CITATION: Toussaint v. Canada (Attorney General) 2022 ONSC 4747
COURT FILE NO.: CV-20-00649404-0000
DATE: 2022/08/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NELL TOUSSAINT	)	
Plaintiff	)	*Andrew C. Dekany, Barbara Jackman, James Yap* for the Plaintiff
- and –	)	
	)	
ATTORNEY GENERAL OF CANADA	)	
Defendant	)	*David Tyndale* and *Asha Gafar* for the defendant
- and –	)	
	)	
CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ REFUGEE CENTRE, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND CANADIAN CIVIL LIBERTIES ASSOCIATION	)	*Iris Fischer, Kaley Pulfer,* and *Alysha Li* for Canadian Civil Liberties Association *Raj Anand* and *Megan Mah* for the Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Asian Legal Clinic of Ontario, and the Chinese and Southeast Asian Legal Clinic *Yin Yuan Chan, Vanessa Gruben, Martha Jackman* for Charter Committee on Poverty Issues, Canadian Health Coalition and FCJ Refugee Centre *Rachael Saab, Rebecca Amoah,* and *Penelope Simons* for Amnesty International Canadian Sector (English Speaking) and ESCRNet – International Network for Economic, Social and Cultural Rights
Intervenors	)	
	)	**HEARD**: June 12, 2022

PERELL, J.

REASONS FOR DECISION

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A. Introduction

[1] On October 14, 2020, Nell Toussaint commenced this action against the federal government. She sues Canada for $1.2 million for alleged contraventions of the *Canadian Charter of Rights and Freedoms*.[1] Ms. Toussaint alleges that between July 2009 and April 30, 2013, at a time when she was not legally a Canadian resident, she was unlawfully excluded from health care essential to prevent a reasonably foreseeable risk of loss of life or irreversible negative health consequences. She sues Canada for, among other things, the violation of s. 7 (right to life) and s. 15 (equality) of the *Charter.*

[2] The action now before the court is a continuation of a two-decade dispute between Ms.

[1] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada* Act 1982 (UK), 1982, c 11.

Toussaint and Canada. Between 2010 and 2011, there were judicial review proceedings in the Federal Court. After the Federal Court dismissed her judicial review application, Ms. Toussaint took her grievances to the United Nations Human Rights Committee. In 2018, the Committee concluded that Canada had violated Ms. Toussaint's right to life and her equality rights. The Committee directed Canada: (a) to provide Ms. Toussaint with compensation; and, (b) to take positive steps to fix its health care legislation so that others similarly situated as Ms. Toussaint would have their rights to health care protected. In 2019, Canada refused to do either and this action in the Ontario Court of Justice followed.

[3] Ms. Toussaint's case raises the novel question of the relationship among: (a) the enforcement of the human rights guarantees of the *Canadian Charter of Rights and Freedoms* and to the *Constitution Act, 1867*;[2] (b) the enforcement of human rights obligations under Canada's treaty obligations; and (c) the enforcement of human rights obligations under customary international law.

[4] Ms. Toussaint's case also raises the novel questions of whether (a) the *Vienna Convention on the Law of Treaties*,[3] (b) Canada's obligations under the United Nations' *International Covenant on Civil and Political Rights* (the "ICCPR"),[4] and (c) the accompanying adjudicative mechanism set out in the *Optional Protocol* to the ICCPR,[5] have any legal ramifications domestically to the *Charter* or to a human rights claim about health care in Canada.

[5] In the **autumn of 2021**, Canada indicated that it intended to bring a motion for strike Ms. Toussaint's pleading for: (a) being outside the jurisdiction of the Ontario Court; (b) being out of time under the *Limitations Act, 2002*[6]; (c) being *res judicata* or an abuse of process; (d) contravening the rules of pleading; and (e) not showing a reasonable cause of action.

[6] Canada submits that in 2009, when Ms. Toussaint sought judicial review of a government decision to deny her health insurance benefits, she raised or could have raised the issues raised in her current action. Since the Federal Court dismissed her claim, Canada submits that her current action based on the same facts, has no hope of success. It submits that the action is outside the jurisdiction of the Ontario court, untimely, *res judicata*, contrary to the rules of pleading, and that it does not demonstrate a legally viable cause of action. It submits that settled law stands against her because: (a) there is no right to government funded health insurance in Canada, regardless of immigration status; and (b) the conclusions of a United Nations Human Rights Committee do not give rise to a cause of action in damages in Canada, especially when they run counter to Canadian domestic legislation and jurisprudence.

[7] On January 14, 2022, Justice Belobaba granted ten NGOs leave to intervene in Canada's motion to strike Ms. Toussaint's action.

[8] The intervenors formed four groups:

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[2] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11; formerly the *British North America Act*, 1867 (UK), 30 & 31 Victoria, c 3.
[3] *Vienna Convention on the Law of Treaties, United Nations, Treaty Series*, Vol. 1155, p. 331 (23 May 1969)
[4] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999
[5] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 2200A XXI (entered into force 23 March 1976).
[6] S.O. 2002, c 24, Sch. B

a. Canadian Civil Liberties Association;[7]

b. Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Asian Legal Clinic of Ontario, and the Chinese and Southeast Asian Legal Clinic (collectively, the "Colour-Coalition");

c. Amnesty International Canadian Sector (English Speaking) and ESCRNet – International Network for Economic, Social and Cultural Rights (collectively, the "Amnesty Group");[8] and,

d. Charter Committee on Poverty Issues, Canadian Health Coalition and FCJ Refugee Centre. (collectively, the "CCPI-Coalition").

[9] On February 10, 2022, Canada delivered its Notice of Motion making the following objections to the Amended Amended Statement of Claim; visualize:

1. The Statement of Claim discloses no reasonable cause of action:

> (a) Canadian courts have already decided, based on the same facts asserted in this claim, and taking into account Canada's international obligations, that [Ms. Toussaint's] exclusion from health care coverage under the IFHP is not a breach of her *Charter* rights;
>
> (b) The facts pleaded do not disclose any cause of action or right to damages under international law;
>
> (c) The facts pleaded do not disclose any cause of action or right to damages under domestic law, including the Charter;
>
> (d) The facts pleaded do not disclose any right to a declaration by this Court:
>
> > (i) that [Ms. Toussaint's] rights under an international treaty have been breached;
> >
> > (ii) that IFHP breaches the *Charter*
> >
> > (iii) that [Canada's] response to the UNHRC Committee's views reached the Charter
>
> (e) The non-binding views of an international tribunal do not give right to any right to damages in this Court;
>
> (f) It is settled law that Canadian legislation, which generally limits public health insurance coverage to residents, complies with the Charter;
>
> (g) It is settled law that a right to health care insurance coverage regardless of status is not a principle of fundamental justice;
>
> (h) [Ms. Toussaint's] attack on the constitutional validity of a policy which is no longer in effect is moot and would serve no purpose.
>
> (i) The action is statute barred by the *Limitations Act*;

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[7] The Canadian Civil Liberties Association was an intervenor in *Toussaint v. Canada (A.G.)*, 2011 FCA 213, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 412.

[8] Ms. Toussaint submitted the legal opinions of International Network for Economic, Social and Cultural Rights (ESCR-Net) and Amnesty International Canada to the United Nations Human Rights Committee.

(j) There is no basis in law for [Ms. Toussaint's] claim that the common law rules of res judicata, issue estoppel, abuse of process and collateral attack are unconstitutional if they bar a claim against [Canada].

2. The action is frivolous and vexatious, and an abuse of process:

(a) [Ms. Toussaint] is seeking to re-litigate of issues previously decided and the litigation of matters that have been concluded;

(b) In previous proceedings dating back to 2010, [Ms. Toussaint] either did raise, or could have raised the *Charter* arguments and international law arguments referred to in the Statement of Claim, including a potential claim for damages;

(c) A party cannot re-litigate a claim that it could have raised in an earlier proceeding;

(d) The action is an impermissible collateral attack on a decision of a federal tribunal.

3. The Statement of Claim sets out allegations that are frivolous and vexatious, and an abuse of process of the Court, in particular:

(a) Allegations made without evidentiary foundation;

(b) Allegations based on assumptions and speculation, or which are incapable of proof;

(c) Purported allegations of fact which are, in fact, arguments or conclusions.

4. The court has no jurisdiction over parts of the relief claimed in the Statement of Claim:

(a) [Ms. Toussaint] is effectively seeking judicial review of decisions of a federal tribunal, matters which are in the exclusive jurisdiction of the Federal Court.

[10] For the Reasons that follow, Canada's motion is dismissed. Notwithstanding Canada's arguments to the contrary, I find that:

a. Ms. Toussaint's action is within the jurisdiction of the Ontario Court.

b. It is not plain and obvious that Ms. Toussaint's action is out of time; rather, it is plain and obvious that the action is timely.

c. It is not plain and obvious that Ms. Toussaint's action is *res judicata* or an abuse of process.

d. There is no contravention of the rules of pleading.

e. It is not plain and obvious that Ms. Toussaint's action is doomed to fail; it remains to be determined whether her claims may resonate in Canada.

f. Canada shall have forty days to deliver its Statement of Defence in accordance with these Reasons for Decision.

B. Methodology

[11] Given the land, sea, air, submarine, and celestial procedural attack that Canada makes against Ms. Toussaint's pleading, there are many factual and legal issues to address in this pleadings motion in what is a complex factual and legal matrix that may affect others by the

precedent set by Ms. Toussaint's sad case.

[12] The above table of contents sets out the methodology of these Reasons for Decision and provides a roadmap through the myriad of factual and legal issues.

C. Summary of the Facts

[13] By way of a summary of the complex factual and legal narrative, the major points are as follows.

[14] Ms. Toussaint arrived in Canada in 1999, and in the years that followed, she attempted but was unsuccessful until April 30, 2013 in regularizing her resident status entitlement to public health care.

[15] Between 2009 and 2013, during the time when Ms. Toussaint was an "irregular" migrant, Canada denied her critically needed public health care that she could not afford to pay for privately.

[16] Between 2010-2011, Ms. Toussaint brought proceedings in the Federal Court with respect to her need for health care. Ms. Toussaint alleged that her rights under s. 7 (right to life) and equality rights (s. 15) under the *Charter* had been infringed. There was a hearing, a rehearing, and an appeal to the Federal Court of Appeal, but her claims were dismissed.[9]

[17] It was found as a fact that Ms. Toussaint was exposed to a risk to her life as well as to long-term and potentially irreversible, negative health consequences. However, it was found that it was incumbent on Ms. Toussaint to establish that the failure to provide medical coverage was the operative cause of her injury to her rights to life and security of the person under s. 7 of the *Charter*. The Federal Court held that assuming that there was a violation of her right to life, it had not been established that the deprivation was contrary to the principles of fundamental justice. The Courts held that the *Charter* does not confer a free standing constitutional right to health care. With respect to Ms. Toussaint's immigration status and her discrimination claim, the Courts held that there was no discriminatory distinction based on any enumerated or analogous ground.

[18] Pausing here, it shall be important to the analysis later of Canada's submissions about *res judicata* and about the viability of Ms. Toussaint's causes of action to keep in mind that: (a) the Federal Court did not address a discrete claim based on the principles of customary international law; and (b) the Federal Court only considered the *International Covenant on Civil and Political Rights* as relevant to defining the precise content of a principle of fundamental justice, but Justice Stratas in the Federal Court stated the analysis had not gotten that far in the section 7 of the *Charter* analysis. Thus, there was no analysis of the *Covenant* in the Federal Court. It should also be noted that Justice Stratas' conclusion that immigration status is not an analogous ground has been criticized by human rights' academics and may be an unsettled issue.[10]

[19] Sadly, Ms. Toussaint suffered very serious adverse health problems.

[20] Between 2014 and 2019, Ms. Toussaint took her grievances with Canada to the United Nations Human Rights Commission pursuant to a procedure set out in the *Optional Protocol to*

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[9] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, leave to appeal to S.C.C. ref'd 2011 S.C.C.A. No. 412, aff'g 2010 FC 926 (motion for reconsideration) and 2010 FC 810.

[10] Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dalhousie Law Journal 17; Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) Alta L Rev 649.

the International Covenant on Civil and Political Rights, which Canada has ratified but not officially incorporated into domestic law.

[21] Meanwhile, after the Federal Court's decisions and while matters were pending before the United Nations' Human Rights Commission, there were some significant developments and changes in the legislation about providing health care to migrants to Canada. There were also significant developments and potential developments in *Charter* and constitutional law about health care, the right to life, equality rights and about *Charter* remedies.

[22] As alluded to above, between 2014 and 2017, Ms. Toussaint and Canada exchanged submission to the Human Rights Committee, and in 2018, the Human Rights Committee rendered a decision known as "Views." The Human Rights Committee concluded that Ms. Toussaint's rights to life and non-discrimination under articles 6 and 26 of the *International Covenant on Civil and Political Rights* were violated. The substantive decision of the Committee is set out in Schedule "A" to these Reasons for Decision. The major findings of the Committee were:

> a. States parties have the obligation to provide access to existing health-care services that are reasonably available when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life and in light of the serious implications of the denial of health care coverage to Ms. Toussaint the facts disclosed a violation of her rights under article 6 of the *Convention*.
>
> b. In the particular circumstances of Ms. Toussaint's case, where the exclusion from health care could result in the loss of life or irreversible, negative consequences, the distinction drawn by Canada for the purpose of admission to the Programme between those with legal status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26 of the *Convention*.

[23] The Human Rights Committee directed Canada to provide Ms. Toussaint with adequate compensation and "to take all steps necessary to prevent similar violations in the future, including reviewing Canada's national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."

[24] On February 1, 2019, Canada informed the Human Rights Committee that it did not agree with the Views of the Committee.

[25] On October 14, 2020, Ms. Toussaint sued Canada – not in the Federal Court – but in the Superior Court of Ontario.

D. ***Vienna Convention on the Law of Treaties, International Covenant on Civil and Political Rights*, and *Optional Protocol to the International Covenant on Civil and Political Rights***

[26] The pertinent provisions of: (a) the *Vienna Convention on the Law of Treaties;* (b) the *International Covenant on Civil and Political Rights*: and (c) the *Optional Protocol to the International Covenant on Civil and Political Rights* are set out in Schedules "B", "C" and "D" respectively.

E. The United Nations Human Rights Committee

[27] To understand the factual narrative and the legal problems presented by the motion now before the court, it is necessary to understand the nature and role of that the United Nation's Human Rights Committee. One of the issues raised by Ms. Toussaint's action is the effect, if any, of the UN Human Rights Committee's "Views" on Canada's liability, if any, to Ms. Toussaint. As the factual summary, which is set out above, and as her more detailed story and the Amended Amended Statement of Claim, which are set out below, reveal, the triple-suns of Ms. Toussaint's legal universe are Ontario's Superior Court of Justice, the Federal Court, and the United Nations Human Rights Committee. I shall have more to say about the Committee throughout this decision but by way of introduction, the Committee is associated with Canada's international law obligations.

[28] In 1970, Canada acceded to the *Vienna Convention on the Law of Treaties,* and Canada agreed to perform its obligations under international treaties in good faith and not to invoke any provisions of its domestic as a justification for its failure to perform its obligations. The *Vienna Convention on the Law of Treaties* codified for Canada the rule of customary international law known as *pacta sunt servanda*, which is a peremptory norm and forms part of *jus cogens*.

[29] In 1976, Canada acceded to the *International Covenant on Civil and Political Rights* (the "ICCPR") and the *Optional Protocol* of the ICCPR, and by so doing, Canada promised: (a) to protect the right to life of persons within Canada; (b) to protect the right to non-discrimination of persons within Canada; (c) to recognize the competence of the United Nations Human Rights Committee to hear communications from persons within Canada, (d) to recognize the competence of the United Nations Human Rights Committee to determine whether there has been a violation of the right to life of persons within Canada; (e) to recognize the competence of the United Nations Human Rights Committee to determine whether there has been a violation of the right to non-discrimination; and (f) to recognize the competence of the United Nations Human Rights Committee to provide an effective and enforceable remedy to the extent the Committee determine that a violation has occurred.

[30] Although Canada has ratified the *International Covenant on Civil and Political Rights* (the "*ICCPR*") and the *Optional Protocol,* it has not enacted legislation to incorporate the *ICCPR* or the *Optional Protocol* into domestic law.

[31] Part IV of the United Nation's *International Covenant on Civil and Political Rights* establishes a Human Rights Committee.

