

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

BETWEEN:

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

- and -

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## PART I: CONCISE OVERVIEW AND STATEMENT OF FACTS

### Overview

1. This appeal is about whether Canadians will have recourse to our courts for redress for injuries suffered in Canada at the hands of foreign sovereigns. The British Columbia Civil Liberties Association (the “BCCLA”)’s position is that this Court should recognize and give full effect to access to justice and accountability principles by taking an appropriately narrow interpretation of section 3 and broad interpretation of section 6 of the *State Immunity Act* (the “SIA”).<sup>1</sup>
2. A Canadian citizen, Zahra Kazemi, was arrested, detained, sexually assaulted, tortured, and ultimately killed by the Iranian authorities in 2003. The Estate of Ms. Kazemi and her son, Stephan Hashemi, bring this appeal. Mr. Hashemi alleges that he suffered injuries in Canada.
3. At issue before this Court is the proper interpretation of sections 3 and 6 of the SIA.
4. The BCCLA was granted leave to intervene to argue that the SIA must be interpreted in a manner consistent with the principles adopted in the *Charter of Rights and Freedoms* (the “Charter”). An interpretation of the SIA that permits state imposed barriers to redress for the most serious human rights violations would be contrary to the values and principles underlying the *Charter*. Specifically, the exception contained in section 6 of the SIA, excluding the protection of foreign states for “personal or bodily injury that occurs in Canada”, should be guided by *Charter* case law on the security of the person, which establishes that affronts to a person’s integrity, autonomy or dignity are properly imbedded within a person’s physical and psychological integrity. The right to redress for victims of torture is rendered meaningless with an interpretation of the SIA that removes the only available forum for claimants to access justice and vindicate their rights.

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<sup>1</sup> R.S.C., 1985, c. S-18.



## PART II: STATEMENT OF ISSUE

5. The BCCLA will argue the following issues in this appeal:
- a. The SIA should be interpreted in conformity with broader *Charter* values and, in particular, the principles and case law informing section 7.
  - b. Section 7 of the *Charter* embodies the prohibition against torture. An interpretation of the SIA that creates state imposed barriers to redress for victims of torture are inconsistent with section 7's principles.
  - c. The exception contained in section 6 of the SIA allowing actions for "personal or bodily injury that occurs in Canada" should be read in line with principles of statutory interpretation and *Charter* case law on security of the person so as to include both physical and psychological integrity.

## PART III: ARGUMENT

### **The *State Immunity Act* should be interpreted in light of section 7 of the *Charter*.**

6. This Honourable Court has confirmed that the *Charter* enshrines essential values and principles widely recognized in Canada, and which should guide the development of Canadian law. In *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*, the Court stated:

The second preliminary issue is how the Charter may affect the development of the common law. Here again the answer seems clear. The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.<sup>2</sup>

7. This principle applies in particular in cases where statutes are ambiguous.<sup>3</sup>

8. Sections 3 and 6 of the SIA are ambiguous. The competing arguments advanced in the array of facta filed on this appeal make this lack of clarity clear.

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<sup>2</sup> [2002] 1 S.C.R. 156 para. 18.

<sup>3</sup> *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 para. 62.

9. For example, section 3 of the SIA provides that foreign states are immune from the jurisdiction of Canadian courts. However, it does not state clearly whether the immunity applies to breaches of *jus cogens*. In particular, Parliament failed to provide an indication of whether the SIA was intended to derogate from its existing international commitments in the *Convention against Torture*.

10. Further, section 6 of the SIA provides an exception that foreign states are not immune from the jurisdiction of Canadian courts where an individual suffered “...death or personal or bodily injury” in Canada. By including the conjunction “or”, Parliament would appear to have intended that “personal injury” means something distinct from “bodily injury”.

11. Ambiguity arises because the words “personal or bodily injury” are “reasonably capable of more than one meaning”.<sup>4</sup> In particular, that ambiguity is whether “personal or bodily injury” includes the psychological injuries suffered by a Canadian citizen, the son Mr. Hashemi, while in Canada.

12. The French version of that wording (“dommages corporels”) contains only one phrase to express the nature of the injury. Several different English terms and concepts have been offered to translate its meaning including “bodily injury”, “physical injury to the body”, and “breach of physical integrity”.<sup>5</sup> This distinct turn of phrase in the French version creates further ambiguity as to the meaning of that section.

13. This Honourable Court has confirmed that where a statutory provision is ambiguous, the statute should be interpreted according to the “Charter values presumption”.<sup>6</sup> Accordingly *Charter* values, and specifically those underlying section 7, should guide the interpretation of the relevant provisions of the SIA.

