SCC File No. 34470

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

B E T W E E N:

Rachidi EKANZA EZOKOLA

APPELLANT
(Respondent)

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

MOTION RECORD
MOTION BY CANADIAN CENTRE FOR INTERNATIONAL JUSTICE ("CCIJ") AND THE INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF TORONTO FACULTY OF LAW ("IHRP") FOR LEAVE TO INTERVENE
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada)*

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(Respondent)

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

NOTICE OF MOTION TO A JUDGE OR THE REGISTRAR
MOTION BY THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND THE UNIVERSITY OF TORONTO INTERNATIONAL HUMAN RIGHTS PROGRAM FOR LEAVE TO INTERVENE
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Canadian Centre for International Justice ("CCIJ") and the International Human Rights Program at the University of Toronto Faculty of Law ("IHRP") hereby apply to a Judge of the Court pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for an Order:

(a) Granting the CCIJ and IHRP leave to intervene in this appeal;

(b) Permitting the CCIJ and IHRP to file a memorandum of argument not exceeding 20 pages;

(c) Permitting the CCIJ and IHRP to present oral argument at the hearing of the appeal; and

(d) For such further or other order as the Judge or Registrar may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

About the CCIJ and the IHRP

(a) The CCIJ is a non-governmental organization that works with survivors of genocide, torture and other atrocity crimes to seek redress and bring perpetrators to justice. The CCIJ fulfills its mandate, in part, through the application of international criminal law ("ICL") in domestic, foreign and international courts.

(b) Accordingly, the CCIJ has extensive expertise in and knowledge of ICL, and has applied its expertise and knowledge in several contexts, including intervening in cases involving the application of ICL;

(c) The IHRP is part of the Faculty of Law at the University of Toronto. Its mission is to advance the field of international human rights law, including ICL, and its work focuses, in part, on the domestic application of international law in Canada;

(d) Accordingly, like the CCIJ, the IHRP has extensive expertise in and knowledge of ICL. It has been involved in numerous academic and research initiatives, and has intervened in other matters, including international proceedings, involving the application of ICL;

(e) The CCIJ and the IHRP have a special interest in ensuring that the law adequately takes into account the principles of ICL;

The CCIJ's and the IHRP's Proposed Submissions

(f) The Court's ruling in the appeal will have an impact well beyond the interests of the immediate parties to the appeal;

(g) The CCIJ and the IHRP propose to make submissions at the hearing of this appeal that will be independent, relevant to the appeal, useful to the Court and different from the submissions of the parties;

(h) Specifically, if granted leave to intervene, the CCIJ and the IHRP will provide the following assistance to the Court:

(i) With their expertise in ICL, they will explain, expand on and provide detailed submissions on the ICL issues that are engaged by this matter;

(ii) They will submit that in determining how to interpret Article 1F(a) of the Refugee Convention, which provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that … he has a committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes", the Court must be guided by ICL, with reference to the international instruments that set out the principles of ICL and the jurisprudence of international bodies;

(iii) They will submit that under ICL, determining whether a person has "committed a crime against peace, a war crime, or a crime against humanity" is not a matter of determining "personal and knowing participation";

(iv) They will submit that, rather, there are specific modes of individual criminal responsibility that apply to such crimes, including, by way of example:

(A) Planning;

(B) Instigating;

(C) Ordering;

(D) Committing (i.e. direct participation);

(E) Aiding and abetting in the planning, preparation or execution of a crime;

(F) Joint criminal enterprise;

(G) Superior or command responsibility;

(H) Co-perpetration; and

(I) Attempt to commit international crimes.

(v) They will submit that each of these modes of individual criminal responsibility has constituent elements – specifically, *actus reus* and *mens rea* elements – that must be established;

(vi) They will submit that, under ICL, in addition to the modes of liability, the international crimes of genocide, crimes against humanity and war crimes have their own constituent elements that must be established;

(vii) They will submit that in order to determine whether "there are serious reasons for considering" that a person has committed an international crime such that refugee protection can be denied, the Canadian courts must determine whether, on the applicable "serious reasons to consider" standard, a person has committed an international crime through one of the modes of individual criminal responsibility recognized in ICL, with reference to the constituent elements of the applicable mode of individual criminal responsibility and the specific crime that is alleged;

(viii) They will provide submissions on the nature of "contribution" to an international crime under ICL, and omission of an obligation under ICL;

(ix) They will submit that, under modern ICL, membership, without more, in an organization that has been associated with or implicated in international crimes is not enough to constitute an international crime;

(x) They will provide analogous cases from international criminal courts and tribunals (e.g. involving senior officials and diplomats) that will assist the Court in understanding how commission of an international crime is determined under ICL, including discussing particular modes of liability that may be directly relevant to the disposition of this matter such as

aiding and abetting (including by omission), joint criminal enterprise, and superior responsibility of civilians;

(xi) They will provide submissions on how modern ICL impacts and differs from the "limited and brutal purpose" criteria used by the Canadian courts in analyzing organizations in refugee claims that engage Article 1F(a) of the Refugee Convention; and

(xii) Based on its submissions, they will provide the Court with its expertise on the desirability and feasibility of establishing principles for determining refugee claims that engage Article 1F(a) of the Refugee Convention.

(i) While the parties will have their own interests to protect and advance, the CCIJ and IHRP will be able to offer this Court objective, useful and distinct submissions at the hearing of this appeal, from a perspective grounded in their respective mandates, that differs from those of the parties;

(j) Rules 47 and 55 of the Rules of the Supreme Court of Canada; and

(k) Such further and other grounds as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the motion:

(a) The Affidavit of Matthew Eisenbrandt, affirmed September 10, 2012;

(b) The Affidavit of Patrick Macklem, affirmed September 10, 2012; and

(c) Such further and other material as counsel may advise and this Court may permit.

Dated at Toronto, Ontario this 11th day of September, 2012:

SIGNED BY

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2

SCC Court File No.: 34470

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

B E T W E E N:

Rachidi EKANZA EZOKOLA

Appellant
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Appellant)

AFFIDAVIT OF MATTHEW EISENBRANDT
(in respect of a motion for leave to intervene, pursuant to the Rules of the Supreme Court of Canada)

I, MATTHEW EISENBRANDT, of the City of Vancouver, in the Province of British Columbia, **AFFIRM AND SAY AS FOLLOWS:**

1. I am the Legal Director for the Canadian Centre for International Justice ("CCIJ"). As such, I have knowledge of the matters to which I hereinafter depose, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

I. BACKGROUND

A. Nature of this Motion

2. I make this affidavit in support of a motion by the CCIJ for leave to intervene in this appeal. The CCIJ seeks leave to intervene in this appeal jointly with the University of Toronto International Human Rights Program ("IHRP").

3. This appeal raises issues at the heart of the CCIJ's mandate and about which we have expertise that will assist the Court in determining the issues before it. Specifically, the Court will examine the scope of "complicity" for crimes against humanity under international criminal law ("ICL"), and other modes of individual criminal liability. The Court's conclusions on this issue will affect future criminal prosecutions in Canada under the *Crimes against Humanity and War Crimes Act* (S.C. 2000, c. 24), a statute that explicitly relies on international law. In particular, the Court's conclusions will affect whether those allegedly implicated in crimes against humanity can be prosecuted and convicted under the Act in Canada. The prosecution of these cases and the application of the Act in Canada are at the heart of the CCIJ's work.

B. The CCIJ: Overview and Mission

4. The CCIJ, a federally-incorporated, registered charity, is a non-governmental organization that works with survivors of genocide, torture and other atrocity crimes to seek redress and bring perpetrators to justice. The CCIJ pursues this mission, in part, through the application of ICL in appropriate domestic, foreign and international courts. In Canada, this includes the application of ICL through the *Crimes against Humanity and War Crimes Act.*

5. The CCIJ is the only Canadian organization primarily dedicated to (a) supporting survivors of genocide, torture and other atrocity crimes in their pursuit of justice; and (b) seeking and promoting accountability for torturers, war criminals and others who commit atrocity crimes. The CCIJ supports the application of international law in criminal and civil prosecutions of those responsible for genocide, torture and other atrocity crimes.

6. More specifically, the CCIJ's mission consists of:

(a) providing information, assistance and direction to survivors of atrocity crimes and families of victims, carrying out or facilitating research and investigations of such cases, and compiling cases to be brought to the attention of the Canadian Government or other authorities or to be filed in Canadian courts;

(b) providing support to government initiatives leading to the prosecution in Canada of alleged torturers, war criminals and other perpetrators of atrocity crimes, and providing support for other appropriate remedies, including civil lawsuits;

(c) providing education and training for legal professionals, civil society groups and the general public in Canada about impunity as a critical human rights issue;

(d) serving as a resource centre for anti-impunity initiatives launched across the country, including access to Canadian and international jurisprudence and information regarding Canadian law, policy and practice; and

(e) providing support for on-going law efforts aimed at strengthening the legal remedies available in Canada for the victims of atrocity crimes.

7. The CCIJ interacts directly with survivors of crimes against humanity and other atrocity crimes. It has experience in supporting these survivors and providing information about remedies, including legal actions grounded in ICL and the *Crimes against Humanity and War Crimes Act*.

8. The CCIJ receives and responds to requests for information and assistance regarding atrocity crimes committed around the world and works directly on matters that have a connection to Canada. The CCIJ has received inquiries concerning crimes that occurred in North America, the Middle East, Europe, Latin America, Africa and Asia, and has pursued those cases with a connection to Canada.