[32] The Committee is comprised of eighteen recognized as experts in the field of human rights.[11] The Committee has various tasks and responsibilities relating to monitoring and evaluating states parties' compliance with the *ICCPR*. For example, article 41 allows a state party that believes another state party is violating its obligations under the *Covenant* to refer the matter to the Committee, which may then receive and consider submissions and submit a report.

[33] The *Optional Protocol to the International Covenant on Civil and Political Rights*, ("the

[11] The late Walter Tarnopolsky was a member of the Committee before joining the Court of Appeal for Ontario. The Committee has a Canadian member, Marcia V.J. Kran, although she recused herself from taking part in Ms. Toussaint's communication.

Optional Protocol")[12] adds a procedure that allows individuals to present a complaint to the Committee in a similar way to a state party.

[34] Article 1 of the *Optional Protocol* provides that if a state party to the Covenant also becomes a party to the *Optional Protocol*, the Committee may receive and consider communications from individuals subject to [the state party's] jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the *Covenant*.

[35] Articles 2 and 5 of the *Optional Protocol* require that any individual who wishes to submit such a communication must first exhaust all available domestic remedies.

[36] Pausing here to foreshadow, this feature of the *Optional Protocol* allowing individuals access to the Human Rights Committee but only after the individual has exhausted his or her domestic remedies is a significant factor to the immediate case. It is significant because pursuant to the *Optional Protocol*, Ms. Toussaint did not have access to the Human Rights Committee until after she first sought relief in the Federal Court.

[37] Further, it shall also be important for the analysis that follows to note that the "Views" of the Human Rights Committee as to whether there has been a human right's violation are not binding under international law; however, they are highly persuasive. The highest judicial authority on international law, the International Court of Justice, has stated:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first *Optional Protocol*, and in the form of its General Comments. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[13]

[38] In the immediate case Canada was not persuaded by the Views of the United Nations' Committee on Human Rights.

F. The Availability of Health Care to Persons in Canada

[39] To understand the factual narrative and the legal problems presented by the motion now before the court, it is also necessary to have an understanding about the law associated with the availability of publicly funded health care to persons in Canada and how it has changed during the duration of Ms. Toussaint's case.

[40] The federal government's *Canada Health Act*[14] provides for the funding of provincial health care plans. Pursuant to s. 7 of the Act, provincial programs must provide coverage to residents of a province. "Resident" is defined in s. 2 as "a person lawfully entitled to be or to remain in Canada who makes his home and is ordinarily present in the province, but does not include a tourist, a transient, or a visitor to the province".

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[12] The *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 2200A XXI (entered into force 23 March 1976).
[13] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, (2011) 50 ILM 37 at para. 66.
[14] R.S.C. 1985, c. C-6.

[41] Under the *Health Insurance Act*,[15] the Ontario Health Insurance Plan ("OHIP") is a public health care plan available to residents of Ontario. Under the regulations to Ontario's *Health Insurance Act*, a person cannot be recognized as a resident for the purposes of OHIP coverage unless the person has a specific eligible status.[16]

[42] Canadian Courts and tribunals have held that legislation which limits public health insurance coverage to residents complies with sections 7 and 15 of the *Charter*.[17]

[43] In 1957, Canada established the *Interim Federal Health Program* (the "*IFHP*") under Order-in-Council number 157-11/848. The *IFHP* creates an exception to federal and provincial legislation that limits public health insurance coverage to residents.[18] The program is a part of Canada's immigration law.

[44] The *IFHP* was under the responsibility of Canada's Minister of Citizenship and Immigration until November 3, 2015 and since then the Minster of Immigration, Refugees and Citizenship has responsibility for the *IFHP*.

[45] The *IFHP* is a policy which provides public health care coverage to certain status categories of immigrants. It operates as an exception to the legislation that limit public health insurance coverage to status residents. However, the *IFHP* policy provides no exemptions for persons without <u>any</u> immigration status to receive public health care insurance coverage. (In other words, the *IFHP* policy does not provide an exemption that would make public health care available to Ms. Toussaint.)

[46] The *IFHP* provides health care benefits to four categories of foreign nationals: (a) refugee claimants, (b) resettled refugees, (c) persons detained under the *Immigration and Refugee Protection Act*;[19] and, (d) victims of human trafficking. Ms. Toussaint did qualify under these provisions of the *IFHP*.

[47] On April 5, 2012, Canada repealed the 1957 Order-in-Council and replaced it with the 2012 Order-in-Council SI/2012-26. The four categories of exceptions continued. What was added is that the Minister was provided with some discretionary power to grant health care coverage to individuals not within the established categories. The 2012 Order-in-Council did not categorically provide irregular migrants with health-care coverage. In the immediate case, the Minister has not exercised discretion in favour of Ms. Toussaint.

[48] In 2014, the 2012 Order-in-Council was declared unconstitutional with respect to its treatment of certain refugees as being discriminatory,[20] and it was replaced in 2016 by the 2016 Interim Federal Health Care Program policy effective as of April 1, 2016, pursuant to the Immigration, Refugees and Citizenship Canada Notice "*Changes to the Interim Federal Health*

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[15] R.S.O. 1990, c H.6.
[16] R.R.O. 1990, Reg. 552 (*Health Insurance Act, General)*, s 1.4.
[17] *Canadian Snowbirds Association Inc. v. A.G. (Ontario)*, 2020 ONSC 5652; *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2014 FC 651; *Toussaint v. Canada (AG)*, 2011 FCA 213; *Toussaint v. Ontario (Health and Long-Term Care)*, 2011 HRTO 760; *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365; *Irshad v. Ontario (Minister of Health)* (2001), 55 OR (3d) 43 (C.A.).
[18] *Canada Health Act*, R.S.C. 1985, c. C-6 s. 2; *Health Insurance Act*, R.S.O. 1990, c H.6, ss. 2-3; R.R.O. 1990, Reg. 552, (*Health Insurance Act- General),* s 1.4.
[19] S.C. 2001, c. 27.
[20] *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2014 FC 651.

Program" dated April 11, 2016.

[49] As with the 2012 Order-in-Council, the Minister continues to maintain some discretionary power to grant health care coverage under the 2016 policy; however there has never been a categorical exception for situations where life or health is at risk, except where there is a clear health risk to the public at large. Ms. Toussaint's circumstances never provided a health risk to the public at large.

G. Ms. Toussaints' Story

[50] A more detailed account of Ms. Toussaint's story follows.

[51] Ms. Toussaint is a 51 year-old women of colour who lawfully entered Canada as a visitor from Grenada in **1999**. At the present time, she is impecunious and a resident of a rehabilitation hospital in Toronto.

[52] Ms. Toussaint's visitor status expired, and beginning in 2005, she sought to regularize her resident status, but she was deceived by an immigration consultant, and her status remained that or an irregular migrant.

[53] Between **July 2009 and April 20, 2013**, Ms. Toussaint asked Canada for urgently needed health care under Canada's Interim Federal Health Program, the "*IFHP*," which was established in 1957 under Order-in Council 157-111848 and continued in 2012 under Order-in-Council S1/2012-26.

[54] The *IFHP* provides an exception to federal and provincial legislation that limits public health insurance coverage to Canadian residents. Ms. Toussaint was not legally a Canadian resident although she had been living in Canada since 1999 when she arrived from Ghana but never left. She was also not a refugee claimant, a resettled refugee, a person detained under the under the *Immigration and Refugee Protection Act*, or a victim of human trafficking, which are the exceptions under the *IFHP*, where health care is provided to non-residents. Nor had Ms. Toussaint received an exemption from the Minister of Immigration, who has a discretion to extend health care under the IFHP in some circumstances. Ms. Toussaint's request for urgently needed health care was refused by the Minister.

[55] In **2010**, Ms. Toussaint brought a judicial review application in the Federal Court. She argued that Canada had contravened sections 7 and 15 of *Canadian Charter of Rights and Freedoms* and that Canada had failed to apply domestic law in accordance with its international human rights treaty obligations by denying her urgent need for health care.

[56] In a decision that was upheld by the Federal Court of Appeal, Ms. Toussaint's judicial review application about the denial of health care was dismissed and leave to appeal to the Supreme Court of Canada was refused in **2011**.[21]

[57] Meanwhile, Ms. Toussaint did suffer serious irreversible health consequences. She had one leg amputated above the knee. She became blind. Her kidneys failed. She had a stroke. She had an anoxic brain injury due to heart failure. She currently lives with those irreversible sicknesses.

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[21] *Toussaint v. Canada (A.G.),* 2010 FC 810, aff'd 2011 FCA 213, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 412.

[58] In **2013**, although Ms. Toussaint had become a permanent resident and entitled to OHIP coverage in Ontario, she made a submission to the United Nations Human Rights Committee that Canada had violated her right to life and her right to nondiscrimination.

[59] On **July 24, 2018** the UN's Committee stated its "Views"[22] that Canada had violated [Ms. Toussaint's right to life recognized in article 6 of the *ICCPR*. The UN Committee stated that Canada was obliged pursuant to its undertaking in article 2.3 (a) of the *International Covenant on Civil and Political Rights* ("*ICCPR*") to provide Ms. Toussaint with an effective remedy, including appropriate compensation and all steps necessary to prevent similar violations in the future.

[60] In **2018**, Ms. Toussaint asked Canada to provide her for the remedy authorized by the UN Human Rights Committee.

[61] On **February 1, 2019**, Canada submitted its formal reply to the UN Committee's View, stating that "Canada regrets that it is unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views."

[62] In **July 2020**, the Human Rights Committee determined that Canada had failed to meet its obligations to provide Ms. Toussaint with adequate compensation and to take all steps necessary to prevent non-repetition.

[63] However, Canada was unmoved by the Committee's determination, and in **September 2020**, it advised Ms. Toussaint that it would not take any measures.

[64] On **October 14, 2020**, Ms. Toussaint commenced this action against the federal government.

H. The Pleaded Facts

[65] Under rule 21.01, on a pleadings motion to strike a plaintiff's action for failure to show a reasonable cause of action, the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof.[23]

[66] In the immediate case, I shall not paraphrase the pleaded facts; rather, with some editing to remove peripheral facts, I shall set out the pertinent paragraphs from the Amended Amended Statement of Claim in full, with paragraph 23, 24, and a part of paragraph 30 out of order.

[67] The material facts for Ms. Toussaint's pleaded causes of action as set out in her Amended Amended Statement of Claim are as follows:

> 23. On October 14, 1970 [Canada] acceded to the *Vienna Convention on the Law of Treaties* (the "VCLT") and caused to be tabled copies thereof in both the House of Commons and the Senate on December 17, 1970. The VCLT entered into force on January 27, 1980. By so acceding [Canada] agreed to perform its obligations under, among other treaties, the [*International Covenant on Civil and Political Rights* (the "ICCPR")] and the *Optional Protocol* [of the ICCPR], to do so in good faith, and not to invoke any provisions of its internal law as a justification for its failure to perform

[22] *Toussaint v. Canada*, CCPR/C/123/D/2348/2014.
[23] *Folland v. Ontario* (2003), 64 OR (3d) 89 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Canada v. Operation Dismantle Inc*., [1985] 1 S.C.R. 441; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

such obligations. The aforesaid provisions of the VCLT codify the rule of customary international law known as *pacta sunt servanda*, which is a peremptory norm and forms part of *jus cogens*.

24. After consultation with provincial governments [Canada] acceded both to the ICCPR and the *Optional Protocol* on May 19, 1976 and caused to be tabled copies thereof in the House of Commons on February 17, 1977 and in the Senate on February 22, 1977. By so acceding [Canada] undertook and agreed to binding international obligations, among other things, to act as follows in [Ms. Toussaint's] interests, intending to provide to [Ms. Toussaint] as well as other individuals within Canada and subject to Canada's jurisdiction the benefits contained in such undertakings and agreements:

> (a) undertook to respect and to ensure to [Ms. Toussaint] the rights to life and to non-discrimination without distinction of any kind;
>
> (b) undertook to take the necessary steps to adopt measures as may be necessary to give effect to such rights;
>
> (c) agreed that it may not derogate from its obligations to protect by law [Ms. Toussaint's] inherent right to life and to prohibit any discrimination against [Ms. Toussaint] and guarantee to [Ms. Toussaint] equal and effective protection against discrimination (other than a limited right of derogation in times of emergency from its obligation to prohibit discrimination but no derogation under any circumstances from the obligation to protect the right to life);
>
> (d) agreed to recognize the competence of the [United Nations Human Rights Committee (the "Committee")] to receive and consider [Ms. Toussaint's] claims to violations of her rights recognized in the ICCPR, and to engage in good faith in those proceedings before the Committee including submitting to the Committee written explanations or statements clarifying the matter in response to [Ms. Toussaint's] communication and any additional written information or observations requested by the Committee, including remedial measures that have been taken;
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> (e) undertook to ensure that [Ms. Toussaint] shall have an effective remedy for the violation of such rights, notwithstanding that the violation has been committed by persons acting in an official capacity; and
>
> (f) undertook to ensure that [Ms. Toussaint] shall have her right to an effective remedy determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by Canada's legal system, and to develop the possibilities of judicial remedy.

[part] 30. [Canada] undertook, pursuant to article 2 of the ICCPR, to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR. [Canada] has also recognized the competence of the Committee to determine whether there has been a violation of rights under the ICCPR and undertook to provide an effective and enforceable remedy to the extent the Committee determines that a violation has occurred.

2. The plaintiff Nell Toussaint is a 51 year old woman of colour who is a national of Grenada. She has lived in Canada since December 1999 and currently resides in the City of Toronto in the Province of Ontario. […] the plaintiff currently lives with irreversible negative health consequences.

[…]

7. On 11 December 1999 [Ms. Toussaint] lawfully entered Canada as a visitor from Grenada. She worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. However, some of her employers made deductions from her salary to cover federal and provincial

taxes, *Canada Pension Plan* and Employment Insurance. During this period, she managed to pay privately for any medical costs.

8. Encouraged by an employer who wished to hire her permanently, [Ms. Toussaint] began to seek regularization of her status in Canada in 2005. That year, she paid a significant part of her savings to an immigration consultant who turned out to be dishonest and provided no useful service. [Ms. Toussaint] could not afford to make further attempts to regularize her status for some time.

9. In 2006, [Ms. Toussaint's] health began to deteriorate as she developed chronic fatigue and abscesses. In November 2008, she became unable to work due to illness, and in 2009 her health deteriorated to life-threatening status. In February 2009 she was diagnosed with pulmonary embolism and suffered from poorly controlled diabetes with complications of renal dysfunction, proteinuria, retinopathy, and peripheral neuropathy. Her neurological problems resulted in severe functional disability with marked reduction in mobility and impairment of basic activities. She also suffered from hyperlipidaemia and hypertension.

10. In 2008, [Ms. Toussaint] received free assistance from a qualified immigration consultant and on September 12, 2008 made an application for permanent resident status on humanitarian and compassionate grounds to Citizenship and Immigration Canada, including a request that Citizenship and Immigration Canada waive the application fee which it incorrectly stated it did not have the authority to do.

11. In April 2009, [Ms. Toussaint] was informed that she had qualified for provincial social assistance under the Ontario Works program due to her pending application for permanent residence in Canada based on humanitarian and compassionate grounds. She was also deemed eligible for social assistance from the Ontario Disability Support Program, but neither of those programs covered health care or the cost of fees for a humanitarian and compassionate application.

12. On 6 May 2009, [Ms. Toussaint] applied for health-care coverage under [Canada's] aforesaid program of health care for immigrants, called the IFHP, established pursuant to the 1957 Order-in-Council.

13. On 10 July 2009, [Ms. Toussaint] was denied health coverage under the IFHP by an immigration officer as she did not fit into any of the four categories of immigrants eligible for IFHP coverage as set out in the Citizenship and Immigration Canada guidelines: refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection Act* and victims of trafficking in persons. The life-threatening nature of [Ms. Toussaint's] health problems was not mentioned as a consideration.

14. [Ms. Toussaint] sought judicial review before the Federal Court of the decision denying her health-care coverage under the IFHP. She argued that the decision was in breach of her rights to life, to security of the person and to non-discrimination under sections 7 and 15, respectively, of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") and that the immigration officer had failed to apply domestic law in a manner consistent with the international human rights treaties ratified by Canada. [Ms. Toussaint] also provided the Court with extensive medical evidence proving that her life had been put at risk.