14. It is notable that the appointed *amicus curiae* has also had resort to the *Charter* in interpreting the SIA, as part of its defence of the named public officials.<sup>7</sup>

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<sup>4</sup> *Bell ExpressVu* para. 29.

<sup>5</sup> *Kazemi (Estate) v. Islamic Republic of Iran*, 2012 QCCA 1449 paras. 74-75 and 81.

<sup>6</sup> *Bell ExpressVu* para. 62.

<sup>7</sup> Factum of the *Amicus Curiae*, paras. 32-35.

**Interpreting the SIA in a manner that creates state imposed barriers to redress for victims of torture is inconsistent with the principles of section 7**

15. This Court recently confirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)* that Canadian laws should be interpreted in a manner consistent with international law.<sup>8</sup>

16. In Article 14 of the *Convention against Torture*, Canada has committed to ensuring that victims of an act of torture obtain redress and have an enforceable right to compensation:

Article 14

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

2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

17. In this context, a proper interpretation of any ambiguous elements of the SIA should support Canada's commitment to ensure that it provides civil redress for victims of an act of torture. In particular, an interpretation of the SIA that would immunize foreign states from actions arising from state acts of torture causing personal injury to Canadians should be avoided.

18. An interpretation of the SIA that prohibits Mr. Hashemi from suing the respondents in Canada for damages arising from the torture and killing of his mother would deprive Mr. Hashemi of his ability to exercise his right to redress as a victim of an act of torture. The deprivation of Mr. Hashemi's right at international law engages section 7 of the *Charter*. In *Rodriguez v. British Columbia (Attorney General)*, this Court recognized that a legislative barrier is sufficient to engage section 7 interests:

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<sup>8</sup> *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 para 27.

As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in s. 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur. Nor do I accept the submission that the appellant cannot avail herself of s. 7 because she is not presently engaged in interaction with the criminal justice system, and that she will likely never be so engaged. It was argued that the comments concerning security of the person found in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and the *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 [[1990] 4 W.W.R. 481], were not applicable to this case and that the appellant could not seek the protection of s. 7 at all, as that section is concerned with the interaction of the individual with the justice system. In my view, the fact that it is the criminal prohibition in s. 241(b) which has the effect of depriving the appellant of the ability to end her life when she is no longer able to do so without assistance is a sufficient interaction with the justice system to engage the provisions of s. 7 assuming a security interest is otherwise involved.<sup>9</sup>

19. Many of the notable section 7 decisions from this Court – *Rodriguez*, *Morgentaler*, *Chaoulli*<sup>10</sup> and *PHS*<sup>11</sup> – found that legislative action in concert with non-state factors led to interferences with security of the person. Such state interference will clearly cause psychological stress for Mr. Hashemi, as there will be no redress for the sexual assault, torture and murder of his mother committed by a foreign state. *Morgentaler*<sup>12</sup> and *Rodriguez*<sup>13</sup> hold that serious state interference with physical or emotional integrity constitutes a breach of the security of the person. In this case, therefore, an interpretation of the SIA that prevents redress would validate a legislative barrier created by the Canadian government that is contrary to the principles of section 7.

**Section 6 of the SIA must be read to include both physical and psychological integrity**

20. The exception in section 6 of the SIA provides:

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
- (a) any death or personal or bodily injury, or
  - (b) any damage to or loss of property
- that occurs in Canada.

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<sup>9</sup> [1993] S.C.R. 519 para 13.

<sup>10</sup> *Chaoulli v. Quebec (AG)*, 2005 SCC 35

<sup>11</sup> *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44

<sup>12</sup> [1988] 1 S.C.R. 30.

<sup>13</sup> *Rodriguez*, para 21.

21. This provision distinguishes between “personal injury” and “bodily injury”. Both of those phrases stand in contrast to the French version which speaks of “dommages corporels”. As referenced above, the lack of statutory definitions and difference in terms creates an undeniable ambiguity which can best be resolved by looking to *Charter* case law.

22. While the Quebec Court of Appeal concluded that section 6 addressed “physical integrity” only, it is submitted that psychological integrity is in fact an integral part of one’s physical integrity, and is properly viewed as a personal (if not a bodily) injury.

