

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

**BETWEEN:**

**CLUB RESORTS LTD.**

**APPELLANT**

– and –

**MORGAN VAN BREDA, VICTOR BERG, JOAN VAN BREDA, TONY VAN  
BREDA, ADAM VAN BREDA and TONILLE VAN BREDA**

**RESPONDENTS**

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

**PROPOSED INTERVENERS**

---

**MOTION RECORD FOR LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: FrancoisLarocque@uOttawa.ca

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: mpower@heenan.ca

*Counsel for the proposed interveners*

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: lwihak@heenan.ca

*Agent for the proposed interveners*

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

**BETWEEN:**

**CLUB RESORTS LTD.**

APPELLANT

– and –

**ANNA CHARRON, ESTATE TRUSTEE OF THE ESTATE OF CLAUDE  
CHARRON, DECEASED, THE SAID ANNA CHARRON, PERSONALLY, et  
al.**

RESPONDENTS

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

PROPOSED INTERVENERS

---

**MOTION RECORD FOR LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: FrancoisLarocque@uOttawa.ca

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: mpower@heenan.ca

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: lwihak@heenan.ca

*Agent for the proposed interveners*

*Counsel for the proposed interveners*

**TO: REGISTRAR OF THE SUPREME COURT OF CANADA**

**AND TO:**

**Beard Winter LLP**  
130 Adelaide St. West  
Suite 701  
Toronto, Ontario M5H 2K4

**John A. Olah**  
Telephone: (416) 306-1818  
FAX: (416) 593-7760  
E-mail: jolah@beardwinter.com

Counsel for the Appellant, Club Resort Ltd.

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

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

Agent for the Appellant, Club Resort Ltd.

**Paliare, Roland, Rosenberg, Rothstein, LLP**  
501-250 University Avenue  
Toronto, Ontario M5H 3E5

**Chris G. Paliare**  
Telephone: (416) 646-4318  
FAX: (416) 646-4301  
E-mail: chris.paliare@paliareroland.com

Counsel for the Respondents, Morgan Van Breda, Victor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda

**Lang Michener LLP**  
300 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Marie-France Major**  
Telephone: (613) 232-7171  
FAX: (613) 231-3191  
E-mail: mmajor@langmichener.ca

Agent for the Respondents, Morgan Van Breda, Victor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda

**Fasken Martineau DuMoulin LLP**  
333 Bay Street, Suite 2400  
Bay Adelaide Centre, Box 20  
Toronto, Ontario M5H 2T6

**Peter J. Pliszka**  
Telephone: (416) 366-8381  
FAX: (416) 364-7813  
E-mail: ppliszka@fasken.com

Counsel for the Appellant, Club Resort Ltd.

**Gowling Lafleur Henderson LLP**  
2600 - 160 Elgin St  
P.O. Box 466, Stn "D"  
Ottawa, Ontario K1P 1C3

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

Agent for the Appellant, Club Resort Ltd.

**Adair Morse LLP**  
1 Queen Street East  
Suite 1800  
Toronto, Ontario M5C 2W5

**Jerome R. Morse**  
Telephone: (416) 863-1230  
FAX: (416) 863-1241  
E-mail: [jmorse@adairmorse.com](mailto:jmorse@adairmorse.com)

Counsel for the Respondents, Anna Charron,  
Estate Trustee of the Estate of Claude  
Charron, deceased, the said Anna Charron,  
personally, Jennifer Candace Charron,  
Stephanie Michelle Charron, Christopher  
Michael Charron

**McCague Peacock Borlack McInnis &  
Lloyd LLP**  
2700-130 King St. W., The Exchange  
Tower,  
PO Box 136, Stn. 1st Can. Pl.  
Toronto, Ontario M5X 1C7

**Howard B. Borlack**  
Telephone: (416) 860-0054  
FAX: (416) 860-0003  
E-mail: [hbborlack@mwpb.com](mailto:hbborlack@mwpb.com)

Counsel for the Respondent, Bel Air Travel  
Group Ltd.

**Lang Michener LLP**  
300 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Marie-France Major**  
Telephone: (613) 232-7171  
FAX: (613) 231-3191  
E-mail: [mmajor@langmichener.ca](mailto:mmajor@langmichener.ca)

Agent for the Respondents, Anna Charron,  
Estate Trustee of the Estate of Claude  
Charron, deceased, the said Anna Charron,  
personally, Jennifer Candace Charron,  
Stephanie Michelle Charron, Christopher  
Michael Charron

**Lang Michener LLP**  
300 - 50 O'Connor Street  
Ottawa, Ontario  
K1P 6L2

**Marie-France Major**  
Telephone: (613) 232-7171  
FAX: (613) 231-3191  
E-mail: [mmajor@langmichener.ca](mailto:mmajor@langmichener.ca)

Agent for the Respondent, Bel Air Travel  
Group Ltd.

**Buie Cohen LLP**

250 Merton Street  
Suite 205  
Toronto, Ontario M4S 1B1

**Catherine M. Buie**

Telephone: (416) 869-3400  
FAX: (416) 869-0094  
E-mail: [cmbuie@buiecohen.com](mailto:cmbuie@buiecohen.com)

Counsel for the Respondent, Hola Sun  
Holidays Limited

**Lang Michener LLP**

300 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Marie-France Major**

Telephone: (613) 232-7171  
FAX: (613) 231-3191  
E-mail: [mmajor@langmichener.ca](mailto:mmajor@langmichener.ca)

Agent for the Respondent, Hola Sun  
Holidays Limited

## **INDEX**

<b>Tab</b>	<b>Document</b>	<b>Page</b>
<b>1</b>	Notice of Motion seeking Leave to Intervene	1
<b>2</b>	Affidavit of Antoinette Issa	9
<b>3</b>	Affidavit of Hilary Homes	14
<b>4</b>	Affidavit of Matthew Eisenbrandt	25
<b>5</b>	Factum in support of the Motion for Leave to Intervene	32

SCC File No. 33692

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

**BETWEEN:**

**CLUB RESORTS LTD.**

APPELLANT

– and –

**MORGAN VAN BREDa, VICTOR BERG, JOAN VAN BREDa, TONY VAN  
BREDa, ADAM VAN BREDa and TONILLE VAN BREDa**

RESPONDENTS

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

PROPOSED INTERVENERS

---

**NOTICE OF MOTION SEEKING LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: [FrancoisLarocque@uOttawa.ca](mailto:FrancoisLarocque@uOttawa.ca)

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: [mpower@heenan.ca](mailto:mpower@heenan.ca)

*Counsel for the proposed interveners*

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: [lwihak@heenan.ca](mailto:lwihak@heenan.ca)

*Agent for the proposed interveners*

SCC File No. 33606

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

**BETWEEN:**

**CLUB RESORTS LTD.**

APPELLANT

– and –

**ANNA CHARRON, ESTATE TRUSTEE OF THE ESTATE OF CLAUDE  
CHARRON, DECEASED, THE SAID ANNA CHARRON, PERSONALLY, et  
al.**

RESPONDENTS

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

PROPOSED INTERVENERS

---

**NOTICE OF MOTION SEEKING LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: [FrancoisLarocque@uOttawa.ca](mailto:FrancoisLarocque@uOttawa.ca)

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: [mpower@heenan.ca](mailto:mpower@heenan.ca)

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: [lwihak@heenan.ca](mailto:lwihak@heenan.ca)

*Agent for the proposed interveners*

*Counsel for the proposed interveners*



**TAKE NOTICE** that Amnesty International, the Canadian Centre for International Justice, and Canadian Lawyers for International Human Rights (“Amnesty, CCIJ and CLAIHR”) hereby apply to a Judge of this Court, in writing, pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for an order:

- (a) granting Amnesty, CCIJ and CLAIHR leave to intervene in these appeals;
- (b) permitting Amnesty, CCIJ and CLAIHR to file a single factum of no more than twenty (20) pages in length;
- (c) permitting Amnesty, CCIJ and CLAIHR to make joint oral submissions at the hearing of these appeals; and
- (d) granting any further relief as the said Judge may deem appropriate.

**AND FURTHER TAKE NOTICE** that the Affidavits of Hilary Homes, Matthew Eisenbrandt and Antoinette Issa, all sworn December 15<sup>th</sup>, 2010, and such further or other material as counsel may advise will be referred to in support of the motion.