9. The CCIJ has extensive knowledge of ICL, including the jurisprudence of international criminal tribunals and the application of the *Crimes against Humanity and War Crimes Act*. This knowledge has been conveyed through the CCIJ's activities, including the presentation of

continuing professional development courses about ICL and its application in Canada under the Act. These courses have been offered in cities throughout Canada.

10. Individuals with a deep and longstanding commitment to the defence of human rights have taken part in the CCIJ's activities and have given their endorsement to the CCIJ. The following persons are members of the CCIJ's Honorary Council: the Honourable Madam Justice Louise Arbour, the Honourable Madam Justice Claire L'Heureux-Dubé, the Honourable Flora MacDonald, the Honourable Raynell Andreychuck, Judge Philippe Kirsch, Mr. Maher Arar, Dr. Lloyd Axworthy, Dr. Ed Broadbent and Ms. Erna Paris.

11. The CCIJ is also supported by an Advisory Committee that includes several professors, lawyers and experts in ICL and refugee issues.

12. The creation of the CCIJ was supported and endorsed by groups such as Amnesty International-Canada, the Canadian Council for Refugees, the Canadian Centre for Victims of Torture, the Canadian Labour Congress and B'nai Brith.

13. In addition to more than four years of experience working on these issues in Canada with the CCIJ, I previously served as Legal Director for a similar organization in the United States, the Center for Justice and Accountability ("CJA"). In that job, I litigated several cases on behalf of survivors against alleged perpetrators of crimes against humanity, including as CJA's lead counsel in two jury trials and two hearings on damages. These cases included claims based on indirect liability for international crimes: see, e.g., *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D.Cal. 2004); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D.Tenn. 2005). As a result, I have extensive experience with the application of ICL in domestic courts and the issue of liability for international crimes under international law.

C. Recent Work by the CCIJ

14. Since its inception in 2000, the CCIJ has actively and consistently promoted the application of ICL in Canadian courts. Some of the CCIJ's work in this regard includes:

(a) Intervening in select cases, listed below, on issues of international law and the ability of survivors to seek redress in Canadian courts;

(b) Presenting, in cities throughout Canada, continuing professional development courses on ICL and its application in Canadian courts under the *Crimes against Humanity and War Crimes Act*;

(c) Investigating cases against persons allegedly involved in crimes against humanity and other atrocity crimes, and seeking their prosecution in Canada under, *inter alia*, the *Crimes against Humanity and War Crimes Act;*

(d) Serving as a leading resource centre in Canada for information on, *inter alia*, ICL and the *Crimes against Humanity and War Crimes Act*;

(e) Researching international law, and particularly ICL, with regard to potential cases in Canadian courts and other domestic and international tribunals;

(f) Acting on the Board of Directors for an association of victims' families seeking class certification with regard to redress for a massacre in the Democratic Republic of Congo;

(g) Hosting a two-day workshop on remedies for torture survivors in Canadian courts, with the participation of numerous experts on international law;

(h) Undertaking a major campaign to amend the *State Immunity Act* (R.S.C. 1985, c. S-18) – and thereby allow greater opportunities for survivors of atrocity crimes to seek redress in Canadian courts – by testifying before committees in the House of Commons and the Senate, drafting proposed legislation, and meeting with MPs and other government officials;

(i) Promoting educational and outreach initiatives to raise awareness of the legal issues related to redress and accountability, including ICL and the *Crimes against Humanity and War Crimes Act*, by participating in conferences and workshops and providing presentations to stakeholders.

D. Other Interventions by the CCIJ

15. The interest of the CCIJ has been recognized as sufficient to grant it intervener status in several cases. This Court has granted the CCIJ leave to intervene in two previous cases, including one relying heavily on ICL:

(a) *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, in which the Court upheld the deportation of a permanent resident for whom there were reasonable grounds to believe that he had committed a crime against humanity;

(b) *Club Resorts Ltd. v. Van Breda et al.*, 2012 S.C.C. 17, on the issue of "forum of necessity," an exception to the common law test for jurisdiction in cases where a plaintiff cannot reasonably bring suit elsewhere, as often occurs in cases of atrocity crimes that take place outside Canada.

16. In addition, the CCIJ has been granted intervener status in other cases related to the application of international law in Canadian courts and issues of redress for victims of atrocity crimes:

(a) *Kazemi (Estate of) v. Islamic Republic of Iran*, [2012] Q.J. No. 7754, 2010 QCCS 196, a civil lawsuit in Quebec against the Government of Iran and individual Iranian officials for their role in the torture and murder of Canadian citizen Zahra Kazemi;

(b) *Kunlun Zhang et al. v. Jiang Zemin* et al., Court File No. 04-CV-278915CM2, a civil lawsuit in Ontario Superior Court against Chinese government officials for their role in the torture of, *inter alia*, a Canadian citizen.

E. IHRP

17. In the interest of reducing the volume of intervener materials before this Court, while ensuring that interested parties with useful and different submissions are heard, the CCIJ seeks leave to intervene in this appeal jointly with the IHRP.

18. I have read the affidavit of Patrick Macklem of the IHRP, and can confirm that the IHRP has the same views on the issues raised by this appeal.

II. PROPOSED SUBMISSIONS FOR THE INTERVENTION

19. If granted leave to intervene, the CCIJ anticipates that it will, along with the IHRP, assist the Court in the following ways:

(a) With its expertise in ICL, it will explain, expand on and provide detailed submissions on the ICL issues that are engaged by this matter;

(b) It will submit that in determining how to interpret Article 1F(a) of the Refugee Convention, which provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that … he has a committed a crime against peace, a war crime, or a crime against humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes*", the Court must be guided by ICL, with reference to the international instruments that set out the principles of ICL and the jurisprudence of international bodies;

(c) It will submit that under ICL, determining whether a person has "committed a crime against peace, a war crime, or a crime against humanity" is not a matter of determining "personal and knowing participation";

(d) It will submit that, rather, there are specific modes of individual criminal responsibility that apply to such crimes, including, by way of example:

(i) Planning;

(ii) Instigating;

(iii) Ordering;

(iv) Committing (i.e. direct participation);

(v) Aiding and abetting in the planning, preparation or execution of a crime;

(vi) Joint criminal enterprise;

(vii) Superior or command responsibility;

(viii) Co-perpetration; and

(ix) Attempt to commit international crimes.

(e) It will submit that each of these modes of individual criminal responsibility has constituent elements – specifically, *actus reus* and *mens rea* elements – that must be established;

(f) It will submit that, under ICL, in addition to the modes of liability, the international crimes of genocide, crimes against humanity and war crimes have their own constituent elements that must be established;

(g) It will submit that in order to determine whether "there are serious reasons for considering" that a person has committed an international crime such that refugee protection can be denied, the Canadian courts must determine whether, on the applicable "serious reasons to consider" standard, a person has committed an international crime *through one of the modes of individual criminal responsibility recognized in ICL*, with reference to the constituent elements of the applicable mode of individual criminal responsibility and the specific crime that is alleged;

(h) It will provide submissions on the nature of "contribution" to an international crime under ICL, and omission of an obligation under ICL;

(i) It will submit that, under modern ICL, membership, without more, in an organization that has been associated with or implicated in international crimes is not enough to constitute an international crime;

(j) It will provide analogous cases from international criminal courts and tribunals (e.g. involving senior officials and diplomats) that will assist the Court in

understanding how commission of an international crime is determined under ICL, including discussing particular modes of liability that may be directly relevant to the disposition of this matter such as aiding and abetting (including by omission), joint criminal enterprise, and superior responsibility of civilians;

(k) It will provide submissions on how modern ICL impacts and differs from the "limited and brutal purpose" criteria used by the Canadian courts in analyzing organizations in refugee claims that engage Article 1F(a) of the Refugee Convention; and

(l) Based on its submissions, it will provide the Court with its expertise on the desirability and feasibility of establishing principles for determining refugee claims that engage Article 1F(a) of the Refugee Convention.

20. The CCIJ will expand on these submissions if granted leave to intervene.

III. SUMMARY

21. As a centre focused on ICL and its domestic application in Canada, primarily through the *Crimes against Humanity and War Crimes Act*, the CCIJ has a strong interest in this appeal and will present arguments that are different from those of the parties.

22. In my view, therefore, the CCIJ can make a valuable contribution to this appeal that will be useful to this Court in determining the questions before it.

23. Granting the CCIJ leave to intervene will not prejudice any party. The CCIJ will take the record as it finds it and will not supplement the record. The CCIJ will seek to avoid duplication of submissions and will abide by any schedule set by the Court. The CCIJ seeks no costs in the proposed intervention and asks that none be awarded against it.

24. Consistent with the proper role of an intervener before this Court, the CCIJ will take no position on the disposition of the appeal.

25. For these reasons, the CCIJ respectfully requests that it be granted leave to intervene jointly with the IHRP. It further requests leave to file a joint factum and to present oral argument at the hearing of this appeal. The CCIJ respectfully requests that it be permitted to file a joint

factum of no more than 20 pages due to the fact that the CCIJ is collaborating and sharing resources with another organization.

26. I affirm this affidavit in support of the CCIJ's motion for leave to intervene, and for no other or improper purpose.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia on September 10, 2012.

