: martha.healey@nortonrosefulbright.com

Agent for the Interveners,
David Asper Centre for Constitutional Rights and International Human Rights Program University of Toronto Faculty of Law

ORIGINAL TO: **THE REGISTRAR OF THIS COURT**

COPIES TO:

IRVING MITCHELL KALICHMAN LLP
2 Place Alexis Nihon, bur. 1400
3500, boul. Maisonneuve Ouest
Montréal, QC H3Z 3C1

Kurt A. Johnson
Mathieu Bouchard
Audrey Boctor
David Grossman
Tel: (514) 934-7727
FAX: (514) 935-2999

Counsel for the Appellants,
Estate of the Late Zahra (Ziba) Kazemi and
Stephan (Salman) Hashemi

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin St
Box 466, Station D
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com

Agent for the Appellants,
Estate of the Late Zahra (Ziba) Kazemi and
Stephan (Salman) Hashemi

WOODS LLP
1700 - 2000 McGill College Avenue
Montreal, QC H3A 3H3

James A. Woods

Tel: (514) 982-4545
Fax: (514) 284-2046
E-mail: jwoods@woods.qc.ca

Counsel for the Respondents,
Islamic Republic of Iran, Ayatollah Sayyid Ali
Khamenei, Saeed Mortazavi, and Mohammad
Bakhshi

ATTORNEY GENERAL OF CANADA
284, rue Wellington, T-6060
Ottawa, ON K1A 0H8

Bernard Letarte
René LeBlanc
Tel: (613) 946-2776
Fax: (613) 952-6006
E-mail: bernard.letarte@justice.gc.ca

Counsel for the Respondent,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Respondent,
Attorney General of Canada

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
E-mail: cbredt@blg.com

Counsel for the Amicus Curiae

BORDEN LADNER GERVAIS LLP
100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for the Amicus Curiae

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100, P.O. Box 180
Toronto, ON M5G 2G8

Jill Copeland
Tel: (416) 977-6070
Fax: (416) 591-7333
E-mail: jcopeland@sgmlaw.com

Counsel for the Intervener,
Canadian Lawyers for International Human Rights

SACK GOLDBLATT MITCHELL LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 235-5327
Fax: (613) 235-3041
E-mail: cbauman@sgmlaw.com

Agent for the Intervener,
Canadian Lawyers for International Human Rights

CAZASAIKALEY LLP
220 avenue Laurie Ouest
Ottawa, ON K1P 5Z9

François Larocque
Tel: (613) 894-4783
Fax: (613) 565-2087
E-mail: francoislarocque@uottawa.ca

Counsel for the Intervener,
Amnistie internationale, Section Canada francophone

CAZASAIKALEY LLP
220 avenue Laurie Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins
Tel: (613) 564-8271
Fax: (613) 565-2087
E-mail: atomkins@plaideurs.ca

Agent for the Intervener,
Amnistie internationale, Section Canada francophone

NORTON ROSE FULBRIGHT CANADA LLP
79 Wellington Street West, Suite 2300
P.O. Box 128
Toronto, ON M5K 1H1

Azim Hussain
Rahool P. Agarwal
Maureen Edwards
Tel: (416) 216-3943
Fax: (416) 216-3930
E-mail: azim.hussain@nortonrosefulbright.com

Counsel for the Intervener,
REDRESS Trust Ltd.

NORTON ROSE FULBRIGHT CANADA LLP
1500-45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery

Tel: (613) 780-8604
Fax: (613) 230-5459
E-mail: sally.gomery@nortonrose.com

Agent for the Intervener,
REDRESS Trust Ltd.

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100, P.O. Box 180
Toronto, ON M5G 2G8

Daniel Sheppard
Tel: (416) 979-6442
Fax: (416) 979-4430
E-mail: dsheppard@sgmlaw.com

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

SACK GOLDBLATT MITCHELL LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 235-5327
Fax: (613) 235-3041
E-mail: cbauman@sgmlaw.com

Agent for the Intervener,
Canadian Association of Refugee Lawyers

BRANCH, MACMASTER
1410-777 Hornby Street
Vancouver, BC V6Z 1S4

Ward K. Branch
Susan M. Precious
Tel: (604) 654-2999
Fax: (604) 684-3429
E-mail: wbranch@branmac.com

