

FEDERAL COURT OF APPEAL

BETWEEN:

**JEREMY DEAN HINZMAN, NGA THI NGUYEN and LIAM LIEM
NGUYEN HINZMAN,**

Appellants,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

MOTION RECORD

**Thompson Dorfman Sweatman LLP
Barristers & Solicitors
CanWest Global Place
2200 - 201 Portage Avenue
Winnipeg MB R3B 3L3**

**(Matter No. 0094661 SRP)
Sacha R. Paul (204) 934-2571
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**JEREMY DEAN HINZMAN, NGA THI NGUYEN and LIAM LIEM
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THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

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NOTICE OF MOTION

**(Proposed Intervener: Amnesty International
Canadian Section, English Branch)**

TAKE NOTICE THAT the proposed intervener, Amnesty International (Canadian Section, English Branch) ("AI"), will make a motion to the Court in writing under Rule 369 of the Federal Courts Rules.

THE MOTION IS FOR:

- (a) an Order granting leave for AI to intervene in the hearing of this Appeal pursuant to Rule 109 of the Federal Court Rules;

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- (b) an Order granting leave to file a Memorandum of Fact and Law up to 20 pages in length;
- (c) an Order granting leave to make oral argument at the hearing of this Appeal, time permitting;
- (d) an Order that AI will not seek costs from any party;
- (e) an Order that AI be served only with any reply filed by the parties to this Appeal and any Memoranda of Fact and Law filed by any other interveners;
- (f) an Order that AI will not itself seek appeal of any judgment, but will be allowed to participate in any appeal and be served with such appeal material; and
- (g) such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

- (a) the Proposed Intervener is Amnesty International (Canadian Section, English Branch), 312 Laurier Avenue East, Ottawa, ON K1N 1H9;

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- (b) the Solicitor acting for AI is Thompson Dorfman Sweatman LLP, 2200 - 201 Portage Avenue, Winnipeg MB, R3B 3L3 (per Sacha R. Paul/ Allison Fenske);
- (c) Federal Court Rule 109;
- (d) if leave to intervene is granted, AI will make a submission on s. 25(1) of the *Immigration and Refugee Protection Act* (the "Act"), which will be useful and different from the submissions of the parties and which will not be raised if AI is not granted leave to intervene;
- (e) AI shall invite this Honourable Court to conclude that the Pre-Removal Risk Assessment ("PRRA") Officer erred and acted unreasonably in dismissing the Appellants' application for an exemption pursuant to section 25(1) of the Act because the Officer failed to give any consideration or any due consideration to freedom of conscience/ conscientious objection considerations, protected under the Charter of Rights and Freedoms and under international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which Canada is a signatory;
- (f) AI is directly affected by the outcome of this case because AI has a long history of:

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- (i) advocating and promoting international human rights issues, including issues associated with refugee claimants, such as the one at bar;
 - (ii) advocating and raising awareness on behalf of individuals whom AI considers to be conscientious objectors, including Jeremy Hinzman;
- (g) the rights of refugee claimants to have a PRRA Officer consider Charter values and Canada's international law obligations when reflecting on the humanitarian and compassionate considerations per section 25(1) of the Act and pursuant to section 3(3) of the same act is an issue of pressing public importance and an issue of interest beyond the facts of this particular case; and
- (h) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the affidavit of Alex Neve sworn January 12, 2010; and

- (b) such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

Dated at the City of Winnipeg, Province of Manitoba, this 13th day of January 2010.

Per:


Thompson Dorfman Sweatman LLP
Barristers and Solicitors
2200 - 201 Portage Avenue
Winnipeg MB R3B 3L3
Sacha R. Paul/ Allison Fenske (204) 934-2571
Counsel for the proposed intervener
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TO: John H. Sims
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Solicitors for the Respondent

AND TO: Alyssa Manning
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Solicitors for the Appellants

FEDERAL COURT OF APPEAL

BETWEEN:

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- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

AFFIDAVIT OF ALEX NEVE

I, **ALEX NEVE**, of the City of Ottawa, in the Province of Ontario, make oath
and state as follows:

1. I am the Secretary General of Amnesty International ("AI") (Canadian
Section, English Branch) and as such have knowledge of the matters hereinafter deposed
to.