A Commissioner for Taking Affidavits in British Columbia

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MATTHEW EISENBRANDT

3

SCC Court File No.: 34470

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

B E T W E E N:

Rachidi EKANZA EZOKOLA

Appellant
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Appellant)

AFFIDAVIT OF PATRICK MACKLEM
(in respect of a motion for leave to intervene, pursuant to the Rules of the Supreme Court of Canada)

I, PATRICK MACKLEM, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS:**

1. I am a Professor at the University of Toronto Faculty of Law ("Faculty of Law") and a member of the Faculty Advisory Committee of the International Human Rights Program ("IHRP") at the Faculty of Law. As such, I have knowledge of the matters to which I depose in this affidavit, except where I have otherwise stated. Where facts are based on information obtained from others, I believe that information to be true.

I. BACKGROUND

A. Nature of this Motion

2. I make this affidavit in support of a motion by the IHRP for leave to intervene in this appeal. The IHRP seeks leave to intervene in this appeal jointly with Canadian Centre for International Justice ("CCIJ").

3. This appeal raises issues in which the IHRP has an interest and about which we have expertise that will assist the Court in determining the issues before it. The IHRP's mission is to enhance the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society. In short, the IHRP's mission is to advance the field of international human rights law. The IHRP is particularly interested in the outcome of this appeal since much of our work is focused on the domestic application of international law in Canada.

4. The main issue on appeal is the appropriate legal test to be applied to determine applicability of the exclusion provision found in Article lF(a) of the United Nations *Convention Relating to the Status of Refugees* ("Refugee Convention"). The Appellant seeks to reverse a unanimous decision of the Federal Court of Appeal wherein the Court found that the appropriate test for determining "complicity" in crimes against humanity under Article 1F(a) was the "personal and knowing participation" test set out in previous decisions of the Federal Court of Appeal; namely, *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 and *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298.

5. This appeal raises issues concerning the domestic application of international law, including the appropriate application of Canada's binding treaty obligations under the Refugee Convention and its commitment to international justice as a signatory to the *Rome Statute of the International Criminal Court* ("Rome Statute"), various Geneva Conventions, and the *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention"). These issues are centrally important to the IHRP's international law-focused mission, especially as a program housed in a Canadian law school.

6. Consistent with its mission to advance the field of international human rights law, the IHRP has developed specific expertise with respect to the domestic application of international law principles in Canada. Indeed, this Court has granted the IHRP (or a sub-program of the IHRP, the International Human Rights Clinic), leave to intervene in four previous cases where the domestic application of international law was at issue:

(a) *Canada (Prime Minister)* v. *Khadr,* [2010] 1 S.C.R. 44;

(b) *Canada (Justice)* v. *Khadr*, [2008] 2 S.C.R. 125;

(c) *Charkaoui* v. *Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9; and

(d) *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39.

7. The IHRP has expertise in the area of international criminal law to contribute to this appeal. Jointly with the CCIJ, it will make useful and different submissions than those of the parties. The IHRP seeks to contribute its expertise by collaborating with CCIJ in order to make the most valuable contribution possible to this appeal, while combining resources and reducing any potential overlap.

B. Description of the IHRP

8. The IHRP was established in 1987 and is contained within the Faculty of Law. As stated above, the IHRP's mission is to enhance the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society. In short, the IHRP seeks to advance the field of international human rights law. In keeping with its location within an academic institution, the IHRP values intellectual rigour, professionalism, independence, and collaboration with civil society as the foundation for its advocacy work.

9. The IHRP is led by a Director, Renu Mandhane, who has a J.D. from the Faculty of Law and an LL.M. focused on international law from New York University, and is a member of the

Law Society of Upper Canada. Prior to her position at the Faculty, Mandhane practiced criminal law in Ontario with Diane Oleskiw, who in 2009 was appointed as a judge to the Ontario Court of Justice (Toronto). The IHRP has established lines of accountability through the Dean's Office, an internal Faculty Advisory Committee – which is Chaired by Professor Audrey Macklem and of which I am a member – as well as an external Advisory Board.

10. The external Advisory Board was set up in 2003. Its members include the Hon. Louise Arbour, Rt. Hon. Adrienne Clarkson, Prof. Ronald Daniels, Prof. Yash Ghai, Hon. William Carvel Graham, Michael Ignatieff, Prof. Harold Hongju Koh, Hon. Roy McMurtry, Prof. Cecilia Medina, Dr. James Orbinski, John Ralston Saul, Hon. Bob Rae and Ken Wiwa.

11. The internal Faculty Advisory Committee, of which I am a member, oversees all of the IHRP's work and takes an active role in its development. The IHRP draws on the extensive international law and litigation experience of the Faculty Advisory Committee, which includes leading international law scholars. It also draws on the expertise of the large number of scholars who research in the international law field at the Faculty of Law, including, for example, Prof. Kent Roach.

12. Current members of the Faculty Advisory Committee include myself, Prof. Audrey Macklin (Chair), Prof. Vincent Chiao, Prof. Karen Knop, adjunct Prof. Jennifer Orange, Andrea Russell (who teaches international criminal law at the Faculty of Law), and Assistant Dean Alexis Archbold (*ex officio).*

13. The IHRP hosts international law conferences, supports internships for law students to work in the field of international human rights and international criminal law, orchestrates and develops working groups on important international law issues of the day, and runs the award-winning International Human Rights Clinic (the "Clinic"), which was Canada's first international law-focused legal clinic. The Clinic provides law students with the opportunity to work with experienced lawyers and professors at the Faculty of Law on innovative international human rights advocacy for academic credit. The Clinic was the recipient of a Lexpert Zenith award for *pro bono* service in 2010.

C. The IHRP's Distinct Expertise

14. The IHRP has developed particular expertise in the areas of international human rights law, international criminal law, and refugee law.

15. As is noted above, this Honourable Court granted leave to intervene to the IHRP (or a sub-program of the IHRP, the International Human Rights Clinic) in four cases related to the domestic application of international law in Canada.

16. In one of the four cases, *Mugesera*, this Court considered whether the Respondent could be deported from Canada based on allegations that he incited genocide toward Tutsis in Rwanda in 1992. In its factum, the IHRP and its co-interveners, Human Rights Watch and the Canadian Jewish Congress, outlined the importance of international criminal law as the primary source for the definition and analysis of international crimes, and in particular in terms of considering whether the Respondent's speech incited hatred, murder, and genocide, and constituted a crime against humanity.

17. In its decision in *Mugesera*, this Court found that, on a balance of probabilities, the Respondent had incited hatred, murder and genocide, and committed a crime against humanity and was, therefore, inadmissible to Canada. In so finding, the Court noted the crucial role of international law as an interpretative aid when considering the elements of the crimes of incitement to genocide and crimes against humanity, and also restated the importance of interpreting domestic law in a manner that accords with the principles of customary international law and Canada's treaty obligations. Moreover, the Court, at para. 143, stated that "[i]n this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis".

18. In addition to the four cases before this Court, the Clinic has also been granted leave to intervene as *amicus curiae* in two international proceedings, including one which directly related to the interpretation of international criminal law.

19. In 2003, the Clinic was granted leave by the Special Court for Sierra Leone to submit an amicus brief on the international law regarding the recruitment of child soldiers and the scope of

crimes against humanity and war crimes. In *Prosecutor v. Sam Hinga Norman*, the Special Court adopted the Clinic's position and cited the Clinic's submission (June 14, 2004, SCSL-2004-14-AR72(E) at 7383-7489).

20. In 2006, the Clinic was granted leave to intervene by the State of Connecticut Supreme Court in *Kerrigan and Mock et al. v. Department of Public Health*. The Clinic made submissions on developments in international jurisprudence with respect to civil marriage and equal treatment of same-sex couples.

21. The IHRP and/or the Clinic have also participated in a number of international legal projects including:

(a) Providing research assistance to the Office of the Prosecutor of the International Criminal Court ("ICC") on the recruitment of child soldiers in *Prosecutor v. Thomas Lubanga Dyilo* (ICC-CPI-20070129-196) in 2006-2007;

(b) Providing research assistance to the Refugee Law Office of Legal Aid Ontario to support two claims to the United Nations Human Rights Committee on behalf of failed refugee claimants in Canada who claimed breach of their rights under international law in 2010 and 2011;

(c) Providing comprehensive research briefs to dozens of Canadian refugee lawyers on the persecution of sexual minorities in countries around the world;

(d) Preparing a report highlighting Canada's international human rights obligations vis-à-vis Canadian prisoners with mental health issues. The report was provided to the Canadian Human Rights Commission and the United Nations Committee against Torture, and received front-page coverage in the *Toronto Star* on May 9, 2012;

(e) Partnering with local counsel before the Ugandan Constitutional Court to challenge Uganda's sedition and sectarianism laws in 2005-2006;

(f) Acting on behalf of a number of Mayan farmers before the Inter-American Court of Human Rights in a matter regarding traditional communal rights to land in 2003-2008; and

(g) Representing applicants before the European Court of Human Rights in *Tanase and Others v. Romania* in a matter regarding an anti-Roma pogrom in Romania in 2003-2009 (this matter was successfully settled).

22. Every year, the IHRP hosts speakers who engage with our community on issues relevant to international criminal law, human rights law, and refugee law. For example, during the 2011-2012 academic year, we hosted the then-Prosecutor of the ICC, Luis Moreno Ocampo, as well as Robert Petit, former co-chief prosecutor for the Extraordinary Chambers in the Courts of Cambodia and current counsel for the Department of Justice, Crimes Against Humanity and War Crimes Section for a number of events at the Faculty.