Counsel for the Intervener,
British Columbia Civil Liberties Association

MICHAEL J. SOBKIN
90 blvd. de Lucerne, Unit #2
Gatineau, QC J9H 7K8

Tel: (819) 778-7794
Fax: (819) 778-1740
E-mail: msobkin@sympatico.ca

Agent for the Intervener,
British Columbia Civil Liberties Association

DAVID MATAS
225 Vaughan Stree, Suite 602
Winnipeg, MB R3C 1T7

Tel: (204) 944-1831
Fax: (204) 942-1494
E-mail: dmatas@mts.net

Counsel for the Intervener,
Canadian Bar Association

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin St.
Box 466 Station D
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

Agent for the Intervener,
Canadian Bar Association

MCCARTHY TÉTRAULT LLP
Suite 4700, TD Bank Tower
Toronto, ON M5K 1E6

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

Counsel 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

Tel: (613) 569-8558
Fax: (613) 569-8668
E-mail: cbaxter@cwcb-law.com

Agent for the Intervener,
Canadian Civil Liberties Association

TORYS LLP
Suite 3000, Maritime Life Tower
P.O. Box 270, Toronto-Dominion Centre
Toronto, ON M5K 1N2

John Terry
Sarah R. Shody
Tel: (416) 865-8245
Fax: (416) 865-7380
E-mail: jterry@torys.com

Counsel for the Intervener,
Canadian Center for International Justice

MCMILLAN LLP
50 O'Connor Street, Suite 300
Ottawa, ON K1P 6L2

Jeffrey W. Beedell
Tel: (613) 232-7171, ext. 122
Fax: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca

Agent for the Intervener,
Canadian Center for International Justice

BARIN AVOCATS
4435 Sherbrooke Street West, Suite 7
Westmount, QC H3Z 1E5

Babak Barin
Tel: (514) 419-7519
Fax: (514) 221-4780
E-mail: bbarin@barinavocats.ca

Counsel for the Intervener,
Iran Human Rights Documentation Center

CAVANAGH WILLIAMS CONWAY BAXTER LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, ON K2C 3T2

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

Agent for the Intervener,
Iran Human Rights Documentation Center

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. By the Order of Abella J. dated September 23, 2013, the David Asper Centre for Constitutional Rights ("Asper Centre") and the International Human Rights Program ("IHRP"), both at the University of Toronto Faculty of Law, were granted to leave to intervene in the within appeal.

2. The Asper Centre and the IHRP submit that by denying victims of gross human rights violations access to a civil remedy in Canada against a foreign State, the *State Immunity Act* ("the *SIA*") fails to recognize the fundamental importance to rights claimants and to the legal order generally of being able to seek legal vindication for rights violations. The appellant Hashemi submits, *inter alia,* that the *SIA* infringes his rights under s. 7 of the *Canadian Charter of Rights and Freedoms.* The Asper Centre and the IHRP submit that the impact of the statute on him should not be understood under s. 7 simply as the frustration of a merely idiosyncratic personal preference to seek damages from the defendants. Rather, this impact must be assessed and understood in light of the fact that the action which the law prevents him from pursuing is an expression of the deeply rooted principle that for rights to be meaningful, violations of rights must be capable of being remedied. This is as true for basic human rights as it is for rights guaranteed by the *Charter*. What the *SIA* denies to the appellant Hashemi is fundamental to our understanding of justice; the impact on him of this denial is acute both personally and juridically. The importance of the principle that the *SIA* negates is the essential context for a full understanding of the impact of the *SIA* on the appellant Hashemi and, accordingly, for a proper appreciation of his claim under s. 7 of the *Charter.*

3. The Asper Centre and the IHRP take no position on the facts as summarized by the parties.

PART II – QUESTIONS IN ISSUE

4. The Asper Centre and the IHRP limit their submissions to the third constitutional question stated by the Chief Justice on April 26, 2013, namely: Does s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

PART III – ARGUMENT

A) The Essential Connection between Rights and Remedies

5. At its heart, this case is about access to justice. As McLachlin C.J. stated in *Hill v Hamilton-Wentworth Regional Police Services Board*: "To deny a remedy in tort is, quite literally, to deny justice."[1] Where the remedy sought is for the gross violation of fundamental human rights, this denial of justice could not be more profound.

6. It is submitted that it is a principle of fundamental justice that where there is a right there must be a remedy for its violation. The criteria for identifying a principle of fundamental justice are well-known: the principle must (1) be a legal principle; (2) about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and (3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[2]

7. The maxim *ubi jus ibi remedium* – where there is a right there must be a remedy – meets all these criteria. It is a legal principle which is well-established in Canadian and international jurisprudence. There is significant consensus about this principle in legal theory, international law, and Canadian law. Finally, these sources all demonstrate that the principle can be identified with sufficient precision. The *SIA* is inconsistent with this principle of fundamental justice.