2. I was hired as Secretary General of AI's Canadian section ("AI Canada") in
January 2000. Prior to assuming this position I had been an active member of AI for 15
years, during which time I was employed by AI Canada and by AI's International
Secretariat in London, England for 3 years. My activities with AI have included numerous
research missions to monitor and report on human rights abuses, the preparation of

international and national reports on issues of concern to AI, and participation in AI national and international meetings.

3. In addition to my experience with AI, I hold a Master of Laws degree in International Human Rights Law, with distinction, from the University of Essex in the United Kingdom.

4. As Secretary General for AI Canada, I am responsible for overseeing implementation of AI's mission in Canada. This includes supervising staff and ensuring that there is a national network of volunteers to carry out AI's work in Canada. My responsibilities also include ensuring that AI's expertise is available to decision-making bodies and the general public, communicating and cooperating with others who are interested in working to advance international human rights issues, and educating the public on human rights.

5. AI and AI Canada have a strong record as a credible, trustworthy and objective organization that possesses unique expertise on international human rights law. AI and AI Canada have commented extensively on refugee issues and international human rights, including freedom of conscience, in numerous reports and other public documents as well as before courts, international bodies and legislatures. AI Canada has a strong interest in this appeal as it will certainly impact its ongoing ability to protect conscientious objectors and promote human rights.

Amnesty International: The Organization

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

7. 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.

8. The organizational structure of AI Canada includes a board of 12 directors elected across the country, specific country and issue coordinators in each region and province, and a membership of approximately 60,000.

9. There are currently close to 2 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories the work of these groups is coordinated by national sections like AI Canada.

Amnesty International: The Vision

10. 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* ("UDHR") and other international human rights standards.

11. 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, economic, social, and cultural.

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

Promoting and Advancing International Human Rights

13. 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

14. 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, web-sites 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.

15. 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.

16. 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

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

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

- (a) *Tiberiu Gavrilla v. Minister of Justice (Canada)*, leave granted December 30, 2009, hearing pending. (AI was granted leave respecting the relationship between extradition law and refugee law.)
- (b) *Michael Joseph Charles Karas v. Minister of Justice for Canada*, leave granted December 10, 2009, hearing pending. (AI was granted leave respecting the nature of the obligation to seek and obtain reliable assurances with respect to the death penalty in extradition cases involving capital charges.)

- (c) *Canada (Prime Minister) v. Khadr* (on appeal from this Honourable Court 2009 FCA 246), argument before the Supreme Court heard November 13, 2009, decision pending. (AI was granted leave respecting Canada's obligations to repatriate citizens detained abroad.)
- (d) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008], 2 S.C.R. 326. (AI was granted leave to intervene 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);
- (e) *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (AI presented 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);
- (f) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (AI 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);

- (g) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (AI presented 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, which the Court referred to);
- (h) *United States v. Burns*, [2001] 1 S.C.R. 283 (AI provided information to the Court on the significant international movement towards the abolition of capital punishment);
- (i) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (AI provided information regarding the international movement towards the abolition of capital punishment); and
- (j) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (AI provided information regarding the international movement towards the abolition of capital punishment).

19. AI Canada has intervened before the Ontario Court of Appeal in *Bouzari v. Islamic Republic of Iran* (Court File C38295, June 30, 2004), a case involving the right of a torture victim to sue for compensation from the offending government and in *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration* (Court file C37565, February 8, 2002), where AI 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.

20. 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*. 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.

21. AI has also made submissions on international human rights in judicial proceedings in other countries. AI was recently *amicus curiae* before the Supreme Court of the United States in *Boumediene v. Bush*; *Al Odah v. United States*, 128 S. Ct. 2229 where AI argued that the Military Commission Act of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations.

22. 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] 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 indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001*);
- (c) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (U.K.H.L.) (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).