23. Every year, the IHRP's students intern at various international criminal tribunals. In the past three years we have placed students at the ICC, International Criminal Tribunal for Rwanda, and International Criminal Tribunal for Yugoslavia. We also have a long-standing partnership with the United Nations High Commissioner for Refugees; in the past five years, have placed student interns at the Headquarters in Geneva, as well as at field offices in Georgia, Kenya, Morocco, Nepal, Sudan and Uganda.

24. On August 30, 2012, Professor Audrey Macklin, in her capacity as chair of the IHRP Faculty Advisory Committee, received notice that the IHRP and the Munk School for Global Affairs received a grant from the Social Sciences and Humanities Research Council for $18,562 to host an international conference entitled, "Sexual Violence in the Recent Conflicts in Libya and Syria: Challenges to Protecting Victims and Pursuing Accountability." The conference will take place in February 2013 and will explore international criminal accountability for sexual violence in the recent and ongoing conflicts in Libya and Syria, and include lawyers from the ICC and leading academic and civil society experts. Papers from the conference will be published in the *Journal of International Law and International Relations*.

D. CCIJ

25. In the interest of reducing the volume of intervener materials before this Court, while ensuring that interested parties with useful and different submissions are heard, the IHRP seeks leave to intervene in this appeal jointly with the CCIJ.

26. I have read the affidavit of Matthew Eisenbrandt of the CCIJ, and confirm that the CCIJ has the same views on the issues raised by this appeal.

II. PROPOSED SUBMISSIONS FOR THE INTERVENTION

27. The IHRP has an interest in this appeal because of its mission to enhance the legal protection of existing and emerging international human rights obligations through advocacy. In particular, the IHRP has a demonstrated track record of research and advocacy focused on establishing human rights norms in both domestic and international contexts.

28. The IHRP has expertise on the issues raised in this appeal, drawing on the IHRP's extensive resources and research with respect to many of the issues raised in this appeal, including the domestic application of international law, relevant jurisprudence from various international criminal courts and tribunals, and relevant commonwealth jurisprudence interpreting Article 1F(a). The IHRP will make useful and different submissions than those of the other parties.

29. If granted leave to intervene, the IHRP anticipates that it will, along with the CCIJ, assist the Court in the following ways:

(a) With its expertise in international criminal law ("ICL"), it will explain, expand on and provide detailed submissions on the ICL issues that are engaged by this matter;

(b) It will submit that in determining how to interpret Article 1F(a) of the Refugee Convention, which provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that … he has a committed a crime against peace, a war crime, or a crime against

humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes*", the Court must be guided by ICL, with reference to the international instruments that set out the principles of ICL and the jurisprudence of international bodies;

(c) It will submit that under ICL, determining whether a person has "committed a crime against peace, a war crime, or a crime against humanity" is not a matter of determining "personal and knowing participation";

(d) It will submit that, rather, there are specific modes of individual criminal responsibility that apply to such crimes, including, by way of example:

(i) Planning;

(ii) Instigating;

(iii) Ordering;

(iv) Committing (i.e. direct participation);

(v) Aiding and abetting in the planning, preparation or execution of a crime;

(vi) Joint criminal enterprise;

(vii) Superior or command responsibility;

(viii) Co-perpetration; and

(ix) Attempt to commit international crimes.

(e) It will submit that each of these modes of individual criminal responsibility has constituent elements – specifically, *actus reus* and *mens rea* elements – that must be established;

(f) It will submit that, under ICL, in addition to the modes of liability, the international crimes of genocide, crimes against humanity and war crimes have their own constituent elements that must be established;

(g) It will submit that in order to determine whether "there are serious reasons for considering" that a person has committed an international crime such that refugee protection can be denied, the Canadian courts must determine whether, on the

applicable "serious reasons to consider" standard, a person has committed an international crime *through one of the modes of individual criminal responsibility recognized in ICL*, with reference to the constituent elements of the applicable mode of individual criminal responsibility and the specific crime that is alleged;

(h) It will provide submissions on the nature of "contribution" to an international crime under ICL, and omission of an obligation under ICL;

(i) It will submit that, under modern ICL, membership, without more, in an organization that has been associated with or implicated in international crimes is not enough to constitute an international crime;

(j) It will provide analogous cases from international criminal courts and tribunals (e.g. involving senior officials) that will assist the Court in understanding how commission of an international crime is determined under ICL, including discussing particular modes of liability that may be directly relevant to the disposition of this matter such as aiding and abetting (including by omission), joint criminal enterprise, and superior responsibility of civilians;

(k) It will provide submissions on how modern ICL impacts and differs from the "limited and brutal purpose" criteria used by the Canadian courts in analyzing organizations in refugee claims that engage Article 1F(a) of the Refugee Convention;

(l) Based on its submissions, it will provide the Court with its expertise on the desirability and feasibility of establishing principles for determining refugee claims that engage Article 1F(a) of the Refugee Convention.

30. The IHRP will expand on these submissions if granted leave to intervene.

III. SUMMARY

31. As a centre for international human rights advocacy in Canada, and with particular expertise on the domestic application of international law in Canada, international criminal law,

and refugee law, the IHRP has an interest in this appeal and will present arguments that are different from those of the parties.

32. In my view, therefore, the IHRP can make a valuable contribution to this appeal that will be useful to this Court in determining the questions before it.

33. Granting leave to intervene to the IHRP will not prejudice any party. The IHRP will take the record as it finds it and will not supplement the record. The IHRP will seek to avoid duplication of submissions, and will abide by any schedule set by the Court. The IHRP seeks no costs in the proposed intervention and asks that none be awarded against it.

34. Consistent with the proper role of an intervener before this Court, the IHRP will take no position on the disposition of the appeal.

35. For these reasons, IHRP respectfully requests that it be granted leave to intervene jointly with the CCIJ. It further requests leave to file a joint factum, of no more than 20 pages (since it is collaborating and sharing resources with another organization) and to present oral argument at the hearing of this appeal.

36. I affirm this affidavit in support of the IHRP's motion for leave to intervene, and for no other or improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on September 10, 2012.

A Commissioner for Taking Affidavits

PATRICK MACKLEM

Thomas Ryan Lax,
a Commissioner, etc., Province of Ontario, while a Student-at-Law.
Expires August 20, 2015.

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SCC Court File No.: 34470

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

BETWEEN:

Rachidi EKANZA EZOKOLA

Appellant
(Applicant)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT
OF THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND
AND THE INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF TORONTO FACULTY OF LAW
(MOTION FOR LEAVE TO INTERVENE)
Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

PART I – FACTS

Overview

1. This is a motion by the Canadian Centre for International Justice (the "CCIJ") and the International Human Rights Program at the University of Toronto Faculty of Law (the "IHRP") for leave to intervene in this appeal, including leave to file a factum and present oral argument at the hearing of the appeal.

2. This appeal will address an issue with wide-ranging impact: the appropriate law and legal principles to be applied to the exclusion provision found in Article 1F(a) of the United Nations

Convention Relating to the Status of Refugees (the "Refugee Convention"), which provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that … he has a committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes".

3. Specifically, the Court will consider whether the appropriate test for applying Article 1F(a) of the Refugee Convention is the "personal and knowing participation" test set out in previous decisions of the Federal Court of Appeal.[1] Given that Article 1F(a) expressly refers to the international instruments drawn up in respect of international crimes, it appears clear that international criminal law ("ICL"), and its application in Canada, will be integral to this appeal.

4. Both the CCIJ and the IHRP have extensive experience with ICL. If granted leave to intervene, the CCIJ and the IHRP will assist the Court in its consideration of this appeal by providing submissions that are relevant, useful and distinct from the submissions of the parties.

5. The CCIJ and the IHRP propose to make the submission that the "personal and knowing participation" test is not grounded in ICL. Whether a person has committed an international crime is a nuanced question that involves specific modes of individual criminal responsibility, each of which has its own constituent elements. In interpreting Article 1F(A), the Court should be guided by how international crimes are defined in ICL.

6. In making this submission, the CCIJ and the IHRP propose to provide the Court with analogous cases from international tribunals. These will assist the Court in understanding how commission of an international crime is determined under ICL. These submissions will be relevant and useful to the Court.

7. The CCIJ's and the IHRP's submissions will be distinct from those of the parties, since the CCIJ and the IHRP have specific expertise in ICL that will enable them to provide the Court with a detailed, objective review of the relevant international law. Their submissions will focus

[1] That is, *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298.

only on the relevant issues of ICL, and the domestic application thereof, and will not take a position in favour of either the appellant or respondent.

8. Given the CCIJ's and IHRP's established interests in the key areas at issue, the organizations are particularly well-placed to assist the Court as interveners in this appeal. Their expertise has been repeatedly recognized by the courts, which have granted each organization intervener status in a number of previous cases concerning similar issues.

The CCIJ

9. The CCIJ, a federally-incorporated, registered charity, is a non-governmental organization that works with survivors of genocide, torture and other atrocity crimes to seek redress and bring perpetrators to justice. The CCIJ pursues this mission, in part, through the application of international criminal law in appropriate domestic, foreign and international courts. In Canada, this includes the application of international criminal law through the *Crimes against Humanity and War Crimes Act*.[2]

10. The CCIJ is the only Canadian organization primarily dedicated to (a) supporting survivors of genocide, torture and other atrocity crimes in their pursuit of justice; and (b) seeking and promoting accountability for torturers, war criminals and others who commit atrocity crimes. The CCIJ supports the application of ICL in criminal and civil prosecutions of those responsible for genocide, torture and other atrocity crimes.[3]

The CCIJ's Knowledge and Expertise

11. As an established centre of knowledge on ICL and its domestic application, the CCIJ, among other things, presents courses on ICL and its application in Canadian courts in various settings throughout Canada, investigates cases for potential prosecution under the *Crimes against Humanity and War Crimes Act*, serves as a leading resource centre on the subject, and is

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[2] Affidavit of Matthew Eisenbrandt, sworn September 10, 2012, para. 4, Motion Record, Tab 2 ["Eisenbrandt Affidavit].