1) The right to a remedy is a legal principle

8. In *Dunedin*, this Honourable Court stated that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[3] Thus, the Court held in *Doucet-Boudreau* that an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights of the claimants.[4]

---

[1] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 35, [2007] 3 SCR 129.
[2] *R v Malmo Levine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571 [*Malmo-Levine*].
[3] *R v 974649 Ontario Inc*., 2001 SCC 81 at para 20, [2001] 3 SCR 575 [*Dunedin*].
[4] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 55, [2003] 3 SCR 3 [*Doucet-Boudreau*].

9. In *Allen v College of Dental Surgeons of British Columbia*, the British Columbia Court of Appeal recognized as a "fundamental legal principle" that there is no right without a remedy.[5] Writing for the Court, Donald J.A. noted that this principle is said to be an "elementary maxim", as discussed in *Broom's Legal Maxims*:

> UBI JUS IBI REMEDIUM.–*There is no wrong without a remedy* (*b*).
>
> *Jus* signifies here "the legal authority to do or to demand something" (*c*); and *remedium* may be defined to be the right of action, or the means given by law, for the recovery or assertion of a right. According to this elementary maxim, whenever the common law gives a right or prohibits an injury, it also gives a remedy (*d*): *lex semper dabit remedium* (*e*). If a man has a right, he must, it has been observed, "have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (*f*).
>
> * * *
>
> (*f*) *Per* Holt, C.J., in *Ashby* v. *White*, 2 Raym. Ld. 938, at p. 953; see *per* Vaughan, C.J., in *Dixon* v. *Harrison*, Vaugh. 37, at p. 47, and in *North* v. *Coe*, Vaugh. 251, at p. 253; and *per* Willes, C.J., in *Winsmore* v. *Greenbank*, Will. 577, at p. 581.[6]

10. Blackstone recognized that "it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."[7] Similarly, A.V. Dicey found that there is an "inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation."[8]

11. Foundational U.S. jurisprudence also demonstrates that the principle, that a right requires a remedy, is a legal principle. In *Ex Parte v United States*, Holmes J. interpreted *ubi jus, ibi remedium* to mean that a right's existence depends on its remedy – "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law, but are elusive to the grasp."[9] In *Marbury v Madison*, Marshall C.J. reiterated Blackstone's observation that "it is a general and

---

[5] *Allen v College of Dental Surgeons of British Columbia*, 2007 BCCA 75 at para 35, 68 BCLR (4th) 53 [*Allen*].
[6] *Ibid* at para 36 (quoting *Broom's Legal Maxims*, 10th ed. (London: Sweet & Maxwell, 1939) at 118).
[7] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book, 2013) [*Remedies*] at s. 1.10 (quoting William Blackstone, Commentaries, 14th ed. (London: A. Strahan, 1803), Book 3, Ch. 7 at 109).
[8] *Ibid* (quoting Albert Venn Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed. (London: MacMillan, 1959) at 199).
[9] *Ex Parte v United States*, 257 US 419 at 433 (1922).

indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."[10]

2) There is a significant societal consensus that the right to a remedy is fundamental to the way in which legal systems ought fairly to operate

i. Consensus in legal theory

12. There is a general consensus among modern legal scholars that a remedy is inextricably connected to the substantive right.[11]

13. Unified Rights Theory, which has gained theoretical prominence,[12] states that a remedy is the *essence* of the right and not merely a procedural or separate aspect of the right. A right comprises an inert skeleton (the descriptive guarantee of the right) and the living matter (the operative remedy), which together give life to the concept.[13] The essential correlation between rights and duties is also fundamental to the widely influential Hohfeldian theory of rights. According to Hohfeld, a remedy is the component of the unified right that imposes an active requirement (or a remedy) as a result of the violation of that descriptive duty. The remedy thus effectuates the inert description of legal duties by giving life to an otherwise dormant provision.[14]

ii. Consensus in international law

14. As this Court has made clear, international human rights law serves as an important point of reference in constitutional interpretation, with the *Charter* presumed to contain at least as much human rights protection as found in Canada's binding international human rights obligations.[15]