15. The Federal Court in its August 6, 2010 judgment, 2010 FC 810 accepted that the evidence before it established that [Ms. Toussaint] experienced extreme delay in receiving medical treatment and suffered severe psychological stress resulting from the uncertainty surrounding whether she would receive the medical treatment she needed. The Federal Court also found that the evidence established a deprivation of [Ms. Toussaint's] right to life and security of the person that was caused by her exclusion from the IFHP. However, the Court found that the deprivation of the rights to life and security of the person in [Ms. Toussaint's] case was not contrary to section 7 of the *Canadian Charter*, that denying financial coverage for health care to persons who have chosen to enter or remain in Canada "illegally" is consistent with fundamental justice and that the impugned policy

was a permissible means to discourage defiance of Canada's immigration laws. The Federal Court raised, but did not decide, whether [Ms. Toussaint's] right to non-discrimination on the basis of her immigration status as an irregular migrant had been violated.

16. [Ms. Toussaint] then appealed to the Federal Court of Appeal, arguing, among other things, that the Federal Court's decision was contrary to the right to life under article 6 of the *International Covenant on Civil and Political Rights* (the "ICCPR") and to protection from discrimination on the ground of immigration status under international human rights law.

17. The Federal Court of Appeal in its June 27, 2011 judgment, 2011 FCA 2013 upheld the Federal Court's finding that [Ms. Toussaint] "was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person". The Court held, however, that the "operative cause" of the risk to her life was her decision to remain in Canada without legal status and agreed with the lower court's finding that the deprivation of the right to life and security of the person in this case accorded with the principles of fundamental justice. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status did not qualify for protection as an "analogous ground" of discrimination under the *Canadian Charter*. The Court also commented that in assessing whether the exclusion of immigrants without legal status from access to health care was justifiable as a reasonable limit under section 1 of the *Canadian Charter*, appropriate weight should be given to the interests of the State in defending its immigration laws. The Court held that while international human rights law could be considered in interpreting the *Canadian Charter*, it was not relevant in this case.

18. [Ms. Toussaint] then sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. Her application for leave to appeal was denied on April 5, 2012.

19. On April 5, 2012, [Canada] repealed the 1957 Order-in-Council and replaced it with the 2012 Order-in-Council. In relation to access to the IFHP the 2012 Order-in-Council does not, however, provide irregular migrants with health-care coverage under the Program and makes no explicit exception for situations where life or health is at risk, except where there is a clear health risk to the public. This remains the case in the 2016 IFHP Policy.

20. At all material times, the Minister of Citizenship and Immigration or his delegates both before and after the making of the 2012 Order-in-Council on occasion granted benefits to persons who did not clearly meet the criteria then in place under the IFHP, but negligently, in bad faith or in abuse of their powers refused to do so for [Ms. Toussaint], despite knowing that she was then ineligible for provincial health insurance coverage and that her medical problems were serious and urgent, even after being made aware of medical opinions to that effect, and even after learning of the finding of the Federal Court, upheld by the Federal Court of Appeal, that [Ms. Toussaint] was exposed to a significant risk to her life and health, so significant that her rights to life and security of the person were violated.

21. On April 30, 2013, [Ms. Toussaint] became eligible for health-care coverage as a result of her application for permanent residence based on spousal sponsorship and a confirmation by Citizenship and Immigration Canada that she met the criteria for spousal sponsorship. Since then, [Ms. Toussaint] has been granted health-care coverage under the provincial Ontario Health Insurance Plan and has been receiving health care.

22. In December, 2013 [Ms. Toussaint] submitted a communication to the United Nations Human Rights Committee (the "Committee") under the First *Optional Protocol* to the *International Covenant on Civil and Political Rights* (the "*Optional Protocol*"). The Committee is an independent body established by the ICCPR specifically to supervise the application of the ICCPR and is recognized as an authority on the interpretation of the scope and nature of the obligations thereunder. [Ms. Toussaint] claimed that as a result of her exclusion from the IFHP she was a victim of violations of, among others, the right to life and the right to non-discrimination recognized in articles 6 and 26 of the ICCPR.

25. Between 2014 and 2017 the Committee received from [Canada] and forwarded to [Ms. Toussaint] various submissions and observations contesting both the admissibility and merits of [Ms. Toussaint's] claims, and also received from [Ms. Toussaint] her submissions and observations in response thereto which in turn the Committee forwarded to [Canada].

26. Among other things, [Ms. Toussaint] brought to the Committee's attention that in *Canada* v. *Bedford*, 2013 SCC 72 the Supreme Court of Canada held that the standard for causation between a law and the violation of the rights to life and security of the person under section 7 of the *Canadian Charter* is not that of a "direct" causal connection, which is how "operative cause" was used by the Federal Court of Appeal, but rather a "sufficient causal connection", which does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant.

27. On July 24, 2018 the Committee in *Toussaint* v. C*anada*, CCPR/C/123/D/2348/2014 determined that [Canada] had violated [Ms. Toussaint's] right to life recognized in article 6 of the ICCPR, noting both the Federal Court and the Federal Court of Appeal acknowledged that, despite the care [Ms. Toussaint] may have received, she had been exposed to a serious threat to her life and health because she had been excluded from the benefits of the IFHP. The Committee also noted the medical opinions to this effect which were accepted by the Federal Court. The Committee noted [Ms. Toussaint] did not claim a right to health, but that specific rights under the International Covenant on Civil and Political Rights have been violated in the context of access to health care. It stated that the obligation to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life and includes the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

28. The Committee also determined that [Canada] is not entitled to make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants. The Committee stated that in the particular circumstances of [Ms. Toussaint's] case where, as recognized by the Federal Court and the Federal Court of Appeal, the exclusion of [Ms. Toussaint] from the IFHP could result in her loss of life or irreversible, negative consequences for her health, the distinction drawn by [Canada] for the purpose of admission to the IFHP between those with legal status in Canada and those with irregular status was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26 of the ICCPR.

29. The Committee further determined that pursuant to article 2.3(a) of the ICCPR [Canada] is under an obligation to provide [Ms. Toussaint] with an effective remedy and is therefore obliged, among other things, to take appropriate steps to provide [Ms. Toussaint] with adequate compensation, and is also under an obligation to take all steps necessary to prevent similar violations in the future and ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

30. […, see above] Moreover, [Canada] acceded to the jurisdiction of the Committee to determine whether [Ms. Toussaint's] rights under the ICCPR had been violated, participating in the proceedings initiated by [Ms. Toussaint] before the Committee. As a result, [Ms. Toussaint] reasonably believed that [Canada] would respond to the Committee's finding that it had violated [Ms. Toussaint's] rights under the ICCPR, including, but not limited to, by making reparations to her. [Canada's] failure to do so violated her reasonable expectations and constituted a breach of [Canada's] duty to act in good faith in complying with its obligations under international law.

31. [Ms. Toussaint] by her counsel wrote to the Prime Minister of Canada on August 30, 2018 asking for his assurance that [Canada] will make good on its obligation to provide her with redress and to amend its regulatory scheme. The Prime Minister's office replied that the matter is the responsibility of the Minister of Immigration, Refugees and Citizenship. On September 25, 2018 [Ms. Toussaint's] counsel wrote to the then Minister asking for the same assurance. The Minister's office replied that the correspondence had been forwarded to the appropriate Departmental officials for their

information and consideration. However, neither the Minister nor any Departmental officials replied to [Ms. Toussaint].

32. On July 16, 2020 as part of the follow-up procedure to its Views the Committee assigned [Canada] two E grades (the worst possible, indicating that the information provided or measures taken by [Canada] were contrary to or reflected rejection of the Committee's Views) for failing to meet its obligations to provide [Ms. Toussaint] with adequate compensation and for failing to take all steps necessary to prevent non-repetition, noting that [Canada] had rejected the Committee's assessment of the case and mistakenly viewed the follow-up procedure as an opportunity to reargue the case.

33. On July 17, 2020 [Ms. Toussaint's] counsel wrote to the current Minister of Immigration, Refugees and Citizenship asking that [Canada] provide [Ms. Toussaint] with an effective remedy for the violation of her rights. On September 15, 2020 the Director General, Migration Health at Immigration, Refugees and Citizenship Canada responded that [Canada] would not take any measures to do so.[24] [Canada] relied on the same reasons it gave to the Committee as part of the follow-up procedure, which [Canada] mistakenly used as an opportunity to reargue the case.

34. [Canada] incorrectly, in bad faith and unreasonably refused to give effect to the Committee's decision by relying on its own, different interpretation of its obligations under the ICCPR and on the decisions of the Federal Court and Federal Court of Appeal in relation to rights under the *Canadian Charter*, thereby failing to meet the standard of good faith performance of the obligations it undertook by acceding to the *Optional Protocol* and the ICCPR. In particular, [Canada]:

> (a) asserted that a serious risk to [Ms. Toussaint's] life was in no way a reasonably foreseeable outcome of the denial of coverage under the IFHP, despite the Federal Court finding, after a full and fair opportunity to litigate the issue, that [Canada] was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person, and despite the acceptance of the Federal Court's finding by the Federal Court of Appeal and the Committee;
>
> (b) continued to rely on the Federal Court of Appeal's "operative cause" standard of causation without any regard to or mention of the Supreme Court of Canada's subsequent jurisprudence that effectively rejected that standard in favour of a "sufficient causal connection" standard that supports the Federal Court's finding that the deprivation of [Ms. Toussaint's] right to life was caused by her exclusion from the IFHP, and without any regard to or mention of the June 3, 2016 opinion of nine Canadian constitutional and health law experts submitted by [Ms. Toussaint] in the proceedings before the Committee that it was reasonable for [Ms. Toussaint] as an irregular migrant to seek a remedy against [Canada] rather than against the provincial government;
>
> (c) continued to rely on the incorrect characterization of [Ms. Toussaint's] claim as asserting a right to publicly funded healthcare or a right to health as guaranteed under the *International Covenant on Economic, Social and Cultural Rights*, rather than a right to life and to non-discrimination under articles 6 and 26 of the *International Covenant on Civil and Political Rights*, in the context of access to existing health care services;
>
> (d) continued to assert that excluding irregular migrants from the IFHP, even when it could result in loss of life or irreversible, negative consequences for their health, "advances a legitimate aim of encouraging persons not lawfully present in Canada to take steps to regularize their status", without giving due weight and consideration (i) to the interpretation of the right to life and to non-discrimination adopted by the Committee, (ii) to other authoritative international bodies such as the Inter-American Court of Human Rights which

[24] Permanent Mission of Canada to the UN, Response of the Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 (Feb 1, 2019).

the Committee cited in support of its interpretation that [Canada] cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants, (iii) to opinions of international organizations and others such as the opinions dated August 21, 2015 of Amnesty International and August 22, 2015 of the International Network for Economic, Social & Cultural Rights submitted by [Ms. Toussaint] in the proceedings before the Committee and the studies and reports referred to therein, or (iv) to the fact that at all material times [Ms. Toussaint] had taken steps to regularize her status, which had been impeded by the wrongful failure of Citizenship and Immigration Canada to consider her request for a fee waiver, all of which [Canada] was, or ought to have been, aware of;

(e) recognizing that it has obligations under the ICCPR, asserted that the provision of life-saving emergency medical services to irregular migrants at Canadian hospitals is sufficient to meet such obligations, despite the rejection of that assertion by the Federal Court and Federal Court of Appeal in the context of the violation of [Ms. Toussaint's] right to life and security of the person under the *Canadian Charter*, and despite knowing that irregular migrants are not entitled even to emergency care under legislation in Saskatchewan, Manitoba, Newfoundland and Labrador, and Prince Edward Island or in any of Canada's three territories, and that in Ontario, British Columbia, Alberta and New Brunswick, apart from situations where there is immediate danger to life, legislation does not mandate access to other medical services that may be required in order to prevent endangering life and thereby protect the right to life;

(f) asserted that it meets its obligations under the ICCPR by the 2012 Order-in-Council giving a discretionary power to the Minister of Immigration, Refugees and Citizenship on his or her own initiative to grant IFHP benefits in exceptional and compelling circumstances to persons otherwise not entitled thereto, when there are no guidelines for the exercise of such discretion nor is there any provision for any judicial or administrative review thereof and there are significant hurdles for an individual to access this remedy as there is no provision for an individual to apply for or seek the application of the Minister's discretion. In any event, the provision of discretion in exceptional circumstances to a general policy of denying access to essential health care to irregular migrants does not satisfy the "minimum" requirement which the Committee described as follows in paragraph 11.3 of its Views. "In particular, as a minimum States parties have the obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life."; and

(g) asserted that any compensation whatsoever to [Ms. Toussaint] is unwarranted, when, in addition to the extreme psychological stress which the Federal Court found [Ms. Toussaint] had suffered, [Canada] had been informed that [Ms. Toussaint] came to suffer many of the serious consequences of inadequate preventative and diagnostic care for her conditions identified in the opinions of the medical experts accepted by the Federal Court, including stroke, leg amputation above the knee, partial blindness, kidney failure requiring dialysis several times a week, and heart failure resulting in an anoxic brain injury.

[Canada], in discharging its duty to honour its obligations under the ICCPR, failed, and continues to fail, to take into consideration the interests of [Ms. Toussaint] as a vulnerable affected person, a vulnerability created by the [Canada's] violation of her rights to life and security of the person.

35. The Committee determined that [Canada] had violated [Ms. Toussaint's] rights to life and non-discrimination under articles 6 and 26 of the ICCPR by [Canada's] failure or refusal to provide essential health care benefits to [Ms. Toussaint] under the IFHP, and that [Canada] was therefore under an obligation to provide an effective remedy, including providing [Ms. Toussaint] with adequate compensation.

36. [Canada] decided not to comply with this obligation. The basis of this decision was its opinion that no violation of the rights to life and non-discrimination under articles 6 and 26 had occurred.

37. The right to life is a universally recognized human right. As such, aside from being encapsulated in article 6 of the ICCPR, it is also a rule of customary international law.

38. Likewise, the prohibition against discrimination, as encapsulated in article 26 of the ICCPR, is also a universally recognized right under customary international law.

39. Both are also rules of Canadian common law, by virtue of the fact that rules of customary international law are automatically incorporated into domestic common law.

40. Accordingly, an administrative decision that is premised on a determination that these rules of international (and therefore Canadian) law have not been violated is a question of law, reviewable on a correctness standard.

41. *Pacta sunt servanda* – the international law rule that states must comply with their obligations under the international treaties they are parties to – is also a rule of customary international law. Further, as one of the central organizing principles of the international legal order, it is also a rule of *jus cogens*, and thus among a small number of peremptory norms from which no state may derogate.

42. Article 2.3(a) of the ICCPR obliges all states parties to ensure an effective remedy for violations of the rights and freedoms protected therein. Having acceded to the ICCPR, [Canada] is bound by the *pacta sunt servanda* principle under customary international law – and therefore under domestic law – to observe its obligations under ICCPR article 2.3(a).

43. Thus, an administrative decision whether to provide a remedy for alleged violations of rights protected under the ICCPR is a question of law, also reviewable on a correctness standard.

44. In the alternative, such administrative decisions are reviewable on a reasonableness standard.

45. By excluding irregular migrants, and/or failing or refusing to consider the Views in applying the IFHP in a manner that continues to exclude irregular migrants, the IFHP breaches section 7 and section 15(1) of the *Canadian Charter*. In particular, the exclusion of irregular migrants such as [Ms. Toussaint], from essential health care benefits violates their right to life and security of the person, in a grossly disproportionate manner that is arbitrary and not in accordance with the principles of fundamental justice, including but not limited to the government's obligation to perform treaty obligations in good faith. The exclusion of certain groups of migrants is also discriminatory, in purpose and/or effect, based on the distinction drawn by the government, for the purpose of admission to the IFHP, between those having legal status in the country, and those who have not been fully admitted to Canada, when the exclusion of those migrants could result in loss of life or irreversible negative consequences for their health, as was held in the Views of United Nations Human Rights Committee. Moreover, the addition of Ministerial discretion - the discretionary power of the Minister of Immigration, Refugees and Citizenship on his or her own initiative to grant IFHP benefits in exceptional and compelling circumstances - to the 2012 Order-in-Council, as continued in the current 2016 IFHP Policy, does not render the policy constitutional, nor can the violations be justified under section 1 of the *Canadian Charter*.

