COURT OF APPEAL FOR ONTARIO

Court File No. C53812

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA
(ON BEHALF OF THE REPUBLIC OF FRANCE)

Respondent

- and –

HASSAN NAIM DIAB

Appellant

Court File No. C55441

B E T W E E N :

THE MINISTER OF JUSTICE OF CANADA

Respondent

- and –

HASSAN NAIM DIAB

Applicant

MEMORANDUM OF FACT AND LAW OF THE PROPOSED INTERVENOR: AMNESTY INTERNATIONAL

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I. OVERVIEW

1. Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") brings the present motion for leave to intervene in the above appeal and application for judicial review pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and Rule 23(1) of the *Criminal Appeal Rules*, SI/93-169. Amnesty Canada seeks leave to intervene in the above matter as a friend

Court, to assist the Court in determining this appeal in a manner that is consistent with Canada's obligations under international law.

2. Specifically, Amnesty Canada seeks to make submissions to this Court regarding the standard of proof to be met by the person claiming the use of torture-derived evidence in an extradition context. Amnesty Canada will submit that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone who has established that there is a real risk of admission of evidence derived through torture at the trial following extradition. The higher standard of balance of probabilities would place Canada in violation of its international obligations.

3. Amnesty Canada's submissions will be grounded in Canada's obligations under international human rights law.

4. Drawing on its expertise and special knowledge of international human rights law, Amnesty Canada wishes to provide assistance to this Court in the proper determination of these proceedings, consistent with Canada's obligations under relevant international human rights law and standards.

II. THE FACTS

The Appeal and Application

5. The appeal is from an order of the Honourable Justice Maranger dated June 6, 2011 pursuant to s. 29(1)(a) of the *Extradition Act*, S.C. 1999, c. 18 wherein Justice

Maranger ordered the committal of the Appellant/Applicant for surrender to the Republic of France.[1]

6. The application for judicial review seeks review of the order of the Minister of Justice, the Honourable Rob Nicholson, dated April 4, 2012 wherein the Minister ordered the surrender of the Appellant/Applicant to the Republic of France.[2]

7. The Appellant/Applicant, Dr. Hassan Diab, is a naturalized Canadian citizen of Lebanese origin. The Republic of France submitted to the government of Canada a request for the extradition of Dr. Diab to France. The Republic of France alleged that Dr. Diab is one of the persons responsible for a bombing that took place in Paris in 1980 and resulted in the death of 4 people and bodily injury to 40 others.[3]

8. The request for extradition submitted to Canada by the Republic of France was accompanied by a Record of Case (ROC) containing all the major pieces of evidence to be used against Dr. Diab at trial. The ROC included evidence that Dr. Diab described as "unsourced" and "uncircumstanced" intelligence evidence.[4]

9. Dr. Diab, by way of counsel's submissions, urged the Minister to refuse his surrender to France. Dr. Diab submitted that surrender in the face of France's reliance on unsourced and uncircumstanced intelligence would be "unjust and oppressive". Dr. Diab requested, in the alternative, that the Minister order surrender only if fully effective and binding assurances were obtained from France assuring

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1 *Appellant's Appeal Book, Appeal of Order of Committal, Tab 1, pp. 1-5.*
2 *Appellant's Appeal Book, Application for Judicial Review, Tab 1, pp. 1-5.*
3 *Appellant's Appeal Book, Application for Judicial Review, Tab 3, p. 11.*
4 *Appellant's Appeal Book, Application for Judicial Review, Tab 5, p. 54.*

that the above-mentioned unsourced and uncircumstanced intelligence would not be used as evidence against Dr. Diab.[5]

10. Dr. Diab later submitted that there was "at least a plausible connection between the intelligence evidence contained in the Record of the Case and the French dossier, and the use of torture-based interrogations by Syrian state security". Dr. Diab relied upon public sources to substantiate his claim.[6]