Participating in Legislative Proceedings

23. 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, including Canada's laws, policies and procedures affecting refugee claimants. AI Canada's submissions include:

- (a) *Amnesty International: Brief on Bill C-3 (An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act)*, submitted to the Standing Committee on Public Safety and National Security, November 2007;
- (b) *Regulating for Safety: Amnesty International's comments with respect to the Regulations Amending the Immigration and Refugee Protection Act and consequent designation of the United States as a Country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture*, submitted to the Standing Committee on Citizenship and Immigration, November 2002;
- (c) *Amnesty International: Brief on Bill C-11 (An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger)*, submitted to the Standing Committee on Citizenship and Immigration, March 2001;

- (d) *Amnesty International: Brief on Bill C-31 (Immigration and Refugee Protection Act)*, submitted to the Standing Committee on Citizenship and Immigration, August 2000;
- (e) *Amnesty International: Response to Canada's White Paper, Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Legislation*, March 1999;
- (f) *Amnesty International: Response to the Report of the Legislative Advisory Group*, March 1998.

Participation with International Organizations

24. 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, the Organization of African Unity, and the Inter-Parliamentary Union.

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

- (a) *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 17th and 18th Periodic Reports submitted by Canada), February 2007;

- (b) Amnesty International's Updated Briefing to United Nations Human Rights Committee with respect to the United States, July 2006;
- (c) Amnesty International's Supplementary Briefing to United Nations Committee Against Torture with respect to the United States, May 2006;
- (d) *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;
- (e) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, October 8, 2004; and
- (f) *It's Time* (Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada), November 2000.

26. These international bodies recognize and trust AI's experience, objectivity and value AI's 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 Freedom of Conscience and Human Rights

27. In its first preambular paragraph, the *UDHR* recognized that the “inherent dignity and... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The drafters of the *UDHR* understood that “freedom, justice and peace” depend entirely on there being full respect for basic human rights. One of those basic human rights is one’s freedom of conscience. Disregard for any basic human rights threatens the very foundation of freedom, justice and peace.

28. AI has campaigned tirelessly on behalf of both conscientious objectors and prisoners of conscience.

29. AI considers a conscientious objector to be any person who, for reasons of conscience or profound conviction, refuses to perform service in the armed forces or any other direct or indirect participation in wars or armed conflicts. This can include refusal to participate in a war because one disagrees with its aims or the manner in which it was being waged, even if one does not oppose taking part in all wars.

30. AI considers a conscientious objector to be a prisoner of conscience when they are detained or imprisoned solely because they have been denied or refused their right to register an objection or to perform a genuinely civilian alternative service. They would also be prisoners of conscience if they are imprisoned for leaving the armed forces without authorization for reasons of conscience, if they have taken reasonable steps to secure release from military obligations.

31. Following this, AI opposes the forcible return of an applicant under s. 25(1) of the *Immigration and Refugee Protection Act* if he, like Mr. Hinzman, is a conscientious objector and upon return would be at risk of becoming a prisoner of conscience or at risk of other serious human rights violations for reasons of his conscience.

32. AI is an experienced and internationally-recognized leader in advocacy for the protection and promotion of human rights. As a result of AI's continued advocacy on behalf of conscientious objectors and prisoners of conscience and their expertise with respect to the *IRPA*, the *Canadian Charter*, and the application and implementation of Canada's human rights and humanitarian law obligations, AI Canada is uniquely positioned to provide assistance to this Honourable Court.

Amnesty International's Interest/Involvement with Jeremy Hinzman

33. AI Canada has had an active and long-standing interest in Mr. Hinzman's case. AI Canada became involved with Mr. Hinzman's case when it first learned of Mr.

Hinzman's initial refugee claim in January 2004. AI Canada was one of the first non-governmental organizations to advocate and raise awareness of Mr. Hinzman's situation; AI Canada's public action began in May 2005.