46. Independently of any administrative law remedies and remedies under the *Canadian Charter*, violations of rules of customary international law that have been incorporated into domestic common law may also give rise directly to civil remedies. Justifications for violations of the rights to life and non-discrimination under the *Canadian Charter* found by the Federal Court and Federal Court of Appeal do not *per se* apply to violations of the right to life and non-discrimination protected under customary international law.

> 47. [Canada's] decision not to give effect to the Views of the Committee to provide [Ms. Toussaint] with a remedy was therefore incorrect and/or unreasonable. Moreover, [Ms. Toussaint] is entitled to a civil remedy directly for the violation of her customary international law rights to life and non-discrimination.
>
> 48. Further, the customary international law rights to life and freedom from discrimination as protected under the ICCPR are similar to the domestic *Canadian Charter* rights to life and equality protected under sections 7 and 15(1) respectively. The Supreme Court of Canada has on multiple occasions stated to the effect that "the *Canadian Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." Thus, a finding of a violation of the rights to life and freedom from discrimination as protected under the ICCPR creates a presumption that the corresponding *Canadian Charter* rights have been violated as well. The common law rules of *res judicata,* issue estoppel, abuse of process and collateral attack do not apply in this case as there has been a new United Nations Human Rights Committee decision since the Federal Court of Appeal decision in *Toussaint* v. *Canada* so that [Ms. Toussaint] is not relitigating an old issue but seeking to give effect to that new Human Rights Committee decision.
>
> 49. As a direct and proximate result of the breaches by [Canada] and by the Minister of Citizenship and Immigration and his delegates of their aforementioned obligations [Ms. Toussaint] suffered personal injury, economic, and non-economic damages, and will continue to suffer such harm, damages, and economic loss in the future. Damages are a just and appropriate remedy to compensate [Ms. Toussaint], vindicate her rights, and deter future breaches of such rights.

I. The Intervenors' Arguments

1. The Canadian Civil Liberties Association's Procedural Argument

[68] The Canadian Civil Liberties Association (the "CCLA") makes a procedural argument about the approach that the court should take when a pleadings motion is brought to strike a *Charter* claim that if struck will have repercussions and affect the rights of many persons beyond the immediate parties to the action.

[69] The CCLA's main submission is that given the overwhelming power imbalance that favours the government over rights-based claimants and given the importance of rights-based claims to the claimants and to society, such claims should be dealt with on a full evidentiary record and such claims should rarely be dismissed on a pleadings motion for failing to disclose a cause of action or by applying the doctrine of *res judicata*.

2. The Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Asian Legal Clinic of Ontario, and the Chinese and Southeast Legal Clinics' Procedural Argument.

[70] The Colour of Poverty/Colour of Change Network ("COP-COC"), the Black Legal Action Centre ("BLAC"), the South Asian Legal Clinic of Ontario ("SALCO"), and the Chinese and Southeast Asian Legal Clinic ("CSALC") (collectively, the "Colour-Coalition"), makes a procedural argument about the approach that the court should take when a pleadings motion is brought to strike a claim involving *Charter* rights, particularly when the claim requires the court to consider the societal context, including systemic discrimination barriers confronted by a

racialized group.

[71] The Colour-Coalition states that the developing jurisprudence about *Charter* rights and particularly about the equality rights of s. 15 of the *Charter* requires courts to examine on an adequate evidentiary record the full sociological context of a group's physical, economic, societal, cultural situation including systemic disadvantages and systemic racism, discrimination, and the actual impact of the law on the group.[25]

[72] The Colour-Coalition submits that the case at bar involves the novel issue of the scope of Canada's obligations under international law and the *Charter* to provide essential health care to "irregular migrants," a group that is disproportionately racialized. The Colour-Coalition submits that for the court to determine this issue, it will need to consider the systemic barriers confronted by racialized irregular immigrants, which is an evidentiary issue that has not previously been addressed by the courts. These intervenors submit that these circumstances mean that it is not "plain and obvious" that Ms. Toussaint's claim discloses no reasonable cause of action, and the Canada has not met the stringent test for a motion to strike under rule 21.01.

[73] The Colour-Coalition asserts that in considering the systemic discrimination and systemic barriers faced by irregular migrants, it is clear that there is no "radical defect" in Ms. Toussaint's claim, and that there is a chance that she might succeed; her claim is not doomed to failure.

3. Amnesty International Canada and ESCR – Nets' Substantive Arguments

[74] Amnesty International Canada and ESCR-Net (collectively, the "Amnesty Group") make two substantive submissions.

[75] The Amnesty Group's first submission is that Canada's interpretation of its obligations under the *ICCPR*, which interpretation is premised on Canada's characterization of Ms. Toussaint's claim as a matter of economic and social rights and not a matter of the right to life, is wrong, because this premise ignores the doctrine of indivisibility, interdependence, and interrelatedness of human rights.[26]

[76] As part of the first submission, the Amnesty Group submits that the court should not accept Canada's constrained interpretation of its legal obligations, particularly at this preliminary stage. The Amnesty Group submits that because Canada's domestic laws, including the *Charter*, are presumed to conform with its international legal obligations under ratified treaties, it is not plain and obvious that that Canada's failure to abide by its international obligations and to implement the United Nation Committee's Views does not constitute violations of sections 7 and 15 of the *Charter*.

[77] The Amnesty Group's second submission is that Canada's submission that the systemic remedy sought by Ms. Toussaint, which is that Canada take positive steps to prevent similar, future violations of the *ICCPR*, has no prospect of success is wrong. The Amnesty Group disputes Canada's submission that international law obligations cannot amend domestic legislation or

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25 *R. v. Chouhan*, 2021 SCC 26*; Zoghbi v. Air Canada*, 2021 FC 1154; *R. v. Morris*, 2021 ONCA 680; *R. v. Theriault*, 2021 ONCA 517; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *R. v. Le*, 2019 SCC 34; Peel *Law Association v. Pieters*, 2013 ONCA 396 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.).

26 +

policy and the Amnesty Group contends that Canada's assertion runs contrary to the right to an "effective remedy" for those who have had their rights violated.

[78] Contrary to Canada's submission, The Amnesty Group argues as part of the second submission that the right to an effective remedy includes the duty of non-repetition, which requires states to prevent the recurrence of a human rights violation, and it argues that this request for relief is available under the *Charter* and under the *ICCPR*. The Amnesty Group argues that a systemic remedy ensures that Canada abides by its international law obligations to provide an effective remedy.[27] Thus, the Amnesty Group submits that Ms. Toussaint's request for systemic relief is not doomed to fail.

4. The Charter Committee on Poverty Issues', the Canadian Health Coalition's, and the FCJ Refugee Centre's Substantive Arguments

[79] Similar to the argument made by the Amnesty Group, The Charter Committee on Poverty Issues', the Canadian Health Coalition's, and the FCJ Refugee Centre's (collectively, the "CCPI-Coalition") submits that Canada has mischaracterized Ms. Toussaint's human-rights claim as being a matter of freestanding socio-economic rights when her claim is indivisibly connected to the right to life and about non-discrimination.

[80] The CCPI-Coalition makes other substantive arguments. It submits that Canada has misstated the current state of *Charter* law about access to essential health care, which is in flux and not settled and therefore it submits that it is not plain and obvious that Ms. Toussaint's claim will fail.

[81] The CCPI-Coalition argues that Ms. Toussaint's current claim is different from Ms. Toussaint's previous proceedings before the Federal Court, which argument addresses Canada's submissions that Ms. Toussaint is relitigating a settled matter.

[82] The CCPI-Coalition argues that although the United Nation Human Rights Committee's Views are not binding, the Ontario court has jurisdiction to review Canada's decision not to implement those Views and the jurisdiction to determine Ms. Toussaint's *Charter* claims. The CCPI-Coalition submits that given the UN Human Rights Committee's Views and Supreme Court of Canada jurisprudence, sections 7 and 15 of the *Charter* should be interpreted to prevent irregular immigrants from being denied access to essential health care necessary for life and therefore it is not plain and obvious that Ms. Toussaint's claims are doomed to fail.

J. The Theory of Ms. Toussaint's Claim

[83] Based on the material facts of her Amended Amended Statement of Claim, the legal theory for Ms. Toussaint's claim for a myriad of remedies is extraordinarily complex as is the law associated with the availability of the remedies. By way of analogy, a typical case theory may be described as a solution for two or three discrete legal equations that formulate causes of action, while, in comparison, Ms. Toussaint's case theory may be described as a solution for three partial differential equations that impose relations between the various partial causes of action of a

[27] International Commission of Jurists, "*The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*" (2018) at p. 137,

multivariable cause of action.

[84] In this part of my Reasons for Decision, I shall itemize the many remedies that Ms. Toussaint seeks, and then, I shall deconstruct the legal theory behind Ms. Toussaint's Amended Amended Statement of Claim.

1. The Remedies Claimed by Ms. Toussaint

[85] As pleaded in paragraph 1 of her Amended Amended Statement of Claim, Ms. Toussaint claims the following remedies:

> The plaintiff claims:
>
> (a) General and special damages in the amount of $1,200,000 arising out of her exclusion between July 2009 and April 30, 2013 from health care benefits essential to prevent a reasonably foreseeable risk of loss of life or irreversible negative health consequences […] and the defendant's failure or refusal to pay her compensation for the resulting violation of her rights to life, security of the person and non-discrimination,
>
> (i) under section 24(1) of the *Canadian Charter of Rights and Freedoms*,
>
> (ii) under domestic law requiring the defendant to perform its obligations under [the ICCPR and the *Optional Protocol*] […] in good faith, and
>
> (iii) at customary international law as incorporated into the law of Canada;
>
> […]
>
> (c) A declaration pursuant to section 52(1) of *The Constitution Act, 1982* that the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 as continued in amended form in the 2016 Interim Federal Health Program policy effective as of April 1, 2016, is unconstitutional, in that it excludes irregular migrants from access to essential health care benefits, in a manner that violates sections 7 and 15 (1) of the *Canadian Charter of Rights and Freedoms*;
>
> (d) A declaration that the Minister of Citizenship and Immigration violated the plaintiff's rights under sections 7 and 15 (1) of the *Canadian Charter of Rights and Freedoms* between April 5, 2012 and April 30, 2013 by not acting on his own initiative to pay the costs of essential health care benefits for her when it was within his power to do so pursuant to section 7 of the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26;
>
> (e) An order requiring the defendant to interpret and apply the Interim Federal Health Program in a manner consistent with sections 7 and 15 (1) of the *Canadian Charter of Rights and Freedoms* and to provide that irregular migrants in Canada are eligible for essential health care benefits;
>
> (f) A declaration that the defendant violated the plaintiff's rights to life and non-discrimination as recognized in articles 6 and 26 of the *International Covenant on Civil and Political Rights* by failing to provide her essential health care benefits under the Interim Federal Health Program between July 2009 and April 30, 2013 when she was an irregular migrant, as the United Nations Human Rights Committee determined in its Views adopted July 24, 2018 in *Toussaint v. Canada*, CCPR/C/123/D/2348/2014, and violated her right to an effective remedy therefor as provided for in article 2.3(a) of the said

> Covenant by failing or refusing to pay her adequate compensation as the Committee stated the defendant was obliged to do;
>
> (g) A declaration that the defendant's decision not to give effect to the said Views of the United Nations Human Rights Committee infringed sections 7 and 15 (1) of the Canadian Charter of Rights and Freedoms, interpreted in light of the Human Rights Committee's Views, and an order under section 24 (1) of the *Canadian Charter of Rights and Freedoms* requiring the defendant to give effect to the Views of the Human Rights Committee in a manner that complies with the *Canadian Charter of Rights and Freedoms*;
>
> (h) A declaration that the defendant's failure or refusal to provide adequate compensation to the plaintiff for the violation of her rights and to ensure that irregular migrants have access to essential health care benefits as determined in the aforementioned Views of the Human Rights Committee was an incorrect or, in the alternative, an unreasonable decision, contrary to Canada's international human rights obligations to act in good faith, and an order requiring the defendant to give effect to the Views of the Committee;
>
> (i) if necessary, a declaration pursuant to section 52 (1) of *The Constitution Act, 1982* that section 32 of the *Crown Liability and Proceedings Act*, R.S., 1985, c. C-50, and the provisions of the *Limitations Act, 2002*, S.O. 2002, c 24, Sch. B as made applicable by section 32, are invalid, inoperable, inapplicable and of no force or effect to the extent that they would bar a claim against the government of Canada for a breach of section 7 or 15(1) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms*;
>
> (j) if necessary, a declaration pursuant to section 52 (1) of *The Constitution Act, 1982* that the common law rules of *res judicata*, issue estoppel, abuse of process, and collateral attack are invalid, inoperable, inapplicable and of no force or effect to the extent that they would bar a claim against the government of Canada for a breach of section 7 or 15 (1) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*;
>
> […]

2. Deconstructing the Theory of the Case

[86] For her myriad claims for remedies, Ms. Toussaint advances three main causes of action that her right to life and her right to non-discrimination have been violated. The three main causes of action are based on: (a) the *Charter*; (b) customary international law; and (c) domestic administrative law. Ms. Toussaint advances three main causes of action that are simultaneously and somewhat paradoxically both analytically discrete and analytically profoundly interrelated. Thus, for example, while international law about treaties and about customary international law may not be determinative of the *Charter* analysis, customary international law is at least relevant to the *Charter* analysis. And, it is arguable that the *Charter* claim is discrete from the customary international law claim and *vice versa* so that it is theoretically possible that the *Charter* claim might fail and the customary international law claim might succeed or *vice versa* or they might both fail or they might both succeed.

[87] Apart from the law that on a pleadings motion, the properly pleaded material facts are taken to be proven, the material facts of Ms. Toussaint's case are more or less already proven. Her story is virtually a matter of public record and is essentially about the proceedings in the Federal Court and what happened after those proceedings when she took her story to the United Nations Human

Rights Committee. Ms. Toussaint's case is actually factually simple but legally extraordinarily complex both for her and for Canada.

[88] The deconstruction of Ms. Toussaint's case theory is as follows:

a. The material facts support a cause of action for contravention to her right to life under s. 7 of the *Charter* and her right to non-discrimination under s. 15 of the *Charter*.

b. Ms. Toussaint's *Charter* causes of action are not barred by *res judicata* or by limitation periods.

c. Without being jurisdictionally binding, international human rights law with respect to Ms. Toussaint's right to life her right and her to non-discrimination are relevant evidentiarily and analytically to her *Charter* claims.

d. Since, the *Charter* is presumed to provide protections at least as great as those contained in Canada's international human rights obligations,[28] Ms. Toussaint also seeks *Charter* remedies for violations of the *Charter* rights that correspond to her rights under customary international law.

e. Independent of the *Charter* breaches of domestic law breaches of customary international law may be civilly actionable in a domestic common law court.[29]

f. Ms. Toussaint's causes of action based on customary international law and domestic law are not barred by *res judicata* or by limitation periods.

g. Ms. Toussaint seeks damages based on four rules of customary international law; namely: (a) the rule of *pacta sunt servanda* ("agreements are to be kept"); (b) the rule that treaties are binding and meant to be kept; (c) the rule that guarantees the right to life; and (d) the rule that guarantees the right to nondiscrimination.

h. Ms. Toussaint submits that under the doctrine of incorporation, by which rules of customary international law are automatically adopted into the common law in the absence of conflicting legislation,[30] when Canada entered into the *International Covenant on Civil and Political Rights* (the "ICCPR") and its *Optional Protocol*, it became bound by the customary international law rules of *pacta sunt servanda* and the rule of the binding nature of treaties, which meant, in turn, means that Canada promised Ms. Toussaint that: (a) it would guarantee her right to life, which is another customary international law rule; (b) it would guarantee her right to non-discrimination, which is another customary international law rule; and (c) it would ensure her an effective remedy for any breaches of her right to life or her right to non-discrimination.

i. As a discrete alternative, that is evidentiarily and analytically connected to Ms. Toussaint's *Charter* claims and her claims based on customary international law, Ms. Toussaint advances a claim for judicial review of Canada's response to the Views of the United Nations Human Rights Committee.

j. Ms. Toussaint submits that this Court has jurisdiction to judicial review Canada's

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[28] *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, at para. 31.
[29] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.
[30] *R. v. Hape* 2007 SCC 26; *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (*)

> decision not to provide her with compensation and Canada's decision not to take steps to amend its present policies that violate the right to life and the right to non-discrimination identified by the UN Committee on Human Rights. Thus, Canada's decision not to accept the Views of the United Nations Human Rights Committee was legally incorrect or unreasonable and subject to judicial review and the court should order Canada to act to implement the Views of the Committee.