11. Dr. Diab argued that the Minister of Justice was under a duty to investigate the claim of torture-based evidence, stating that, Dr. Diab having established a plausible connection to torture, it was open to the Minister, "to conduct an investigation into the intelligence to determine whether the risk of tainting by torture or CIDT can be dispelled".[7]

12. On April 4, 2012, the Minister of Justice ordered Dr. Diab's surrender to the Republic of France. The Minister rejected Dr. Diab's submission that, "in the extradition context, the standard to be met by the person claiming the use of torture-derived evidence is 'plausible connection'". The Minister held that, "[t]he extradition jurisprudence confirms that a claimant bears the onus of establishing a torture claim on a 'balance of probabilities'".[8]

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5 *Appellant's Appeal Book, Application for Judicial Review, Tab 5, p. 110, 132.*
6 *Appellant's Appeal Book, Application for Judicial Review, Tab 18, p. 1747.*
7 *Appellant's Appeal Book, Application for Judicial Review, Tab 18, p. 1758.*
8 *Appellant's Appeal Book, Application for Judicial Review, Tab 2, pp. 7-10; Tab 3, p. 33*

Amnesty International's Interest in the Appeal and Relevant Expertise

13. Amnesty International is a worldwide movement founded in 1961 that works to prevent some of the gravest violations of people's fundamental human rights.[9]

14. AI is impartial and independent of any government, political persuasion or religious creed. AI and Amnesty Canada are financed by subscriptions and donations from its membership, and receives no government funding.[10]

15. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.[11]

16. There are currently close to 3 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like Amnesty Canada.[12]

17. Amnesty Canada is the manifestation of the global AI movement in this country. Amnesty Canada's organizational structure includes a board of 12 directors elected across the country. Amnesty Canada has a staff of about 50 employees. There are approximately 60,000 members of Amnesty Canada.[13]

18. Amnesty Canada implements and shares AI's vision of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of

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9 *Motion Record, Affidavit of Alex Neve, p. 12.*
10 *Motion Record, Affidavit of Alex Neve, p. 12.*
11 *Motion Record, Affidavit of Alex Neve, p. 12.*
12 *Motion Record, Affidavit of Alex Neve, p. 12.*
13 *Motion Record, Affidavit of Alex Neve, p. 12.*

Human Rights and other international human rights standards. Amnesty Canada seeks to advance and promote international human rights at both the international and national level. As part of its work to achieve this end, Amnesty Canada:

a. Monitors and reports on human rights abuses;

b. Participates in relevant judicial proceedings;

c. Participates in national legislative processes and hearings; and

d. Participates in international committee hearings and processes.[14]

19. Amnesty Canada has frequently been granted intervener status before Courts and tribunals across Canada to present oral and written submissions based on relevant international human rights, humanitarian and refugee law and standards. Amnesty Canada has intervened before the Supreme Court of Canada in several cases and has appeared before other courts, including this Court, as either a party or an intervener. Amnesty Canada has also been granted intervener status in public inquiries in Canada. In addition, Amnesty Canada has presented written and oral submissions to government officials, legislators and House and Senate committees on various human rights issues. Amnesty Canada has made submissions to various international bodies regarding Canada's compliance with its obligations under international law.[15]

20. Amnesty International has a strong record as a credible, trustworthy and objective organization with a unique expertise in international human rights law. The organization has a legitimate and significant interest in this appeal, as it engages

14 *Motion Record, Affidavit of Alex Neve, pp. 12-13.*
15 *Motion Record, Affidavit of Alex Neve, pp.14-20.*

core international principles relating to the non-admissibility of evidence derived from torture, and the right to a fair trial, issues that have long formed part of Amnesty International's work in Canada and around the world. [16]

III. ISSUES AND THE LAW

21. The issue on this motion is whether Amnesty Canada should be granted intervener status as a friend of the Court in this appeal and application.