34. On numerous occasions since 2005 and continuing to date, AI Canada has continued to raise public awareness with respect to Mr. Hinzman's case. AI Canada also wrote a letter of support for Mr. Hinzman and his family that was considered by the Pre-Removal Risk Assessment (PRRA) officer in the PRRA and their application for permanent residence within Canada based on humanitarian and compassionate grounds, which was ultimately denied. The statements of AI Canada have centered on AI Canada's position that if Mr. Hinzman were forcibly returned to the United States and imprisoned on the basis of his conscientious objection, AI Canada would consider him to be a prisoner of conscience.

Amnesty International as a proposed intervener

35. This appeal raises legal issues regarding the consideration of Charter values and international human rights obligations in respect of the humanitarian and compassionate considerations under s. 25(1) of the *Immigration and Refugee Protection Act*. The legal submissions on the proper consideration of the Charter and international human rights obligations are further developed in AI Canada's written brief, which form part of the Motion Record.

36. From my review and the review done by my legal counsel, I am advised by one of my legal counsel, Mr Sacha Paul, that the submissions of AI Canada on s. 2(a) and international obligations are different from the argument of the parties contained in their briefs filed in the Federal Court.

AI's Interest in this Appeal

37. AI Canada has a legitimate interest in the issues raised by this appeal. The interaction between the right to freedom of conscience and other human rights has been a centre-piece of AI's work in recent years, and a central aspect of our work for more than 40 years.

38. AI has demonstrated its interest in the subject of these proceedings through its longstanding work to ensure that human rights are not violated and freedom of conscience is respected, and its representations on the subject of human rights, including freedom of conscience, to international human rights bodies, the Canadian government, other governments, and through the media, to the Canadian public.

39. The Court's determinations regarding the issues in this appeal will have a significant impact on AI's work, within Canada and internationally, to ensure that governments respect freedom of conscience and other fundamental human rights.

AI's Unique Perspective

40. I believe that AI brings a unique perspective and approach to the issues raised in this appeal.

41. AI is uniquely positioned as an international non-governmental organization to bring a truly international perspective to this appeal. AI has extensive knowledge of the international norms that are relevant in this appeal, most notably the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*).

42. If granted leave to intervene, AI Canada will be mindful of submissions made by parties and other interveners in this appeal and will seek to avoid duplication of argument and materials before the Court.

43. I make this affidavit in support of AI Canada's application to intervene and for no other or improper purpose.

SWORN BEFORE ME at the City of
Ottawa in the Province of
Ontario this 24 day of
January, 2010



A Commissioner for Taking Affidavits


ALEX NEVE

MICHAEL BOSSIN
Barrister & Solicitor

FEDERAL COURT OF APPEAL

BETWEEN:

JEREMY DEAN HINZMAN, NGA THI NGUYEN and LIAM LIEM
NGUYEN HINZMAN,

Appellants,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

WRITTEN REPRESENTATIONS

I. STATEMENT OF FACTS

1. Amnesty International (Canadian Section, English Branch) ("AI") asks this Honourable Court to grant it leave to intervene in the within appeal pursuant to Federal Court Rule 109.

2. This appeal is from the decision of Russell J. in *Jeremy Dean Hinzman, Nga Thi Nguyen and Liam Liem Nguyen Hinzman and the Minister of Citizenship and Immigration*, 2009 FC 415 (the "Decision"). The Federal Court upheld the decision of the Pre-Removal Risk Assessment (PRRA) officer (the "Officer"), who had denied the Appellants' application for permanent residence from within Canada based on

humanitarian and compassionate grounds ("the H & C Application") under section 25(1) of the *Immigration and Refugee Protection Act* on the basis that the Appellants were not able to show that the United States was unwilling or unable to protect them from persecution.

**Federal Court Judgment and Federal Court Reasons for Judgment,
Appeal Book at Tabs 2 and 3, respectively; together being the Decision**

3. In addition to dismissing the Appellants' application for judicial review, the Federal Court also certified a question of general importance.