K. Discussion and Analysis: Issues Overview

[89] As the above discussion reveals, Canada attacks Ms. Toussaint's Amended Amended Statement of Claim in five ways. Canada submits that Ms. Toussaint's actions are: (a) outside the jurisdiction of the Ontario Court; (b) out of time under the *Limitations Act, 2002*[31]; (c) *res judicata* or an abuse of process; (d) in contravention of the rules of pleading; and (e) doomed to fail for not showing a reasonable cause of action. I shall analyze Canada's arguments and Ms. Toussaint's counterarguments and sometimes the intervenors' counterarguments discretely beginning with the matter of this court's jurisdiction.

[90] Because, as foreshadowed above, Ms. Toussaint's Amended Amended Statement of Claim is not being struck out and this action will be proceeding to the completion of the pleadings and to the interlocutory stages of the proceeding, which might include a motion for summary judgment by either side, apart from my conclusions that: (a) this court has jurisdiction; (b) Ms. Toussaint's claims are timely and not statute-barred; and (c) Ms. Toussaint has not contravened the rules of pleading, nothing that I shall say is meant to be a determination of the merits of Ms. Toussaint's claim or Canada's defence.

[91] It may be said that just as it is not plain and obvious that Ms. Toussaint's causes of action are doomed to fail, it is not plain and obvious that Canada's defences based on *res judicata*, or procedural or substantive law may not succeed.

[92] With respect to Canada' fifth argument about whether Ms. Toussaint has pleaded a reasonable cause of action, I have focused my analysis on *Nevsun Resources Ltd. v. Araya*,[32] which Ms. Toussaint relies on heavily to show that she has a viable claim against Canada and on *Ahani v Canada (Minister of Citizenship and Immigration)*,[33] which Canada relies on heavily to show that Ms. Toussaint has no reasonable cause of action, and that her claims are doomed to fail.

L. Does the Ontario Court Have Jurisdiction?

1. The Jurisdiction of the Superior Court

[93] Section 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act*[34] confer concurrent jurisdiction on the superior courts and the Federal Court for claims against

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[31] S.O. 2002, c 24, Sch. B
[32] 2020 SCC 5.
[33] (2002), 58 O.R. (3d) 107 at paras. 32 and 35 (C.A.), leave to appeal to SCC ref'd [2002] S.C.C.A. No. 62. See also *Mugesera v Kenney*, 2012 QCCS 116 at para. 37.
[34] R.S.C., 1985, c. C-50.

the federal Crown.[35] Section 18 of the *Federal Courts Act* confers on the Federal Court the exclusive jurisdiction to judicially review the administrative decisions of the federal Crown.

[94] Sections 17 and 18 of the *Federal Courts Act*, state:

> *Jurisdiction of Federal Court*
> *Relief against the Crown*
>
> 17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.
>
> *Cases*
>
> (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which
>
> (a) the land, goods or money of any person is in the possession of the Crown;
>
> (b) the claim arises out of a contract entered into by or on behalf of the Crown;
>
> (c) there is a claim against the Crown for injurious affection; or
>
> (d) the claim is for damages under the *Crown Liability and Proceedings Act*.
>
> *Crown and subject: consent to jurisdiction*
>
> (3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:
>
> (a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and
>
> (b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.
>
> *Conflicting claims against Crown*
>
> (4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.
>
> *Relief in favour of Crown or against officer*
>
> (5) The Federal Court has concurrent original jurisdiction
>
> (a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and
>
> (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

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[35] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of habeas corpus ad subjiciendum, writ of certiorari, writ of prohibition or writ of mandamus in relation to any member of the Canadian Forces serving outside Canada.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[95] Section 21 of the *Crown Liability and Proceedings Act* states:

Jurisdiction
Concurrent jurisdiction of provincial court

21 (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

Where proceedings pending in Federal Court

(2) No court in a province has jurisdiction to entertain any proceedings taken by a person if proceedings taken by that person in the Federal Court in respect of the same cause of action, whether taken before or after the proceedings are taken in the court, are pending.

Declaration of rights

22 (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

Servants of Crown

(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.

[96] All exercises of government discretion must conform to the *Charter* and Canada's prerogative powers are subject to judicial review.[36] The Federal Court's exclusive jurisdiction over federal administrative decisions extends only to decisions made by or under an Act of Parliament or an order made pursuant to Crown prerogative.[37] Absent an order, the exercise of a prerogative power is reviewable in the Superior Court.[38]

[97] Where an action is, in effect, a disguised application for judicial review of a decision of a federal tribunal, the Ontario Court may dismiss the action as disclosing no cause of action, or on the grounds that the Court has no jurisdiction to great the relief sought.[39]

2. Discussion and Analysis

[98] Canada argues that Ms. Toussaint's action is in its essence a matter of judicial review within the exclusive jurisdiction of the Federal Court and, therefore, the Ontario Superior Court does not have jurisdiction.

[99] Canada's argument is wrong on two accounts. First, the Ontario Court has concurrent jurisdiction with the Federal Court with respect to *Charter* claims brought against the Federal Government. There is nothing in the *Federal Court Act* that precludes a claim for damages against Canada for breach of Ms. Toussaint's rights under the *Charter*[40] or under international law.

[100] The first point is demonstrated by *Ahani v. Canada (Minister of Citizenship and Immigration),*[41] the case much relied on by Canada with respect to the role of the United Nations Human Rights Commission as the discussion later will reveal.

[101] The *Ahani* case is about Canada's efforts to deport Mr. Ahani because he was alleged to be a terrorist. Mr. Anhani applied to the Superior Court of Ontario to enjoin his deportation pending a response from the United Nations' Human Rights Committee to his submission under the *Optional Protocol* to the *ICCPR.* Justice Dambrot dismissed the motion for an interlocutory injunction and Mr. Ahani appealed. The Crown cross-appealed on the ground that Justice Dambrot should not have assumed jurisdiction but instead should have deferred to the Federal Court. The Court of Appeal dismissed the cross-appeal because the Superior Court had concurrent jurisdiction and Justice Dambrot did not err in exercising the court's discretion to hear a constitutional law matter.

[102] The case at bar is similar, as in the *Ahani* case, there were proceedings before the Federal Court about the constitutionally of Canada's actions and Ontario's courts had jurisdiction to address subsequent events including proceedings before the United Nations Human Rights Committee.

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[36] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; J.A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2016) 54 Alta. L. Rev. 997.
[37] *Black v. Chrétien*, (2001), 54 O.R. (3d) 215 at para. 74 (C.A.).
[38] *Black v. Chrétien*, (2001), 54 O.R. (3d) 215 at para. 76.
[39] *Smith v. Canada (Attorney General)*, 2016 ONSC 489; *Ontario Inc. v. Canada (Canada Revenue Agency)*, 2013 ONSC 152, aff'd 2013 ONCA 604; *Canada (Attorney General v. TeleZone Inc.*, 2010 SCC 62.
[40] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.
[41] (2002), 58 O.R. (3d) 107 (C.A.), leave to appeal to S.C.C. ref'd [2002] S.C.C.A. No. 62.

[103] Second, Canada is wrong with respect to the ambit of the Federal Court's exclusive jurisdiction in matters of administrative law. In Ms. Toussaint's case, there is no Act of Parliament, nor order made pursuant to a Crown prerogative that confers on the Minister the authority to decide whether or not to implement a recommendation of the United Nations Human Rights Committee.

[104] The Minister's decision is an exercise of a Crown prerogative of the sort that is outside the exclusive jurisdiction of the Federal Court and reviewable by the Superior Court of Justice in Ontario where Ms. Toussaint resides and seeks access to justice.

[105] I dismiss Canada's argument that this court does not have the jurisdiction to determine Ms. Toussaint's action.

M. Are Ms. Toussaint's Claims Statute-Barred?

1. The Limitations Act, 2002

[106] The relevant provisions of the *Limitations Act, 2002* are sections 1, 4, and 5, which are set out below:

> *Definitions*
>
> 1. In this Act,
>
> […]
>
> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; ….
>
> BASIC LIMITATION PERIOD
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[…]

[107] Prior to the enactment of s. 5(1)(a)(iv) of the current *Limitations Act, 2002*, the judge-made discoverability principle governed the commencement of a limitation period. The discoverability principle stipulated that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief.[42] The discoverability principle conforms with the idea of a cause of action being the fact or facts which give a person a right to judicial redress or relief against another.[43]

[108] Subject to the adjustment made by s. 5(1)(a)(iv), which adds the element that a proceeding is an appropriate means to seek a remedy, the basic limitation period of two years under the *Limitations Act, 2002*, a claim is "discovered" on the earlier of the date the claimant knew - a subjective criterion - or ought to have known - an objective criterion - about the claim.[44]

[109] Pursuant to s. 5(2) of the *Limitations Act, 2002*, unless the contrary is proven, it is presumed that a claimant will know of the above matters on the day that the act or omission took place.

[110] Under the discoverability principle, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.[45] The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case; it is a fact-based analysis.[46]

[111] Discovery means knowledge of the facts that may give rise to the claim, and the knowledge required to start the limitation period is more than suspicion and less than perfect knowledge.[47] If the plaintiff does know "enough facts", which means knowing the material facts, then the claim is discovered and the limitation period begins to run.[48]

[112] Because of the Covid-19 pandemic, pursuant to *O. Reg*. 73/20, the running of limitation

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[42] *Kamloops v. Nielson* (1984), 10 D.L.R. (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549.
[43] *Lawless v. Anderson*, 2011 ONCA 102 at para. 22; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 at p. 170 (C.A.).
[44] *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at paras. 33 and 70.
[45] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224.
[46] *Madden v. Holy Cross Catholic Secondary School*, 2015 ONSC 1773 at para. 17; *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165; *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at para. 71; *Lawless v. Anderson*, 2011 ONCA 102 at para. 22; *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 (C.A.); *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger* (2001), 53 O.R. (3d) 208, at para. 19 (S.C.J.); *Smyth v. Waterfall* (2000), 50 O.R. (3d) 481 at para. 8 (C.A.).
[47] *Vu v. Canada (Attorney General)*; 2021 ONCA 574 at para. 47; *Grant Thornton LLP v. New Brunswick* 2021 SCC 31; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 at para. 41, leave to appeal refused, [2019] S.C.C.A. No. 91.
[48] *Vu v. Canada (Attorney General)*; 2021 ONCA 574 at para. 49; *Lawless v. Anderson*, 2011 ONCA 102 at para. 23.

periods was suspended during the public health emergency.

2. Discussion and Analysis

[113] Ms. Toussaint commenced her action against Canada on October 14, 2020.

[114] It is plain and obvious that Ms. Toussaint did not have the knowledge necessary to advance her claims against Canada until after Canada unequivocally indicated that it disagreed with the Views of the United Nations' Human Rights Committee and that occurred on September 15, 2020.

[115] However, even under the alternative theory advanced by Canada under which Ms. Toussaint could and should have sued Canada after the Human Rights Committee released its July 24, 2018 decision, the two-year limitation period would still not have expired when Ms. Toussaint commenced her action due to the operation of O. Reg. 73/20 suspending limitation periods in Ontario courts during the COVID-19 pandemic.

[116] Ms. Toussaint's action is not statute barred pursuant to the *Limitations Act, 2002*.

N. Are Ms. Toussaint's Claims Barred on the Grounds of *Res Judicata*, Issue Estoppel, Abuse of Process, or Impermissible Collateral Attack?

1. *Res Judicata*, Issue Estoppel, Collateral Attack, and Abuse of Process

[117] The law has several doctrines to substantially diminish but not to eradicate absolutely re-litigation.

[118] The idea of *res judicata* ("a matter adjudicated") is the legal rule and the public policy that a final judgment on the merits by a court of competent jurisdiction is binding and determinative of the rights of the parties or their privies in all later suits with respect to fundamental issues decided in the former suit (issue estoppel),[49] and with respect to causes of actions and defences that were decided (cause of action estoppel)[50] or could and ought to have been decided in the former suit (the rule from *Henderson v. Henderson*).[51]

[119] The court has an inherent and broad jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute and this flexible jurisdiction has been utilized to prevent re-litigation where the technical requirements of cause of action, issue estoppel, or the doctrine of collateral attack are not satisfied.[52] The doctrine of abuse of process is a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a

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[49] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *Angle v. M.N.R.* (1974), 47 D.L.R. (3d) 544 (S.C.C.).

[50] *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430, (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 656; *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621; *Maynard v. Maynard*, [1951] 1 D.L.R. 241.

[51] (1843), 67 E.R. 313, 3 Hare 100 (V.C. Ct.).

[52] *Power Tax Corporation v. Millar*, 2013 ONSC 135 (S.C.J.); *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at paras. 55–56 *per* Goudge J.A., dissenting (C.A.), approved [2002] 3 S.C.R. 307.

miscarriage of justice, and its application will depend on the circumstances, facts and context of a given case.[53]

[120] A collateral attack to an existing court order in subsequent proceedings is regarded as an abuse of process.[54] Collateral attacks are objectionable because they re-litigate already decided matters. The underlying policy of the collateral attack principle is that an order made by a court or tribunal having jurisdiction to make the order stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed in a proceeding to have the order set aside on grounds of fraud or new evidence.

[121] *Danyluk v. Ainsworth Technologies Inc.*[55] is a leading case on issue estoppel. It adds an element of discretion to the determination of whether there is an issue estoppel. Where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.[56]

[122] There may be situations where re-litigation would enhance the integrity of the judicial system; for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context, — and in these instances, the subsequent proceeding would not be an abuse of process.[57]

2. Discussion and Analysis

[123] Canada submits that Ms. Toussaint's Claim based on a contravention of the *Charter* is *res judicata* having been decided against her in the Federal Court judicial review action in 2010-12. Canada further submits that all of Ms. Toussaint's claims are barred as re-litigation, an abuse of process, or an impermissible collateral attack on the decisions of the Federal Court.

[124] There may be merit to Canada's submissions, which amount to a defence to Ms. Toussaint's claim based on *res judicata*, but it is not plain and obvious that this defence dooms Ms. Toussaint's claim to failure and it is certainly not plain and obvious that the court would not stand back and taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.

[125] The immediate case raises new issues that were not before the Federal Court in 2010-12. The immediate case addresses additional and different legislation than was before the Federal Court. Three iterations of the *IFHP* are subject matter for the current litigation, but the Federal

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[53] *Plate v. Atlas Copco Canada Inc.*, 2019 ONCA 196; *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 at paras. 29–32 (C.A.).
[54] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Wilson*, [1983] 2 S.C.R. 594.
[55] [2001] 2 S.C.R. 460.
[56] *Apotex Inc. v. Schering Corp.*, 2018 ONCA 890; *Amtim Capital Inc. v. Appliance Recycling Centres of America*, 2014 ONCA 62; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.
[57] *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 at paras. 29–32 (C.A.).

Court proceedings only addressed the constitutionality as it existed in 2009. In the immediate case, the United Nations' Human Rights Committee's decision came after the Federal Court proceedings. Indeed, Ms. Toussaint's could not have made submissions to the Committee until she had exhausted her domestic proceedings. The factual circumstances are different including the actualization of the harm from the non-availability of health care and the before and after of Ms. Toussaint's submissions to the United Nations Human Rights Committee and Canada's response. Ms. Toussaint's action raises matters of importance to others similarly situated to Ms. Toussaint and there have fundamental changes to *Charter* law and to human rights law jurisprudence in Canada since the 2010 proceedings before the Federal Court including *Canada* v. *Bedford* (2013),[58] and *Carter v. Canada* (2015),[59] that might warrant a reconsideration of the Federal Court's decisions.

[126] In short, it is not plain and obvious that Canada has a *res judicata* argument that dooms Ms. Toussaint's action to failure.

O. The Attack on Paragraphs 20, 30, and 33 of the Amended Amended Statement of Claim

[127] Canada makes a focused attack on just three paragraphs of the Amended Amended Statement of Claim, which it seems is ancillary to and in aid of its more substantial challenges to Ms. Toussaint's pleading. My discussion of this issue can be very brief. I shall first describe the pertinent rules of pleading and then analysis how paragraphs 20, 30, and 33 stand up to Canada's attack.