[3] Eisenbrandt Affidavit, *ibid.* at para. 5.

undertaking a campaign to amend the *State Immunity Act* to enable more survivors of atrocity crimes to seek redress in Canadian courts.[4]

12. In addition, this Court has granted CCIJ leave to intervene in two previous cases, including one relying heavily on ICL:

(1) *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, in which the Court upheld the deportation of a permanent resident for whom there were reasonable grounds to believe that he had committed a crime against humanity, and in which this Court found that, on the balance of probabilities, the Respondent had incited hatred, murder, and genocide, and committed a crime against humanity, and therefore is inadmissible to Canada. In so finding, this Court noted the importance of "international sources like the recent jurisprudence of international criminal courts"; and

(2) *Club Resorts Ltd. v. Van Breda et al.*, 2012 SCC 17, on the issue of "forum of necessity", an exception to the common law test for jurisdiction in cases where a plaintiff cannot reasonably bring suit elsewhere, as often occurs in cases of atrocity crimes outside Canada.[5]

13. The CCIJ has been granted intervener status in other cases related to the application of international law in Canadian courts and issues of redress for victims of atrocity crimes:

(1) *Kazemi (Estate of) v. Islamic Republic of Iran*, [2012] Q.J. No. 7754, 2010 QCCS 196, a civil lawsuit in Quebec against the Government of Iran and individual Iranian officials for their role in the torture and murder of Canadian citizen Zahra Kazemi; and

[4] Eisenbrandt Affidavit, *ibid.* at para. 14.

[5] Eisenbrandt Affidavit, *ibid.* at para. 15; Affidavit of Patrick Macklem, sworn September 10, 2012, paras. 16-17, Motion Record, Tab 3 ["Macklem Affidavit"].

(2) *Kunlun Zhang et al. v. Jiang Zemin*, Court File No. 04-CV-278915CM2, a civil lawsuit in Ontario Superior Court against Chinese government officials for their role in the torture of, *inter alia*, a Canadian citizen.[6]

The IHRP

14. The IHRP was established in 1987 and is contained within the Faculty of Law, University of Toronto. Its mission is to enhance the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society. In short, the IHRP seeks to advance the field of international human rights law.[7]

15. The IHRP draws on the extensive international law and litigation experience of its Faculty Advisory Committee, which includes leading international law scholars. It also draws on the expertise of the large number of scholars who research in the international law field at the Faculty of Law.[8]

16. The IHRP has a distinct awareness and understanding of many aspects of international law and international criminal law, and has been granted leave to intervene in four previous cases at the Supreme Court of Canada, and two international proceedings. Additionally, the IHRP has participated in a number of international legal projects, provided research assistance to various domestic and international governments and organizations, and acted in cases from Uganda to Romania to Mexico, all pertaining to various international human rights issues.[9]

The IHRP's Knowledge and Expertise

17. The IHRP has expertise in the domestic application of international law in Canada, particularly those of international human rights law, ICL, and refugee law. Indeed, this Court has granted the IHRP (or a sub-program of the IHRP, the International Human Rights Clinic), leave to intervene in four previous cases where the domestic application of international law was at issue:

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[6] Eisenbrandt Affidavit, *ibid.* at para. 16.

[7] Macklem Affidavit, *supra* note 5 at para. 8.

[8] Macklem Affidavit, *ibid.* at para. 11.

[9] Macklem Affidavit, *ibid.* at paras. 18-23.

(1) *Canada (Prime Minister) v. Khadr,* [2010] 1 S.C.R. 44;

(2) *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125;

(3) *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9; and

(4) *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39.[10]

18. In addition to the four cases before this Court, the Clinic has also been granted leave to intervene as *amicus curiae* in two international proceedings, including one which directly related to the interpretation of ICL:

(1) In 2003, the Clinic was granted leave by the Special Court for Sierra Leone to submit an amicus brief on the international law regarding the recruitment of child soldiers and the scope of crimes against humanity and war crimes. In *Prosecutor v. Sam Hinga Norman*, the Special Court adopted the Clinic's position and cited the Clinic's submission (June 14, 2004, SCSL-2004-14-AR72(E) at 7383-7489).

(2) In 2006, the Clinic was granted leave to intervene by the State of Connecticut Supreme Court in *Kerrigan and Mock et al. v. Department of Public Health*. The Clinic made submissions on developments in international jurisprudence with respect to civil marriage and equal treatment of same-sex couples.[11]

19. As stated above, the IHRP has also participated in a number of international legal projects. The IHRP has partnered with local counsel or acted in cases before the Ugandan Constitutional Court, the Inter-American Court of Human Rights, and the European Court of Human Rights. Finally, every year the IHRP hosts speakers and conferences on various issues pertaining to ICL, human rights law, and refugee law, and sends students to intern at various international criminal tribunals.[12]

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[10] Macklem Affidavit, *ibid.* at paras. 6, 16.
[11] Macklem Affidavit, *ibid.* at paras. 19-20.
[12] Macklem Affidavit, *ibid.* at paras. 21-23.

The Issues Raised by this Appeal

20. This appeal asks the Court to determine the appropriate legal principles that govern the application of the exclusion provision found in Article 1F(a) of the Refugee Convention.

21. This question will require careful consideration of the principles of ICL. The Court will be called upon to consider the appropriate application of international instruments such as the *Rome Statute of the International Criminal Court* ("Rome Statute"), various Geneva Conventions, and the *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention"). Precedents from various international criminal tribunals will also be of use in determining whether the "personal and knowing participation" test developed by the Canadian courts accords with international law.

The CCIJ and IHRP's Proposed Helpful and Distinct Submissions

22. Made from a perspective different from that of the immediate parties, the CCIJ and the IHRP's submissions will be uniquely grounded in their background in ICL. Both organizations promote, through advocacy, the implementation of ICL.[13]

23. In keeping with their ongoing commitment to bolster the development of ICL and its application in Canadian courts, the CCIJ and the IHRP have an interest in the domestic application of international law, relevant jurisprudence from various international criminal courts and tribunals, and relevant jurisprudence from other countries interpreting Article 1F(a).[14]

24. If granted leave to intervene, the CCIJ and the IHRP anticipate that they will assist the Court in the following ways:

(a) With their expertise in ICL, they will explain, expand on and provide detailed submissions on the ICL issues that are engaged by this matter;

(b) They will submit that in determining how to interpret Article 1F(a) of the Refugee Convention, which provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that … he has a committed a crime against peace, a war crime, or a crime against

[13] Macklem Affidavit, *ibid.* at para. 27; Eisenbrandt Affidavit, *supra* note 2 at para. 4.
[14] Macklem Affidavit, *ibid.* at para. 28.

humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes*", the Court must be guided by ICL, with reference to the international instruments that set out the principles of ICL and the jurisprudence of international bodies;

(c) They will submit that under ICL, determining whether a person has "committed a crime against peace, a war crime, or a crime against humanity" is not a matter of determining "personal and knowing participation";

(d) They will submit that, rather, there are specific modes of individual criminal responsibility that apply to such crimes, including, by way of example:

(i) Planning;

(ii) Instigating;

(iii) Ordering;

(iv) Committing (i.e. direct participation);

(v) Aiding and abetting in the planning, preparation or execution of a crime;

(vi) Joint criminal enterprise;

(vii) Superior or command responsibility;

(viii) Co-perpetration; and

(ix) Attempt to commit international crimes.

(e) They will submit that each of these modes of individual criminal responsibility has constituent elements – specifically, *actus reus* and *mens rea* elements – that must be established;

(f) They will submit that, under ICL, in addition to the modes of liability, the international crimes of genocide, crimes against humanity and war crimes have their own constituent elements that must be established;

(g) They will submit that in order to determine whether "there are serious reasons for considering" that a person has committed an international crime such that refugee protection can be denied, the Canadian courts must determine whether, on the

applicable "serious reasons to consider" standard, a person has committed an international crime *through one of the modes of individual criminal responsibility recognized in ICL*, with reference to the constituent elements of the applicable mode of individual criminal responsibility and the specific crime that is alleged;

(h) They will provide submissions on the nature of "contribution" to an international crime under ICL, and omission of an obligation under ICL;

(i) They will submit that, under modern ICL, membership, without more, in an organization that has been associated with or implicated in international crimes is not enough to constitute an international crime; and

(j) They will provide analogous cases from international criminal courts and tribunals (e.g. involving senior officials and diplomats) that will assist the Court in understanding how commission of an international crime is determined under ICL, including discussing particular modes of liability that may be directly relevant to the disposition of this matter such as aiding and abetting (including by omission), joint criminal enterprise, and superior responsibility of civilians;

(k) They will provide submissions on how modern ICL impacts and differs from the "limited and brutal purpose" criteria used by the Canadian courts in analyzing organizations in refugee claims that engage Article 1F(a) of the Refugee Convention; and

(l) Based on their submissions, they will provide the Court with their expertise on the desirability and feasibility of establishing principles for determining refugee claims that engage Article 1F(a) of the Refugee Convention.[15]

25. The CCIJ and IHRP will expand on these submissions if leave to intervene is granted.

PART II – STATEMENT OF QUESTIONS IN ISSUE

26. The issue on this motion is whether the CCIJ and the IHRP should be granted leave to intervene in this appeal.

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[15] Macklem Affidavit, *ibid.* at para. 29; Eisenbrandt Affidavit, *supra* note 2 at para. 19.