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

***These appeals concern the forum of necessity doctrine***

1. These appeals concern the principles that govern the adjudicative jurisdiction of Canadian courts in civil proceedings involving foreign defendants and extraterritorial injuries.
2. A five-judge panel of the Court of Appeal for Ontario has held that it was appropriate to modify and clarify the principles it had laid down in *Muscutt v Courcelles* “in light of the post-Muscutt changes to the legal landscape”.<sup>1</sup> One of these changes included, notably, the emergence of the doctrine of forum of necessity.
3. The forum of necessity doctrine “allows the forum to take jurisdiction in cases despite the absence of a real and substantial connection where there is no other forum in

---

<sup>1</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 70, **Book of authorities in support of the motion for leave to intervene (hereafter “Authorities”), Tab 12.**

*which the plaintiff could reasonably seek relief.”<sup>2</sup> The Court of Appeal for Ontario held that, in exceptional cases, the forum of necessity doctrine “operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction”<sup>3</sup>.*

4. The doctrine of forum of necessity is rooted in the constitutional imperatives of order and fairness, and allows claimants to access justice in cases where justice would otherwise be denied.

***Amnesty, CCIJ and CLAIHR are directly affected and interested by these appeals because they are organizations that promote access to justice for survivors of human rights violations, who might rely on the forum of necessity doctrine***

5. Amnesty, CCIJ and CLAIHR are non-profit organizations that advocate for the respect and application of Canada’s international human rights obligations, and the right of survivors of grave human rights abuses to access justice and obtain adequate redress.

6. Amnesty, CCIJ and CLAIHR have considerable experience before courts and tribunals, both as applicants and as interveners, on a range of issues relating to jurisdiction, access to justice and Canada’s international human rights obligations.

7. Together or separately, Amnesty, CCIJ and CLAIHR have taken part in such cases as :

- *Charkoui v. Canada (MCI) No. 2*, [2008] 2 S.C.R. 326;
- *Charkoui v. Canada (MCI) No. 1*, [2007] 1 S.C.R. 350;
- *Mugesera v. Canada (MCI)*, [2005] 2 S.C.R. 91;
- *Schreiber v. Canada (AG)*, [2002] 3 S.C.R. 269;
- *Suresh v. Canada (MCI)*, [2002] 1 S.C.R. 3;
- *United States v. Burns*, [2001] 1 S.C.R. 283;
- *Reference Re Ng Extradition (Can)*, [1991] 2 S.C.R. 858;
- *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779;

<sup>2</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 54, **Authorities, Tab 12**.

<sup>3</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 100, **Authorities, Tab 12**.

- *Kazemi v. Islamic Republic of Iran* (Quebec Superior Court, File No. 500-17-031760-062; heard in December 2009 and February 2010; presently under reserve); and
- *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (CA).

8. Amnesty, CCIJ and CLAIHR seek to intervene in these appeals in order make joint submissions pertaining exclusively to the doctrine of forum of necessity, its origins in Canadian law, its connection with international law and its high importance to survivors of extraterritorial human rights abuses who have no other jurisdiction in which to obtain redress.

9. More specifically, if granted leave to intervene, Amnesty, CCIJ and CLAIHR intend to argue:

- that the forum of necessity doctrine ought to be explicitly recognized at common law as an exception to the real and substantial connection test;
- that the forum of necessity doctrine's parameters ought to be defined so as to permit Canadian courts, in exceptional cases, to take jurisdiction over civil claims relating to grave breaches of international human rights and to avoid a denial of justice where no other jurisdiction exists in which the plaintiff may reasonably seek a remedy.

10. Many survivors of human rights violations on whose behalf Amnesty, CCIJ and CLAIHR advocate are unable to seek justice in the countries where the abuses occurred, because they would be at risk of violence or death, or because the judicial systems in those countries are unable or unwilling to process their claims. In those situations, Canadian courts truly are the forum of last resort and, as such, survivors' access to justice should not be blocked merely because they fail to satisfy the real and substantial connection test.

11. The manner in which this Honourable Court will define the forum of necessity doctrine in this case, particularly as it relates to the real and substantial connection test, will directly affect the ability of survivors of extraterritorial human rights violations to seek redress in Canadian courts.

12. When accessible, Canadian courts can provide the survivors of grave extraterritorial human rights violations with an opportunity to obtain justice, while ensuring that Canada complies with its conventional and customary international legal obligations.

***Amnesty, CCIJ and CLAIHR's joint submissions will be different from those of the parties***

13. The proposed joint submissions of Amnesty, CCIJ and CLAIHR will be different from those contained in the factum of the Appellant. In its factum, the Appellant refers only to the forum of necessity doctrine in broad terms and only in relation to the ability of a litigant to make full answer and defense.<sup>4</sup>

14. The Appellant makes no argument whatsoever relating to the manner in which the forum of necessity doctrine impacts the ability of survivors of human rights abuses to access justice.

***Amnesty, CCIJ and CLAIHR's joint submission will be relevant and useful to this Honourable Court in addressing the issues raised in these appeals***

15. Amnesty, CCIJ and CLAIHR have a useful and different perspective, as well as special expertise and interest with respect to the issues in these appeals, and they can assist this Honourable Court with issues critical to their resolution.

16. The main issue in these appeals – the factors that ought to properly govern the real and substantial connection test – requires this Honourable Court to be mindful of the scope and parameters of the forum of necessity doctrine.

17. In its reasons for judgment in these appeals, the Court of Appeal for Ontario referred to *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 (CA) as an example of a proceeding where the forum of necessity doctrine could have provided the basis for jurisdiction.<sup>5</sup> Both Amnesty and CLAIHR were interveners in *Bouzari* and, as such, have detailed knowledge of the facts and principles that led the Court of Appeal for

---

<sup>4</sup> Appellant's factum, para 58-70.

<sup>5</sup> *Van Breda v Village Resorts Ltd*, 2010 ONCA 84 at para 54, **Authorities, Tab 12**.

Ontario to observe that jurisdiction could have been asserted in that case on the basis of necessity.

18. No other party to these appeals will present the international human rights implications of the forum of necessity doctrine.

19. No other party to these appeals is interested in, and mandated to advocate for, survivors of extraterritorial human rights violations who might rely on the forum of necessity doctrine to access justice in Canadian courts.

***Amnesty, CCIJ and CLAIHR's joint intervention will not cause undue prejudice***

20. Amnesty, CCIJ and CLAIHR take no position on the merits of these appeals. They do not seek to support or oppose either the Appellants or the Respondents.

21. Amnesty, CCIJ and CLAIHR have opted to seek leave to intervene together, rather than separately, in order to avoid unnecessary expense, duplication or delay.

22. There will be no prejudice to the parties herein if Amnesty, CCIJ and CLAIHR are granted leave to intervene together. In the alternative, if the parties are prejudiced by granting Amnesty, CCIJ and CLAIHR leave to intervene together, that prejudice will not be significant.

***Additional grounds***

23. Rules 47 and 55 of the *Rules of the Supreme Court of Canada*.

24. Such further or other grounds as counsel may advise and this Court may permit.

Dated at Ottawa, Ontario this 20th day of December 2010.

**François Larocque**

Telephone: 613-894-4783

Email: [FrancoisLarocque@uOttawa.ca](mailto:FrancoisLarocque@uOttawa.ca)

**HEENAN BLAIKIE LLP**

55 Metcalfe Street, Suite 300

Ottawa, ON K1P 6L5

**Mark Power**

Telephone: 613-236-7908

Fax: 866-296-8395

Email: [mpower@heenan.ca](mailto:mpower@heenan.ca)

*Counsel for the proposed interveners*

**HEENAN BLAIKIE LLP**

55 Metcalfe Street, Suite 300

Ottawa, ON K1P 6L5

**Lauren Wihak**

Telephone: 613-236-8073

Fax: 866-296-8395

Email: [lwihak@heenan.ca](mailto:lwihak@heenan.ca)

*Agent for the proposed interveners*

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the respondent may serve and file the response to the motion together with the response to the application for leave.

SCC File No. 33692

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

**BETWEEN:****CLUB RESORTS LTD.**

**APPELLANT**  
(Appellant in the Court of Appeal for Ontario)

– and –

**MORGAN VAN BREDa, VICTOR BERG, JOAN VAN BREDa, TONY VAN BREDa,  
ADAM VAN BREDa and TONILLE VAN BREDa**  
**RESPONDENTS**  
(Respondents in the Court of Appeal for Ontario)

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE  
CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS  
AMNESTY INTERNATIONAL**  
**PROPOSED INTERVENERS**

---

**AFFIDAVIT OF  
ANTOINETTE ISSA  
IN SUPPORT OF MOTION FOR INTERVENTION**

---

I, Antoinette Issa, of the City of Toronto, MAKE OATH AND SAY:

1. I am a member of the Board of Directors of Canadian Lawyers for International Human Rights (“CLAHR”) and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

**A. CLAIHR: Overview and Mission**

2. CLAIHR, a federally-incorporated registered charity, is a non-governmental organization of lawyers, law students and legal academics, among others, founded in 1992 to promote human rights law from a Canadian perspective through education and research, advocacy and law reform.