1. The Rules of Pleading

[128] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion under Rule 21.[60] Pleadings that are irrelevant, argumentative, inflammatory, inserted only for colour, inserted only to disconcert or humiliate, or that constitute bare unfounded allegations should be struck out as scandalous or as an abuse of process.[61]

[129] While most factual allegations must be taken as true for the purposes of a motion to strike, those made without evidentiary foundation are an abuse of process.[62] Allegations based on

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59 2015 SCC 5.

60 *Deluca v. Canada* (AG), 2016 ONSC 3865; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438.

61 *Sequin v. Van Dyke*, 2011 ONSC 2566 (Master); *Dugal v. Manulife Financial Corp*., 2011 ONSC 387; *Carney Timber Company, Inc. v Pabedinskas*, [2008] O.J. No. 4818 (S.C.J.); *Gardner v. Toronto Police Services Board*, [2006] O.J. No. 3320 (S.C.J.), var'd 2007 ONCA 489; *Williams v. Wai-Ping*, [2005] O.J. No. 1940 (S.C.J.), aff'd, [2005] O.J. No. 6186 (Div. Ct.); *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.); ; *Brodie v Thomson Kernaghan & Co.*, [2002] O.J. No. 1850 (S.C.J.); *George v Harris*, [2000] O.J. No. 1762 (S.C.J.).

62 *Merchant Law Group v Canada (CRA)*, 2010 FCA 184; *AstraZeneca Canada Inc. v Novopharm Ltd*, 2009 FC 1209, aff'd 2010 FCA 112.

assumptions and speculation, or which are incapable of proof need not be taken as true.[63]

2. Discussion and Analysis

[130] Canada moves to have just paragraphs 20, 30, and 33 of the Amended Amended Statement of Claim struck out for the failure to plead material facts as required by the rules of pleading. There is no merit to Canada's attack on these three paragraphs of a forty-nine paragraph pleading. These paragraphs may be argumentative allegations, but they are not bare allegations and conclusory statements, and they are based on material facts. The three paragraphs are not inserted only for colour and they do not contain allegations unconnected to the pleaded material facts. Canada's attack on these three paragraphs fails.

P. The Legal Viability of Ms. Toussaint's Claims

[131] The predominant focus of a Rule 21 motion is the issue of whether the plaintiff has a legally viable claim. I have described Ms. Toussaint's case theory above, and the subject of this section of my Reasons for Decision is to determine whether it is plain and obvious that this case theory is doomed to failure, which is the measure used on a Rule 21 motion. Apart from Canada's argument based on *res judicata,* this is the most serious and substantial aspect of Canada's motion to have Ms. Toussaint's action dismissed summarily without evidence apart from the assumption that the allegations in the Statement of Claim are provable.

[132] Subject to one preliminary matter, I shall make the determination of the legal viability of Ms. Toussaint's case by describing in more detail the test for a motion to strike, then I shall set out the background law and legal principles associated with Ms. Toussaint's *Charter* claims and her claims under domestic law and pursuant to international law. The discussion of the background law will be followed by my analysis of *Nevsun Resources Ltd. v. Araya*, which Ms. Toussaint relies on to show that she has a viable claim against Canada, and of *Ahani v Canada (Minister of Citizenship and Immigration),*[64] which Canada relies on to have Ms. Toussaint's action dismissed, and. I conclude that Ms. Toussaint's claim should not be dismissed at this early juncture of the proceedings.

[133] The preliminary matter is to properly focus the substantive legal analysis. For reasons that will shortly become apparent, it pains me to have to say that Canada's argument that it is plain and obvious that Ms. Toussaint's claim is doomed to fail does it no pride, because Canada pejoratively mischaracterizes Ms. Toussaint's human rights claim and thus its rhetorical and largely conclusory argument misfires and is also unfair.

1. The Characterization of Ms. Toussaint's Human Rights Claim

[134] In a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system, Canada mischaracterizes Ms. Toussaint's *Charter* claim as a

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[63] *Sivak v. Canada*, 2012 FC 272; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

[64] (2002), 58 O.R. (3d) 107 (C.A.), leave to appeal to SCC ref'd [2002] S.C.C.A. No. 62. See also *Mugesera v Kenney*, 2012 QCCS 116 at para. 37.

right to receive free health care anywhere in the world, regardless of one's lack of status" or as a right to receive "an optimum level of health insurance and as a claim for a purely socio-economic right which is outside the guarantees of the *Canadian Charter of Rights and Freedoms*.

[135] Canada mischaracterizes Ms. Toussaint's claim that her *Charter* rights have been violated as a claim based on principles of international law supporting a right to receive free health care regardless of immigration status. Canada says that there is no Canadian law that incorporates customary international law that includes a right to free health care regardless of immigration status, and, in any event, principles of international law are not directly enforceable in Canada, unless they are incorporated into Canadian law and a right to free health care regardless of immigration status has not been incorporated into Canadian law.[65]

[136] Since Ms. Toussaint's claim does not assert a right to free health care anywhere in the world regardless of one's lack of status, Canada's argument is a fallacious straw man argument that might successfully knock down claims that are not being asserted.

[137] Canada's argument contains three assertions that are true or that may be true, but whose veracity the court need not decide in the immediate case, because the assertions are irrelevant to the correct characterization of Ms. Toussaint's claim, which in the immediate case is not a claim for free health care anywhere in the world, regardless of one' lack of status.

[138] Canada's first assertion, which is true, is that Canadian Courts and tribunals have consistently held that legislation which limits public health insurance coverage to residents complies with sections 7 and 15 of the *Charter*.[66] That assertion however is irrelevant to the present case where Ms. Toussaint's claim is not a claim for free health care but is a claim for public health care in circumstances where the claimant's right to life is demonstrably and not just theoretically at risk of being seriously impaired or extinguished.

[139] Canada's second assertion, which may be true but that is irrelevant for present purposes, is the assertion that customary international law does not impose a duty on Canada to provide free health care, regardless of immigration status. This assertion may be true, but its truth or falsity is irrelevant for present purposes where Ms. Toussaint's claim would not impose a duty on Canada to provide free health care, regardless of immigration status.

[140] Canada's third assertion, which is true, but that is irrelevant for present purposes, is the assertion that Ms. Toussaint cannot point to any Canadian law that incorporates the right to free health care regardless of immigration status. Yet, once again, this assertion may be true, but its relevance is off the target of Ms. Toussaint's grievance.

[141] I do not propose to dignify Canada's pejorative arguments further, but I shall deal with its properly focused arguments that Ms. Toussaint has not demonstrated a legally viable claim against Canada in the circumstances of the immediate case.

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[65] *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100, at paras. 76-92; *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2014 FC 651 at para. 474.

[66] *Canadian Snowbirds Association Inc. v Attorney General (Ontario)*, 2020 ONSC 5652; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651; *Toussaint v Canada (Attorney General)* 2011 FCA 213; *Toussaint v. Ontario (Health and Long-Term Care)*, 2011 HRTO 760; *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365; *Irshad v Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (C.A.)

2. The Test for a Motion to Strike under Rule 21.01

[142] Under Rule 21.01, a claim will be struck it if it is plain, obvious and beyond doubt that the respondent could not succeed in the claim or defence. A claim will be struck out if it has no reasonable prospect of success but where a reasonable prospect of success exists, the matter should be allowed to proceed.[67] The threshold to be met by a moving party on a rule 21.01(1)(b) motion is very high.[68] In *R. v. Imperial Tobacco Canada Ltd*.,[69] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[143] In *Atlantic Lottery Corp. Inc. v. Babstock*,[70] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. That said, in *Atlantic Lottery Corp. Inc. v. Babstock*,[71] in order to promote timely and affordable access to justice, the Supreme Court encouraged lower courts where possible to resolve legal disputes promptly and rather than referring them to a full trial. The following principles apply to a Rule 21 motion to strike a pleading for failing to disclose a reasonable cause of action or defence:

a. the material facts pleaded must be deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or incapable of proof;[72]

b. the court is not obliged to accept as a proven material fact the conclusory allegations that there is a cause of action or a duty of care; rather, the court must examine whether the genuine material facts disclose a reasonable cause of action.[73]

c. the claim is deemed to include any statement or documents incorporated in it by reference and which form an integral part of a plaintiff's claim and the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings;[74]

d. a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses; the facts pleaded are the basis upon which the claim is evaluated;[75]

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[67] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.
[68] *Amato v. Welsh*, 2013 ONCA 258 at para. 32.
[69] 2011 SCC 42 at paras. 17-25.
[70] 2020 SCC 19 at para. 87–88.
[71] 2020 SCC 19 at para. 18.
[72] *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.*, [1992] O.J. No. 1547 at para. 9 (Gen. Div.); *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
[73] *Abdullahi et al v Children's Aid Society of Toronto et al*, 2019 ONSC 3816 at para. 54 (*)
[74] *Das v. George Weston Ltd.*, 2017 ONSC 4129 at paras. 14–29, aff'd 2018 ONCA 1053 (C.A.), leave to appeal refused [2019] S.C.C.A. No. 69; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32; *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, 2012 ONSC 4544 at paras. 11–12; *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.).
[75] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 22–25.

e. the statement of claim must be read generously to allow for drafting deficiencies; and,

f. if the claim has some chance of success, it must be permitted to proceed.[76]

[144] The case law establishes that issues that are novel, complex, and important should normally be decided on a full factual record after trial.[77] However, novelty by itself is not a reason to allow a cause of action to proceed to trial and a novel claim must also be arguable, have some elements of a cause of action recognized in law, be a reasonable and arguable incremental extension of established law and have a reasonable prospect of success.[78]

[145] On motions to strike pleadings for not disclosing a reasonable cause of action or defence, there are three different types of outcome: (1) it is not plain and obvious that the claim or defence is doomed;[79] (2), there is a cause of action or defence if the material facts are proven at trial;[80] and (3), it is plain and obvious that the claim or defence is doomed to fail.[81]

3. The *Charter* and International Law

[146] As the above deconstruction of the theory of Ms. Toussaint's case reveals, she advances a case where it is the law and not the facts that are complex. She advances causes of action based on: (a) the *Charter*; (b) customary international law; and (c) domestic administrative law that are both analytically discrete and analytically profoundly interrelated. In the discussion that follows, I shall provide a synopsis of some (not all) the core principles for these three causes of action demonstrate their discrete nature and also their profound interrelationship. I shall then focus my attention on just the customary international law strand of Ms. Toussaint's complex argument. For present purposes, demonstrating that it is not plain and obvious that this strand is doomed to fail is sufficient reason to dismiss Canada's motion in its entirety.

(a) Application of the *Canadian Charter of Rights and Freedoms*

[147] The *Canadian Charter of Rights and Freedoms* is part of the *Constitution*, and s. 52 (1) of the *Constitution Act, 1982* proclaims the Constitution to be the "supreme law of Canada". The

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[76] *Jordan v. Canada (Attorney General)*, 2016 ONSC 3831; *Capital Solar Power Corp. v. Ontario Power Authority*, 2015 ONSC 2116; *Advance Beauty Supply Ltd. v. 233930 Ontario Inc. (c.o.b. Saryna Key)*, 2015 ONSC 422; *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at para. 31; *Mackinnon v. Ontario Municipal Employees Retirement Board* (2007), 88 O.R. (3d) 269 at para. 20 (C.A.).

[77] *Sells v. Manulife Securities Inc.*, 2014 ONSC 715; *Leek v. Vaidyanathan*, [2011] O.J. No. 200 at para. 3 (C.A.); *PDC 3 Limited Partnership v. Bregman + Hamann Architects*, [2001] O.J. No. 422 paras. 7–12 (C.A.).

[78] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19; *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 51; *Das v. George Weston Ltd.*, 2017 ONSC 4129 aff'd 2018 ONCA 1053, leave to appeal refused [2019] S.C.C.A. No. 69.

[79] Examples are: *Taylor v. Canada (Attorney General)*, 2012 ONCA 479; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454 (C.A.), leave to appeal refused [2007] S.C.C.A. No. 454; *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (C.A.).

[80] Examples are: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, rev'g (2000), 52 O.R. (3d) 181 (C.A.), var'g [1998] O.J. No. 5426 (Gen. Div.); *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771 (C.A.); *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

[81]

Canadian Constitution is "a living tree capable of growth and expansion within its natural limits.[82] The idea that the Canadian Constitution is a living tree capable of growth and expansion within its natural limits is a fundamental principle of Canadian constitutional interpretation.[83] The interpretation of the *Charter* is not frozen to the intention of its drafters at time of its enactment, and the *Charter* is capable of change and adaptation to changing circumstances to meet new social, political, and historical realities unimagined by the framers.[84]

[148] In *Charter* cases, the court adopts a purposive approach that recognizes the *Charter's* linguistic, philosophic, and historic context and that aims to further the interests that the *Charter* was meant to protect.[85] It is essential to place the purpose of the right in question in its historic, linguistic, and philosophical contexts.[86] The judiciary is the guardian of the *Constitution* and of the *Charter* and courts should use the *Charter* for the unremitting protection of individual rights and liberties.[87] The *Charter* is to be interpreted liberally and purposively to provide the full measure of the fundamental rights and freedoms that are guaranteed.[88]

[149] In ascertaining the purpose of a right or freedom, the courts consider a number of indicators, including: the text of the *Charter*; the context and overall purpose of the *Charter*; the historical and philosophical roots of the right or freedom; the interests that the *Charter* was intended to protect; the common law and pre-*Charter* jurisprudence; and *Charter* jurisprudence.[89]

[150] The court will consider international law and Canada's international human rights obligations, but the court is not bound to follow international law in its interpretation of *Charter* rights and freedoms.[90]

[151] The *Charter* is presumed to provide protections at least as great as those contained in

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[82] *Edwards v. Canada (Attorney General)*, [1930] A.C. 124 (P.C.) at p. 136 per Lord Sankey at p. 136.
[83] *Reference re Same-Sex Marriage*, 2004 SCC 79
[84] *Reference re Same-Sex Marriage*, 2004 SCC 79; *R. v. Tessling*, 2004 SCC 67 at paras. 61-62; *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486 at p. 509; *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 at p. 155; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at p. 366.
[85] *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344: *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 at pp. 156-7.
[86] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at para. 1; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at pp. 499-500; *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344; *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at pp. 155-56; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at pp. 366-68.
[87] *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 at p. 155 per Dickson, J.
[88] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62; *Figueroa v. Canada (Attorney General),* 2003 SCC 37 at para. 20; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para. 53; *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486 at p. 509; *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.,* [1984] 2 S.C.R. 145 at p.156..
[89] *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62; *Irwin Toy Ltd. v. Québec (Attorney General),* [1989] 1 S.C.R. 927; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Oakes* [1986] 1 S.C.R. 103 at pp. 119-34; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 at pp. 154-60.
[90] *Canada (Human Rights Commission v. Taylor,* [1990] 3 S.C.R. 892 at para. *R. v. Keegstra*, [1990] 3 S.C.R. 697 at paras. 255-261; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

Canada's international human rights obligations.[91]

[152] Any exercise of statutory discretion by a state actor must comply with the *Charter* and its values[92] and is reviewable based on the public law framework for administrative decisions set out in *Doré v. Barreau du Québec*,[93] and *Loyola High School v. Québec (Attorney General)*,[94] the so-called *Doré*/*Loyola* framework.[95] Under the *Doré*/*Loyola* framework, if a *Charter* right or value is infringed by a discretionary decision of a state actor, it will not survive *Charter* scrutiny unless having regard to the statutory and factual context, the decision reflects a proportionate balancing of the protections at play and the statutory objectives of the relevant statute.[96]

[153] Under the *Doré*/*Loyola* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate.[97] For a decision to be found to be proportionate, the decision must with a range of reasonable outcomes give effect as much as possible to the *Charter* protection; *i.e.*, the decision with a range of reasonable outcomes must affect the protection as little as reasonably possible having regard to the applicable statutory objective.[98]

(b) Section 7 of the *Charter*

[154] Sections 1 and 7 of the *Charter* state:

> *Rights and Freedoms in Canada*
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> […]
>
> *Life, liberty and security of person*
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[155] Pursuant to ss. 1 and 7 of the *Canadian Charter of Rights and Freedoms*, everyone is guaranteed the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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[91] *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, at para. 31; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, para. *137; *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313.
[92] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 41; *R. v. Conway*, 2010 SCC 22.
[93] 2012 SCC 12.
[94] 2015 SCC 12
[95] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.
[96] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 58-59; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at para. 39; *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 57.
[97] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 79; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at para. 32; *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 7.
[98] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 80, 114.