PART III – ARGUMENT

27. To obtain leave to intervene, the CCIJ and IHRP must demonstrate that their submissions will be relevant, useful to the Court and distinct from those of the parties.[16] The CCIJ and the IHRP's proposed intervention fulfills these criteria.

The CCIJ's and the IHRP's Proposed Submissions Will Be Relevant

The CCIJ and the IHRP seek to assist the Court by providing their expertise in ICL in order to aid the Court's interpretation of Article 1F(a), and its analysis of the specific modes of individual criminal responsibility that apply to the crimes addressed therein. This issue is central to this appeal. The proposed submissions are, therefore, relevant.

The CCIJ's and the IHRP's Proposed Submissions Will Be Useful to the Court

28. This appeal raises an issue that will have an impact on persons other than the parties. It will affect other refugee claimants, and it will also affect how international law is interpreted and applied in Canada. The CCIJ's and the IHRP's perspective will aid the Court in its consideration of whether and how to use the principles of ICL in interpreting Article 1F(a). While the parties have their own interests to protect and advance, the CCIJ and IHRP seek to engage in the development of Canadian immigration and refugee law in accordance with the principles of ICL.

29. The CCIJ's and the IHRP's proposed submissions will approach the issues in this appeal from a perspective grounded the CCIJ's and IHRP's expertise in ICL, with a view to providing the Court with the in-depth information it may need about ICL in order to adjudicate this matter with the relevant international law in mind. The CCIJ and the IHRP have played significant roles as interveners in similar cases in the past, and they are well-placed to provide the Court with a unique, valuable and independent perspective on how these issues ought to be addressed in this appeal.

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[16] *Rules of the Supreme Court of Canada,* 57(2)(b), Memorandum of Argument of the CCIJ and the IHRP, Part III, Motion Record,; *R. v. Finta*, [1993] 1 S.C.R. 1138 at 1142, Motion Record, Tab 5A; *Reference re: Workers' Compensation Act, 1983 (Nfld) (Application to Intervene)*, [1989] 2 S.C.R. 335 at 339, CCIJ's and IHRP's Authorities, Motion Record, Tab 5B.

The CCIJ's and the IHRP's Proposed Submissions Will Be Distinct from those of the Parties

30. The CCIJ's and the IHRP's submissions will not take a position supporting either the appellant or the respondent on the appeal. Rather, the aim of their submissions is to provide the Court with its expertise in ICL, since this matter will necessarily involve the need to examine the international instruments drawn up in respect of international crimes, and the jurisprudence thus far thereunder.

31. Because the CCIJ and IHRP will focus only on the issues of ICL, and its domestic application, raised by this matter, they will – unlike the parties – be in a position to provide an in-depth review and analysis of these issues. They will do so from an objective position, without advocating for either of the parties, since their interest is in ensuring that Canadian law develops to accord with international law.

32. For example, the CCIJ and IHRP will review, in detail, the different modes of criminal responsibility for international crimes in ICL, with a view to guiding the Court in determining how Article 1F(a) of the Refugee Convention should be applied in light of how criminal responsibility is defined in international law.

33. The CCIJ and the IHRP therefore submit that their proposed submissions will be relevant, useful to the Court and distinct from those of the parties, and will contribute to this Court's analysis of a matter of vital importance to the development of Canadian refugee law.

PART IV – COSTS

34. The CCIJ and the IHRP undertake not to seek any costs and asks that no costs be awarded against them.

PART V – ORDER SOUGHT

35. The CCIJ and the IHRP respectfully seek leave to intervene in the appeal, to submit a memorandum of argument not exceeding 20 pages and to present oral submissions at the hearing of the appeal. The CCIJ and the IHRP undertake not to seek any costs and asks that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2012:

John Terry

Sarah R. Shody

Counsel for the Moving Parties, the Canadian Centre for International Justice and the University of Toronto International Human Rights Program

PART VI—TABLE OF AUTHORITIES

Authority	Reference in Argument
R. v. Finta, [1993] 1 S.C.R. 1138	para. 25
Ref. re Workers' Compensation Act, 1983 (Nfld) (Application to intervene), [1989] 2 S.C.R. 335	para. 25

PART VII—STATUTORY PROVISIONS

Rules of the Supreme Court of Canada, SOR/2002-156

English	Francais
47. (1) Unless otherwise provided in these Rules, all motions shall be made before a judge or the Registrar and consist of the following documents, in the following order: (*a*) a notice of motion in accordance with Form 47; (*b*) an affidavit; (*c*) when considered necessary by the applicant, a memorandum of argument in accordance with paragraph 25(1)(*e*), with any modifications that the circumstances require; (*d*) the documents that the applicant intends to rely on, in chronological order, in accordance with subrule 25(3); and (*e*) a draft of the order sought, including costs. (2) Parts I to V of the memorandum of argument shall not exceed 10 pages. (3) There shall be no oral argument on the motion unless a judge or the Registrar otherwise orders.	**47.** (1) Sauf disposition contraire des présentes règles, toute requête est présentée à un juge ou au registraire et comporte dans l'ordre suivant : *a*) un avis de requête conforme au formulaire 47; *b*) un affidavit; *c*) si le requérant le considère nécessaire, un mémoire conforme à l'alinéa 25(1)*e*), avec les adaptations nécessaires; *d*) les documents que compte invoquer le requérant, par ordre chronologique, compte tenu du paragraphe 25(3); *e*) une ébauche de l'ordonnance demandée, notamment quant aux dépens. (2) Les parties I à V du mémoire de la requête comptent au plus dix pages. (3) Sauf ordonnance contraire d'un juge ou du registraire, aucune plaidoirie orale n'est présentée à l'égard de la requête.
55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.	**55.** Toute personne ayant un intérêt dans une demande d'autorisation d'appel, un appel ou un renvoi peut, par requête à un juge, demander l'autorisation d'intervenir.
57. (2)(b) A motion for intervention shall…set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.	**57.** (2) (b) La requête expose ce qui suit…ses arguments, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différents de ceux des autres parties.

5

SCC Court File No.: 34470

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

THE HONOURABLE)
JUSTICE _____)
)

_____ the _____
day of _____, 2012

B E T W E E N :

Rachidi EKANZA EZOKOLA

Appellant
(Applicant)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
(Respondent)

ORDER GRANTING INTERVENER STATUS
MOTION BY THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE AND THE INTERNATIONAL HUMAN RIGHTS PROGRAM AT THE UNIVERSITY OF TORONTO FACULTY OF LAW
FOR LEAVE TO INTERVENE

UPON MOTION by the Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law, pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, for an order granting them leave to intervene in this appeal;

AND UPON reading the Notice of Motion, dated September 11, 2012; the Affidavit of Patrick Macklem, affirmed September 10, 2012; the Affidavit of Matthew Eisenbrandt, affirmed September 10, 2012; and the Memorandum of Argument of the Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law:

1. IT IS ORDERED that the Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law are granted leave to intervene in this appeal, with permission to file a factum not exceeding 20 pages and to present oral argument at the hearing of the appeal;

2. AND IT IS ORDERED that the Canadian Centre for International Justice and the International Human Rights Program at the University of Toronto Faculty of Law shall not seek or be made subject to any order as to costs.

6

A

Case Name:

R. v. Finta

Her Majesty The Queen, appellant;
v.
Imre Finta, respondent, and
Canadian Holocaust Remembrance Association, intervener.

[1993] S.C.J. No. 137

[1993] A.C.S. no 137

[1993] 1 S.C.R. 1138

[1993] 1 R.C.S. 1138

150 N.R. 370

61 O.A.C. 321

File Nos.: 23023, 23097

Supreme Court of Canada

1993: March 24.

Present: McLachlin J.

MOTIONS FOR LEAVE TO INTERVENE (11 paras.)

Practice -- Supreme Court of Canada -- Applications to intervene -- Public interest groups establishing interest in outcome of appeal and offering useful and novel submissions -- Groups granted leave to intervene -- Private individual having no stake in result of appeal -- Individual denied leave to intervene -- Rules of the Supreme Court of Canada, SOR/83-74, r. 18.

Cases Cited

Referred to: Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335.

Statutes and Regulations Cited

Rules of the Supreme Court of Canada, SOR/83-74, r. 18 [rep. & sub. SOR/87-292, s. 1; am. SOR/91-347, s. 8; am. SOR/92-674, s. 1].

MOTIONS for leave to intervene in an appeal from a judgment of the Ontario Court of Appeal (1992), 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 92 D.L.R. (4th) 1, 9 C.R.R. (2d) 91. Motions on behalf of the League for Human Rights of B'Nai Brith Canada, the Canadian Jewish Congress and InterAmicus granted; motion on behalf of Kenneth M. Narvey denied.