Federal Court Judgment, Appeal Book at Tab 2

II. POINTS IN ISSUE

4. Should this Honourable Court grant leave to AI to intervene in the within Appeal, pursuant to Federal Court Rule 109?

III. STATEMENT OF SUBMISSIONS

5. Pursuant to Federal Court Rule 109, this Honourable Court may grant leave to AI to intervene in this appeal. In *Benoit v. Canada*, 2001 FCA 71, Sexton J.A. summarized the principles that may be considered on a motion for intervention at para 15:

This Court, in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.* set out the factors which might be considered on a motion to intervene. They are:

- 1) Is the proposed intervener directly affected by the outcome?
- 2) Does there exist a justiciable issue and a veritable public interest?

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3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

***Benoit v. Canada*, 2001 FCA 71 [Tab A]
See also: *Federal Court Rules*, SOR/98-106,
Rule 109 [Tab B]**

6. The six factors identified do not all need to be satisfied before leave to intervene is granted. Sexton J.A went on to hold at para 17, "The Supreme Court of Canada in *R. v. Finta* (1993), 150 N.R. 370 said one criteria for allowing intervention is if the intervenor has submissions which will be useful and different from those of the other parties."

***Benoit* at para 17 [Tab A]**

A) The Nature of AI's Proposed Legal Argument

7. AI supports the Appellants, but seeks to offer an additional complementary argument.

8. Under section 25 of the *IRPA*, the phrase "humanitarian and compassionate considerations" is far from clear and difficult to apply, a fact recognized by Canada in its

guidelines, entitled IP5 "Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds."

9. AI will contend that "humanitarian and compassionate considerations" include respect for and consideration of Charter values and Canada's international human rights obligations. The purpose of H & C applications is to give an Officer leeway to deal with situations not expressly contemplated in the Act; thus the phrase "humanitarian and compassionate" should be given an expansive meaning. Accordingly, as a matter of statutory interpretation, Charter values and Canada's international human rights obligations can inform the interpretation of a statute.

10. Article 18 of the International Covenant on Civil and Political Rights and section 2(a) of the Charter both guarantee to everyone the fundamental freedom of conscience and religion. AI will contend that a religiously or conscientiously based opposition to war in general is protected by this freedom of conscience and religion, as is a religiously or conscientiously based opposition to a particular war. Contrary to the submissions of the Respondent, the Charter and international law do protect the right of conscientious objection even where a person does not have an aversion to all war.

11. The usefulness of this argument, which is based both in international human rights law and the Charter, is highlighted when one considers the Federal Court's decision

and the Memoranda of Fact and Law of the Appellants and Respondent, wherein there is no discussion of the Charter values engaged in this case.

12. It is submitted that the argument advocated by AI is useful and distinct from that considered by the trial judge and advocated by the parties. If AI is not granted leave to intervene, this argument will not be raised. This prospect justifies granting leave to intervene.

Benoit at para 16 [Tab A]

13. In addition, AI's argument raises a justiciable public interest. AI is advancing the argument that Charter values and human rights obligations are engaged in this case. The argument advanced relates to value of freedom of conscience in Canada and its impact on the humanitarian and compassionate considerations of s. 25(1) *IRPA* application.

Benoit at para 15-16 [Tab A]

B) The Interest of AI in this Appeal

14. AI is directly affected by the outcome of this appeal.

Benoit at para 15-16 [Tab A]

15. The Canadian component of AI has approximately 60,000 members. It is part of the global AI movement, which has close to 2 million members in over 162 countries. AI was awarded the Nobel Peace Prize in 1977.

**Motion Record, Affidavit of Alex Neve sworn January 12, 2010
("Neve Affidavit") at paras 8, 9 & 12**

16. 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. To 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.

Neve Affidavit at para 13

17. The work of AI in the area of international law and basic human rights is extensive. Two aspects are highlighted:

- (a) Past Interventions: AI has intervened in ten Supreme Court of Canada cases and twice in the Ontario Court of Appeal. Like the case at bar, AI's past interventions fall within its expertise in international law and human rights.
- (b) Monitoring and Documenting Human Rights Abuses: AI's role expands well beyond the courtroom. It conducts "on the ground" research in countries to monitor and report on human rights abuses. AI's research has been accepted by the Federal Court as credible and reliable. AI's reports are routinely considered by Courts because of AI's reputation for credible research.