3. CLAIHR's organizational objectives include:

- a) Analyzing laws, institutions and practices affecting human rights;
- b) Contributing to the strengthening of international human rights instruments and institutions that protect human rights both domestically and internationally;
- c) Promoting awareness of international human rights issues among Canadians generally, and specifically within the Canadian legal community; and
- d) Supporting lawyers, legal organizations and others dedicated to achieving human rights.

4. The work of CLAIHR includes: assisting in the development of international law, by supporting and encouraging student involvement in research on matters of international human rights, hosting conferences and speakers on international law and related topics, intervening in court proceedings where questions of international law are being considered, including in how it is applied through domestic legislation and by domestic courts in Canada, promoting human rights education through awareness-raising events such as hosting panels of speakers debating human rights topics or through the support of films that address current human rights issues. CLAIHR also works closely with other groups dedicated to human rights advocacy such as the Law Society of Upper Canada, the University of Toronto Human Rights Clinic, the Human Rights and Education Research Centre at the University of Ottawa, Hotdocs Documentary Film Festival and the Canadian Centre for International Justice.

5. The members of CLAIHR have, among them, experience in matters which involve international law and redress for violations of international human rights, notably:



- a) As having worked for the International Criminal Tribunal for the former Yugoslavia concerning the Yugoslavia conflict;
  - b) As having acted for the prosecution, at trial and on appeal, before the International Criminal Tribunal for the former Yugoslavia in matters of persons charged with offences relating to the Yugoslavia conflict;
  - c) As having acted with the defence lawyers representing a person charged with matters falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia;
  - d) By drafting academic papers and publishing articles on matters of terrorism and international criminal law;
  - e) By lecturing and speaking on matters concerning international criminal law, genocide and terrorism;
  - f) By providing training to foreign prosecutors on procedure and trial issues that commonly arise in war crimes prosecutions.
6. Individuals with a deep and longstanding commitment to the defence of human rights have taken part in CLAIHR's activities and have given their endorsement to CLAIHR. For example, the Honourable Peter Cory and the Honourable Allan Rock have both participated in and are strong supporters of the work and efforts of CLAIHR.
7. CLAIHR is supported by an Advisory Committee composed of professors, lawyers and other experts on international law and human rights.
8. The interest of CLAIHR in matters concerning justice for violations of international law has been recognised as sufficient to grant it intervener status in the 2004 case of *Bouzari v Islamic Republic of Iran*, (2004) 71 OR (3d) 675 (CA). In that case, CLAIHR intervened for the purpose of assisting the Court of Appeal for Ontario with certain issues relating to the common law doctrine of state immunity, the international legal instruments to which Canada was a signatory, as well as the state of customary international law with respect to torture at that time.

**D. What CLAIHR is Seeking**

9. If permitted to intervene with the Canadian Centre for International Justice (“CCIJ”) and Amnesty International, CLAIHR seeks to make submissions on the following, limited issues:

a) The application of the “forum of necessity” doctrine at common law and under international law.

i. In the Court of Appeal judgment, Justice Sharpe concluded, “The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction.... Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.” *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 54 and 100.

b) The importance of the “forum of necessity” doctrine to survivors of torture, war crimes and other atrocities.

i. Many survivors are unable to seek justice in the countries where the abuses occurred because they would be at risk of violence or death or because the judicial systems in those countries are unable or unwilling to process such claims. In those situations, the Canadian courts truly are the forum of last resort, and as such, the survivors’ access to justice should not be blocked merely because they fall just outside the “real and substantial connection” test for jurisdiction.

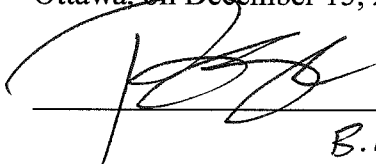
10. The issue of “forum of necessity,” addressed by the Court of Appeal, is of great importance in enforcing international human rights norms. If the “forum of necessity” doctrine is disturbed, it will greatly undermine the ability of some Canadians to seek relief for the most

severe human rights violations. As a result of its unique perspective from the work it carries out on issues of international human rights, CLAIHR can make a substantial contribution to the discussion of this issue.

11. If granted intervener status, CLAIHR, the CCIJ and Amnesty International would be jointly represented by counsel, and counsel would make one set of submissions on behalf of all three organizations.

12. I make this affidavit in support of CLAIHR'S joint motion for intervention with the CCIJ and Amnesty International and for no other or improper purpose.

SWORN BEFORE ME at the city of  
Ottawa, on December 15, 2010.

  
\_\_\_\_\_  
B. Luke  
U.B.

Commissioner for Taking Affidavits

  
\_\_\_\_\_  
Antoinette Issa

SCC File No. 33692

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

**BETWEEN:**

**CLUB RESORTS LTD.**

**APPELLANT**  
(Appellant in the Court of Appeal for Ontario)

– and –

**MORGAN VAN BREDa, VICTOR BERG, JOAN VAN BREDa, TONY VAN BREDa,  
ADAM VAN BREDa and TONILLE VAN BREDa**  
**RESPONDENTS**  
(Respondents in the Court of Appeal for Ontario)

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE  
CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS  
AMNESTY INTERNATIONAL**  
**PROPOSED INTERVENERS**

---

**AFFIDAVIT OF  
HILARY HOMES  
IN SUPPORT OF MOTION FOR INTERVENTION**

---

I, Hilary Homes, of the City of Ottawa, MAKE OATH AND SAY:

1. I am the Campaigner for International Justice, Security and Human Rights for Amnesty International (“AI”), Canadian Section, English Branch (“AI Canada”) and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

**A. Amnesty International: The Organization**

2. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to people's fundamental human rights.

3. AI is impartial and independent of any government, political persuasion or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding.

4. The organizational structure of AI Canada includes a board of 10 directors elected across the country, specific country and issue coordinators in each region and province and a membership of approximately 60,000.

5. There are currently 2.8 million members of AI in over 150 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 80 countries and territories the work of these groups is coordinated by national sections like AI Canada.

**B. Amnesty International: The Vision**

6. AI's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

7. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural and economic.

8. In 1977, AI was awarded the Nobel Peace Prize for our work in promoting international human rights.

**Promoting and Advancing International Human Rights**

9. AI seeks to advance and promote international human rights at both the international and national level. As part of its work to achieve this end, AI monitors and reports on human rights abuses, participates in international committee hearings, intervenes in domestic judicial proceedings, and prepares briefs for and participates in national legislative processes and

hearings. AI also prepares international and national reports for the purpose of educating the public on international human rights.

### **Monitoring and Documenting Human Rights Abuses**

10. AI's investigative work is carried out by human rights researchers who receive, cross-check and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, websites and other media outlets. As well, AI sends about 130 fact-finding missions to some 70 countries each year to directly assess what is happening on the ground. AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists and scholars.

11. Based on its research, AI publishes reports, briefing papers, newsletters and campaigning materials. Amongst its publications is the annual *Amnesty International Report* on human rights conditions in countries around the world.

12. These official reports by AI are often relied on as evidence by immigration review boards and in Canadian courts. For example, in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, Justice Tremblay-Lamer found "the [Minister's] delegate's blanket rejection of information from agencies with worldwide reputations for credibility, such as AI and [Human Rights Watch] ... puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources." Indeed, as Justice Tremblay-Lamer pointed out, "the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility." Similarly, in *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, the Federal Court allowed a judicial review of a Pre-Removal Risk Assessment ("PRRA") on the basis that the PRRA officer failed to consider a detailed analysis of the applicant's personal circumstances prepared by AI, whom the Court referred to as a "credible source." The Federal Court has also emphasized the important evidentiary role of AI reports in *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, and *Ertuk v. Canada (Minister of Citizenship and Immigration)*,

2004 FC 1118. Finally, in *Suresh v. Canada (Minister of Citizenship and Immigration, et al.)*, [2002] 1 S.C.R. 3, the Supreme Court of Canada relied on an AI report concerning Sri Lanka's torture of members of the Liberation Tigers of Tamil Eelam.

### **Participation in Judicial Proceedings**

13. AI has participated as an intervener and made submissions in numerous judicial proceedings both in Canada and elsewhere.