---

[10] *Marbury v Madison*, 5 U.S. (1 Cranch) 137 at 163 (1803) (quoting Blackstone's *Commentaries*, Volume 3 at 23).
[11] See Tracy Thomas, "Congress' Section 5 Power and Remedial Rights" (2001) 34 UC Davis L Rev 673 at 688 [Thomas].
[12] Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857.
[13] Thomas, *supra* note 11 at 687-90.
[14] *Ibid* at 688.
[15] *Slaight Communications inc. v Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416 (quoting *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 349; *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70, [2007] 2 SCR 391; *R v Hape*, 2007 SCC 26 at paras 55-56, [2007] 2 SCR 292. See also *R v Keegstra*, [1990] 3 SCR 697 at 750 (observing that "[g]enerally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself").

15. The right to a remedy is a foundational principle of international human rights law, and finds expression in numerous international human rights instruments [16] and in the international jurisprudence[17]. The 1955 *traveaux preparatoire* to the *International Covenant on Civil and Political Rights* ("ICCPR") shows that the international community considered that protecting fundamental human rights rights – including the right to be free from torture – depended on the availability of remedies for their breaches. In drafting the ICCPR, all state parties accepted that "the proper enforcement of the provisions of the covenant depended on guarantees of the individual's rights against abuse, which comprised the following elements: the possession of a legal remedy, the granting of this remedy by national authorities and the enforcement of the remedy by the competent authorities."[18]

16. The ICCPR's remedial provisions are replicated in regional human rights instruments, including the American Convention on Human Rights ("ACHR") [19] and the European Convention on Human Rights ("ECHR").[20] According to the Inter-American Court of Human Rights ("IACtHR"), the right to a remedy constitutes "one of the basic pillars" not only of the

---

[16] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/180, (1948) 71, art 8; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 2(3), Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 14(1), Can TS 1987 No 36 (entered into force 26 June 1987, accession by Canada 24 June 1987); *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, art 6, Can TS 1970 No 28 (entered into force 4 January 1969, accession by Canada 14 October 1970); *American Convention on Human Rights, "Pact of San Jose, Costa Rica"*, 22 November 1969, 1144 UNTS 123, arts 25, 63(1); OASTS 36; 9 ILM 99 (entered into force 18 July 1978) [ACHR]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, art 13, Eur TS 5 (entered into force 3 September 1953) [ECHR]; *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217, art 7(1)(a) (entry into force 21 October 1986); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3, art 83; *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, UN Doc A/RES/61/177, art. 24(4) (entered into force 23 December 2010).

[17] *Factory at Chorzow (Germany v Poland)* (1928), PCIJ (Ser A) No 17 at 29 (International Court of Justice stating that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"); *Velásquez-Rodríguez v Honduras* (1989) Inter-Am Ct HR (Ser C) No 7 at para 25.

[18] United Nations, Office of High Commissioner for Human Rights, *Annotations on the draft International Covenants on Human Rights*, UNGAOR, 10th Sess, UN Doc A2929 (1955) at 18 para 14, online: Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf>.

[19] ACHR, *supra* note 16, at art 25.

[20] ECHR, *supra* note 16, at art 13.

ACHR, but of the rule of law in a democratic society.[21] In a case where the state's constitution served as a bar to an effective remedy, the IACtHR directed the state to amend its constitution so that a law deemed incompatible with the ACHR could be challenged in its domestic courts.[22]

17. Remedies cannot be illusory: the right to a remedy is a right to an *effective* remedy. As set out by the Canadian Association of Refugee Lawyers in its intervener factum, the right to an effective remedy for gross human rights violations is a preemptory norm of international law. Thus, the European Court of Human Rights, in interpreting the ECHR, has found that a remedy "must be effective in practice as well as in law".[23] Similarly, the IACtHR has found that "remedies that, owing to the general conditions of the country or even the circumstances of the particular case, are illusory cannot be considered effective."[24]

18. In December 2005, the United Nations General Assembly adopted by consensus the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ("the *Basic Principles*"),[25] reaffirming state obligations to provide victims of gross human rights violations with "equal and effective access to justice" and "effective remedies, including reparations".[26]

19. Effective remedies include compensation.[27] Where full restitution[28] is impossible – as will often be the case with serious human rights violations – compensation is an appropriate and