Neve Affidavit at para 16

18. As such, AI is directly affected by cases that raise issues of international law, such as the case at bar. However, AI also has a long standing interest in the Appellants' case in particular. This request for leave to intervene on the issue of the right of freedom of conscience is a natural extension of AI's work on the Appellants' case.

Neve Affidavit at para 33

19. In sum, AI asks that this Honourable Court grant AI leave to intervene in this appeal. The argument proposed will be useful and different from the arguments at issue. It is submitted that the interests of justice are served if AI is allowed to bring its substantial expertise in international law to this appeal.

C) The Role of AI in the Appeal

20. The Appellants have consented and fully support AI's intervention.

21. AI undertakes to cooperate with the parties and any other interveners to avoid duplication of submissions or materials.

22. AI will work within any time frames if granted leave to intervene.

23. AI seeks to make oral submissions at the hearing of this matter, whenever so scheduled.

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24. AI has already been provided the Appeal book and the Memoranda of Fact and Law of the parties and would only require any reply by the parties, along with any Memoranda of Fact and Law of any other interveners which arise after this Honourable Court grants leave to intervene.

IV. ORDER SOUGHT

25. The applicant seeks the following orders:

- (a) an Order granting leave for AI to intervene in the hearing of this Appeal pursuant to Rule 109 of the Federal Court Rules;
- (b) an Order granting leave to file a Memorandum of Fact and Law up to 20 pages in length;
- (c) an Order granting leave to make oral argument at the hearing of this Appeal up to 15 minutes in length, time permitting;
- (d) an Order that AI will not seek costs from any party;
- (e) an Order that AI be served only with any reply to the Memoranda of Fact and Law filed by the parties to this Appeal, including any Memoranda of Fact and Law filed by other interveners;

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- (f) an Order that AI will not itself seek appeal of any judgment, but will be allowed to participate in any appeal and be served with such appeal material.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2010.

THOMPSON DORFMAN SWEATMAN LLP

Per: A. Fenske
SACHA R. PAUL/ ALLISON FENSKE
Counsel for the Proposed Intervener
Amnesty International (Canadian
Section, English Branch)

Per: "Michael Bossin"
MICHAEL BOSSIN
Community Legal Services (Ottawa-
Centre)

V. LIST OF AUTHORITIES

- A. *Benoit v. Canada*, 2001 FCA 71
- B. *Federal Court Rules*, SOR/98-106, Rule 109

Canadian Taxpayers Federation v. Benoit, 2001 FCA 71 (CanLII)

Date: 2001-03-16
Docket: A-464-00
Parallel citations: 57 D.T.C. 5261 • [2001] 2 C.T.C. 245 • 201 F.T.R. 137
URL: <http://www.canlii.org/en/ca/fca/doc/2001/2001fca71/2001fca71.html>
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20010316

Docket: A-464-00

Citation: 2001 FCA 71

CORAM: STRAYER J.A.

LINDEN J.A.

SEXTON J.A.

BETWEEN:

CANADIAN TAXPAYERS FEDERATION

Appellant

- and -

CHARLES JOHN GORDON BENOIT,

JOAN ELIZABETH BENOIT,

GORDON JAMES ALFRED BENOIT,

ATHABASKA TRIBAL CORPORATION, and

THE NORTHWEST TERRITORIES TREATY 8 TRIBAL COUNCIL, and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and

THE ATTORNEY GENERAL OF ALBERTA

Respondents

REASONS FOR JUDGMENT OF THE COURT

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(Delivered orally from the Bench in Vancouver, B.C.**Thursday, March 15, 2001)****SEXTON J.A.**

[1] In this action, the Plaintiffs, who are Indians as defined in the *Indian Act*, claim that by virtue of a treaty (Treaty #8), Her Majesty the Queen in right of Canada ("The Queen") cannot impose tax of any kind upon them. The Queen in her defence, denies that the treaty prevents her from imposing tax upon the Plaintiffs and says alternatively if there ever was an exemption from taxation it was extinguished. The Queen, further says that "a limitation of the Plaintiffs' alleged exemption is justified by the valid legislative objective of providing public funding to finance the many and diverse needs of people in Canada, who include the Plaintiffs, and by public objectives including economic fairness and regional fairness".