14. AI Canada has intervened on the issue of international human rights in several cases before the Supreme Court of Canada, including:

- (a) *Charkoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008] 2 S.C.R. 326 (AI Canada made submissions with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international norms and the constitutional principles of procedural fairness);
- (b) *Charkoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (AI Canada made submissions on the constitutionality of the procedural protections in IRPA's security certificate regime and on the arbitrary detention of foreign nationals under that regime);
- (c) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (AI Canada argued that the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);
- (d) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (AI Canada made submissions to the Court regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, to which the Court referred);

- (e) *United States v. Burns*, [2001] 1 S.C.R. 283 (AI Canada provided information to the Court on the significant international movement towards the abolition of capital punishment);
- (f) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (AI Canada provided information regarding the international movement towards the abolition of capital punishment); and
- (g) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (AI Canada provided information regarding the international movement towards the abolition of capital punishment).

15. Before the Ontario courts, AI Canada has intervened in *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration* (Court file No. C37565, February 8, 2002). AI Canada made submissions on Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

16. AI Canada has also intervened in cases specifically relating to the *State Immunity Act* and the access of torture survivors to civil remedies. Before the Ontario Court of Appeal, AI Canada intervened in *Bouzari v. Islamic Republic of Iran* (Court File No. C38295, June 30, 2004), which considered the right of a torture victim to sue for compensation from the offending government and the constitutional validity of the *State Immunity Act*. AI Canada also intervened in a similar lawsuit against Chinese officials accused of torture in *Zhang v. Zemin* (Court File No. 04-CV-278915CM2). Before the Superior Court of Quebec, AI Canada was granted intervener status in *Kazemi v. Islamic Republic of Iran* (Court File No. 500-17-031760-062), a case presently before the Superior Court of Quebec involving a similar claim for compensation against a foreign government.

17. AI Canada was also an applicant in two matters before the Federal Court concerning fundamental human rights issues. In *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, the applicants asserted that Canada's "safe third country" agreement with the United States was invalid and



unlawful because the United States fails to comply with its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("Convention against Torture"). In *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of The Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, the applicants asserted that Canada is in breach of its obligations under the *Convention against Torture* by transferring Afghan detainees into the custody of Afghan officials where they are at serious risk of torture or cruel, inhuman or degrading treatment.

18. AI Canada was also granted intervenor status in the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry"), where it made extensive submissions on the subject of security and human rights and met on numerous occasions with the Commissioner and/or Commission counsel.

19. Further, AI Canada was granted intervenor status in the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin ("Iacobucci Inquiry") where it made oral and written submissions on the substantive issues before the Commissioner on the source of applicable standards under international law; the prohibition against torture; providing or exchanging information and travel plans with foreign officials; the inadequacy of diplomatic assurances with respect to the use of torture; the prohibition against the use of information obtained through torture; communication, the provision of information, and assistance in questioning detained Canadians; requirement of consular officials to ensure that basic human rights are protected and the presumption of innocence of Canadians detained abroad, among other things.

20. AI has also made submissions on international human rights in judicial proceedings in other countries. AI was amicus curiae before the Supreme Court of the United States in *Boumediene v. Bush*; *Al Odah v. United States*, where AI argued that the suspension of habeas corpus under the Military Commissions Act of 2006 is unconstitutional under United States law and in violation of the United States' international obligations.

21. In 2006, the British House of Lords granted AI intervener status in *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26, an appeal concerning the applicability of the

European Convention on Human Rights and the UK's *Human Rights Act 1998* to the actions of British armed forces in Iraq. Other proceedings where AI has intervened include:

- (a) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] 2 UKHL 71, (regarding the admissibility of evidence obtained through torture);
- (b) *A and others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (regarding the admissibility of evidence obtained through torture);
- (c) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (regarding state immunity for international crimes); and
- (d) *Chahal v. United Kingdom*, [1997] 23 E.H.R.R. 413 (E.Ct.H.R.) (regarding the absolute prohibition against returning an individual to face a risk of torture).

### **Participation in Legislative Proceedings**

22. AI Canada has also sought to advance international human rights directly through the legislative process. AI Canada has submitted written and oral arguments to government officials, legislators and House and Senate committees on numerous human rights issues. Regarding the *State Immunity Act*, AI Canada wrote the Minister of Foreign Affairs in April 2005 calling on him and the Minister of Justice to, among other things, act immediately to amend the *State Immunity Act* to make it explicit that it does not act as a bar to civil lawsuits against foreign governments where damages are sought for acts which are subject to universal criminal law jurisdiction under international law.

### **Engagement with International Organizations**

23. AI has formal relations with the United Nations Economic and Social Council (ECOSOC), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe, the Organization of American States, and the Inter-Parliamentary Union.

24. AI Canada recently made the following submissions to various international organizations regarding human rights:

- (a) Amnesty International's submission to the fourth session of the Universal Period Review Working Group of the Human Rights Council, February 2009;
- (b) *Human Rights for All: No Exceptions* (Amnesty International's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17<sup>th</sup> and 18<sup>th</sup> Periodic Reports submitted by Canada), February 2007;
- (c) Amnesty International's Updated Briefing to United Nations Human Rights Committee with respect to the United States, July 2006;
- (d) Amnesty International's Supplementary Briefing to United Nations Committee Against Torture with respect to the United States, May 2006;
- (e) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (Amnesty International Canada's Submissions to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada), 2005.

25. These international bodies recognize and trust AI's experience and objectivity, and value its unique perspective. As Jean-Pierre Hocke, former United Nations High Commissioner for Refugees, noted, "It's a worn cliché but if Amnesty did not exist, it would have to be invented. It is simply unique."

#### **Expertise on Civil Remedies for Torture**

26. The *International Covenant on Civil and Political Rights* obliges State parties to ensure that any person whose human rights are violated shall have an effective remedy (Article 2(3)(a)). Article 14 of the *Convention against Torture* specifically provides that 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." Recent practice of the Committee against Torture, the expert body that monitors implementation of the *Convention against Torture*, demonstrates that states parties have an obligation to provide victims with a forum to obtain

reparations for torture, regardless of where it occurred and regardless whether the victim is a national of the forum state.

27. Throughout more than four decades of investigating, documenting and reporting human rights violations around the world, AI has highlighted issues regarding the right to an effective remedy for victims of human rights violations in countries on every continent. AI has repeatedly underscored the central role that remedies play in ensuring respect for human rights and deterring future violations. In particular, AI has consistently advocated for the exercise of adjudicative universal jurisdiction over civil tort claims, including those based on genocide, crimes against humanity, war crimes, torture and other crimes and serious violations of human rights under international law, without requiring a link between the tort or underlying crime and the forum state.

28. AI has actively participated in the debate regarding the right to an effective remedy for human rights violations at the international level and in a number of countries and as a result has first-hand knowledge of the various ways different countries have attempted to give effect to this right in domestic legislation. AI Canada has also played a prominent role in promoting the right to compensation for human rights violations in a number of cases in Canada, including the *Bouzari*, *Kazemi* and *Zhang* cases, as highlighted above.

29. As a result of our longstanding and ongoing work on the issue of remedies for human rights violations, AI has developed a unique expertise on the provision of civil remedies for crimes under international law committed abroad.

### **C. Amnesty International as a Proposed Intervener**

30. If permitted to intervene with the Canadian Centre for International Justice (“CCIJ”) and Canadian Lawyers for International Human Rights (“CLAHR”), Amnesty International seeks to make submissions on the following, limited issues:

- a) The application of the “forum of necessity” doctrine at common law and under international law.

i. In the Court of Appeal judgment, Justice Sharpe concluded, “The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction.... Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.” *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 54 and 100.

b) The importance of the “forum of necessity” doctrine to survivors of torture, war crimes and other atrocities.

i. Many survivors are unable to seek justice in the countries where the abuses occurred because they would be at risk of violence or death or because the judicial systems in those countries are unable or unwilling to process such claims. In those situations, the Canadian courts truly are the forum of last resort, and as such, the survivors’ access to justice should not be blocked merely because they fall just outside the “real and substantial connection” test for jurisdiction.

31. The issue of “forum of necessity,” addressed by the Court of Appeal, is of great importance in enforcing the right to an effective remedy. If the “forum of necessity” doctrine is disturbed, it will greatly undermine the ability of some Canadians to seek relief for the most severe human rights violations. As a result of its unique perspective from the work it carries out on issues of international human rights, Amnesty International can make a substantial contribution to the discussion of this issue.