---

[21] *19 Merchants v Colombia* (2004) Inter-Am Ct HR (Ser C) No 109, at para 193 [*19 Merchants*].
[22] *Caesar v Trinidad and Tobago* (2005) Inter-Am Ct HR (Ser C) No 123 at para 133. See also *Hilaire, Constantine and Benjamin, et al. v Trinidad and Tobago* (2001) Inter-Am Ct HR (Ser C) No 94 at para 152(c).
[23] *Iovchev v Bulgaria*, No. 41211/98, [2006] ECHR at para 142.
[24] *19 Merchants*, *supra* note 21 at para 192 (quoting *Baena Ricardo et al. v Panama* (2003) Inter-Am Ct HR (Ser C) No 104 at para 77).
[25] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), GA Res 60/147, UN Doc. A/RES/60/147 [*Basic Principles*]. The General Assembly adopted this resolution without a vote on the recommendation of Economic and Social Council Resolution 2005/30. [ESCR 2005/30]. Canada voted in favour of ESCR 2005/30. See United Nations "Protection of Human Rights" in Yearbook of the United Nations 2005, part 2 (New York: UN, 2005) at 792-93, online: Yearbook of the United Nations <http://unyearbook.un.org/unyearbook.html?name=2005index.html>
[26] *Basic Principles*, *supra* note 25 at paras 3(c) and 3(d).
[27] See *19 Merchants*, *supra* note 21 at para 222.

common mode of reparation. In articulating appropriate remedies for gross human rights violations, the *Basic Principles* explicitly contemplate compensation for physical or mental harm.[29] The very first decision of the IACtHR involved an award of money damages to the family of a university student who had been forcibly disappeared by the government of Honduras.[30] Recent decisions from the United Nations Human Rights Committee, the treaty body responsible for ensuring state compliance with the ICCPR, have found compensation to be an appropriate remedy for victims of torture and their families, as well as for the families of the forcibly disappeared.[31]

iii. Consensus in Canadian law

20. This Honourable Court has repeatedly affirmed the importance of access to remedies. It has called the power to grant remedies the court's "most meaningful function under the *Charter*."[32] In his text *Constitutional Remedies in Canada*, Kent Roach states that "[e]nsuring that people who claim *Charter* violations have access to a court of competent jurisdiction to consider their remedial claims is one of the purposes of the *Charter*."[33] The same jurisprudence showing that the right to a remedy is a legal principle also demonstrates that there is a consensus in Canadian law that it is fundamental to our conception of a fair and just system of law. [34]

3) The right to a remedy can be identified with sufficient precision

21. The right to a remedy is respected when the law ensures access to a court of competent jurisdiction for the adjudication of a claim for a remedy for the violation of a right. It does not

---

[28] Restitution, as defined by the *Basic Principles*, seeks to "restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred." *Basic Principles*, *supra* note 25 at para 19.
[29] *Basic Principles, supra* note 25 at para 20.
[30] *Velásquez-Rodríguez v Honduras* (1988) Inter-Am Ct HR (Ser C) No 4 at para 189.
[31] *Peurtas v Spain*, (2013) UN Doc CCPR/C/107/D/1945/2010 at para 10; *Al-Khazmi v Libya*, (2013) UN Doc CCPR/C/108/D/1832/2008 at para 10; *Mechani v Algeria*, (2013) UN Doc CCPR/C/107/D/1807/2008 at para 10; *Saadoun v Algeria*, (2013) UN Doc CCPR/C/107/D/1806/2008 at para 10; *Boudjemai v Algeria*, (2013) UN Doc CCPR/C/107/1791/2008 at para 10.
[32] *Nelles v Ontario*, [1989] 2 SCR 170 at 196, 60 DLR (4th) 609 [*Nelles*].
[33] *Remedies*, *supra* note 7 at s. 3.410.
[34] See *Dunedin*, *supra* note 3; *Doucet-Boudreau*, *supra* note 4; *Allen*, *supra* note 5; see also *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230.

guarantee any particular remedial outcome. As this Honourable Court noted in *City of Vancouver v Ward*:

> [A]n appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.[35]

22. It is submitted that, notwithstanding the breadth of remedies available and the wide discretion granted to courts to fashion appropriate remedies for rights violations, particularly under s. 24(1) of the *Charter*, the principle of the right to a remedy is sufficiently precise to yield a manageable standard.

B) Understanding the Appellant's Claim

23. Viewed against this backdrop, it is apparent that the appellant Hashemi's objection to the *SIA* is not simply that it denies him the "right to sue". Rather, it denies him access to something that is fundamental to our conception of justice: the right to seek a remedy for rights violations. The *SIA* forecloses his ability to even seek a remedy for gross violations of the most basic human rights.