[2] The Appellant was incorporated federally in 1991 as a vehicle for people throughout Canada concerned about all types of taxation in the Country. It has offices in Ottawa, B.C., Alberta, Saskatchewan and Manitoba and has approximately 40,000 paying supporters in Canada. The Appellant is not affiliated with any political party and does not accept government grants or financial concessions.

[3] The Applicant, has a fundamental objective in its public activities and in this action, to seek to uphold the principle that all Canadian taxpayers should be treated equally in taxation matters before and under the law with the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour or religion.

[4] The Appellant and its members are concerned that if the Federal Court upholds the Plaintiffs' claim that, as Indians they are exempt from imposition of any tax on them by Canada and the Province of Alberta, the effect of a judgment affirming such claim would be to amend by necessary implication every federal and Alberta statute dealing with taxes or tax-like charges so as to exempt on racial grounds a particular class of people and impose, on racial grounds, such taxes and charges on the remaining classes of people.

[5] The Appellant wishes to intervene in this action so as to raise this issue because The Queen has not raised it. The Appellant says that its membership will be affected by the outcome in this case, and that there therefore, it has a genuine public interest. It says that this issue will not be raised unless the Appellant is allowed to intervene and that there is an important public issue involved.

[6] Before the Motions Judge, the Appellant sought to be added as a defendant or alternatively to be allowed to intervene. The Motions Judge dismissed the Appellant's motion in its entirety. He said that in order for the Appellant to be added as an Defendant, it must be shown that a cause of action exists between the Plaintiffs and the Appellant over which this Court has jurisdiction. He found that no such cause of action exists.

[7] With respect to the request to intervene pursuant to Rule 109, he found that the Appellant had failed to show that The Queen was constrained in her defence of the present action. The Appellant had argued before him that the Queen is bound by many constitutional, statutory and other legal responsibilities and fiduciary obligations to Indians and must necessarily be constrained from making submissions or arguments perceived to be against the interests of the Plaintiffs. The Appellant further argued that it was not so constrained.

[8] The Respondents Athabaska Tribal Corporation and the Northwest Territories Treaty 8 Tribal Council were earlier in the proceeding granted leave to intervene and were subsequently added as plaintiffs in

the action. On the return of the Appellant's Motion, before the Motions Judge Her Majesty the Queen and the Attorney General of Alberta did not oppose the Appellant's application to intervene nor have they taken any position on this appeal. 36

[9] The Appellant has appealed only the decision of the Motions Judge relating to its motion for leave to intervene.

[10] The *Federal Court Rules* provide for intervention in Rule 109:

109.(1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of motion under subsection (1) shall

(a) set out the full name and address of the proposed intervenor and of any solicitor acting for the proposed intervenor; and

(b) describe how the proposed intervenor wishes to participate in the proceeding and how that participation will assist in the determination of a factual or legal issue related to the proceeding.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents;

(b) the role of the intervenor, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervenor.

[11] On this appeal, the Appellant argues that the issue of equality before and under the law sought to be raised by the Appellant is not encompassed within the Queen's Amended Defence and is of such constitutional and statutory importance that it ought to be dealt with by the Court in this action and that the failure of the Crown to raise the issue warrants an order granting the Appellant leave to intervene.

[12] In support of its position the Appellant wishes to rely on the *Constitution Act, 1867*, the Charter of the United Nations to which Canada is a party, the Universal Declaration of Human Rights to which Canada is a party, the United Nations Declaration on the Elimination of all Forms of Racial Discrimination which Canada has joined in, the International Convention on the Elimination of All forms of Racial Discrimination 1965 which Canada has joined in, the International Covenant on Civil and Political Rights - December 1966 which Canada became a party to, the *Citizenship Act*, the Charter and the *Canadian Multicultural Act*.