The Test for Intervention

22. Rule 23(1) of the *Criminal Appeal Rules* provides that "[a]ny person interested in an appeal between other parties may by leave of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario, intervene in the appeal upon such terms and conditions and with such rights and privileges as the court, the Chief Justice or the Associate Chief Justice determines".[17] Rule 13.02 of the *Ontario Rules of Civil Procedure* governs civil appeals, and is substantively similar.[18]

23. The Court's power under Rule 23(1) is discretionary. In *R. v. McCullough*, this Court held that "what is normally required is material which discloses that the proposed intervenor would be able to make a useful contribution beyond that which would be offered by the parties and without causing an injustice to the immediate parties".[19]

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16 *Motion Record, Affidavit of Alex Neve, p. 11.*
17 *Criminal Appeal Rules*, SI/93-169,
18 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 13.02
19 *R. v. McCullough* (1995), 24 O.R. (3d) 239.

24. In the context of civil appeals, in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. Of Canada,* this Court laid out specific matters to consider with respect to interventions: "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties".[20]

25. In *Bedford v. Canada (A.G.)* this Court noted that in order to grant intervener status in a case concerning the *Charter*, "usually at least one of three criteria is met by the intervener: it has a real, substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well recognized group with a special expertise and a broadly identifiable membership base".[21]

This Appeal Raises Issues of General Public Importance

26. This appeal and application raise a question pertaining to Canada's compliance with its international obligations, and thus engage issues of general public importance. The fact that the dispute in the application for judicial review is between the Minister of Justice and a private individual is not determinative of the nature of the appeal. In the case at bar, this Court is called upon to determine the standard of proof to which a person must establish that evidence derived from torture will be used at his or her trial following extradition, such that extradition must not be carried out.

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20 *A.C.B. v. R.B.,* [2010] O.J. No. 3505 at para. 4; *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. Of Canada* (1990), 74 O.R. (2d) 164, at p. 167 ["*Peel*"].
21 *Bedford v. Canada (A.G.)* 2009 ONCA 669 at para. 2 [*Bedford*].

27. This issue arises in the context of s. 44 of the *Extradition Act*, which states that an extradition request must be refused if the Minister is satisfied that, "surrender would be unjust or oppressive having regard to all the relevant circumstances." Canadian case law has established that, where surrender would be contrary to the principles of fundamental justice under s. 7 of the *Charter*, "it will also be unjust and oppressive within the meaning of s. 44(1)(a) [of the *Extradition Act*]".[22]

28. The issue to be addressed by the proposed intervener, "transcends the dispute between the immediate parties to the litigation". Determining the standard of proof that a person must meet to establish that evidence derived from torture will be used at his or her trial following extradition will affect persons beyond the parties in this appeal. It will affect all persons in Canada whose extradition is sought to face trial in another state where some of the evidence against him or her may have been obtained through torture.[23]

29. The Court has also recognized that cases that raise constitutional issues have an impact beyond the immediate parties. In *Peel,* the Court noted:

> In constitutional cases, including cases under the Canadian Charter of Rights and Freedoms, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.[24]

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22 *Extradition Act,* S.C. 1999, c. 18, s. 44(1)(a); *Canadian Charter of Rights and Freedoms,* R.S.Q. c. C-12, s.7; *Nemeth v. Canada (Justice)*, 2010 SCC 56 at para. 71.
23 *Childs et al. v. Desormeaux et al.*, 67 O.R. (3d) 385 at paras. 10.
24 *Peel, supra*, at note 17.

Amnesty International Will Make a Useful Contribution

30. If granted intervener status, Amnesty Canada will make a useful contribution to this Court's determination of the legal issues raised in this appeal and application, and will do so without causing injustice or prejudice to the immediate parties.