[156] Section 7 protects a sphere of personal autonomy involving inherently private choices that implicate basic choices going to the core of what it means to enjoy individual dignity and independence.[99] The right to life is engaged where a law or government action directly or indirectly imposes death or an increased risk of death on a person.[100]

[157] In *R. v. Morgentaler*,[101] *Chaoulli v. Canada*,[102] *Canada (AG) v. PHS Community Services Society,*[103] and *Carter v. Canada (Attorney General),*[104] which all involved state interference to access to medical treatment, the Supreme Court held that a risk of harm is sufficient to engage the right to security of the person and that state interference with a person's access to medical treatment constituted a deprivation of security of the person. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[105], the Supreme Court held that he protection of a child's right to life and to health is a basic tenet of our legal system and legislation to that end accords with the principles of fundamental justice so long as it also meets the requirements of fair procedure. In *Bedford v. Canada*,[106] the Supreme Court ruled that legislation that increases sex workers' risk of harm constitutes unlawful interference with security of the person.

[158] However, the *Charter* does not confer a constitutional right to a minimum level of health care and courts have denied claims under the *Charter* to obtain state funding or financial assistance for necessary treatments.[107]

[159] To demonstrate that government action has infringed s. 7 of the *Charter*, a plaintiff must demonstrate that: (a) the action interferes with or deprives individuals of life, liberty, or security of the person; and (b) the deprivation is not in accordance with a principles of fundamental justice.[108] To demonstrate that government action has infringed s. 7 of the *Charter*, a plaintiff must identify and define the relevant principles of fundamental justice that apply, and then show that the infringement or deprivation of rights does not accord with the identified principles.[109]

[160] Principles of fundamental justice are basic tenets of the Canadian legal system.[110] To establish that a rule or principle is a principle of fundamental justice, the plaintiff must show that it is a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or

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[99] *Association of Justice Counsel Appellant; v. Attorney General of Canada Respondent*, 2017 SCC 55 at paras. 49-52; *R. v. Malmo-Levine*, 2003 SCC 74 at para. 85; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 49; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66.

[100] *Carter v. Canada (Attorney General)*, 2015 SCC 5. S. Joseph, "Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36" (2019) 19 Human Rights Law Review 347

[101] [1988] 1 S.C.R. 30.

[102] 2005 SCC 35.

[103] 2011 SCC 44.

[104] 2015 SCC 5.

[105] [1995] 1 S.C.R. 315.

[106] 2013 SCC 72.

[107] *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538; *Ali v. Canada*, 2008 FCA 190; *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (C.A.); *Eliopoulos v. Ontario* (2006), 82 O.R. (3d) 321 (C.A.); *Chaoulli v. Canada* 2005 SCC 35; *Auton (Guardian ad litem of) v. British Columbia (A.G.),* 2004 SCC 78.

[108] *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.

[109] *R. v. Malmo-Levine*, 2003 SCC 74; *R v. White*, [1999] 2 S.C.R. 417.

[110] *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486.

security of the person.[111]

[161] The principles of fundamental justice do not lie in the realm of general public policy but are to be found in the basic tenets of the Canadian legal system and within the domain of the judiciary as guardian of the justice system.[112] Whether a principle is a principle of fundamental justice rests upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in the legal system as it develops.[113] The scope of the principals of fundamental justice will vary with the context and the interests at stake.[114] The basic tenets and principles of the legal system, in which are found the principles of fundamental justice, are reflected in express provisions of the *Charter*, in the common law or statutes that exist outside the Charter or it may be more expansive than either.[115]

[162] A principle of fundamental justice can be established through international law, if the international law is shown to be a principle that is part of international customary law or is incorporated into Canadian domestic law in some way.[116]

[163] The principles of fundamental justice are concerned not only with the interests of the person who claims that his or her liberty has been limited but with the protection of society; fundamental justice requires a fair balance, both procedurally and substantively, between these interests.[117]

[164] The concept of fundamental justice includes the notion of procedural fairness, which, however, may require different procedures depending on the context.[118]

(c) Section 15 of the *Charter*

[165] Section 15 of the *Charter* states:

> *Equality before and under law and equal protection and benefit of law*
>
> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Affirmative action programs*
>
> (2) […]

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[111] *R. v. Malmo-Levine*, 2003 SCC 74; *R v. White*, [1999] 2 S.C.R. 417.
[112] *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486 at p. 503.
[113] *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486 at p. 513.
[114] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at p. 363; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *R. v. Lyons*, [1987] 2 S.C.R. 309.
[115] *R. v. S. (R..J.)*, [1995] 1 S.C.R. 451 at p. 488.
[116] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.
[117] *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at pp. 151-2; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 828; *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486 at pp. 502-3; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at p. 212.
[118] *Dehghani* v. *Canada*, [1993] 1 S.C.R. 1053; *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 361; *R. v. Jones*, [1986] 2 S.C.R. 284 at p. 322; *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] S.C.R. 486*; Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

[166] The equality guaranteed by the *Charter* is substantive equality and more than the formal equality of treating likes alike and treating unlikes differently in proportion to their difference.[119] And substantive equality is more than just equality of opportunity. Substantive equality involves more than just the availability of options and opportunities, and it aims to prevent the violation of essential human dignity and freedom and to eliminates any possibility of a person being treated as less worthy *.

[167] The purpose of s. 15 (1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.[120] The protection provided by s.15 is extended to analogous grounds, which can be identified as distinctions that serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity or decisions that impact a discrete and insular minority or a group that has been historically discriminated against.[121] Analogous grounds to race, national or ethnic origin, colour, religion, sex, age or mental or physical disability are: adopted status;[122] citizenship;[123] indigenous status;[124] marital status,[125] parental status;[126] sexual orientation;[127] and welfare status.[128] Once a ground is found to be analogous, it becomes an enumerated ground for other cases.[129]

[168] Section 15 prohibits discriminatory state action, where discrimination is an intentional or unintentional distinction based on the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[130] Disadvantage connotes vulnerability, prejudice and negative social characterization.[131] The presence of discrimination can be examined

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[119] In the *Ethica Nichomacea*, Aristotle stated "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" (Aristotle, *Ethica Nichomacea*, trans. by William David Ross (London: H. Milford, Oxford University Press, 1925) Book V3, at 1131a-6, cited in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 27.

[120] *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

[121] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 at para. 13.

[122] *Re Marshall Estate*, [2009] N.S.J. No. 103 (N.S.C.A.).

[123] *Lavoie v. Canada*, 2002 SCC 23; *Chiarelli v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 71; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[124] *Baier v. Alberta*, 2007 SCC 31 at paras. 63-67; *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203.

[125] *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325; *Miron v. Trudel* [1995] 2 S.C.R. 418.

[126] *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97 (N.S.C.A.).

[127] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69; *M. v. H*., [1999] 2 S.C.R. 3; *Vriend v. Alberta* [1998] 1 S.C.R. 493; *Egan v. Canada* [1995] 2 S.C.R. 513.

[128] *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.). Whether immigrant status is an analogous ground may be an open and unsettled question: Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dalhousie Law Journal 17; Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) Alta L Rev 649.

[129] *Lavoie v. Canada*, 2002 SCC 23 at para. 41; *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 at para. 8.

[130] *R. v. Kapp*, 2008 SCC 41; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[131] *Fraser v. Canada (Attorney Genera),* 2020 SCC 28; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30; *Withler v. Canada (Attorney General),* 2011 SCC 12; *R. v. Kapp*, 2008 SCC 41 at para. 55; *Law v. Canada*

in terms of four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.[132]

[169] A difference in treatment before and under the law does not necessarily produce inequality and the same treatment before and under the law does not necessarily produce equality, and substantive equality rather acknowledges difference and aims to obviate state action that is discriminatory.[133] To determine whether government action violates the *Charter's* guarantee of equality, the court adopts a two-step approach and asks: (a) Does the law or state action create a distinction based on an enumerated or analogous ground?; and, (b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[134]

[170] In some cases, the two-steps are broken down into the three steps of: (a) determining whether there is differential treatment; (b) determining whether the determining whether the differential treatment is on the basis of an enumerated or analogous ground; and (c) determining whether the differential treatment is discriminatory having the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.[135]

[171] Whether a law has the effect of reinforcing, perpetuating or exacerbating disadvantage, the second step of the test of determining whether the law contravenes substantive equality requires, examining the harm caused to the affected group including economic exclusion or disadvantage, social exclusion, psychological harm, physical harms, or political exclusion in light of any systemic or historical disadvantages faced by the claimant group.[136]

[172] To determine whether government action violates the *Charter's* guarantee of equality the matter must be considered in the full context of the case, including how the government's conduct, acts and omissions, effects the claimants and the members of the group to which they belong.[137] The court must examine the larger context to determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment that would foster inequality or disadvantage.[138]

(Minister of Employment and Immigration), [1999] 1 S.C.R. 497; *Egan v. Canada* [1995] 2 S.C.R. 513 *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[132] *R. v. Kapp*, 2008 SCC 41; *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497.

[133] *R. v. Kapp*, 2008 SCC 41 at paras. 15-16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[134] *Ontario (Attorney General) v. G.* (2020), 2020 SCC 38; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9; *Withler v. Canada (Attorney General)*, 2011 SCC 12*R. v. Kapp*, 2008 SCC 41 at para. 17; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[135] *Lavoie v. Canada*, 2002 SCC 23, *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497.

[136] *Fraser v. Canada (Attorney General),* 2020 SCC 28 at para. 76.

[137] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.

[138] *R. v. Turpin* [1989] 1 S.C.R. 1296 at para. 45.

4. Principles of International Law

[173] International treaties and conventions are not part of domestic law and have no domestic legal consequences unless they are implemented by statute.[139] Domestic legislation should be interpreted so that it is consistent with Canada's international obligations.[140] However, the presumption of conformity does not overthrown clear legislative intent, and if a treaty obligation conflicts with the clear wording of a Canadian statute, a Canadian Court must give precedence to the statutory language over the international obligation.[141]

[174] Customary international law is part of Canadian common law, and a breach of customary international law is actionable at common law.[142] Unlike foreign law, which in conflict of laws jurisprudence is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed and enforced.[143] Just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law.[144]

[175] Just as the common law develops remedies for breaches of the common law, it can develop remedies for the part of the common law that is customary international law. Where a right of customary international law is recognized as law, the principle *ubi jus ibi remedium* (*for every wrong, the law provides a remedy*) applies.[145]

[176] Since the character of a violation of a customary international norm is of a more public nature and since the violation of these norms tends to shock the conscience of humanity different and stronger remedial responses may be required.[146] In *Nevsun Resources Ltd. v. Araya*¸ Justice Abella stated at para. 129 for a majority of the Supreme Court:

> 129. Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" […] The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature

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[139] *Ahani v. Canada (Minister of Citizenship and Immigration)* (2002), 58 O.R. (3d) 107 (C.A.), leave to appeal to SCC ref'd [2002] S.C.C.A. No. 62; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817; *Capital Cities Communications Inc, Taft Broadcasting Co and WBEN Inc.* v. *Canadian Radio Television Commission*, [1978] 2 S.C.R. 141

[140] *R. v. Hape*, 2007 SCC 26 at para. 53; *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para. 50 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

[141] *Revell v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 262, at paras. 131-135; *Febles v. Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para. 64; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para. 60; *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 35; *R. v. Hape*, 2007 SCC 26; *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 at paras. 64-65 (C.A.); *Schreiber v Canada (Attorney General),* [2002] 3 S.C.R. 269 at para. 50.

[142] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5; Armand de Mestral and Evan Fox-Decent, ―Rethinking the Relationship Between International and Domestic Law‖ (2008), 53 McGill L.J. 573; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3; Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89

[143] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras. 96-97.

[144] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 98.

[145] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras. 117-118; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62; *Sidaway v. Board of Governors of the Bethlem Royal Hospital,* [1985] 1 A.C. 871 at p. 884 (H.L).

[146] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras. 124-130.

> and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

[177] Subject to the caveat that that they are incorporated only so far as not inconsistent with existing statutes or existing judicial decisions about the law, customary international law is automatically adopted into Canadian domestic law and is enforceable without any need for legislative action.[147]

[178] The four authoritative sources of customary international law, are: (a) international conventions establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations (*jus cogens)*; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[148]

[179] To be recognized as a norm of customary international law, the norm must: (a) be a general widespread and consistent, but not necessarily universal practice and (b) be *opinion juris i.e*., regarded as a legal obligation as distinguished from mere usage or habit. [149]

[180] Within customary international law, there is a subset of norms known as *jus cogens,* or peremptory norms, which have been accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[150]

[181] *Pacta sunt servanda,* the principle that all treaties are binding and must be performed in good faith is a principle of *jus cogens* and as a central unifying principle of the international legal system.[151] The *pacta sunt servanda principle* requires that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith.[152]

[182] The purpose of modern international human rights law is to identify and remedy breaches of internationally accepted norms in a global war on human rights' abuses.[153] Canadian courts have an important role to play and have a responsibility to participate and to contribute to the ongoing development of international law.[154]

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[147] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 86; *R. v. Hape*, 2007 SCC 26 at paras. 36, 39; *Trendtex Trading Corp. v. Central Bank of Nigeria,* [1977] 1 Q.B. 529 (Eng. C.A.); *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.); *The Ship "North" v. The King* (1906), 37 S.C.R. 385.

[148] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 76.

[149] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras. 77-80; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.

[150] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 83; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62. *Vienna Convention on the Law of Treaties, United Nations, Treaty Series,* Vol. 1155, p. 331 (23 May 1969)

[151] John H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), chap. 4 "The Law of Treaties"; Mark W. Janis, "Nature of *Jus Cogens*" (1988), 3 *Conn. J. Int'l L*. 359 at pp. 361-362; A. A. Cançado Trindade, "Jus Cogens: The Determination And The Gradual Expansion Of Its Material Content In Contemporary International Case-Law" p. 28 (*); R. Kolb, *Théorie du jus cogens international*, (Paris: PUF, 2001), pp. 98-100, 105, 110 and 112.

[152] *Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para 59.

[153] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 1.

[154] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras. 70-73.

5. *Nevsun Resources Ltd. v. Araya,*

[183] As already noted several times above, Ms. Toussaint relies on *Nevsun Resources Ltd. v. Araya*[155] as a demonstration that she has a legally viable cause of action against Canada based on the principles of customary international law.

[184] *Nevsun Resources Ltd. v. Araya* is a class action that was commenced in British Columbia. The plaintiffs were refugees from Eritrea who were conscripted soldiers of the Eritrean military who were forced to work for a Canadian mining company in Eritrea and subjected to horrible inhuman treatment. In addition to conventional tort claims, the Eritrean workers sought damages for breaches of the customary international that prohibited forced labour, slavery, torture, and crimes against humanity.

[185] Pursuant to the procedural equivalent of Ontario's Rule 21, Nevsun Resources, the Canadian mining company, brought a motion to strike the pleading for not disclosing a reasonable cause of action. Like Canada in the immediate case, Nevsun Resources submitted that the plaintiffs claim had no reasonable prospect of success. In a judgment affirmed by the British Columbia Court of Appeal and the Supreme Court of Canada, Justice Abrioux dismissed Nevsun Resources' motion.

[186] The majority of the Supreme Court found no reason to disturb the lower court decisions, and the majority rejected Nevsun Resources' argument that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, Nevsun Resources is immune from their application because it is a corporation. The majority held that modern international human rights law does not exist simply as a contract between states or between individuals and a state but were enforceable as law between litigants in the private sector including corporations.

[187] Justice Abella for the majority addressed the issue of the significance of the *International Covenant on Civil and Political Rights* to the plaintiffs' claim at paragraph 119 of her judgment, where she stated:

> 119. With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee -- which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* -- provides additional guidance in its General Comment No. 31: […] In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:
>
> > [T]he enjoyment of the rights recognized under the *Covenant* can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. [para. 15]

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[155] 2020 SCC 5, aff'g 2017 BCCA 401, aff'g 2016 BCSC 1856. (Abella, J, Wagner, C.J., Karakatsanis, Gascon, and Martin, JJ. concurring; Côté, J. with Moldaver, J. dissenting; Brown J. and Rowe, J. dissenting)

[188] One can readily understand why Ms. Toussaint relies on *Nevsun Resources Ltd. v. Araya* to resist Canada's motion. In *Nevsun Resources*, like Canada in the immediate case, the defendant submitted that the plaintiffs' reliance on the principles of customary international law was doomed to fail. The courts of British Columbia and a majority of the Supreme Court of Canada disagreed.