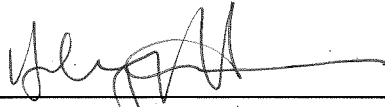
32. If granted intervener status, Amnesty International, the CCIJ and CLAIHR would be jointly represented by counsel, and counsel would make one set of submissions on behalf of all three organizations.

33. I make this affidavit in support of the Amnesty International's joint motion for intervention with the CCIJ and CLAIHR and for no other or improper purpose.

SWORN BEFORE ME at the city of  
Ottawa, on December 15, 2010.



Michael Bossin  
Commissioner for Taking Affidavits



Hilary Homes

**MICHAEL BOSSIN**  
Barrister & Solicitor

SCC File No. 33692

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

**BETWEEN:****CLUB RESORTS LTD.**

**APPELLANT**  
(Appellant in the Court of Appeal for Ontario)

– and –

**MORGAN VAN BREDa, VICTOR BERG, JOAN VAN BREDa, TONY VAN BREDa,  
ADAM VAN BREDa and TONILLE VAN BREDa**  
**RESPONDENTS**  
(Respondents in the Court of Appeal for Ontario)

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE  
CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS  
AMNESTY INTERNATIONAL**  
**PROPOSED INTERVENERS**

---

**AFFIDAVIT OF  
MATTHEW EISENBRANDT  
IN SUPPORT OF MOTION FOR INTERVENTION**

---

I, Matthew Eisenbrandt, of the City of Ottawa, MAKE OATH AND SAY:

1. I am the Legal Coordinator for the Canadian Centre for International Justice (“CCIJ”) and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

**A. The CCIJ: Overview and Mission**

2. The CCIJ, a federally-incorporated registered charity, is a non-governmental organization that works with survivors of genocide, torture and other atrocities to seek redress and bring perpetrators to justice.

3. The CCIJ is the only Canadian organization primarily dedicated to (a) supporting survivors of genocide, torture and other severe human rights violations in their pursuit of justice; and (b) seeking and promoting accountability for torturers, war criminals and other human rights abusers. The CCIJ assists survivors and families with connections to Canada and supports the criminal and civil prosecutions of those responsible for genocide, torture and other serious human rights violations.

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

- a) providing information, assistance and direction to survivors of human rights abuses 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 torturers, war criminals and other perpetrators of severe human rights abuses, 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 serious human rights abuses.



5. The CCIJ interacts directly with survivors of genocide, torture and other severe human rights abuses. It has experience in supporting these survivors and their families, providing information about remedies and assisting them in seeking redress.

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

7. The CCIJ has extensive knowledge of civil remedies for survivors in Canadian courts. In particular, the CCIJ has expertise on jurisdictional issues, most specifically the Canadian statutory and common law of state immunity and particularly the *State Immunity Act*, R.S.C. c. S-18. This knowledge has been obtained and conveyed through CCIJ activities, including actively participating in civil lawsuits against alleged human rights violators; advocating reform of the *State Immunity Act*; educating government officials, lawyers and students on civil remedies; and undertaking extensive research on jurisdiction, state immunity, victims' rights, Canada's international obligations and law reform.

8. 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, Mr. Maher Arar, Dr. Lloyd Axworthy, Dr. Ed Broadbent, Ms. Erna Paris and Judge Philippe Kirsch.

9. The CCIJ is also supported by an Advisory Committee and regional Working Groups composed of professors, lawyers and other experts on international law, human rights, accountability, civil litigation, refugee issues and immigration.

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

11. Prior to joining the CCIJ, I was the Legal Director for a similar organization in the United States, the Center for Justice and Accountability (“CJA”). In that job, I litigated several civil lawsuits on behalf of survivors against alleged torturers and war criminals, including as CJA’s lead counsel in two jury trials and two hearings on damages. As a result, I have extensive experience with civil litigation and the benefits experienced by survivors in having access to civil redress. In particular, I was involved in cases that dealt significantly with jurisdictional issues and addressed the fact that my clients could not obtain redress in the countries where the abuses happened. For example, CJA brought suit on behalf of a relative of slain Salvadoran archbishop Oscar Romero against one of the people, then residing in the United States, responsible for the murder. We were required to prove that the case could not proceed in El Salvador because of the threat of danger and deficiencies in the Salvadoran justice system, thereby making the U.S. court the proper venue. *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D.Cal. 2004). CJA also filed a lawsuit against a former Defense Minister from Somalia who argued he was immune from claims of torture and other human rights violations. The U.S. Supreme Court recently denied the defendant immunity. *Yousuf v. Samantar*, 130 S. Ct. 2278 (2010).

#### **B. Recent Work by the CCIJ**

12. Since its inception in 2000, the CCIJ has actively and consistently promoted accountability for human rights abuses, including the right to civil redress for survivors. Some of the CCIJ’s work in this regard includes:

- Hosting a two-day workshop on civil remedies for torture survivors in Canada with the participation of numerous experts on civil litigation, international law, human rights, jurisdiction and the *State Immunity Act*;
- Acting on the Board of Directors for an association of victims’ families currently seeking class certification in Québec Superior Court with regard to civil redress for a massacre in the Democratic Republic of Congo in which a Canadian company is alleged to have played a role;
- Working directly with survivors of serious human rights violations on an ongoing basis to hear their stories, investigate their cases and assist them in seeking redress;

- Undertaking a major campaign to amend the *State Immunity Act* – and thereby allow greater opportunities for survivors of torture to seek civil redress in Canadian courts – by testifying before the Subcommittee on International Human Rights of the House of Commons Standing Committee on Foreign Affairs and International Development, drafting proposed legislation and meeting with MPs and other government officials;
- Intervening in select cases, listed below, to support the ability of survivors to have access to Canadian courts in order to seek redress;
- Providing continuing legal education courses in several Canadian cities on civil and criminal liability, particularly in Canadian courts, for war crimes, genocide and torture;
- Developing legal resources and research regarding civil, criminal and immigration case law in the prosecution of torturers and war criminals; and
- Promoting educational and outreach initiatives to raise awareness of accountability issues, including participating in conferences and workshops, and providing numerous presentations to stakeholders.

**C. Other Interventions by the CCIJ**

13. The interest of the CCIJ has been recognised as sufficient to grant it intervener status in the following cases:

- In 2005, the Supreme Court of Canada granted the CCIJ leave to intervene in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, a case in which the Court ordered the deportation of a permanent resident who was alleged to have incited and advocated genocide in Rwanda;
- In 2009, the CCIJ intervened in a civil lawsuit in Québec Superior Court against the Government of Iran and individual Iranian officials for their role in the torture and murder of Canadian citizen Zahra Kazemi (Court File No. 500-17-031760-062); and,

- In 2009, the CCIJ intervened in a civil lawsuit in Ontario Superior Court against Chinese government officials for their role in the torture of *inter alia*, a Canadian citizen (Court File No. 04-CV-278915CM2).

#### **D. What the CCIJ is Seeking**

14. If permitted to intervene with Canadian Lawyers for International Human Rights (“CLAIHR”) and Amnesty International, the CCIJ seeks to make submissions on the following, limited issues:

- a) The application of the “forum of necessity” doctrine at common law and under international law.
  - i. In the Court of Appeal judgment, Justice Sharpe concluded, “The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction.... Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.” *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 54 and 100.
- b) The importance of the “forum of necessity” doctrine to survivors of torture, war crimes and other atrocities.
  - i. Many survivors are unable to seek justice in the countries where the abuses occurred because they would be at risk of violence or death or because the judicial systems in those countries are unable or unwilling to process such claims. In those situations, the Canadian courts truly are the forum of last resort, and as such, the survivors’ access to justice should not


be blocked merely because they fall just outside the “real and substantial connection” test for jurisdiction.


15. The issue of “forum of necessity,” addressed by the Court of Appeal, is of great importance to the individuals and families the CCIJ supports. If the “forum of necessity” doctrine is disturbed, it will greatly undermine the ability of some Canadians to seek relief for the most severe human rights violations. As a result of its unique perspective from the work it carries out on behalf of survivors and families, the CCIJ can make a substantial contribution to the discussion of this issue.

16. If granted intervener status, the CCIJ, CLAIHR and Amnesty International would be jointly represented by counsel, and counsel would make one set of submissions on behalf of all three organizations.

17. I make this affidavit in support of the CCIJ’s joint motion for intervention with CLAIHR and Amnesty International and for no other or improper purpose.

SWORN BEFORE ME at the city of  
Ottawa, on December 15, 2010.