31. As will be elaborated upon below, Amnesty Canada's submissions will focus on Canada's obligations under international human rights law and standards in light of s.7 of the *Charter*. Amnesty Canada's submissions will incorporate international jurisprudence, including from the European Court of Human Rights. Amnesty Canada will submit that the proper test to be applied is that of a "real risk" of the admission of evidence derived from torture. Specifically, the Minister of Justice should refuse extradition where it has been established that the subject of the extradition request faces a real risk that evidence that was derived from torture would be used against him or her at trial. The person need not prove on the balance of probabilities that any specific item of evidence will be used against him or her; nor need the person prove on the balance of probabilities that any specific piece of evidence was obtained by torture. A *real risk* of the use of evidence derived from torture would suffice.

International Law is Relevant and Important

32. The Supreme Court of Canada has expressly recognized the importance and relevance of international law in defining the scope of fundamental justice:

> [Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a

> system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.[25]

33. The Court has also affirmed that, "Canada's international human rights obligations should inform [...] the interpretation of the content of the rights guaranteed by the *Charter*"[26] and identified, "the various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" as "relevant and persuasive sources for interpretation of the *Charter*'s provisions".[27]

34. The Supreme Court has held that there are two important interpretive presumptions at play when dealing with the impact of international law on the interpretation of a domestic statute:

> [...] First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. [...] Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional.[28]

35. Both of the above presumptions are directly engaged in determining what constitutes the applicable principle of fundamental justice in an extradition case involving a real risk that information extracted by torture will be used as a source of evidence when the subject of the extradition request faces trial.

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25 *United States of America v. Burns*, 2001 SCC 7 at para. 79, citing *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 at p. 503, at 512 [*Re B.C. Motor Vehicle Act*].
26 *Ibid.* at para. 80, citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp. 1056-57 [emphasis omitted].
27 *Ibid.*, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 348.
28 Ruth Sullivan, *Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths, 2002) at 422, cited with approval in *R. v. Hape*, [2007] 2 S.C.R. 292 at paras. 53-54; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175.

The Principle of the Non-Admissibility of Evidence Extracted by Torture

36. The prohibition against torture is a *jus cogens* norm at international law. The prohibition on the use of evidence obtained through torture is essential to ensure compliance with the absolute ban on the use of torture. This prohibition is recognized, *inter alia*, in Article 15 of the *United Nations Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT").[29]

37. The United Nations Committee against Torture has affirmed that this exclusionary rule is broad in scope and applies to any proceedings, including extradition proceedings.[30]

38. The exclusionary rule is also found in the *International Covenant on Civil and Political Rights* ("ICCPR"), both as an inherent consequence of the prohibition of torture and cruel, inhuman or degrading treatment under Article 7, and as an element of the right to fair trial under Article 14 of the Covenant.[31]

39. Further, the exclusionary rule should be read in conjunction with what the UN Special Rapporteur on human rights and counter-terrorism has characterized as the "obligation *erga omnes* of States to cooperate in the eradication of torture".[32] The *erga omnes*, character of this obligation means that it is, "owed toward all the other

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29 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
30 *G.K. v. Switzerland*, CAT/C/30/D/219/2002 (CAT 2003) at para 6.10 [*G.K. v. Switzerland*]; *P.E. v. France*, Comm. 193/2001, U.N. Doc. A/58/44 (CAT 2002) [*P.E. v. France*].
31 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [*ICCPR*].
32 Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", A/HRC/10/3, February 4, 2009, para 55.

members of the international community, each of which then has a correlative right".[33]

The Obligation to Protect and Ensure the Right to a Fair Trial

40. The United Nations Human Rights Committee, in its General Comment No. 32, notes the importance of the right to a fair trial:

> The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.[34]

41. Article 2(1) of the ICCPR also states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.[35]

42. The United Nations Human Rights Committee has also affirmed that a State party's duty under this Article would be violated, "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction".[36]

43. Article 14 of the ICCPR provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

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33 *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, at para. 151.
34 UN Human Rights Committee, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, UN Doc CCPR/C/GC/32 (2007), para. 1
35 *ICCPR, supra* note 28, art. 2(1).
36 *Charles Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, UN Human Rights Committee (HRC), 7 January 1994, at para. 6.2.