Marvin Kurz, for the applicant the League for Human Rights of B'Nai Brith Canada.
Edward M. Morgan, for the applicant the Canadian Jewish Congress.
Joseph R. Nuss, Q.C., Irwin Cotler and Lieba Shell, for the applicant InterAmicus.
Kenneth M. Narvey, on his own behalf.
Christopher A. Amerasinghe, Q.C., and Thomas C. Lemon, for the appellant.
Martin W. Mason, for the respondent.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The following reasons for the order were delivered by

1 McLACHLIN J.:-- These applications to intervene arise in an appeal from the Ontario Court of Appeal. Imre Finta served during the Second World War as commander of the investigative subdivision of the Gendarmerie at Szeged, Hungary. He became a Canadian citizen in 1956. In 1988, he was charged under alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the Criminal Code, R.S.C. 1927, c. 36, while the other count was characterized as a war crime or crime against humanity under the predecessor of s. 7(3.71) of the present Criminal Code). These allegations arose from the deportation of Jews from Hungary in 1944. In a pre-trial motion, Finta challenged the constitutionality of the war crimes provisions in the Criminal Code. The trial judge found that these provisions did not violate the Canadian Charter of Rights and Freedoms. The jury subsequently acquitted Finta on all counts. The Crown's appeal of this acquittal was dismissed by a majority of the Ontario Court of Appeal with two dissenting judges in favour of ordering a new trial. The Court of Appeal was unanimous, however, in upholding the constitutional validity of the war crimes provisions in the Code.

2 Leave to appeal was granted to the Crown by this Court on the four grounds of law upon which Dubin C.J.O. and Tarnopolsky J.A. dissented, and on three additional grounds:

(1) That the Court of Appeal erred in law in holding that s. 7(3.71) of the Criminal Code is not merely jurisdictional in nature, but rather, defines the essential elements of the offences charged, such that it was necessary for the jury to decide beyond a reasonable doubt not only whether the Respondent was guilty of the 1927 Criminal Code offences charged, but also, whether his acts constituted war crimes or crimes against humanity as defined in s. 7(3.71) and 7(3.76).

(2) That the Court of Appeal erred in law in holding that the trial judge correctly instructed the jury that it is not sufficient for the Crown to prove beyond a reasonable doubt that the Respondent intended to commit the offences alleged against him, namely unlawful confinement, robbery, kidnapping and manslaughter, but that the Crown must also prove that the Respondent knew that those acts constituted war crimes or crime against humanity as defined in s. 7(3.76), thereby requiring proof of mens rea in relation to the jurisdictional preconditions set out in s. 7(3.71) of the Criminal Code.

(3) Having found that defence counsel's address was improper and inflammatory on the several grounds enumerated, the Court of Appeal erred in law in holding that the trial judge's instructions to the jury adequately corrected defence counsel's jury address so as to overcome the prejudice to the Crown and did not deprive the Crown of a fair trial.

(4) Having found that the trial judge erred in calling the Dallos statements and the videotaped evidence of the witnesses Kemeny and Ballo as his own evidence, thereby depriving the Crown of its statutory right to address the jury last, the Court of Appeal erred in law in holding that this error resulted in no substantial wrong or miscarriage of justice.

(5) That the Court of Appeal erred in law in holding that the police statement and deposition of Imre Dallos, which were taken from the record of the 1947 investigation and the 1948 in absentia trial of the Respondent held in Hungary, were admissible;

(6) That the Court of Appeal erred in law in holding that the trial judge's instructions to the jury pertaining to the evidence relating to the eyewitness identification of the respondent were appropriate in the circumstances of the case and in not finding that he misdirected the jury on the issue of identification; and

(7) That the Court of Appeal erred in law in failing to find that the trial judge erred in putting to the jury the peace officer defence embodied in s. 25 of the Criminal Code, the military orders defence and the issue of mistake of

fact, and that the trial judge misdirected the jury in the manner in which he defined those defences.

3 The cross-appellant Finta was granted leave by this Court on the constitutional grounds dismissed below. Chief Justice Lamer ordered that the constitutional questions be stated as follows:

(1) Does s. 7(3.74) of the Criminal Code violate ss. 7, 11(a), 11(b), 11(d), 11(g), 12 or 15 of the Canadian Charter of Rights and Freedoms?
(2) If the answer to this question is in the affirmative, is s. 7(3.74) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms?
(3) Does s. 7(3.71) read with s. 7(3.76) of the Criminal Code violate ss. 7, 11(a), 11(b), 11(d), 11(g), 12 or 15 of the Canadian Charter of Rights and Freedoms?
(4) If the answer to this question is in the affirmative, is s. 7(3.71) read with s. 7(3.76) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms?

4 Four applications are before the Court to intervene in this case pursuant to Rule 18 of the Rules of the Supreme Court of Canada, SOR/83-74. Three applicants are public interest groups: the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada, and InterAmicus. One applicant, Mr. Kenneth M. Narvey, is a private individual acting on his own behalf. All of the applicants seek to intervene in favour of the appellant Crown's position. The appellant does not contest the applications of the three interest groups, but does contest the application of Mr. Narvey.

5 As Sopinka J. held in one of the few reported cases on a motion for intervention, Rule 18 of the Rules of the Supreme Court of Canada permits "a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention": Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335, at p. 339. The criteria under Rule 18 require that the applicant establish: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

(1) Interest

6 The three public interest groups have all established an interest in the outcome of this appeal. The Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada and InterAmicus have an interest in ensuring that the interpretation of the Criminal Code provisions on appeal is consistent with the preservation of issues within its mandate. Through either the people they represent or the mandate which they seek to uphold, these applicants have a direct stake in Canada's fulfilling its international legal obligations under customary and conventional international law. While the Court is often reluctant to grant intervener status to public interest groups in criminal appeals, exceptions can be made under its broad discretion where important public law issues are

considered, as in this appeal. All three parties demonstrated in their submissions to the Court that they satisfy the interest requirement under Rule 18.

7 The same cannot be said of Mr. Narvey. There is no question that Mr. Narvey is a qualified expert in the subject matter before this Court. But his interest in the outcome of the litigation cannot be established merely by his status as researcher and advocate on public law issues. He must establish a direct stake in the outcome of the appeal. Mr. Narvey does not argue that his status as a Jewish Canadian or occasional association with Jewish organizations forms any basis for his application. He is not currently engaged in litigation which is implicated by the outcome in this case, nor does he purport to represent an interest which is directly affected by the appeal. In short, Mr. Narvey's interest in this appeal is not in the manner of having a stake in the result, but solely of having a serious preoccupation with the subject matter. This type of interest is not the kind referred to in Rule 18(3)(a) of the Rules of the Supreme Court of Canada. Thus, Mr. Narvey does not meet the first test under Rule 18. I would deny leave to the application of Mr. Narvey.

(2) Useful and Different Submissions

8 There are a number of issues before the Court. While not seeking to limit the questions before the Court, I will summarize the applicants' submissions under three general headings: (1) jurisdiction over crimes against humanity and war crimes; (2) the requisite mens rea of the offences on appeal; and (3) the allegedly inflammatory address by defence counsel. On the first two matters, the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada and InterAmicus all offer useful and novel submissions. In particular, these applicants each have distinctive contributions to make in the area of international law theory, comparative law, the Nuremberg principles, and the criminal justice obligations and position of Canada vis-à-vis the victims of war crimes. The arguments discussed in their materials appear to supplement the appellant's submissions in a manner suitable to satisfy the second criterion under Rule 18.

9 On the other hand, the arguments regarding the inflammatory address to the jury are already covered by the appellant Crown. Indeed, it seems inappropriate for any of the applicants to be permitted to make submissions on the issue of defence counsel's address to the jury. The public interest groups before this Court have an interest in, and are all experts on, the issues of war crimes and human rights in general. But they are not experts on addresses to the jury, and I have not been persuaded that their arguments on this issue will provide a supplemental or useful perspective that is not already argued by the appellant.

10 In the circumstances of this motion, therefore, I grant leave to the applications of the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada, and InterAmicus. These applicants may file factums on the issues which I have indicated. Like the intervener Canadian Holocaust Remembrance Association, they will not be granted the right to oral argument. However, they may appear through counsel at the appeal for the purposes of answering questions the Court may have with respect to their factums.

11 I would deny leave for the application of Mr. Kenneth M. Narvey.

Solicitors for the applicant the League for Human Rights of B'Nai Brith Canada: Dale, Streiman & Kurz, Brampton.
Solicitors for the applicant the Canadian Jewish Congress: Davies, Ward & Beck, Toronto.
Solicitors for the applicant InterAmicus: Ahern, Lalonde, Nuss, Drymer, Montréal.

Solicitor for the appellant: The Attorney General of Canada, Ottawa.
Solicitor for the respondent: Douglas H. Christie, Victoria.

B

Case Name:

Reference re Workers' Compensation Act 1983 (Nfld.)

**IN THE MATTER s. 13 of Part I of The Judicature Act, 1986, c. 42, S.N. 1986;
IN THE MATTER OF ss. 32 and 34 of The Workers' Compensation Act, 1983, c. 48, S.N. 1983;
AND IN THE MATTER OF a Reference of the Lieutenant-Governor in Council to the Court of Appeal for its hearing, consideration and opinion on the constitutional validity of ss. 32 and 34 of The Workers' Compensation Act, 1983.**

[1989] S.C.J. No. 113

[1989] A.C.S. no 113

[1989] 2 S.C.R. 335

[1989] 2 R.C.S. 335

96 N.R. 231

76 Nfld. & P.E.I.R. 185

File No.: 20697.

Supreme Court of Canada

1988: December 7 / 1989: February 13.

Present: Sopinka J.