  
\_\_\_\_\_  
Michael Bossin  
Commissioner for Taking Affidavits

  
\_\_\_\_\_  
Matthew Eisenbrandt

**MICHAEL BOSSIN**  
Barrister & Solicitor

SCC File No. 33692 / 33606

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

**BETWEEN:**

**CLUB RESORTS LTD.**

APPELLANT

– and –

**MORGAN VAN BRED, VICTOR BERG, JOAN VAN BRED, TONY VAN  
BRED, ADAM VAN BRED and TONILLE VAN BRED**

RESPONDENTS

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

PROPOSED INTERVENERS

---

**FACTUM IN SUPPORT OF THE MOTION FOR LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: FrancoisLarocque@uOttawa.ca

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: lwihak@heenan.ca

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: mpower@heenan.ca

*Agent for the proposed interveners*

*Counsel for the proposed interveners*

SCC File No. 33606

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

**BETWEEN:****CLUB RESORTS LTD.**

APPELLANT

– and –

**ANNA CHARRON, ESTATE TRUSTEE OF THE ESTATE OF CLAUDE  
CHARRON, DECEASED, THE SAID ANNA CHARRON, PERSONALLY, et  
al.**

RESPONDENTS

– and –

**CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN  
LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY  
INTERNATIONAL**

PROPOSED INTERVENERS

---

**FACTUM IN SUPPORT OF THE MOTION FOR LEAVE TO INTERVENE**

---

**François Larocque**  
Telephone: 613-894-4783  
Email: FrancoisLarocque@uOttawa.ca

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**HEENAN BLAIKIE LLP**  
55 Metcalfe Street, Suite 300  
Ottawa, ON K1P 6L5

**Lauren Wihak**  
Telephone: 613-236-8073  
Fax: 866-296-8395  
Email: lwihak@heenan.ca

**Mark Power**  
Telephone: 613-236-7908  
Fax: 866-296-8395  
Email: mpower@heenan.ca

*Agent for the proposed interveners*

*Counsel for the proposed interveners*

## INDEX

<b>PART I – THE FACTS</b>	1
(i) Overview	1
(ii) Amnesty, CCIJ and CLAIHR	2
a. <i>Amnesty International</i>	2
b. <i>Canadian Centre for International Justice</i>	3
c. <i>Canadian Lawyers for International Human Rights</i>	4
<b>PART II – ISSUES</b>	6
<b>PART III – LAW AND ARGUMENTS</b>	6
(i) Position of Amnesty, CCIJ and CLAIHR	6
(ii) Survivors of human rights abuse have a direct interest in these appeals	8
(iii) The position of Amnesty, CCIJ and CLAIHR is different from that of the parties	8
(iv) Amnesty, CCIJ and CLAIHR’s joint submissions will be relevant and useful to this Honourable Court in addressing the issues raised in these appeals	9
(v) Amnesty, CCIJ and CLAIHR’s joint intervention will not cause Prejudice or undue prejudice	9
<b>PART IV – SUBMISSIONS ON COSTS</b>	10
<b>PART V – ORDER SOUGHT</b>	10



## PART I – THE FACTS

### (i) Overview

1. These appeals concern the principles governing the adjudicative jurisdiction of Canadian courts in civil proceedings, involving foreign defendants and extraterritorial injuries.

2. A five-judge panel of the Court of Appeal for Ontario held that it was appropriate to modify and clarify the principles it had laid down in *Muscutt v Courcelles*, “in light of the post-*Muscutt* changes to the legal landscape”.<sup>1</sup> One of these changes includes, notably, the emergence of the doctrine of forum of necessity.

3. Amnesty International, the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (“Amnesty, CCIJ and CLAHR”) seek to intervene in these appeals in order make submissions pertaining exclusively to the doctrine of forum of necessity, its origins in Canadian and international law, its rationale, and its high importance to survivors of extraterritorial human rights abuses who have no other jurisdiction in which to obtain redress.

4. More specifically, if granted leave to intervene, Amnesty, CCIJ and CLAHR intend to submit: (1) that the forum of necessity doctrine ought to be explicitly recognized at common law as an exception to the real and substantial connection test; and (2) that its parameters ought to be defined so as to permit Canadian courts, in exceptional cases, to take jurisdiction over civil claims relating to grave breaches of international human rights, in order to avoid a denial of justice where no other jurisdiction exists in which the plaintiff may reasonably seek a remedy.

5. In its reasons for judgment in these appeals, the Court of Appeal for Ontario referred to *Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.) as an example of a proceeding where the forum of necessity doctrine could have provided the basis for

---

<sup>1</sup>*Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at para 70 (C.A.), **Book of authorities in support of the motion for leave to intervene (hereafter “Authorities”), Tab 9.**

jurisdiction.<sup>2</sup> Both Amnesty and CLAIHR were interveners in *Bouzari* and, as such, have detailed knowledge of the facts and principles that led the Court of Appeal for Ontario to observe that jurisdiction could have been asserted on the basis of necessity.

6. No other party to these appeals will present the international human rights implications of the forum of necessity doctrine.

7. Amnesty, CCIJ and CLAIHR have considerable experience before courts and tribunals, both as applicants and as interveners, on a range of issues relating to jurisdiction, access to justice, and Canada's international human rights obligations. Their submissions will be unique, relevant, and useful, and will cause no prejudice to the parties.

**(ii) *Amnesty, CCIJ and CLAIHR***

8. Amnesty, CCIJ and CLAIHR are non-profit organizations that advocate for the respect and application of Canada's international human rights obligations, and the right of survivors of grave human rights violations to access justice and obtain adequate redress. Each organization will be discussed in turn.

**a. *Amnesty International***

9. Founded in 1961, Amnesty International ("Amnesty") is a worldwide voluntary movement working to prevent some of the gravest violations of fundamental human rights. Amnesty is impartial and independent of any government, political persuasion, or religious creed. Amnesty is financed by subscriptions and donations from its worldwide membership, and receives no government funding. Amnesty has currently 2.8 million members in over 150 countries. There are more than 7,500 Amnesty groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world.<sup>3</sup>

10. In 1977, Amnesty was awarded the Nobel Peace Prize for its work in promoting international human rights. Amnesty's vision is of a world in which every person enjoys all of

---

<sup>2</sup>*Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 54, **Authorities, Tab 12**.

<sup>3</sup>Affidavit of Hilary Homes, sworn December 15th, 2010 ("Homes Affidavit"), **Proposed Intervenors' Motion Record, Tab 3, para. 2-5**.

the human rights enshrined in the Universal Declaration of Human Rights and protected under international human rights law.<sup>4</sup>

11. In pursuit of this vision, Amnesty's mission is to monitor, document, and take action to prevent and end grave abuses of all civil, political, social, cultural, and economic human rights. Amnesty actively participates in the work of international human rights organisations, national legislative bodies, commissions of inquiry, and national courts, always with the view of promoting respect for and the enforcement of international human rights law.<sup>5</sup>

12. Amnesty has intervened in several cases relating to human rights, access to justice and jurisdiction, including: *Charkoui v Canada (MCI) No. 2*, [2008] 2 S.C.R. 326; *Schreiber v Canada (AG)*, [2002] 3 S.C.R. 269; *Suresh v Canada (MCI)*, [2002] 1 S.C.R. 3; *Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (CA); and *Kazemi v Islamic Republic of Iran* (Quebec Superior Court, File No. 500-17-031760-062; presently under reserve).<sup>6</sup>

#### **b. Canadian Centre for International Justice**

13. The Canadian Centre for International Justice ("CCIJ") is a non-governmental organization that works with survivors of genocide, torture, and other atrocities to seek redress and bring perpetrators to justice. The CCIJ is the only Canadian organization primarily dedicated to (a) supporting survivors of genocide, torture and other severe human rights violations in their pursuit of justice; and (b) seeking and promoting accountability for torturers, war criminals and other human rights abusers. The CCIJ assists survivors and families with connections to Canada and supports the criminal and civil prosecutions of those responsible for genocide, torture and other serious human rights violations.<sup>7</sup>

14. More specifically, the CCIJ's mission consists of (a) providing information, assistance and direction to survivors of human rights abuses and families of victims, carrying out or facilitating the research and investigations of their cases, and compiling cases to be brought to the attention of the Canadian Government or other authorities or to be filed in Canadian courts;

<sup>4</sup>Homes Affidavit, **Proposed Interveners' Motion Record, Tab 3, para. 6-8.**

<sup>5</sup>Homes Affidavit, **Proposed Interveners' Motion Record, Tab 3, para. 9-12, 22-29.**