23. In *Morgentaler* and *Rodriguez*, this Court found that there was no question that the concept of personal autonomy, as is encompassed by section 7, involved freedom from state-imposed psychological and emotional stress:

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, *supra*, Lamer J. (as he then was) also expressed this view, stating at p. 1177 that "Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. [emphasis added]<sup>14</sup>

24. This Court in *Blencoe v. British Columbia (Human Rights Commission)*, confirmed that interference with an individual’s psychological integrity will engage section 7 outside of the criminal context where the interference is by the state and it is serious.<sup>15</sup> For the reasons mentioned above, the BCCLA submits there is both state interference and serious interference if the SIA is interpreted in a manner to exclude Mr. Hashemi’s claim for psychological injury.

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<sup>14</sup> *Rodriguez*, para 21.

<sup>15</sup> [2000] 2 SCR 307 para.57.

25. As such, all of the necessary elements are present to support an interpretation of the SIA that would allow recovery by Mr. Hashemi, to wit

- a. a claim for psychological injury<sup>16</sup>;
- b. an ambiguous statutory provision that leaves open the potential for compensation for such injuries; and
- c. Charter values that such injuries are worthy of protection.

**PART IV: SUBMISSIONS CONCERNING COSTS**

26. The BCCLA requests that no order for costs be made against it, and seeks no costs.

**PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT**

27. The BCCLA seeks permission to make oral submissions for 10 minutes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14 day of November, 2013.**

  
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<sup>16</sup> Re-Amended Motion to Institute Proceedings, paras. 81-90 and 113(b).

**PART VI: TABLE OF AUTHORITIES**

<b>Cases</b>		<b>Paragraphs</b>
1.	<i>Bell ExpressVu Limited Partnership v. Rex</i> , [2002] S.C.J. No. 42	7, 11, 13
2.	<i>Blencoe v. British Columbia (Human Rights Commission)</i> , [2000] 2 SCR 307	24
3.	<i>Canada (AG) v. PHS Community Services Society</i> , 2011 SCC 44	19
4.	<i>Chaoulli v. Quebec (AG)</i> , 2005 SCC 35	19
5.	<i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 47	15
6.	<i>Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd</i> , [2002] 1 S.C.R. 156	6
7.	<i>R. v. Morgentaler</i> , [1988] S.C.R. 30	18, 19, 23
8.	<i>R. v. Rodriguez</i> , [1993] 3 S.C.R. 519	18, 19, 23
<b>Statutes and International Convention</b>		
9.	<i>Canadian Charter of Rights and Freedoms</i> , s 2, Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11, s.7	4, 5, 6, 13, 14, 18, 21, 25
10.	<i>Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</i> , U.N.T.S. vol. 1465	9, 16
11.	<i>State Immunity Act</i> , R.S.C., 1985, c. S-18, ss. 3 and 6	1, 3, 4, 5, 8, 9, 10, 13, 14, 17, 18, 19, 20, 24

**PART VII: STATUTORY PROVISIONS**

<p>CONSTITUTION ACT, 1982 (80)</p> <p>1982, c. 11 (U.K.), Schedule B PART I</p> <p><b>CANADIAN CHARTER OF RIGHTS AND FREEDOMS</b></p>	<p>LOI CONSTITUTIONNELLE DE 1982 (80)</p> <p>1982, ch. 11 (R.U.), Annexe B PARTIE I</p> <p><b>CHARTE CANADIENNE DES DROITS ET LIBERTÉS</b></p>
<p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p>	<p>7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.</p>

<p><b><i>CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT</i></b></p> <p>10 December 1984, 1485 U.N.T.S. 85</p>	
<p><b>Article 14</b></p> <p>1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.</p> <p>2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.</p>	

<p><b><i>State Immunity Act</i></b> R.S.C., 1985, c. S-18</p>	<p><b><i>Loi sur l'immunité des États</i></b> L.R.C. (1985), ch. S-18</p>
<p>State Immunity</p> <p>3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.</p>	<p>Immunité de juridiction</p> <p>3. (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.</p>



<p>Court to give effect to immunity (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.</p> <p>1980-81-82-83, c. 95, s. 3.</p>	<p>Note marginale :Immunité reconnue d'office (2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance. 1980-81-82-83, ch. 95, art. 3.</p>
<p>Death and property damage</p> <p>6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to</p> <p>(a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.</p> <p>R.S., 1985, c. S-18, s. 6; 2001, c. 4, s. 121.</p>	<p>Dommmages</p> <p>6. L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant :</p> <p>a) des décès ou dommages corporels survenus au Canada; b) des dommages aux biens ou perte de ceux-ci survenus au Canada.</p> <p>L.R. (1985), ch. S-18, art. 6; 2001, ch. 4, art. 121.</p>