MOTION FOR LEAVE TO INTERVENE

Practice -- Application to intervene -- Applicant contesting constitutionality of similar provisions in another province -- Attorney General of that province intervening as of right -- Factors to be considered in according individual right to intervene -- Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4) -- Rules of the Supreme Court of Canada, SOR/83-74, s. 18(3)(a), (c) -- Canadian Charter of

Rights and Freedoms, s. 15 -- Constitution Act, 1982, s. 52(2) -- Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34 -- Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.

The Attorney General of Newfoundland presented a reference to the Newfoundland Court of Appeal on the issue of the constitutionality of ss. 32 and 34 of The Workers' Compensation Act, 1983 which provided that the right of compensation for injuries arising in the course of a worker's employment was limited to that specifically provided for by the Act. An injured worker, who brought a challenge of similar provisions in British Columbia, applied to intervene pursuant to Rule 18 of the Rules of the Supreme Court of Canada. At issue is whether this application satisfied the requirements of Rule 18(3)(a) and (c) that the intervener have an interest and that the intervener's submissions be useful and different from those of the other parties.

Held: The motion for leave to intervene should be allowed.

Involvement in a similar case may satisfy the criterion that there be an interest in the litigation. "Any interest" extends to an interest in the outcome of an appeal when the determination of a legal issue in that appeal will be binding on other pending litigation to which the applicant is a party. Some courts, however, have declined to exercise their discretion to grant this status on the basis of similar interest alone. Here, the aura of unfairness about a party in litigation, which involved similar issues, facing an opponent who has the right to intervene in this appeal should be remedied by granting the motion to intervene absent other criteria dictating a contrary conclusion.

That other counsel would argue the constitutional issues was not a disqualifying factor. An applicant who has a history of involvement in the issue may have an expertise which can shed fresh light or provide new information on the matter.

Cases Cited

Referred to: Piercey v. General Bakeries Ltd. (1986), 31 D.L.R. (4th) 373; Norcan Ltd. v. Lebrock, [1969] S.C.R. 665; Solosky v. The Queen, [1978] 1 F.C. 609; Re Schofield and Minister of Consumer and Commercial Relations (1980), 28 O.R. (2d) 764; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1982, s. 52(2).
Rules of the Supreme Court of Canada, SOR/83-74, s. 18(a), (c).
Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4).
Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.
Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34.

Authors Cited

Crane, Brian. Practice and Advocacy in the Supreme Court. Vancouver: Continuing Legal Education Society of British Columbia, 1983.

MOTION for leave to intervene in an appeal from an opinion pronounced by the Newfoundland Court of Appeal [An appeal from the judgment of the Newfoundland Court of Appeal was dismissed: see [1989] 1 S.R.C. 922] (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501, on a reference to determine the constitutional validity of ss. 32 and 34 of The Workers' Compensation Act, 1983. Motion granted.

D. Geoffrey Cowper, for the applicant.
W.G. Burke-Robertson, Q.C., for the respondent.

Solicitors for the applicant: Russell & DuMoulin, Vancouver.
Solicitor for the respondent: The Attorney General of Newfoundland, St. John's.

The following are the reasons for the Order delivered by

1 SOPINKA J.:-- This application to intervene arises in an appeal from a reference which was directed to the Newfoundland Court of Appeal by the Newfoundland Lieutenant-Governor in Council (Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.)). The reference has its roots in the case of Piercey v. General Bakeries Ltd. (1986), 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.). Samuel Piercey was an employee of General Bakeries Ltd. allegedly in the course of his employment, when he was electrocuted. It was alleged by his wife, Mrs. Shirley Piercey, that her husband's death was due to the negligence of his employer, General Bakeries Ltd.

2 In the Trial Division of the Newfoundland Supreme Court, Mrs. Piercey argued that the employer could not rely upon ss. 32 and 34 of The Workers' Compensation Act, 1983, S.N. 1983, c. 48, which provide that the right to compensation for injuries arising in the course of a worker's employment is limited to that specifically provided for by the Act. Mrs. Piercey claimed that ss. 32 and 34 of The Workers' Compensation Act, 1983 were of no force and effect under s. 52(2) of the Constitution Act, 1982 as they violated s. 15 of the Canadian Charter of Rights and Freedoms.

3 The trial judge, Hickman C.J., agreed that the provisions unjustifiably denied the right of access to the courts which was held to be an element of s. 15 equality rights. However, Hickman C.J. also held that Mrs. Piercey was unable to rely upon the Charter as her husband's death occurred on July

22, 1984, prior to April 17, 1985 when s. 15 came into force. It was held that s. 15 could not apply retrospectively.

4 As the opinion of Hickman C.J. on the constitutionality of ss. 32 and 34 of The Workers' Compensation Act, 1983 was obiter dictum, there was no ground upon which the Crown could appeal. Mrs. Piercey did not appeal. As a result, a Reference on this issue was directed to the Newfoundland Court of Appeal.

5 In the Court of Appeal, the Attorney General of Newfoundland presented the Reference. Acting as interveners by original order or by subsequent leave were: the Workers' Compensation Commission of Newfoundland and Labrador; la Commission de la santé et de la sécurité au travail du Quebec; the Attorney General of Nova Scotia; the Workers' Compensation Board of New Brunswick; the Workers' Compensation Board of Manitoba; the Attorney General of British Columbia; the Workers' Compensation Board of British Columbia; the Workers' Compensation Board of Prince Edward Island; the Workers' Compensation Board of Alberta; the Workers' Compensation Board of Yukon; the Canadian Manufacturers Association; the Canadian Labour Congress; the Newfoundland and Labrador Federation of Labour; Canadian National Railways; Marine Atlantic Limited; General Bakeries Limited, and Shirley Piercey. All but Mrs. Piercey supported the legislation. The Court of Appeal held that ss. 32 and 34 of The Workers' Compensation Act, 1983 were not inconsistent with s. 15(1) of the Charter. In addition, Goodridge C.J.N. held that s. 15 does not apply to causes of action arising before April 17, 1985.

6 This application by Mr. Cowper is on behalf of Suzanne Côté to intervene in this case pursuant to Rule 18 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicant is an injured person who has brought a challenge of similar British Columbia provisions (ss. 10 and 11 of the Workers Compensation Act, R.S.B.C. 1979, c. 437) based on the unconstitutionality of a statutory bar to private compensation. The action of Mrs. Côté has been stayed by an order of the British Columbia Supreme Court pending the outcome of this appeal. Mr. Cowper has been retained by several other plaintiffs who are in circumstances similar to Suzanne Côté and who wish to have him present argument in this appeal.

7 Our Rule 18 gives this Court a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention. As well, s. 55(4) of the Supreme Court Act, R.S.C. 1970, c. S-19, provides for submissions from persons interested in a reference.

8 The criteria for the exercise of this discretion were the subject of considerable argument on this motion. Counsel were understandably handicapped because these criteria have, perhaps purposely, not been commented on by this Court in recent cases. Threshold requirements are set out in Rule 18(3)(a) and (c). These criteria can be summarized as follows: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

9 The application was resisted principally on the basis that having a similar case does not satisfy

the interest requirement. It was also argued that the applicant has not demonstrated that his argument will differ from that of Mrs. Piercey's counsel.

(1) Interest

10 One of the few authorities in this Court on the exercise of the Court's discretion is Norcan Ltd. v. Lebrock, [1969] S.C.R. 665, in which Pigeon J. held that any interest is sufficient, subject always to the exercise of discretion. From the cases cited by Justice Pigeon, it is apparent that having a similar case can satisfy this requirement. The discretion, however, will not ordinarily be exercised in favour of an applicant just because the applicant has a similar case. Indeed it has been held in some courts that this is not a sufficient interest. See Solosky v. The Queen, [1978] 1 F.C. 609, and Re Schofield and Minister of Consumer and Commercial Relations (1980), 28 O.R. (2d) 764 (C.A.)

11 I agree with Pigeon J. that "any interest" extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party. Although this is usually a tenuous basis upon which to base an application for intervention, in this appeal Mr. Cowper's client is in the unenviable position of facing an opponent in the British Columbia litigation, the Attorney General of British Columbia, who has the right to intervene in this appeal. There is an aura of unfairness about this which should be remedied by granting this application unless the other criteria dictate the contrary conclusion. This unfairness is exacerbated by the imbalance of representation in favour of those supporting the constitutionality of the legislation which would occur if the applicant were denied the right to intervene.

(2) Useful and Different Submissions

12 This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in Practice and Advocacy in the Supreme Court, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05: "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue". It is more difficult for a private litigant to demonstrate that his or her argument will be different. This submission is usually met by the response that the able and experienced counsel already in the case will cover all bases.

13 In my opinion this is not a disqualifying factor here. The only party advancing the position taken by the applicant will be Mrs. Piercey. Her interest in the outcome is somewhat tenuous given the conclusion at trial that s. 15 could not be invoked to retroactively apply to a cause of action arising prior to April 17, 1985. Unlike Mrs. Piercey, the applicant has a definite stake in the outcome. In my view, the applicant can add to the effective adjudication of the issue by ensuring that all the issues are presented in a full adversarial context. This need for an adversarial relationship was one of the factors considered by this Court when granting applicant intervener status in Norcan, supra, and in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.

14 In the circumstances of this case, therefore, I grant leave to the applicant and others in similar circumstances represented by Mr. Cowper to intervene in this appeal. Pursuant to Rule 18, the applicant may file a factum and present oral argument to be limited to not more than fifteen minutes. There will be no costs of the application.

qp/i/qlcvd

SERVICE ADMITTED THIS
_____ DAY OF _____ 20___.

_____
SOLICITOR/AGENT/COUNSEL