[189] In my opinion, the *Nevsun Resources* decision is a complete answer and a reason to dismiss Canada's Rule 21 motion. Although the principles of customary international law and of the *jus cogens* from *Nevsun Resources Ltd.* differ from the principles and the *jus cogens* relied on in the immediate case, Ms. Toussaint's case is closely analogous to *Nevsun Resources.* Just as it could not be said that the plaintiffs' claim in *Nevsun Resources Ltd.* was doomed to fail, it cannot be said that her customary international law claim, which is discrete from Ms. Toussaint's *Charter* damages claim, and which does not necessarily depend upon the *International Covenant on Civil and Political Rights* is bound to fail.

6. *Ahani v Canada (Minister of Citizenship and Immigration),*[156]

[190] The *Ahani* case is the centerpiece to Canada's more comprehensive argument that it is plain and obvious that Ms. Toussaint's action does not demonstrate a reasonable cause of action. Relying on the decision of the Ontario Superior Court and the Ontario Court of Appeal in *Ahani v Canada (Minister of Citizenship and Immigration),*[157] Canada submits that the views of the UN's Human Rights Committee are non-binding and are not enforceable in this Court, and, therefore, Ms. Toussaint's claims are doomed to fail and should be dismissed.

[191] Canada argues that customary international law principles do not apply when there is express domestic legislation to the contrary, and Canada submits that in the immediate case, the governing public health insurance legislation is Canada and Ontario is express legislation contrary to Ms. Toussaint's claim. Further, Canada submits that although domestic legislation should to the extent possible be interpreted consistent with Canada's international obligations, Canada is not required to adopt a treaty definition or treaty obligations into domestic law,[158] and the presumption of conformity does not overthrow clear legislative intent and if a treaty obligation conflicts with the clear wording of a Canadian statute, the statutory language takes precedence over the international obligation.[159] Further still, Canada submits that International treaties and conventions not incorporated into Canadian law have no domestic legal consequences and even when a UN Committee expresses the view that Canada has violated its obligations under an international treaty, this does not automatically translate into a breach of the *Charter* giving rise to a right to

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[156] (2002), 58 O.R. (3d) 107 at paras. 32 and 35 (C.A.), leave to appeal to SCC ref'd [2002] S.C.C.A. No. 62. See also *Mugesera v Kenney*, 2012 QCCS 116 at para. 37.

[157] (2002), 58 O.R. (3d) 107 at paras. 32 and 35 (C.A.), leave to appeal to SCC ref'd [2002] S.C.C.A. No. 62. See also *Mugesera v Kenney*, 2012 QCCS 116 at para. 37.

[158] *R v. Hape*, 2007 SCC 26 at para. 53; *Schreiber v Canada (A.G.)*, 2002 SCC 62 at para. 50; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

[159] *Revell v. Canada (Minister of Citizenship and Immigration)*, 2019 FCA 262, at paras. 131-135; *Kazemi Estate v, Islamic Republic of Iran*, 2014 SCC 62 at para. 60; *Febles v. Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para. 64; *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 35; *R. v. Hape*, 2007 SCC 26; *Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 at paras. 64-65 (C.A.); *Schreiber v Canada (A.G.)*, [2002] 3 S.C.R. 269 at para. 50.

damages.[160]

[192] In my opinion, while *Ahani v. Canada (Minister of Citizenship and Immigration)* may ultimately be helpful to Canada to resist some of Ms. Toussaints' causes of action, the case does not provide an answer to all of those claims and at this juncture it is not plain and obvious that *Ahani v. Canada (Minister of Citizenship and Immigration)* is an answer to any of her claims.

[193] As I shortly explain, *Ahani* was a case about procedural rights associated with the circumstance that Canada was a signatory of the *International Covenant on Civil and Political Rights* and the *Optional Protocol* without having ratified these treaties and making them part of the common law. While Ms. Toussaint's case involves the important issue of her procedural rights under the *Optional Protocol*, it is much more than that, and her case involves substantive rights under the *jus cogni* of customary international law. Thus, it is not plain and obvious that *Ahani v. Canada (Minister of Citizenship and Immigration)* is an answer to the substantive law claim modelled on the approach used in *Nevsun Resources v. Araya*, discussed above.

[194] Further, Canada's reliance on *Ahani v. Canada (Minister of Citizenship and Immigration)* is suspect because the *Ahani* case is about procedural relief and it is not plain and obvious that it forecloses Ms. Toussaint's claims for substantive relief under: (a) the *Charter,* (b) customary international law; (c) administrative law principles In this last regard, it should be recalled that in the immediate case Canada pejoratively mischaracterizes the true nature of her claim that her human rights have been violated. This mischaracterization undermines many of Canada's arguments.

[195] The facts of the *Ahani* case are that in 1992, Mr. Ahani, an Iranian citizen, was admitted to Canada as a Convention Refugee, which is to say that he was admitted because there was a well-founded fear of persecution in his country of nationality. In 1993, Mr. Ahani was arrested and detained after two Ministers of Canada issued a security certificate in the Federal Court alleging that he was a terrorist. Deportation proceedings followed, and after exhausting all domestic remedies, including an appeal to the Supreme Court of Canada, Mr. Ahani made a submission to the United Nations Human Rights Committee that his deportation to Iran would violate his right to life. He asked the Committee to make an interim measures order to not deport him until the Committee could consider his allegations.

[196] The Committee made the interim measures Order, which Canada indicated it would not respect. Mr. Ahani then applied to the Ontario Superior Court for an injunction restraining his deportation pending the Committee's consideration of his communications on their merits. In a decision later upheld by the Ontario Court of Appeal (Justices Laskin and Charron; Justice Rosenberg, dissenting), Justice Drambot dismissed the injunction application.

[197] In the Court of Appeal, Justice Laskin disagreed with Mr. Ahani's two submissions that (a) the principles of fundamental justice under s. 7 of the *Charter* guaranteed him the right not to be returned to Iran until the Human Rights Committee had considered his communication; and (b) he had a legitimate expectation of not being deported pending the Committee's consideration.

[198] As is immediately apparent, unlike the present case, Mr. Ahani's case focused exclusively on procedural not substantive rights. Justice Laskin actually assumed that Mr. Ahani's s. 7 rights has been triggered, but he concluded that even so, no principles of fundamental justice entitled him

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[160] *Dumont c. Québec (Procureur général),* 2012 QCCA 2039 at paras. 107-118

to remain in Canada until his communication is considered by the Committee. The case at bar is a long way from a determination of the implicated principles of fundamental justice.

[199] Justice Laskin's reasoning focusses on the non-binding authority of the United Nations Human Rights Committee in the circumstances that Canada had signed the *Optional Protocol* to the *International Covenant on Civil and Political Rights*, which Canada has ratified but not incorporated into its domestic law. Justice Laskin's decision is obviously helpful to Canada's defence in the immediate case and to Canada's argument in support of its Rule 21 Motion. That said, it is not plain and obvious that the *Ahani* case demonstrates that Ms. Toussaint's case is bound to fail. In this regard, I repeat that the *Ahani* decision is essentially just a procedural case.

[200] I can add that the *Ahani* case may be distinguishable. It is also arguable that the case was wrongly decided in the first instance. As impressive as Justice Laskin was a judge, his decision was matched with a dissent with the equally formidable Justice Rosenberg. It is also arguable that the *Ahani* case has been overtaken and Justice Rosenberg's approach supported by subsequent developments in: (a) *Charter* law; (b) the law about the relationship between the *Charter* and customary international law; and (c) the law about the role of the United Nations Human Rights Committee. In these regards, it needs only to be pointed out that *Ahani* was decided in 2002, and *R. v. Hape*, a very important case about international law was decided in in 2007, *Kazemi Estate v. Islamic Republic of Iran*,[161] another important case was decided in 2014, and *Nevsun Resources Ltd. v Araya* was decided in 2020.

[201] It also needs to be pointed out that it remains to be determined what is the role of the domestic courts, if any, both as a procedural matter and as a matter of substantive law when Canada has agreed to recognize the competence of the United Human Rights Committee to consider communications from individuals claiming a violations of their human rights in Canada after the individual has exhausted all available domestic remedies in Canada.

[202] Canada's position in *Ahani* and in the immediate case is that the domestic courts have no role. However, somewhat ironically the no-role argument did not absolutely succeed in *Ahani,* where both Justice Laskin and Justice Rosenberg agreed that Justice Drambot had been correct in assuming jurisdiction. This suggests that in the immediate case that Canada's response to the Committee's View is at a minimum subject to administrative law judicial review.

[203] I appreciate that Justice Laskin's holding at paragraph 49 of his decision was that "It is not for the courts, under the guise of procedural fairness, to read in an enforceable constitutional obligation and commit Canada to a process that admittedly could take years, thus frustrating this country's wish to enforce its own laws …". Ms. Toussaint is not a terrorist, and in her case, however, Canada has no countervailing purpose in seeking to enforce its laws about the provision of health care in ways that may breach the *Charter* or that may breach customary international law, which alleged breach was not considered by Justice Laskin, whose judgment is limited to the branch of international law about the enforcement of treaties and conventions that have ratified but not incorporated into domestic law.

[204] I, therefore, conclude that while the *Ahani* case may be useful to Canada later in this litigation, it is inadequate to show that Ms. Toussaint's action should be dismissed under Rule 21.

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[161] 2014 SCC 62.

Q. Conclusion

[205] For the above reasons, and for one additional reason, Canada's motion is dismissed.

[206] Although I dealt discretely with Canada's five arguments to strike Ms. Toussaint's pleading, globally speaking, it was plain and obvious that the case at bar is not an appropriate case to be determined summarily on a pleadings motion. I agree with the intervenors' submissions in this regard. The legal issues of the immediate case may be resolvable by summary judgment, but save for the matter of the court's jurisdiction to hear the matter, the matter of limitation periods, and the propriety of three paragraphs of the pleading, it would not be doing justice nor appropriate to decide the merits of Ms. Toussaint's case pursuant to Rule 21 and without additional evidence about the human rights plight of persons like Ms. Toussaint.

[207] Put bluntly, if Canada wished a summary determination of Ms. Toussaint's case, after it declined to implement the Views of the Committee and she sued Canada, Canada ought to have pleaded its defences and moved for a summary judgment with more human rights' evidence for a legally profoundly complex case. While one can understand Canada's frustration in the immediate case of more than a decade of ongoing litigation with Ms. Toussaint and her NGO allies, that is what Canada agreed to when it signed onto the *Optional Protocol*, which provides that the United Nations Human Rights Committee may hear Ms. Toussaint's submissions only after her case has been considered by a domestic court.

[208] Canada shall have forty days to deliver its Statement of Defence in accordance with these Reasons for Decision; *i.e.* without raising a limitations period defence.

[209] There shall be no order for or against the intervenors for costs. The court appreciates the assistance provided by counsel for the intervenors.

[210] If Ms. Toussaint and Canada cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Toussaint's submissions within twenty days from the release of these Reasons for Decision followed by Canada's submissions within a further twenty days.

Perell, J.

Released: August 17, 2022

Schedule "A" – Excerpt of the Views of the United Nations Human Rights Committee

Consideration of the merits

11.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

11.2 Concerning the alleged violation of article 6, the Committee takes note of the author's claims that (a) the denial of her access to health care put her life and health at risk, as she could not receive medical treatment corresponding to the seriousness of her health problems; (b) her already critical health status deteriorated to life-threatening status in 2009; and (c) the Federal Court and the Federal Court of Appeal agreed that her life and health had been put at significant risk by the State party's denial of access to health-care coverage under IFHP. In that context, the Committee notes that the author resided in Canada for a period of time, worked there from 1999 to 2008 and sought to regularize her status in 2005.

11.3 The Committee recalls that in its general comment No. 6, it noted that the right to life had been too often narrowly interpreted and that it could not properly be understood in a restrictive manner, and that the protection of the right required that States adopt positive measures. The Committee considers that the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Furthermore, the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life. In particular, as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

11.4 The Committee notes the State party's observations that the author was able to receive publicly funded medical care through access to hospital emergency care and was not prevented from obtaining primary health care from various community organizations, on a pro bono basis or on the basis of private health insurance. Due to the provision of such health care, the State party considers that it has fulfilled its obligations relative to the protection of the author's right to life under article 6 (1) of the Covenant. The Committee notes, however, that both the Federal Court and the Federal Court of Appeal acknowledged that, despite the care she may have received, the author had been exposed to a serious threat to her life and health because she had been excluded from the benefits of IFHP. The Committee also notes the medical opinions submitted to this effect in the Federal Court proceedings (see para. 2.9).

11.5 In the light of the serious implications of the denial of IFHP health-care coverage to the author under the Program from July 2009 to April 2013, as evidenced in her communication and reviewed in detail by the Federal Courts, the Committee concludes that the facts before it disclose a violation of the author's rights under article 6.

11.6 The Committee notes the author's claim under article 26 that excluding her from IFHP coverage on the basis of her immigration status is not an objective, proportionate or reasonable means of deterring illegal immigration, in particular as her life-threatening health conditions were not taken into account. The Committee also notes the State party's submission that in allocating public health-care funding, it may reasonably differentiate between those with legal status in the country, including immigrants, and foreign nationals who have not been lawfully admitted to Canada and that legal residence is a neutral, objective requirement that cannot be considered as a prohibited ground of discrimination.

11.7 The Committee recalls its general comment No. 18 (1989) on non-discrimination, in which it reaffirmed that article 26 entitled all persons to equality before the law and equal protection of the law, prohibited any discrimination under the law and guaranteed to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (para. 1). While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations and prohibits discrimination in law or in fact in any field regulated and protected by public authorities. The Committee also recalls that in its general comment No. 15 (1986) on the position of aliens under the Covenant, it stated that the general rule was that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. While the Covenant does not recognize the right of aliens to enter and reside in the territory of a State party, the Committee also stated that aliens had an "inherent right to life". States therefore cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.[162] More generally, the Committee also recalls that not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria,[163] in pursuit of an aim that is legitimate under the Covenant.[164]

11.8 The Committee considers that in the particular circumstances of the case where, as alleged by the author, recognized by the domestic courts and not contested by the State party, the exclusion of the author from the care under IFHP could result in the author's loss of life or irreversible, negative consequences for the author's health, the distinction drawn by the State party for the purpose of admission to the Programme between those with legal status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 6 and 26.

13. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obliged, inter alia, to take appropriate steps to provide the author with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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[162] See also Inter-American Court of Human Rights, *Juridical conditions and rights of undocumented migrants*, advisory opinion AO-18/03 of 17 September 2003.

[163] See, e.g., communications No. 172/1984, *Broeks v. Netherlands* (CCPR/C/29/D/172/1984), para. 13; and No. 182/1984, *Zwaan-de Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 13.

[164] See, e.g., communication No. 1314/2004, *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3.

Schedule “B” - The Vienna Convention on the Law of Treaties

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I. INTRODUCTION

Article 1. SCOPE OF THE PRESENT CONVENTION

The present Convention applies to treaties between States.

[…]

PART III OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION I. OBSERVANCE OF TREATIES

Article 26. "PACTA SUNT SERVANDA"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. INTERNAL LAW AND OBSERVANCE OF TREATIES

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. […].

[…]

Schedule “C” - The International Covenant on Civil and Political Rights

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, *

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the com munity to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

[…]

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when

granted.

Article 3.

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

[…]

PART III

Article 6.

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[…]

Article 26.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28.

1. There shall be established a Human Rights Committee (here after referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Schedule "D" -The *Optional Protocol to the International Covenant on Civil and Political Rights*

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the *International Covenant on Civil and Political Rights* (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

[…]

Article 4

Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

The Committee shall not consider any communication from an individual unless it has ascertained that:

1. The same matter is not being examined under another procedure of international investigation or settlement;

2. The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

[…]

CITATION:, Toussaint v. Canada (Attorney General) 2022 ONSC 4747
COURT FILE NO.: CV-20-00649404-0000
DATE: 2022/08/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NELL TOUSSAINT

Plaintiff

- and –

ATTORNEY GENERAL OF CANADA

Defendant

- and -

CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ REFUGEE CENTRE, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

REASONS FOR DECISION

PERELL J.

Released: August 17, 2022