24. The Attorney General of Canada ("AG Canada") cites *Whitbread v Walley*[36] for the proposition that s. 7 is not engaged.[37] However, the claim therein concerned whether a statutory cap could be imposed on an available remedy. This case involves whether an individual may seek an effective remedy at all. While the circumstances here are similar to that in *Bouzari v Iran*,[38] the Ontario Court of Appeal's reliance on *Whitbread v Walley* failed to account for this difference and it is submitted, should not be followed.

25. The distinction between *Whitbread* and the instant case also assists in circumscribing the right to a remedy. The right being sought is not for a *choice* of remedy. Just as the fundamental

---

[35] *Vancouver (City) v Ward*, 2010 SCC 27 at para 20, [2010] 2 SCR 28.
[36] *Whitbread v Walley*, [1990] 3 SCR 1273, 77 DLR (4th) 25.
[37] Factum of the Respondent, Attorney General of Canada at para. 105.
[38] *Bouzari v Iran* (2004), 71 OR (3d) 675, (available on CanLII) (Ont CA).

right to a fair trial does not require application of procedures most favourable to the accused,[39] but simply consideration for the accused's interests and the interests of society in the fair resolution of a trial,[40] the right to a remedy simply requires that an individual be allowed access to an effective remedy.

C) Balancing Interests: Appropriate and Inappropriate Considerations

26. Recognizing a right to a remedy will not have the effect of substantially impairing other important interests. AG Canada argues that the right to access a remedy should be balanced against the important objectives achieved by state immunity.[41] With respect, this is not the correct approach. In *R v Malmo-Levine*, this Honourable Court held that delineating fundamental justice must balance societal interests only to the extent necessary to take into account the social nature of collective existence.[42] Further, it held that broader social interests were to be accounted for in s. 1,[43] and it was erroneous to import these considerations into s. 7 balancing.[44]

27. The approach adopted in *Malmo-Levine* demonstrates that it would be inappropriate to import the objective of the impugned provision into the balancing interests for establishing a principle of fundamental justice. The important state interests protected by the *SIA* are properly weighed against a rights violation in s. 1, but are not an appropriate consideration as to whether there is a right to a remedy. Although the court may decide, as AG Canada has advised, that state immunity outweighs the appellant's interests, this consideration must be left until after it has been established whether there is a right to an effective remedy as a principle of fundamental justice.

---

[39] *R v Lyons*, [1987] 2 SCR 309 at 362, 44 DLR (4th) 193.
[40] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto, ON: Irwin Law, 2012) at 110.
[41] Factum of the Respondent, Attorney General of Canada at para 115.
[42] *Malmo-Levine*, *supra* note 2, at para 99.
[43] *Ibid*, at paras 97-98.
[44] *Ibid*, at paras 96, 182.

D) Conclusion

28. The principles of fundamental justice are informed by the fundamental basic rights owed to individuals in a democracy which respects the rule of law. These concepts underlie the *Charter* and inform the development of the principles of fundamental justice.[45] It is submitted that to grant immunity from legal accountability is akin to granting a license to violate individual rights.[46] This is as true with respect to basic human rights as it is with respect to rights guaranteed under the *Charter*. Accordingly, it is submitted that s. 3(1) of the *SIA* is unconstitutional to the extent that it prevents access to an effective remedy for gross human rights violations, and in particular in respect of torture.

PARTS IV AND V – COSTS SUBMISSION AND ORDER SOUGHT

29. The Asper Centre and IHRP seek no costs and respectfully request that none be awarded against them. The Asper Centre and IHRP request that they be allowed 10 minutes to provide oral argument at the hearing of the appeal. They take no position on the outcome of the appeal but ask that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: November 15, 2013

Per John Norris and Carmen Cheung
Counsel for the Interveners, David Asper Centre for Constitutional Rights and the International Human Rights Program, at the University of Toronto Faculty of Law

[45] *Reference Re Succession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385.
[46] *Nelles, supra* note 33 at 195-96 per Lamer J. (as he then was).

PART VI – ALPHABETICAL LIST OF AUTHORITIES

CASES

Canadian

International

DOCTRINE

OTHER MATERIALS

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

***State Immunity Act*, R.S.C., 1985, c. S-18, s. 3(1)**

State immunity **3.** (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	**Immunité de jurisdiction** **3.** (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de jurisdiction devant tout tribunal au Canada.