> public hearing by a competent, independent and impartial tribunal established by law.[37]

44. As the European Court of Human Rights stated in the case of *Othman (Abu Qatada) v. the United Kingdom*, the admission of statements obtained by torture as evidence would be, "a flagrant denial of justice".[38] The Court in *Othman* applied the 'real risk' test, finding that Mr. Othman's deportation to Jordan would be in violation of Article 6 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ("Convention") on account of the real risk of the admission at Mr. Othman's retrial of evidence obtained by torture of third persons.

45. The Court in *Othman* also noted:

> More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[39]

46. As a signatory to several binding international instruments, Canada has an obligation to refuse extradition when the person sought would face a serious violation of his or her right to a fair trial as a result of the real risk that evidence obtained by torture would be admitted at her or his trial.

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37 *ICCPR, supra* note 28, art. 14.
38 *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012, at para. 267 [*Othman*].
39 *Ibid.*, at para. 264.

State Authorities must refuse the Request where there is a Real Risk of the Admission of Evidence Obtained through Torture

47. Amnesty Canada will submit that it would be unfair and inconsistent with the right of the accused to a fair trial, as well as the absolute ban on torture and the rule of law, to require a higher standard of proof than "real risk". A higher standard such as balance of probabilities would place Canada in violation of its international obligations. This view has been recognized in the jurisprudence of the European Court of Human Rights. If granted leave to intervene, Amnesty Canada will respectfully contend that the Ontario Court of Appeal should adopt a similar test to that adopted by the European Court of Human Rights in its jurisprudence, in order to ensure that Canadian law is in compliance with the international principle of the non-admissibility of evidence extracted by torture and the obligation to protect the right to a fair trial.

48. States have a duty to ensure that all intelligence and security activities respect the absolute ban on torture. States cannot credibly claim to promote respect for the absolute prohibition on torture or other ill-treatment while at the same time submitting to its courts information that has been or may have been obtained through torture. As the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated:

> It is of deep concern that States regularly receive and rely on information – either as intelligence or evidence for proceedings – whose sources present a real risk of having been acquired as a result of torture and ill-treatment from third party States. Receiving or relying on information from third parties which may be compromised by the use of torture does not only implicitly validate the use of torture and ill-treatment as an acceptable tool to gain information, but creates a market for information

> acquired through torture, which in the long term undermines the goal of preventing and eradicating torture.[40]

49. Support for this view is found in the jurisprudence of the European Court of Human Rights.

50. In the case of *Othman*, *supra*, the Court rejected a balance of probabilities test found in cases such as *A. and Others (no. 2)* and *Mahjoub v. Canada (Minister of Citizenship and Immigration*, based on the reasoning that these cases related to proceedings that are "very different from criminal proceedings where, as in the present case, a defendant might face a very long sentence of imprisonment if convicted".[41] The Court noted in this regard:

> Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process [...] All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment [...] in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate.[42]

51. The Court has recently cited with approval the reasoning in *Othman* and confirmed that an individual need only show that there is a "real risk", and not some higher likelihood, that the evidence in question had been obtained by torture, in order to request the exclusion of the evidence.[43]

52. This analysis regarding the appropriate standard of proof is supported by the jurisprudence of international human rights mechanisms including the Committee

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40 Juan Mendez, "Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/HRC/16/52, 3 February 2011, para 53 [emphasis added].
41 *Othman*, *supra* note 35, at para. 274.
42 *Ibid.*, at para. 276.
43 *El Haski v. Belgium*, Application no. 649/08, Council of Europe: European Court of Human Rights, 25 September 2012.

Against Torture and the Special Rapporteur on Torture. The Committee Against Torture has held in its individual complaints procedure that an applicant is only required to demonstrate that his or her allegations of torture are well-founded.[44] After the applicant has established the well-founded nature of his or her allegations, the burden of proof shifts to the State to rebut the evidence adduced by the applicant that the statements invoked as evidence in any proceedings, including extradition proceedings, were made as a result of torture.[45]

53. In a 2006 report to the members of the General Assembly, the Special Rapporteur on Torture described the following test with approval:

> [T]he appellant must first advance a plausible reason why evidence may have been procured by torture. It would then be for the court to inquire as to whether there is a real risk that the evidence has been obtained by torture and if there is, the evidence should not be admitted. In other words, the evidence should only be admitted if the court establishes that there is no such real risk.[46]

54. The Special Rapporteur noted that:

> 47. [...] with an increasing trend towards the use of "secret evidence" in judicial proceedings, possibly obtained by torture inflicted by foreign officials, together with a too-heavy burden being placed on the individual, there exists the potential of undermining the preventive element of article 15.[47]

55. The above-noted obligations apply to any proceeding, including extradition proceedings, and require Canada to refuse extradition where there is a real risk that information extracted by torture will be used as a source of evidence at the trial of the person whose extradition is requested.

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44 *G.K. v. Switzerland, supra* note 27 at para. 6.11. See also *P.E. v. France, supra* note 27 at para. 6.6.
45 *Ibid.*, at para. 6.10, with reference to *P.E. v. France*, *ibid.*, at para. 6.3.
46 UN General Assembly, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 14 August 2006, A/61/259, at para. 65.
47 *Ibid.*, at para. 47.

56. Amnesty Canada can provide a useful contribution to the legal issues in this appeal and application. While Amnesty Canada and the Appellant/Applicant take a similar position on the correct standard of proof to be met by a person claiming the use of torture-derived evidence in an extradition proceeding, Amnesty Canada will draw on its unique expertise to provide a fulsome analysis of the relevant international law obligations. Amnesty Canada's position is based on its knowledge of international jurisprudence and other international human rights mechanisms, such as statements from the Committee Against Torture and the Special Rapporteur on Torture.

57. The Ontario courts have noted that Courts will benefit from different perspectives in argument and thus leave is more readily granted where different perspectives are demonstrated. While it is submitted that, in the case at bar, the perspective of the proposed intervener is different from that of the Applicant, this Court has allowed interventions even when there is a less significant difference. For instance, in *R v. LePage,* and in *Pinet v. Mental Health Centre, Penetanguishene*, the Courts cited approvingly the following passage of Howland C.J.O. in allowing an intervention in a criminal proceeding concerning the constitutional validity of the first rape shield law:

> [...] It is a question of granting the applicant a right to intervene to illuminate a pending issue before the Court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the Court.[48]

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48 *Pinet v. Mental Health Centre, Penetanguishene,* 80 O.R. (3d) 139 at paras. 36, 37; see also *R. v. LePage* [1994] O.J. No. 1305 at paras. 21, 23.

58. Moreover, as noted by this Court in *Oakwell Engineering Limited v. Enernorth Industries Inc.*:

> [...] The fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to intervention if the intervenor can make a useful contribution to the analysis to or of the issues before the court. See *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.); *Halpern v. Toronto (City) Clerk* (2000), 51 O.R. (3d) 742.[49]

Amnesty Canada is a recognized group with special expertise and an identifiable membership base

59. In accordance with the test in *Bedford, supra*, and set out in the Affidavit of Alex Neve, Amnesty Canada constitutes a "well recognized group with a special expertise and a broadly identifiable membership base".[50]

Granting Amnesty Canada leave to intervene will not cause any injustice or prejudice

60. The intervention of Amnesty Canada will not cause any injustice or prejudice to the immediate parties.

61. Amnesty Canada will take the record as it finds it and will not supplement the record, nor will it take a position on the application of the law to the particular facts of Mr. Diab's case. Specifically, it will not address the question of whether Mr. Diab has or has not met the requirement of "real risk". Amnesty Canada only seeks to make legal arguments regarding the proper test.

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49 *Oakwell Engineering Limited v. Enernorth Industries Inc.* [2006] O.J. No. 1942 at para. 9.
50 *Bedford, supra*, note 18; *Motion Record, Affidavit of Alex Neve.*

IV. ORDER REQUESTED

62. Amnesty Canada respectfully requests an order granting it leave to intervene in this appeal and application; an order granting Amnesty Canada leave to file a factum in this appeal and application not exceeding 20 pages in length; an order granting Amnesty Canada leave to make oral argument at the hearing of this appeal and application, not exceeding 30 minutes in length; and an order allowing Amnesty Canada the ability to participate in any motions that arise on this appeal and application.

63. Amnesty Canada will not seek costs, and asks that it not be liable for costs to any other party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF MARCH 2013

Lorne Waldman,
Barrister & Solicitor for the Proposed Intervener,
Amnesty International
LSUC # 18639E

SCHEDULE "A"
LIST OF AUTHORITIES

1.	*A.C.B. v. R.B.*, [2010] O.J. No. 3505
2.	*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. Of Canada* (1990), 74 O.R. (2d) 164
3.	*R. v. McCullough* (1995), 24 O.R. (3d) 239
4.	*Bedford v. Canada (A.G.)* 2009 ONCA 669
5.	*Nemeth v. Canada (Justice)*, 2010 SCC 56
6.	*Childs et al. v. Desormeaux et al.* 67 O.R. (3d) 385
7.	*United States of America v. Burns*, 2001 SCC 7
8.	*R. v. Hape*, [2007] 2 S.C.R. 292
9.	*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
10.	*R. v. Sharpe*, [2001] 1 S.C.R. 45
11.	UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85
12.	*G.K. v. Switzerland*, CAT/C/30/D/219/2002 (CAT 2003)
13.	*P.E. v. France*, Comm. 193/2001, U.N. Doc. A/58/44 (CAT 2002)
14.	UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
15.	Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", A/HRC/10/3, February 4, 2009
16.	*Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998
17.	UN Human Rights Committee, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, UN Doc

	CCPR/C/GC/32 (2007)
18.	*Charles Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, UN Human Rights Committee (HRC), 7 January 1994
19.	*Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012
20.	Juan Mendez, "Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/HRC/16/52, 3 February 2011
21.	UN General Assembly, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 14 August 2006, A/61/259
22.	*Pinet v. Mental Health Centre, Penetanguishene,* 80 O.R. (3d) 139
23.	*R. v. LePage* [1994] O.J. No. 1305
24.	*Oakwell Engineering Limited v. Enernorth Industries Inc.* [2006] O.J. No. 1942

SCHEDULE "B"
RELEVANT STATUTES

1.	*Criminal Appeal Rules*, SI/93-169, s. 23(1)
2.	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 13.02, 13.03
3.	*Extradition Act,* S.C. 1999, c. 18, s. 44(1)(a)
4.	*Canadian Charter of Rights and Freedoms,* R.S.Q. c. C-12, s.7.

***Criminal Appeal Rules*, SI/93-169, s. 23(1)**

INTERVENTION

23. (1) Any person interested in an appeal between other parties may by leave of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario, intervene in the appeal upon such terms and conditions and with such rights and privileges as the court, the Chief Justice or the Associate Chief Justice determines.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 13.02, 13.03**

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

***Extradition Act*, S.C. 1999, c. 18, s. 44(1)(a)**

When order not to be made

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

> (*a*) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or [...]

***Canadian Charter of Rights and Freedoms*, R.S.Q. c. C-12, s.7.**

Life, liberty and security of person

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.

HASSAN NAIM DIAB Appellant/Applicant	and	**ATTORNEY GENERAL OF CANADA (ON BEHALF OF THE REPUBLIC OF FRANCE)** **THE MINISTER OF JUSTICE OF CANADA** Respondents	**Court File Nos. C53812 and C55441**

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

MEMORANDUM OF FACT AND LAW OF THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL (MOTION FOR LEAVE TO INTERVENE)

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