<sup>6</sup>Homes Affidavit, **Proposed Interveners' Motion Record, Tab 3, para. 13-21.**

<sup>7</sup>Affidavit of Matthew Eisenbrandt, sworn December 15<sup>th</sup>, 2010 ("Eisenbrandt Affidavit"), **Proposed Interveners' Motion Record, Tab 4, para. 2-3.**

(b) providing support for government initiatives leading to the prosecution in Canada of torturers, war criminals, and other perpetrators of severe human rights abuses, 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 providing 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 serious human rights abuses.<sup>8</sup>

15. Individuals with a deep and longstanding commitment to the defence of human rights have taken part in the CCIJ's activities, and have given them their endorsement. The CCIJ's Honorary Council includes the Honourable Louise Arbour, the Honourable Claire L'Heureux-Dubé, the Honourable Flora MacDonald, and Judge Philippe Kirsch.<sup>9</sup>

16. The CCIJ interacts directly with survivors of genocide, torture and other severe human rights abuses. It has extensive experience and knowledge in supporting survivors and their families, and assisting them in seeking redress through education and advocacy before legislative and judicial bodies.<sup>10</sup>

17. The CCIJ has intervened in a number of cases relating to human rights, access to justice and jurisdiction, including *Mugesera v Canada (MCI)*, [2005] 2 S.C.R. 100 and *Kazemi v Islamic Republic of Iran* (Quebec Superior Court, File No. 500-17-031760-062; presently under reserve).<sup>11</sup>

### **c. Canadian Lawyers for International Human Rights**

18. Founded in 1992 to promote human rights law from a Canadian perspective through education and research, advocacy, and law reform, Canadian Lawyers for International Human

---

<sup>8</sup>Eisenbrandt Affidavit, Proposed Interveners' Motion Record, Tab 4, para. 4.

<sup>9</sup>Eisenbrandt Affidavit, Proposed Interveners' Motion Record, Tab 4, para. 8.

<sup>10</sup>Eisenbrandt Affidavit, Proposed Interveners' Motion Record, Tab 4, para. 5-12.

<sup>11</sup>Eisenbrandt Affidavit, Proposed Interveners' Motion Record, Tab 4, para. 13.

Rights (“CLAIHR”) is a non-governmental organization of, among others, lawyers, law students and legal academics.<sup>12</sup>

19. CLAIHR’s organizational objectives include (a) analyzing laws, institutions and practices affecting human rights; (b) contributing to the strengthening of international human rights instruments and institutions that protect human rights, both domestically and internationally; (c) promoting awareness of international human rights issues among Canadians generally, and within the Canadian legal community specifically; (d) supporting lawyers, legal organizations, and others dedicated to achieving human rights.<sup>13</sup>

20. The work of CLAIHR includes assisting in the development of international law, by supporting and encouraging student involvement in research on matters of international human rights; hosting conferences and speakers on international law and related topics; intervening in court proceedings where questions of international law are being considered, including the question of how to apply international law through domestic legislation and by domestic courts; promoting human rights education through awareness-raising events such as hosting panels of speakers debating human rights topics; or through supporting films that address current human rights issues.<sup>14</sup>

21. Individuals with a deep and longstanding commitment to the defence of human rights have taken part in CLAIHR’s activities, and have given them their endorsement including the Honourable Peter Cory and the Honourable Allan Rock.<sup>15</sup>

22. CLAIHR’s interest in matters concerning justice for violations of international law was recognised by the Court of Appeal for Ontario as being sufficient to warrant granting it intervener status in *Bouzari v Islamic Republic of Iran*, (2004) 71 O.R. (3d) 675 (C.A.). CLAIHR intervened for the purpose of assisting the Court of Appeal for Ontario with certain issues relating to the common law doctrine of state immunity, the international legal instruments

---

<sup>12</sup>Affidavit of Antoinette Issa, sworn December 15<sup>th</sup>, 2010 (“Issa Affidavit”), **Proposed Interveners’ Motion Record, Tab 2, para. 2-3.**

<sup>13</sup>Issa Affidavit, **Proposed Interveners’ Motion Record, Tab 2, para. 3.**

<sup>14</sup>Issa Affidavit, **Proposed Interveners’ Motion Record, Tab 2, para. 4.**

<sup>15</sup>Issa Affidavit, **Proposed Interveners’ Motion Record, Tab 2, para. 6.**

to which Canada was a signatory, and the state of customary international law with respect to torture at that time.<sup>16</sup>

## PART II –ISSUES

23. The issue for consideration by this Honorable Court is whether Amnesty, CCIJ and CLAIHR should be granted joint intervener status and permitted to file a single factum and make joint oral arguments in these appeals.

## PART III – LAW AND ARGUMENTS

### (i) *Position of Amnesty, CCIJ and CLAIHR*

24. These appeals concern the principles that govern the adjudicative jurisdiction of Canadian courts in civil proceedings involving foreign defendants and extraterritorial injuries.

25. A five-judge panel of the Court of Appeal for Ontario has held that it was appropriate to modify and clarify the principles it laid down in *Muscutt v Courcelles* “in light of the post-*Muscutt* changes to the legal landscape”,<sup>17</sup> including notably the emergence of the doctrine of forum of necessity.

26. The forum of necessity doctrine “allows the forum to take jurisdiction in cases despite the absence of a real and substantial connection where there is no other forum in which the plaintiff could reasonably seek relief.”<sup>18</sup> The Court of Appeal for Ontario held that, in exceptional cases, the forum of necessity doctrine “operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction”.<sup>19</sup>

27. The doctrine of forum of necessity is rooted in the constitutional imperatives of order and fairness, and allows claimants to access justice in cases where justice would otherwise be denied.

---

<sup>16</sup> Issa Affidavit, **Proposed Intervenors’ Motion Record, Tab 2, para. 8.**

<sup>17</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 70, **Authorities, Tab 12.**

<sup>18</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 54, **Authorities, Tab 12.**

<sup>19</sup> *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 100, **Authorities, Tab 12.**

28. When accessible, Canadian courts can provide survivors of grave extraterritorial human rights violations with an opportunity to obtain justice, and ensure that Canada complies with its conventional and customary international legal obligations.
29. Amnesty, CCIJ and CLAIHR seek to intervene in these appeals in order make joint submissions pertaining exclusively to the doctrine of forum of necessity, its origins in Canadian and international law, its rationale, and its high importance to survivors of extraterritorial human rights abuses who have no other jurisdiction in which to obtain redress.
30. Specifically, if granted leave to intervene, Amnesty, CCIJ and CLAIHR will argue:
- a. that the forum of necessity doctrine ought to be explicitly recognized at common law as an exception to the real and substantial connection test;
  - b. that the forum of necessity doctrine's parameters ought to be defined so as to permit Canadian courts, in exceptional cases, to take jurisdiction over civil claims relating to grave breaches of international human rights, and to avoid a denial of justice where no other jurisdiction exists in which the plaintiff may reasonably seek a remedy.
31. These arguments will be grounded, *inter alia*, on established Canadian authorities relating to jurisdiction *simpliciter* and forum of necessity<sup>20</sup>, including both Canadian<sup>21</sup> and foreign<sup>22</sup> legislation, international law<sup>23</sup> and doctrine<sup>24</sup>. The Appellants have not canvassed these authorities in their factum.

<sup>20</sup>*Morguard Investments Ltd v. De Savoye*, [1990] 3 S.C.R. 1077, **Authorities, Tab 7**; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, **Authorities, Tab 3**; *Lamborghini (Canada) Inc v. Automobili Lamborghini SPA*, [1997] R.J.Q. No. 58 (CA) (QL), **Authorities, Tab 6**; *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84, **Authorities, Tab 12**; *Kahlon v. Cheecham*, [2010] O.J. No. 1584 (S.C.J.) (QL), **Authorities, Tab 4**.

<sup>21</sup>*Civil Code of Quebec*, S.Q. 1991, c 64, article 3136; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, article 6; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c 2, article 7; *Canadian Bill of Rights*, SC 1960, c 4, article 2(e).

<sup>22</sup>*Loi fédérale sur le droit international privé*, 1987, c 291 (Suisse), article 3.

<sup>23</sup>*European Convention of Human Rights*, ETS No 5, 213 UNTS 221 (11 November 1950), article 6; *Universal Declaration on Human Rights*, UN GA res. 217A (III), UN Doc A/810 (10 December 1948), articles 8 and 10.

<sup>24</sup>Janet Walker, "Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 *Can. Bus. L. J.* 135; John P McEvoy, "Forum of Necessity in Quebec Private International Law: C.c.Q. art. 3136" (2005) 35 *RGD* 61.