[13] The Order of the Motions Judge is discretionary and the test for review of this exercise of discretion is whether the judge in first instance has given sufficient weight to all relevant considerations.^[1]

[14] The only reason given by the Motions Judge for refusing the Appellants request to intervene was that he found no evidence to support the Appellant's assertion that the Queen was constrained in her defence and therefore he concluded that the Appellant's participation would not assist in the determination of a factual or legal issue in the action.

[15] This Court, in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*^[2] set out the factors which might be considered on a motion to intervene. They are:

1) Is the proposed intervenor directly affected by the outcome?

- 2) Does there exist a justiciable issue and a veritable public interest?
- 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
- 4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- 5) Are the interests of justice better served by the intervention of the proposed third party?
- 6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

[16] The Motions Judge in his Reasons did not refer to any of these factors nor did he apparently consider that without the intervention of the Appellant, the issue of whether all Canadians should be treated equally in taxation matters would be addressed. We therefore believe he erred in not giving weight to all relevant considerations. The Appellant has established:

- 1) that its members will be affected by the outcome of the litigation;
- 2) there is a justiciable public interest issue raised;
- 3) if the Appellant is not allowed to intervene, this issue will not be raised;
- 4) the interests of justice would be better served by permitting the Appellant to intervene.

[17] The Supreme Court of Canada in *R. v. Finta* [1993] 150 N.R. 370 said one criteria for allowing intervention is if the intervenor has submissions which will be useful and different from those of the other parties. That would seem to be the case here.

[18] We are of the view that if in a case where important public interest issues are raised, an intervenor wishes to raise a related public interest question which naturally arises out of the existing lis between the parties, and which none of the other parties has raised, it is appropriate to permit the intervention.

[19] We would therefore allow the appeal, set aside the Order of the Motions Judge, and grant the Appellant leave to intervene in the action on the following basis:

- 1) The Appellant shall be served with all materials of the other parties.
- 2) The Appellant will not itself lead evidence but will rely on the evidence adduced by the parties and on the documents referred to in these reasons as well as any other documents of which the Court may take judicial notice.
- 3) The Appellant will be allowed to be present at trial and to make such written and oral argument as the Trial Judge permits.
- 4) The Appellant will not seek costs.
- 5) The Appellant will not itself seek to appeal any judgment, but will be allowed to participate in any appeal.

(Sgd.) "J.E. Sexton"

J.A.

March 16, 2001

Vancouver, British Columbia

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FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-464-00

STYLE OF CAUSE: *Canadian Taxpayers Federation v. Charles John
Gordon Benoit et al.*

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: March 15, 2001

REASONS FOR JUDGMENT OF Sexton, J.A.

DATED: March 16, 2001

APPEARANCES:

Norman Mullins FOR APPELANT

Elizabeth Johnson FOR RESPONDENT *BENOIT*

ET AL.

Everett Bunnell FOR RESPONDENT

ATTORNEY GENERAL OF AB

SOLICITORS OF RECORD:

Norman Mullins FOR APPELANT

Vancouver, BC

Ackroyd, Piasta, Roth & Day FOR RESPONDENT *BENOIT*

Vancouver, BC *ET AL.*

Parlee McLaws RESPONDENT *BENOIT*

Calgary, AB *ET AL.*

[1] See *Reza v. Canada*, [1994] S.C.J. No 49 at paragraph 20

[2] [2000] F.C.J. No. 220, Court File A-346-99 (F.C.A.)

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by  for the  Federation of Law Societies of Canada

Interpleader

108. (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person

(a) claims no interest in the property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

Intervention

Leave to intervene

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Questions of General Importance

Notice to Attorney General

110. Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,

(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;

(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Parties

Unincorporated associations

111. A proceeding may be brought by or against an unincorporated association in the name of the association.

Partnerships

111.1 A proceeding by or against two or more persons as partners may be brought in the name of the partnership.
SOR/2002-417, s. 11.

Sole proprietorships

111.2 A proceeding by or against a person carrying on business as a sole proprietor may be brought in the name of the sole proprietorship.

SOR/2002-417, s. 11.

Estates and trusts

112. (1) A proceeding may be brought by or against the trustees, executors or administrators of an estate or trust without joining the beneficiaries of the estate or trust.