**(ii) *Survivors of human rights abuses have a direct interest in these appeals***

32. Many of the survivors of human rights violations for whom Amnesty, CCIJ and CLAIHR advocate are unable to seek justice in the countries where the abuses occurred, because they would be at risk of violence or death, or because the judicial systems in those countries are unable or unwilling to process their claims. In those exceptional situations, Canadian courts truly are the forum of last resort and, as such, survivors' ability to access justice should not be blocked merely because they fail to satisfy the real and substantial connection test.

33. The manner in which this Honourable Court will define the forum of necessity doctrine in these appeals, particularly as it relates to the real and substantial connection test, will directly affect the ability of survivors of extraterritorial human rights violations to seek redress in Canadian courts.

**(iii) *The position of Amnesty, CCIJ and CLAIHR is different from that of the parties***

34. The submissions advanced by Amnesty, CCIJ and CLAIHR are different from that of the parties in these appeals, and will be useful to this Court. Neither the Appellant nor the Respondents represent persons who have survived human rights abuses. Amnesty, CCIJ and CLAIHR are the leading organizations in Canada in their field, and will provide this Honourable Court with a unique perspective that would not otherwise be canvassed by the parties.

35. Furthermore, in its factum the Appellant refers only to the forum of necessity doctrine in broad terms and only in relation to the ability of a litigant to make full answer and defense.<sup>25</sup> The Appellant makes no argument whatsoever relating to the manner in which the forum of necessity doctrine impacts the ability of survivors of human rights abuses to access justice.

---

<sup>25</sup>Appellant's factum, para 58-70.



(iv) *Amnesty, CCIJ and CLAIHR's joint submission will be relevant and useful to this Honourable Court in addressing the issues raised in these appeals*

36. Amnesty, CCIJ and CLAIHR have a useful and different perspective. They have special expertise and interest with respect to the issues in these appeals, and can offer assistance to this Honourable Court on issues critical to their determination.

37. The main issue in these appeals – the factors that ought to properly govern the real and substantial connection test – requires this Honourable Court to be mindful of the scope and parameters of the forum of necessity doctrine.

38. In its reasons for judgment in these cases, the Court of Appeal for Ontario referred to *Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (CA) as an example of a proceeding where the forum of necessity doctrine provided the basis for jurisdiction.<sup>26</sup> Both Amnesty and CLAIHR were interveners in the *Bouzari* case and, as such, have detailed knowledge of the facts and principles that led the Court of Appeal for Ontario to observe that jurisdiction could have been asserted on the basis of necessity.

39. No other party to these appeals will present the international human rights implications of the forum of necessity doctrine.

40. No other party to these appeals is interested in, and mandated to advocate for, survivors of extraterritorial human rights violations who rely on the forum of necessity doctrine to access justice in Canadian courts.

(v) *Amnesty, CCIJ and CLAIHR's joint intervention will not cause prejudice or undue prejudice*

41. Amnesty, CCIJ and CLAIHR take no position on the merits of these appeals. They do not seek to support or oppose either the Appellants or the Respondents.

---

<sup>26</sup>*Van Breda v. Village Resorts Ltd*, 2010 ONCA 84 at para 54, **Authorities, Tab 12**.

42. Amnesty, CCIJ and CLAIHR have opted to seek leave to intervene together, rather than separately, in order to avoid unnecessary expense, duplication or delay.

43. There will be no prejudice to the parties if Amnesty, CCIJ and CLAIHR are granted leave to intervene together. In the alternative, if the parties are prejudiced by granting Amnesty, CCIJ and CLAIHR leave to intervene together, that prejudice will not be significant.

#### **PART IV – SUBMISSIONS ON COSTS**

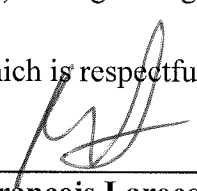
44. Amnesty, CCIJ and CLAIHR are non-profit organizations. They do not seek costs on this motion and request that no costs be ordered against them.

#### **PART V – ORDER SOUGHT**

45. Amnesty, CCIJ and CLAIHR request an order:

- (a) granting Amnesty, CCIJ and CLAIHR leave to intervene in these appeals;
- (b) permitting Amnesty, CCIJ and CLAIHR to file a single factum of no more than twenty (20) pages in length;
- (c) permitting Amnesty, CCIJ and CLAIHR to make joint oral submissions at the hearing of these appeals; and
- (d) granting any further relief as the said Judge may deem appropriate.

All of which is respectfully submitted on this 20<sup>th</sup> day of December 2010.

  
**François Larocque**  
 Telephone: 613-894-4783  
 Email: FrancoisLarocque@uOttawa.ca

**HEENAN BLAIKIE LLP**  
 55 Metcalfe Street, Suite 300  
 Ottawa, ON K1P 6L5

**Mark Power**  
 Telephone: 613-236-7908  
 Fax: 866-296-8395  
 Email: mpower@heenani.ca

*Counsel for the proposed interveners*

**HEENAN BLAIKIE LLP**  
 55 Metcalfe Street, Suite 300  
 Ottawa, ON K1P 6L5

**Lauren Wihak**  
 Telephone: 613-236-8073  
 Fax: 866-296-8395  
 Email: lwihak@heenani.ca

*Agent for the proposed interveners*

## PART VI – TABLE OF AUTHORITIES

Tab	Caselaw	Para. cited
1.	<i>Bouzari v Islamic Republic of Iran</i> (2004), 71 O.R. (3d) 675 (C.A.)	5, 12, 22
2.	<i>Charkoui v Canada (MCI)</i> No. 2, [2008] 2 SCR 326	12
3.	<i>Hunt v T&amp;N plc</i> , [1993] 4 S.C.R. 289	31
4.	<i>Kahlon v Cheecham</i> , [2010] O.J. No. 1584 (SCJ)	31
5.	<i>Kazemi v Islamic Republic of Iran</i> (Quebec Superior Court, File No. 500-17-031760-062; presently under reserve)	12, 17
6.	<i>Lamborghini (Canada) Inc v Automobili Lamborghini SPA</i> , [1997] R.J.Q. 58 (C.A.)	31
7.	<i>Morguard Investments Ltd v De Savoye</i> , [1990] 3 S.C.R. 1077	31
8.	<i>Mugesera v Canada (MCI)</i> , [2005] 2 S.C.R. 100	17
9.	<i>Muscutt v Courcelles</i> (2002), 60 O.R. (3d) 20 (C.A.)	2
10.	<i>Schreiber v Canada (AG)</i> , [2002] 3 S.C.R. 269	12
11.	<i>Suresh v Canada (MCI)</i> , [2002] 1 S.C.R. 3	12
12.	<i>Van Breda v Village Resorts Ltd</i> , 2010 ONCA 84	5, 25, 26, 31

## PART VII – STATUTE, REGULATION, LEGISLATION, RULE

<b>Civil Code of Québec, S.Q. 1991, c. 64</b> <b>3136.</b> Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required. 1991, c. 64, a. 3136.	<b>Code civil du Québec, L.Q. 1991, c. 64</b> <b>3136.</b> Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec. 1991, c. 64, a. 3136.
--	--

**Court Jurisdiction and  
Proceedings Transfer Act, S.B.C.  
2003, c. 28**

**Residual discretion**

**6** A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

- (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
- (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

**Ordinary residence — corporations**

**7** A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in British Columbia,
- (b) pursuant to law, it
  - (i) has registered an address in British Columbia at which process may be served generally, or
  - (ii) has nominated an agent in British Columbia upon whom process may be served generally,
- (c) it has a place of business in British Columbia, or
- (d) its central management is exercised in British Columbia.

**Canadian Bill of Rights, S.C. 1960,  
c. 44, article 2(e).**

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained;
  - (i) of the right to be informed promptly of the reason for his arrest or detention,
  - (ii) of the right to retain and instruct counsel without delay, or
  - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed

**Déclaration canadienne des droits,  
L.C. 1960, c. 44, article 2(e)**

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

- a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;
- b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;
- c) privant une personne arrêtée ou détenue
  - (i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,
  - (ii) du droit de retenir et constituer un avocat sans délai, ou
  - (iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;
- d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;
- e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la

<p>innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or</p> <p>(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.</p>	<p>définition de ses droits et obligations;</p> <p>f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou</p> <p>g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.</p>
---	---

**Loi fédérale sur le droit  
international privé, 1987, c 291  
(Suisse), article 3**

Art. 3

**II. For de nécessité**

Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes.