Court File No.: CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

BRIEF OF PLEADINGS, ENDORSEMENTS, AND ORDERS
(as of May 28, 2024)

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DATED this 28th day of May, 2024

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STATEMENT OF DEFENCE

A. FACTS ALLEGED IN THE FRESH AS AMENDED STATEMENT OF CLAIM

1. Except where expressly admitted herein, the Defendant denies the allegations made in the Fresh as Amended Statement of Claim (the "Statement of Claim") and puts the Plaintiff to the strict proof thereof.

2. The Defendant admits the allegations contained in paragraphs 4, 5, 6, 12, 13, 15, 16, 18, 19, 21, 25 and 26 of the Statement of Claim.

3. With respect to paragraph 2, the Defendant admits that the late Nell Toussaint ("Ms. Toussaint") was a woman of colour who is a national of Grenada, and that she lived in Canada since 1999. The Defendant denies that any irreversible negative health issues suffered by Ms. Toussaint are a result of the Defendant failing or refusing to provide essential health care benefits. The Defendant has no knowledge of the balance of the allegations in that paragraph.

4. With respect to paragraph 2a, the Defendant admits that Ms. Toussaint died on January 9, 2023. The Defendant has no knowledge of Ms. Toussaint's medical condition between November 2022 and January 2023. The Defendant denies the balance of the allegations in that paragraph. The Defendant specifically denies that it caused or contributed to Ms. Toussaint's death, and puts the Plaintiff to the strict proof thereof.

5. With respect to paragraph 2b, the Defendant admits that on October 6, 2023 Ms. Toussaint's mother Ann Toussaint was appointed as the representative of Ms. Toussaint's estate for the purposes of this action. The Defendant has no knowledge of the sources of funding for this action. The Defendant denies the balance of the allegations in that paragraph.

6. With respect to paragraph 3, the Attorney General of Canada defends this action on behalf of the Crown in Right of Canada.

7. With respect to paragraph 7, the Defendant admits that Ms. Toussaint lawfully entered Canada on December 11, 1999 as a visitor from Grenada and that she worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. The Defendant has no knowledge of the balance of the allegations in that paragraph.

8. With respect to paragraph 10, the Defendant admits that on September 12, 2008, Ms. Toussaint made an application for permanent resident status on humanitarian and compassionate ("H&C") grounds to Citizenship and Immigration Canada ("CIC"), including a request that CIC waive the application fee. The Defendant admits that, at the time of the application, CIC took the position

that it did not have discretion to waive the fee, and that the Federal Court of Appeal ultimately ruled that the Minister had that discretion. The Defendant otherwise has no knowledge of the allegations contained in paragraph 10.

9. With respect to paragraph 11, the Defendant denies that Ms. Toussaint qualified for provincial social assistance. In or around 2009, the Ontario Works program granted benefits to Ms. Toussaint on the mistaken assumption that she had an active application for permanent residence in progress. Ms. Toussaint's application for permanent residence had been refused on January 12, 2009. The Defendant has no knowledge of the balance of the allegations in paragraph 11.

10. With respect to paragraph 14, the Defendant denies that Ms. Toussaint's evidence before the Federal Court proved that her life was at risk. The Defendant otherwise admits the allegations in paragraph 14.

11. With respect to paragraph 17, the Defendant denies that the Federal Court of Appeal found that international human rights law was not relevant in Ms. Toussaint's case. The Defendant otherwise admits the allegations in paragraph 17.

12. With respect to paragraph 20, the Defendant denies that the Federal Court and the Federal Court of Appeal found that Ms. Toussaint's rights to life and security of the person were violated. The Federal Court and the Court of Appeal both concluded that Ms. Toussaint's rights under section 7 of the *Charter* were not violated.

13. With respect to paragraph 22, the Defendant admits that the United Nations Human Rights Committee ("UNHRC") is an independent body established

under the First Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"), and that the UNHRC is recognized as an authority on the interpretation of rights in the ICCPR. The Defendant denies that the UNHRC is a binding authority on the scope and effect of the ICCPR in Canadian law. The Defendant otherwise admits the allegations in paragraph 22.

14. With respect to paragraph 23 and 24, the Defendant admits that Canada acceded to the international treaties referred to, and that Ms. Toussaint has correctly summarized the terms of the documents. The Defendant denies that they have the legal effect ascribed to them by Ms. Toussaint.

15. With respect to paragraphs 27-29 and 32, the Defendant admits that the Plaintiff has correctly summarized the views of the UNHRC. The Defendant denies that the UNHRC "determined" these issues, or that the UNHRC's views have the legal effect ascribed to them by Ms. Toussaint.

16. With respect to paragraph 31, the Defendant denies that government officials did not reply to Ms. Toussaint's request for compensation. The Defendant otherwise admits the allegations in paragraph 31.

17. With respect to paragraph 33, the Defendant denies that Canada's response to the Committee's views "mistakenly" re-argued the Defendant's case. The Defendant otherwise admits the allegations in paragraph 33.

18. With respect to paragraphs 34-49, the Defendant denies that the Plaintiff's summary of the legal basis for the claim is correct, or complete.

19. The Defendant denies the allegations contained in paragraphs 20, 30, and 34 of the Statement of Claim.

20. The Defendant has no knowledge of the allegations contained in paragraphs 8 and 9 of the Statement of Claim.

21. The Plaintiff claims that the Defendant wrongfully prevented Ms. Toussaint from receiving state funded health care benefits, to the extent necessary to prevent a reasonably foreseeable risk of loss of life, or to prevent irreversible negative health consequences. For ease of reference, the benefits claimed by Ms. Toussaint are referred to hereinafter as “Essential Health Care Benefits”.

B. BACKGROUND

Ms. Toussaint

22. Ms. Toussaint was a national of Grenada.

23. Ms. Toussaint suffered from diabetes before she arrived in Canada. In Grenada, she took medication for this condition. She paid for this medication from her salary.

24. In 1986, before she arrived in Canada, Ms. Toussaint developed fibroids, which were a source of chronic pain.

25. On December 11, 1999, Ms. Toussaint entered Canada as a visitor.

26. Ms. Toussaint’s status as a visitor expired on or about June 11, 2000. She did not take any steps to renew her status.

27. Ms. Toussaint remained in Canada without status, and worked in Canada without authorization for over twelve years.

28. In the period from 1999 to 2008, when Ms. Toussaint needed to see a doctor, she paid for the visits herself.

29. In or about 2005, Ms. Toussaint contacted a person who she understood to be an immigration lawyer, to obtain a work permit. Ms. Toussaint did not obtain a work permit at this time. Ms. Toussaint continued to work without authorization.

30. In or around December 2007, Ms. Toussaint contacted the Canada Revenue Agency and asked for a determination of her residency status. On December 19, 2007, the CRA advised Ms. Toussaint that they considered her to be a resident of Canada, for the purposes of the *Income Tax Act*, as of December 11, 1999. Ms. Toussaint subsequently received GST and provincial tax credits for the years 1999 to 2006.

31. In 2006, Ms. Toussaint developed chronic fatigue, and an abscess on her right side that left her with chronic pain and difficulty walking.

32. At some point before June 2008, the particulars of which are known to Ms. Toussaint, Ms. Toussaint was referred to Women's College Hospital for an operation to remove uterine fibroids. Ms. Toussaint went to Women's College Hospital in June, 2008, and was told that she would have to pay privately for the operation if she was not covered by the Ontario Health Insurance Plan ("OHIP"). Ms. Toussaint had the procedure performed in November 2008 at Humber River Regional Hospital. She was billed for her care and was unable to pay the bill.

33. In March 2009, Ms. Toussaint was admitted to St. Michael's Hospital and treated for a pulmonary embolism.

34. As of August, 2009, the cost of Ms. Toussaint's medication was covered through the Ontario Drug Benefits program.

Ms. Toussaint applies for landing and a fee waiver

35. In September 2008, Ms. Toussaint made an attempt to legalize her status in Canada. She applied to be granted permanent residence from within Canada, on H&C grounds.

36. Ms. Toussaint asked to be relieved of the legal obligation to pay the required $550.00 application fee, claiming she lacked the funds. By letter dated January 12, 2009, the application was denied, on the basis that the decision maker lacked the discretion to waive the fee.

37. Ms. Toussaint sought judicial review of the refusal before the Federal Court. On September 4, 2009, the Court dismissed the application for judicial review.

38. Ms. Toussaint appealed to the Federal Court of Appeal. On April 4, 2011, the Court of Appeal allowed the appeal, and directed CIC to assess Ms. Toussaint's request to waive the processing fee. The Court found that, as a matter of statutory interpretation, the legislation that allows CIC to grant applications for permanent residence on H&C grounds necessarily includes the discretion to waive the fees for applications.

39. The Federal Court of Appeal rejected Ms. Toussaint's argument that the *Charter* required CIC to process her application without payment of the required fee. The Court found that section 7 of the *Charter* was not engaged by CIC's decision not to consider the request for a fee waiver, and that the decision did not constitute discrimination contrary to subsection 15(1) of the *Charter*.

40. Ms. Toussaint sought leave to appeal to the Supreme Court of Canada on the *Charter* issues. On November 3, 2011, the Supreme Court of Canada dismissed the application for leave.

Application for OHIP denied

41. At some point in 2009, the particulars of which are known to Ms. Toussaint, Ms. Toussaint applied for OHIP coverage. Ms. Toussaint was denied coverage because she did not have legal status in Canada.

42. On October 7, 2010, Ms. Toussaint filed an Application under the Ontario *Human Rights Code* alleging that the denial of OHIP coverage constituted discrimination in services on the basis of citizenship and place of origin.

43. In her application, Ms. Toussaint argued that the Ontario *Human Rights Code*, if interpreted in a manner consistent with international law principles, entitled her to relief. On April 19, 2011, the Ontario Human Rights Tribunal dismissed Ms. Toussaint's application.

44. Ms. Toussaint did not seek judicial review or an appeal of the decision of the Ontario Human Rights Tribunal.

45. Ms. Toussaint did not seek any other form of relief or judicial review with respect to the denial of OHIP coverage.

Application for Interim Federal Health Program coverage denied

46. On May 6, 2009, Ms. Toussaint applied for coverage under the Interim Federal Health Program (the "IFHP").

47. On July 10, 2009, Ms. Toussaint was denied coverage under the IFHP because she did not come within any of the classes designated in the policy.

IFHP history and development

48. The IFHP originated and evolved from a series of Orders-in-Council ("OIC"). As early as 1949, Canada recognized that in some circumstances, there might be a desire, for humanitarian reasons, to provide some short-term, essential medical services to those legal immigrants who required immediate medical attention after their arrival, but who lacked the resources to pay for those services. The 1949 OIC authorized the Federal government to expend $1,500 in a fiscal year for this purpose.

49. In 1952, another OIC (1952 OIC) authorized the Minister of Manpower and Immigration to pay for hospitalization, medical and dental care, together with incidental expenses, for immigrants after they were admitted at a port of entry. The authorization was for cases where immigrants were unable to afford those expenses themselves.

50. In 1957, the 1952 OIC was revoked and replaced by a new OIC (1957 OIC), which provided that the Department of National Health and Welfare was authorized to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:

> (a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and
>
> (b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been

referred for examination and/or treatment by an authorized Immigration officer,

(c) in cases where the immigrant or such person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare.

51. The 1957 OIC served as the regulatory authority for the IFHP from 1957 to 2012.

52. In 1993, responsibility for administering the IFHP, including responsibility for making decisions as to eligibility and making payments under the policy, was transferred from the Department of National Health and Welfare to the Department of Citizenship and Immigration Canada, now known as the Department of Immigration, Refugees and Citizenship Canada ("IRCC"). Under CIC and then IRCC's management, the IFHP had expanded to extend short-term, publicly funded temporary medical benefits to additional discrete groups of individuals whose circumstances demonstrate both a need for humanitarian consideration and financial need.

53. By 1996, the focus of the IFHP had shifted from looking after the medical needs of indigent newly landed immigrants, to meeting the medical needs of refugee claimants, Convention refugees and others in significant humanitarian need, as determined by the Minister.

54. The IFHP was never intended to cover the medical costs of every person without immigration status in Canada who is not eligible for provincial health insurance. The IFHP does not provide the same extent of coverage as provincial health insurance.

55. IFHP benefits are not co-extensive with what Ms. Toussaint describes as Essential Health Care Benefits. If Ms. Toussaint had been given access to IFHP benefits, she would not necessarily have received the level of health care benefits claimed in the Statement of Claim.

56. Funding of the IFHP is made by way of an *ex gratia* payment by the Crown. An *ex gratia* payment is a benevolent payment made by the Crown when there is no statutory or regulatory vehicle to make such a payment. The payment is made in the public interest, where the Crown has no obligation of any kind or has no legal liability, or where the claimant has no right of payment or is not entitled to relief in any form. By making IFHP payments, Canada does not acknowledge any obligation beyond the stated limits of the IFHP policy. The extent of IFHP coverage can be modified at any time.

57. When Ms. Toussaint applied for IFHP coverage, the policy included the following classes of eligible claimants:

(a) refugee claimants;

(b) government-assisted refugees;

(c) privately sponsored refugees

(d) protected persons in Canada';

(e) refused refugee claimants whose negative decisions were under judicial review or appeal or who were awaiting removal from Canada;

(f) members of the "Deferred Removal Orders Class";

(g) persons detained by the Canada Border Services Agency;

(h) applicants for Pre-Removal Risk Assessments (PRRAs);

(i) victims of human trafficking.

58. Ms. Toussaint never fell into the classes of eligible IFHP claimants.

Challenge to IFHP refusal in Federal Court

59. On August 10, 2009, Ms. Toussaint brought an application for judicial review in the Federal Court of the decision that she was ineligible for IFHP medical benefits. Ms. Toussaint argued that the decision violated her right to life liberty and security of the person under section 7 of the *Charter*, and her right to equality under section 15 of the *Charter*. Ms. Toussaint further argued that international law, including sections 6 and 26 of the ICCPR, gave her the right to access IFHP benefits.

60. The Federal Court dismissed the judicial review application. The Court determined that the IFHP was designed to provide temporary medical benefits to specific groups of persons as defined in the policy, but did not include persons living illegally in Canada. The Court determined that neither section 7 nor 15 of the *Charter* nor international law principles granted Ms. Toussaint the right to IFHP benefits.

61. The Federal Court determined that CIC had fettered its discretion by following the departmental policy manual to determine Ms. Toussaint's eligibility for IFHP benefits, rather than considering the terms of the OIC itself.

62. The Federal Court determined that the error was immaterial. The Court found that Ms. Toussaint would not have qualified under the policy in any event. The objective behind the policy was to provide temporary, emergency assistance to specified categories of foreign nationals or those who found themselves under the jurisdiction of the immigration authorities. The policy was not

meant to provide ongoing medical coverage to everyone who enters Canada and remains without status.

63. The Federal Court found that the decision to deny Ms. Toussaint IFHP benefits had not engaged her section 15 *Charter* interests, nor did it violate her section 7 rights, as it was in accordance with the principles of fundamental justice.

64. In June 2011, the Federal Court of Appeal dismissed an appeal from the Federal Court's order. The Court found that while Ms. Toussaint had demonstrated a serious risk to her life and security of the person, the IFHP was not the operative cause of the risk. The Court found that Ms. Toussaint's own conduct, in choosing to live without status in Canada for almost a decade, was the reason she was not able to access more extensive public healthcare coverage.

65. The Federal Court of Appeal ruled that Ms. Toussaint's section 7 *Charter* claim failed because it was her own conduct, rather than the federal government's, which endangered her life and health. The Court noted that, even if it were to conclude that the government's conduct was the operative cause of any harm to Ms. Toussaint, the section 7 *Charter* claim would fail, because there is no principle of fundamental justice requiring Canada to provide Essential Health Care Benefits. The Court held that the principles of fundamental justice do not require the government to provide access to publicly funded healthcare to all those within Canada's border.

66. The Federal Court of Appeal also dismissed Ms. Toussaint's section 15 *Charter* claim. The Court found that Ms. Toussaint's immigration status as a

person not legally present in Canada was not an analogous ground of discrimination. Following established caselaw, the Court found that immigration status is not an immutable characteristic. The Court further found that lack of immigration status in Canada is a characteristic that the government has a valid and justified expectation that people will change.

67. The Federal Court of Appeal found that any distinction drawn by the IFHP was not discriminatory, as it did not promote or perpetuate stereotyping or prejudice against persons who are living in Canada without immigration status. The government was under no obligation to create a particular benefit, or to extend that benefit to persons living illegally in Canada. The Court also found that the 1957 OIC was not the operative cause of any disadvantage Ms. Toussaint may have experienced.

68. On June 27, 2011, Ms. Toussaint sought leave to appeal to the Supreme Court of Canada. On April 5, 2012, the Supreme Court dismissed the application.

69. On January 30, 2013, Ms. Toussaint was approved in principle for permanent residence based on spousal sponsorship. On April 30, 2013, Ms. Toussaint became eligible for and began receiving health care under OHIP.

Complaint to the UNHRC

70. In December 2013, Ms. Toussaint submitted a communication to the UNHRC under the Optional Protocol to the ICCPR. 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.

71. In her observations to the UNHRC, Ms. Toussaint stated, among other things, that

> (a) Canadian courts would have had a broad discretion to award appropriate and just remedies, including compensation, if the Federal Court or the Federal Court of Appeal had upheld her allegations;
>
> (b) since the Federal Court of Appeal found that the *Charter* had not been breached in her case, she had no prospect of success of monetary compensation.

72. On August 14, 2014, Canada submitted its observations to the UNHRC regarding the admissibility of Ms. Toussaint's communication. Canada submitted, among other things, that:

(a) the administration and provisions of health care services is the responsibility of the government of each province or territory, and that Ms. Toussaint should have requested remedies from the Province of Ontario, or challenged the constitutionality of the Ontario health insurance scheme;

(b) that Ms. Toussaint had failed to seek monetary compensation before domestic courts when she challenged the constitutionality of the IFHP.

73. On April 2, 2015 and March 30, 2016, Canada submitted observations on the merits of the communication. Canada submitted, among other things, that:

(a) there had been no violation of Article 6 of the ICCPR: Ms. Toussaint had in fact received numerous health services, and the fact the state did not provide all health services immediately and free of charge did not amount to a violation of her right to life. Article 6 does not impose positive obligations to provide state-funded health insurance for all medical needs of undocumented migrants. Moreover, the reason that Ms. Toussaint may not have received an optimal level of state-funded health services was due to her own delay in regularizing her immigration status;

(b) there had been no violation of Article 26 of the ICCPR: differential treatment, based on legality of residence does not come within the scope of the right to non-discrimination protected by Article 26. In the

alternative, the differential treatment in question was reasonable and objective and in pursuit of a legitimate aim.

74. On August 7, 2018, the UNHRC released its views, in which it expressed the view that Canada had violated Ms. Toussaint's rights under articles 6 and 26 of the ICCPR.

75. On August 30, 2018, Ms. Toussaint, through her counsel, wrote to the Prime Minister requesting a remedy, including monetary compensation.

76. On February 1, 2019, Canada submitted its formal reply to the UNHRC. Canada stated that it disagreed with the views of the UNHRC in respect of the facts and law in the communication. Specifically, Canada disagreed with the broad scope that the Committee gave to article 6 of the ICCPR, noting that the right to life cannot extend to impose a positive obligation on States to provide state-funded medical insurance to foreign nationals without legal status present in the territory of the State. Canada also expressly disagreed that legality of residence in a country comes within the scope of "other status" under article 26 and that differential treatment of Ms. Toussaint was not based on reasonable and objective criteria. Canada stated that it would not be taking further measures to give effect to the UNHRC's views, or to compensate Ms. Toussaint.

77. On June 6, 2019, Ms. Toussaint filed a motion in the Supreme Court of Canada. Ms. Toussaint asked the Supreme Court to reconsider its 2012 decision, in which it dismissed Ms. Toussaint's application for leave to appeal the Federal Court of Appeal's 2011 decision in her case.

78. In the motion for reconsideration, Ms. Toussaint argued (among other things) that:

(a) The UNHRC's views were new jurisprudence which conflicted with the Federal Court of Appeal's decision;

(b) That as a result of the UNHRC's views, Ms. Toussaint's case raised an issue of public importance;

(c) That Ms. Toussaint had shown "exceedingly rare circumstances in the case that warrant consideration by the Court", pursuant to Rule 73 of the *Rules of the Supreme Court of Canada*, SOR/2002-156;

(d) That Ms. Toussaint was entitled to *Charter* damages.

79. On June 9, 2020, the Supreme Court of Canada dismissed Ms. Toussaint's motion for reconsideration.

Canadian legislation governing public health care funding

80. The *Canada Health Act* (the "*CHA*") provides for funding of public provincial health care plans. Provincial programs must provide coverage to residents of a province. "Resident" is defined 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".

81. The Ontario Health Insurance Plan ("OHIP") is a public health care plan available to residents of Ontario. A person cannot be recognized as a resident for the purposes of OHIP coverage unless the person has a specific eligible status.

82. Provincial health care plans include limits to the extent of health care funding provided, and waiting periods for eligibility.

Ms. Toussaint's access to medical care and coverage

83. Ms. Toussaint was able to access health care from various sources while she was without status. Ms. Toussaint accessed healthcare from Community

Health Clinics (“CHCs”). Primary health care is available to persons without OHIP through CHCs. CHCs are non-profit organizations funded by the province to provide primary and integrated health care for individuals, families and communities, that for a variety of reasons may have difficulty accessing health care. CHCs offer a broad range of comprehensive primary health care and health promotion programs to individuals and families including those without OHIP coverage. In 2008, Ms. Toussaint was receiving primary care, free of charge, at the York Community Services Health centre.

84. Ms. Toussaint also accessed healthcare from hospitals and from other medical practitioners in Canada. In some instances, Ms. Toussaint obtained those services free of charge, while being billed for others.

85. Ms. Toussaint was provided with emergency care at various hospitals in Ontario. The Ontario *Public Hospitals Act* requires hospitals to accept a person as an in-patient if the person has been admitted by a physician and the person requires the level or type of care for which the hospital is approved.

86. As of August 2009, the cost of Ms. Toussaint’s medication was covered through the Ontario Drug Benefits program.

C. MS. TOUSSAINT’S CLAIM

Res judicata and abuse of process

87. This proceeding is an attempt to re-litigate issues that have been finally determined in previous proceedings, and is an abuse of process.

88. The claim that the Plaintiff is entitled to relief under the *Charter* is *res judicata*. In her original application for judicial review in 2009, Ms. Toussaint argued

that the denial of benefits under the IFHP was contrary to the *Charter*. She relied on the principles of international law and Canada's international obligations. In 2010, the Federal Court determined that the denial of public health care benefits to Ms. Toussaint did not violate her right to life under section 7 of the *Charter*, or her right to equality under section 15 of the *Charter*. In 2011, the Federal Court of Appeal dismissed Ms. Toussaint's appeal. In 2012, the Supreme Court of Canada dismissed Ms. Toussaint's application for leave to appeal.

89. In 2019, following the release of the UNHRC's views, Ms. Toussaint sought to have the Supreme Court of Canada reconsider its earlier decision dismissing her application for leave, arising out of the original denial of IFHP benefits. Ms. Toussaint argued that the UNHRC's views constituted a reason to reconsider the matter. The Supreme Court dismissed the motion.

90. Canadian courts decided in 2012 the facts of Ms. Toussaint's case, when examined in the light of Canada's international obligations, do not give rise to a *Charter* breach.

91. The release of the UNHRC's views in 2018 did not change the law of Canada.

92. The Supreme Court of Canada did not consider the UNHRC's views to be a sufficient reason to re-open Ms. Toussaint's *Charter* challenge.

93. Ms. Toussaint's attempt to raise issues and seek remedies that could have been raised in previous proceedings is an abuse of process.

94. Ms. Toussaint's claim for damages under the *Charter* and at common law could have been raised, either before the Federal Court or this Court, at the

time that Ms. Toussaint challenged the decision to deny her benefits under the IFHP.

Collateral attack on administrative decisions

95. In paragraphs 1(a) and 20 of the Statement of Claim, it is clear that the Plaintiff is seeking to reverse the initial decision to deny Ms. Toussaint benefits under the IFHP, over 10 years after the fact. The Plaintiff also seeks to set aside Ministerial decisions denying relief to Ms. Toussaint.

96. This action is an impermissible collateral attack on a decision of a federal tribunal.

No right to damages under the ICCPR nor under customary international law

97. Canada has ratified the International Covenant on Civil and Political Rights as well as its Optional Protocol establishing the individual communications mechanism. The ICCPR is not directly enforceable in Canadian law. The UNHRC's views are non-binding in international law and are not enforceable in domestic law. In adhering to the Optional Protocol, Canada did not agree to be bound by the views of the UNHRC.

98. States Parties to the ICCPR and its Optional Protocol, when the treaties were being negotiated, turned their minds to the question of whether they should agree to be bound by the Committee's views. They decided as a matter of policy that they should not, leaving each party state, on a case-by-case basis, free to accept or reject the UNHRC's final views. While States Parties to the Optional Protocol commit to engaging in good faith with the Committee, which includes

giving serious consideration to the Committee's views, it remains open to Canada to disagree with the Committee's views and to choose not to give effect to them.

99. The Plaintiff has no cause of action in damages arising from the Committee's views, nor to a declaration that Ms. Toussaint's rights under the ICCPR have been breached. Customary international law does not give rise to a cause of action for a domestic remedy in damages in Ms. Toussaint's case.

100. The Plaintiff claims that the "right to life" and the "right to be free from discrimination", as protected by the ICCPR, are also rules of customary international law. The Defendant admits that certain aspects of these rights have become part of customary international law. However, the Statement of Claim is not simply asserting a "right to life" or a "right to non-discrimination" at large. The claim is that those general principles include a right to state-funded Essential Health Care Benefits in situations where persons not legally present in Canada face serious risks to their health and life. There is no international consensus or consistent state practice that supports the conclusion that such a right is a principle of customary international law.

101. The UNHRC's non-binding views on this issue are not indicative of a customary international norm. There is no international consensus on the notion that either the right to life or the right to non-discrimination include a right to state-funded Essential Health Care Benefits for persons in Ms. Toussaint's position. In 2017, Canada also expressly disagreed with the UNHRC's interpretation of the right to life as encompassing certain socio-economic entitlements in its comments on the Committee's draft General Comment No. 36 on the Right to Life. Other

countries, including Australia, the United Kingdom and United States, have expressed similar concerns.

102. The Defendant denies that the rights claimed by Ms. Toussaint are principles of customary international law. In any event, customary international law principles can only become part of Canadian common law if there is no express Canadian legislation to the contrary. In this case, the legislation which governs public health insurance in Canada and Ontario runs counter to Ms. Toussaint's claim. Canadian public health insurance legislation expressly limits public health care coverage to residents. Canadian legislation which expressly limits public health insurance coverage to residents has been found to comply with sections 7 and 15 of the *Charter*.

No right to damages under the *Charter*

103. Foreign nationals without status have no right to enter or remain in Canada, nor do they have a *Charter* protected right to access healthcare services funded by the federal government. The Federal Court of Appeal has already concluded that Ms. Toussaint's rights under sections 7 and 15 of the Charter were not violated by exclusion from the IFHP.

104. Where a UN Committee expresses the view that Canada has violated its obligations under an international human rights treaty, this does not automatically translate into a breach of similar *Charter* rights giving rise to a right to damages.

105. The UNHRC is not a court or a tribunal. It plays an important role in monitoring states parties' compliance with their obligations under the ICCPR, and

issues only non-binding recommendations. The views that the UNHRC issued in 2018 in Ms. Toussaint's case did not change the law or impact the scope of the *Charter* rights claimed by Ms. Toussaint.

a) No breach of Section 7

106. Ms. Toussaint's exclusion from health care coverage under the IFHP, and the Defendant's response to the views of the UNHRC do not constitute a breach of Ms. Toussaint's rights under section 7 of the *Charter*.

107. The allegations in the Statement of Claim do not engage Ms. Toussaint's right to life, liberty, or security of the person under section 7 of the *Charter*. In the alternative, any deprivation of Ms. Toussaint's right to life, liberty, or security of the person was in accordance with the principles of fundamental justice.

b) No breach of Section 15

108. The claim does not engage the protection of section 15 of the *Charter*. Section 15 does not impose a positive obligation on the part of the Government of Canada to provide state funded Essential Health Care Benefits.

109. Ms. Toussaint was not, at any relevant time, denied equal protection as compared to others on the basis of an enumerated or analogous ground. In particular The IFHP has not denied Ms. Toussaint a benefit on the basis of any enumerated or analogous ground protected by section 15.

110. Failure to include persons who remain in Canada without status from IFHP benefits does not reinforce, perpetuate or exacerbate any disadvantage. Any distinction at issue is not discriminatory.

c) Any breach saved by Section 1

111. Alternatively, if any of Ms. Toussaint's *Charter* rights were violated, which the Defendant denies, the Defendant says that any infringement was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter*.

d) No right to damages under section 24(1) of the Charter

112. If a breach of any of Ms. Toussaint's *Charter* rights is found, then a remedy pursuant to subsection 24(1) of the *Charter*, including an award of monetary damages to the Plaintiff is not appropriate or just. Such an award would not serve the objectives of subsection 24(1), and would be inappropriate based on countervailing factors. Further, the *Charter* damages the Plaintiff seeks are duplicative of the other damage awards she seeks.

113. The Defendant denies that the UNHRC's 2018 views had any effect on the law or policy in effect in 2009, when Ms. Toussaint applied for IFHP coverage. Even if the UNHRC's views somehow called some part of the policy into question (which is denied), no cause of action for damages can arise from the enforcement of duly enacted laws and policy unless the state conduct under the law or policy was "clearly wrong, in bad faith or an abuse of power". The Defendant denies that in denying IFHP benefits to Ms. Toussaint in 2009, it acted in a manner that was "clearly wrong, in bad faith or an abuse of power". The Defendant denies that, in any of its interactions with Ms. Toussaint, it acted in a manner that was "clearly wrong, in bad faith or an abuse of power".

No right to damages under domestic Ontario law

114. Ms. Toussaint has not cited any Ontario law which would entitle her

to state-funded Essential Health Care Benefits. Ontario law expressly excluded Ms. Toussaint from health care coverage when she arrived in Canada as a visitor, and when she remained without legal authorization. The applicable Ontario law complies with the *Charter*.

115. In any event, in 2009, Ms. Toussaint applied for OHIP coverage and was denied. Ms. Toussaint filed a complaint with the Ontario Human Rights Tribunal. She alleged that, based on international law principles, the Tribunal should find that she had suffered discrimination. The complaint was dismissed. Ms. Toussaint did not pursue any other appeal or application for judicial review.

116. The issue of whether Ontario law gives Ms. Toussaint a right to Essential Health Care Benefits is *res judicata*. Ms. Toussaint's attempt to re-litigate the issue is an abuse of process.

No right to a declaration that IFHP breaches the Charter

117. At all material times, the relevant IFHP policies in force complied with the *Charter.*

118. Both the Federal Court and Federal Court of Appeal have expressly found that the exclusion of irregular migrants from the IFHP does not infringe sections 7 and 15 of the Charter. The UNHRC's non-binding view that Ms. Toussaint's exclusion from IFHP coverage violated her rights under articles 6 and 26 of the ICCPR bears no impact on the *Charter* analysis.

119. In the alternative, if there was any violation of Ms. Toussaint's *Charter* rights as a result of the IFHP, which is expressly denied, it was

demonstrably justified in a free and democratic society and therefore saved by section 1 of the *Charter*.

No right to relief for person other than Ms. Toussaint

120. The Defendant denies that the Plaintiff is entitled to seek relief on behalf of all irregular migrants, as alleged in paragraph 1(e) of the Statement of Claim, or at all.

121. The Ontario Court Rules for the joinder of claims do not create a cause of action or a right to relief in this action for persons other than the Plaintiff. The comments of the Judge who dismissed a motion to strike in this matter do not create a cause of action or a right to relief in this action for persons other than the Plaintiff.

No right to a declaration that the Minister violated Ms. Toussaint's *Charter* rights between 2012 and 2013

122. Ms. Toussaint did not apply for health coverage after the IFHP was amended in 2012, or at any time after the initial refusal of benefits. The Defendant denies that there has been any breach of Ms. Toussaint's *Charter* rights between 2012 and 2013, when Ms. Toussaint obtained status in Canada and thereby became eligible for health insurance under OHIP.

No right to an order directing re-interpretation or amendment of the IFHP

123. The IFHP in force in 2009 complied with the *Charter.*

124. In any event, that 2009 IFHP policy is no longer in effect, having been replaced in 2012, and again in 2016. Ms. Toussaint's request to strike or amend the 2009 IFHP policy is moot.

125. The IFHP in force in 2012, to the extent it excluded Ms. Toussaint from coverage, complied with the *Charter*. In any event, Ms. Toussaint did not apply for health coverage after the IFHP was amended in 2012. The Plaintiff has no standing to request relief with respect to the 2012 IFHP. In the alternative, the Plaintiff's request to strike or amend the 2012 IFHP is also moot.

126. The IFHP in effect since 2016 complies with the *Charter*. Further, Ms. Toussaint has never been subject to, nor made any claim for coverage under the 2016 IFHP. The Plaintiff has no standing to request relief with respect to the 2016 IFHP. In the alternative, the Plaintiff's request to strike or amend the 2016 IFHP is moot.

No right to a declaration under the ICCPR

127. Canada has ratified the ICCPR, and the treaty is binding on Canada in international law. The texts of the ICCPR have not been expressly incorporated into domestic law. The ICCPR is not directly enforceable in Canadian law.

128. The Plaintiff is not entitled to a declaration by a Canadian court that Ms. Toussaint's rights under an international treaty have been breached.

No right to a damages or declaration regarding the Minister's response to non-binding UNHRC views

129. The Statement of Claim seeks to treat the UNHRC's 2018 views as a new fact which would warrant relief in this Court, despite the previous findings of Canadian courts. The UNHRC's views did not change the law of Canada, and do not give rise to a right to damages in Canadian law.

130. The views of the UNHRC are not binding on the Defendant in international law, and are not enforceable in domestic law. The UNHRC is not a

court or a tribunal. It is open to the Defendant to disagree with the Committee's views.

131. Canada has committed to engaging with the Committee in good faith, which includes giving serious consideration to the Committee's views. Canada is not obliged to implement the UNHRC's recommendations . In the case of Ms. Toussaint's communication, Canada did seriously consider the UNHRC's views and recommendations, but ultimately disagreed with the UNHRC for the reasons set out in detail in Canada's response to the views.

132. Canada agreed to ratify an international covenant and protocol that was not binding unless expressly incorporated into domestic law. Canada chose not to incorporate these instruments part of its domestic law. Canada's decisions about which international instruments are incorporated into domestic law are not amenable to the judicial process in this action. Domestic courts do not have the jurisdiction to review these matters.

133. In any event, the Defendant denies that the UNHRC's views are a correct interpretation of Canada's obligations under the ICCPR.

134. The Defendant denies that the Plaintiff is entitled to relief in the nature of judicial review with respect to the Minister's response to the UNHRC's views. The Defendant further denies that the government's decision on whether and how to implement treaty body views is a justiciable issue. The government's decision on whether and how to implement treaty body views is a matter that falls purely within the executive's policy-making responsibility.

135. In the alternative, the Minister's response to the UNHRC's views was reasonable.

136. In the further alternative, if relief in the nature of judicial review is warranted, the Defendant denies that relief in the form of damages or a declaration is appropriate. If relief in the nature of judicial review is warranted (which is denied), the decision not to further implement the UNHRC's views should be remitted to the Minister for reconsideration.

No negligence

137. The Defendant denies that the Defendant, or any Crown servants, agents or employees for whom the Crown may be vicariously liable acted negligently, as alleged in paragraph 20 of the Statement of Claim, or at all.

138. The Defendant did not owe a private law duty of care to Ms. Toussaint. If the Defendant owed a *prima facie* duty of care to Ms. Toussaint, which is not admitted but denied, it is negated as a result of residual policy considerations.

139. In the alternative, if the Defendant owed a private law duty of care to Ms. Toussaint, the Defendant met the standard of care required in the circumstances.

140. The Defendant's reasonable, bona fide policy choices with respect to the administration of the IFHP, including its response to the UNHRC's views, are immune from liability in negligence.

141. At all material times, Crown officials administered the IFHP and made decisions about Canada's response to the UNHRC's views in good faith,

based on their knowledge of relevant facts at the time decisions were made, and for purposes consistent with the relevant statutes and policy.

No bad faith

142. The Defendant denies that the Defendant, or any Crown servants, agents and employees for whom the Crown is liable, acted in bad faith, as alleged in paragraphs 20 and 34 of the Statement of Claim, or at all, and puts Ms. Toussaint to the strict proof thereof.

No damages

143. In response to Ms. Toussaint's claim as a whole, the Defendant denies that any action or inaction on the part of the Defendant or any crown servant caused or contributed to Ms. Toussaint's death, or caused or contributed to any harm to Ms. Toussaint.

144. The Defendant denies that Ms. Toussaint sustained any compensable loss, injury, or damages as alleged against the Defendant and as a result of the facts alleged in the Statement of Claim, and puts Ms. Toussaint to strict proof thereof.

145. In the alternative, if the Defendant sustained any loss, injury or damages as alleged, any such loss, injury or damage was not a reasonably foreseeable consequence of any act or omission on the part of the Defendant or anyone for whom the Defendant may be vicariously liable.

146. The Defendant states that the damages claimed are excessive, exaggerated, unforeseeable, and remote.

147. In the further alternative, if Ms. Toussaint sustained any injuries and damages as alleged in the Claim, then:

(a) Such loss injury or damage was not caused or contributed to by any fault, negligence, breach of duty, or want of care on the part of the Defendant or of anyone for whom the Defendant may be vicariously liable;

(b) Such loss injury or damage is attributable to pre-existing injuries or medical conditions of Ms. Toussaint, and further, no act or omission on the part of the Defendant or anyone for whom the defendant may be vicariously liable aggravated any pre-existing injury;

(c) Such loss, injury or damage was caused by reason of other incidents, injuries or medical conditions occurring subsequent to and independently of the circumstances alleged in the Statement of Claim; and

(d) Ms. Toussaint could have, by the exercise of due diligence, reduced the amount or extent of any loss, injury, or damage. Ms. Toussaint failed to mitigate her damages.

148. Furthermore, the Defendant pleads that if Ms. Toussaint sustained any damages, which is denied, Ms. Toussaint caused or contributed to these damages through her own conduct.

Any causes of action do not survive the death of Ms. Toussaint

149. The Defendant denies that any of the Plaintiff's allegations disclose any right to damages or any other remedy against the Defendant.

150. In the alternative, assuming that the Plaintiff has established any of the causes of action pleaded give rise to any right to damages or any other remedy against the Defendant, the Defendant pleads that any cause of action raised or relief requested is personal to Ms. Toussaint, and does not survive the death of Ms. Toussaint.

Limitations, *res judicata* and estoppel apply to Original Plaintiff's claims

151. There is no basis in law for the Plaintiff's request for a declaration invalidating the statutory limitation periods applicable to this case. Likewise, there is no basis in law for a declaration invalidating common law doctrines of res judicata, issue estoppel, abuse of process or collateral attack. Common law restrictions on pursuing a claim for damages do not engage or breach section 7 of the *Charter*, and do not breach section 15 of the *Charter*.

Action is statute barred

152. The Plaintiff's claim, in whole or in part, is statute barred by operation of the two-year limitation of actions under the *Limitations Act, 2002*. The facts giving rise to Ms. Toussaint's cause of action, Ms. Toussaint's awareness of those facts, and Ms. Toussaint's ability to seek legal redress arising out of those facts date back to 2009.

153. Based on the facts known to her at the time, Ms. Toussaint's interpretation of her *Charter* rights, and her interpretation of Canada's international obligations, Ms. Toussaint could have commenced this action in 2009.

154. In the alternative, based on Ms. Toussaint's application to the UNHRC, in which she engaged with the federal government and argued that Canada's international obligations gave her a right to compensation in Canada arising out of the denial of IFHP benefits, Ms. Toussaint could have commenced this action in December 2013.

155. In the further alternative, even assuming that Ms. Toussaint's cause of action arose after the UNHRC released its views that Canada was in breach of its obligations under the ICCPR, Ms. Toussaint could have commenced this action

on July 24, 2018.

156. Ms. Toussaint's attempts to seek non-judicial remedies, by corresponding with various government officials and asserting a right to a remedy, do not serve to extend a statutory limitation period.

D. LEGAL BASIS

157. The Defendant pleads and relies upon:

(a) The *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11;

(b) The *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

(c) The *Public Authorities Protection Act*, R.S.O. 1990, c. P38,

(d) The *Negligence Act*, R.S.O. 1990, c. N.1;

(e) The *Trustee Act*, R.S.O. 1990, c. T.23;

(f) The *Federal Courts Act*, R.S., 1985, c. F-7, s. 18;

(g) The *Canada Health Act*, R.S.C. 1985, c C-6, ss. 2, 7- 5;

(h) The *Health Insurance Act*, R.S.O. 1990, c H.6, s. 2, 3;

(i) *Regulation 552*, General, R.R.O. 1990, Reg. 552, s. 1.4.

(j) The *Limitations Act*, S.O. 2002, c. 24, Schedule B,

E. CONCLUSION

158. The Defendant pleads that the action should be dismissed, with costs.

Dated at Toronto, November 20, 2023.

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Plaintiff

AND

ATTORNEY GENERAL OF CANADA
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

STATEMENT OF DEFENCE

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CV-20-00649404-000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

REQUEST BY THE PLAINTIFF FOR PARTICULARS
(Pursuant to Rule 25.10 of the Rules Of Civil Procedure)

The plaintiff requests the following particulars of the allegations contained in the statement of defence:

1. Particulars of the aspects of the "right to life" and the "right to be free from discrimination" as protected by the ICCPR that the defendant admits have become part of customary international law, as pleaded in paragraph 100 of the statement of defence.

2. Particulars of the Canadian public health insurance legislation (including names and sections of acts) that the defendant asserts expressly limits public health care coverage to residents, as pleaded in paragraph 102 of the statement of defence.

3. Particulars of all authorities including case law that the defendant asserts have found Canadian legislation allegedly limiting public health insurance coverage to residents to comply with sections 7 and 15 of the *Charter*, as pleaded in paragraph 102 of the statement of defence.

4. Particulars of the principles of fundamental justice which the defendant asserts that any deprivation of Ms Toussaint's right to life, liberty, or security of the person was in accordance with, as pleaded in paragraph 107 of the statement of defence.

5. Particulars of how any infringement of Ms Toussaint's *Charter* rights was demonstrably justified in a free and democratic society, as pleaded in the alternative in paragraph 111 of the statement of defence.

6. Particulars of the "countervailing factors" that the defendant alleges would render inappropriate an award of monetary damages to the plaintiff, as pleaded in paragraph 112 of the statement of defence.

7. Particulars of the provisions of the IFHP in force in 2012 which the defendant alleges excluded Ms Toussaint from coverage and how such provisions complied with the *Charter*, as pleaded in paragraph 125 of the statement of defence.

8. Particulars of the provisions of the IFHP in effect since 2016 that the defendant alleges comply with the *Charter* and in what way such provisions comply with the *Charter*, as pleaded in paragraph 126 of the statement of defence.

9. Particulars of the portions of the UNHRC's views that the defendant alleges are not a correct interpretation of Canada's obligations under the ICCPR and in what way they are alleged to be incorrect, as pleaded in paragraph 133 of the statement of defence.

10. Particulars of the conduct of Ms Toussaint that the defendant alleges caused or contributed to any damages that she sustained, as pleaded in paragraph 148 of the statement of defence.

November 21, 2023

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Toussaint (Estate of)	-and-	Attorney General of Canada
plaintiff		defendant

ONTARIO
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PROCEEDING COMMENCED AT TORONTO

Request by Plaintiff for Particulars

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CV-20-00649404-000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

REPLY

1. The plaintiff admits those facts alleged in the statement of defence that are also expressly alleged in the fresh as amended statement of claim or in this reply.

2. With respect to the allegations in paragraphs 77 to 79, 89 and 92 of the statement of defence regarding Nell Toussaint's motion for reconsideration of the April 5, 2012 decision of the Supreme Court of Canada which dismissed her application for leave to appeal, the deputy registrar of the Supreme Court of Canada did not accept that motion for filing. The motion was never considered, or dismissed, by any judge or judges of the Supreme Court.

3. With respect to the allegation in paragraphs 122 and 125 of the statement of defence that Nell Toussaint did not apply for IFHP coverage after the initial refusal of benefits, the

defendant at all material times was aware of the circumstances of Nell Toussaint's case and was on notice that she was seeking IFHP benefits. The 2012 Order-in-Council did not provide for any application process to access the Minister's discretion and no such process was ever made public. While the 2012 Order-in-Council provided that the Minister "on his or her own initiative" could provide such benefits in "exceptional and compelling circumstances" the Minister wilfully, wrongfully, negligently, and in bad faith or in abuse of his powers refused to act on his own initiative and exercise his discretion to grant Nell Toussaint benefits, despite knowing that she would suffer serious harm as a result.

December 1, 2023

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Toussaint (Estate of) plaintiff	-and-	Attorney General of Canada defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Reply

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CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

RESPONSE TO REQUEST FOR PARTICULARS

The Defendant's response to the Plaintiffs' request for particulars in this matter, dated November 21, 2023, is set out below.

1. Particulars of the aspects of the "right to life" and the "right to be free from discrimination" as protected by the ICCPR that the Defendant admits have become part of customary international law, as pleaded in paragraph 100 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. In particular, the Defendant is not required to plead particulars of legal principles that do not apply to this action.

2. Particulars of the Canadian public health insurance legislation (including names and sections of acts) that the Defendant asserts expressly limits public health care coverage to residents, as pleaded in paragraph 102 of the statement of defence.

Response:

***Canada Health Act*, RSC 1985, c C-6, ss. 2 (definition of "insured person"; definition of "resident"), 3, 4, 10**

***Health Insurance Act*, RSO 1990, c H.6, ss. 2 (definition of "insured person"; definition of "resident"), 10, 11**

***General*, R.R.O. 1990, Reg. 552, s 1.4, 1.5**

3. Particulars of all authorities including case law that the Defendant asserts have found Canadian legislation allegedly limiting public health insurance coverage to residents to comply with sections 7 and 15 of the Charter, as pleaded in paragraph 102 of the statement of defence.

Response:

Particulars of authorities and case law are not required for pleadings in general, and are not required for the Plaintiff to plead to this specific allegation.

4. Particulars of the principles of fundamental justice which the Defendant asserts that any deprivation of Ms. Toussaint's right to life, liberty, or security of the person was in accordance with, as pleaded in paragraph 107 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. In any event, the legal principles at issue are set out in *Toussaint v. Canada (AG)*, 2011 FCA 213, [2013] 1 FCR 374 (Application for leave dismissed: *Toussaint v. Canada (AG)* 2012 CanLII 17813 (SCC)).

5. Particulars of how any infringement of Ms. Toussaint's Charter rights was demonstrably justified in a free and democratic society, as pleaded in the alternative in paragraph 111 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. The pleading is clear. Details of this alternative argument under Section 1 of the *Charter* are not required to be further particularized.

6. Particulars of the "countervailing factors" that the Defendant alleges would render inappropriate an award of monetary damages to the Plaintiff, as pleaded in paragraph 112 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. In any event, the factors that would render an award of monetary damages to the Plaintiff inappropriate in this action include:

a) **The existence of an alternative and equally effective remedy by way of a declaration or an order quashing a decision;**
b) **That the *Charter* damages the Plaintiff seeks are duplicative of the other damage awards she seeks.**

7. Particulars of the provisions of the IFHP in force in 2012 which the Defendant alleges excluded Ms. Toussaint from coverage and how such provisions complied with the Charter, as pleaded in paragraph 125 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. The categories of eligible IFHP claimants are particularized in paragraph 57 of the Statement of Defence. The Plaintiff admits that Nell Toussaint did not fit into these categories. In any event, the legal principles at issue are summarized in *Toussaint v. Canada (AG)*, 2011 FCA 213, [2013] 1 FCR 374 (Application for leave dismissed: *Toussaint v. Canada (AG)*, 2012 CanLII 17813 (SCC)).

8. Particulars of the provisions of the IFHP in effect since 2016 that the Defendant alleges comply with the Charter and in what way such provisions comply with the Charter, as pleaded in paragraph 126 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. The onus of establishing a Charter breach is on the Plaintiff.

9. Particulars of the portions of the UNHRC's views that the Defendant alleges are not a correct interpretation of Canada's obligations under the ICCPR and in what way they are alleged to be incorrect, as pleaded in paragraph 133 of the statement of defence.

Response:

Particulars are not required for the Plaintiff to plead to this allegation. In any event, the particulars of Canada's response to the UNHRC's views are within the knowledge of the Plaintiff. The Plaintiff has summarized her interpretation of the response at paragraph 34 of the Statement of Claim.

10. Particulars of the conduct of Ms. Toussaint that the Defendant alleges caused or contributed to any damages that she sustained, as pleaded in paragraph 148 of the statement of defence.

Response:

The particulars of Ms. Toussaint's conduct are within the knowledge of the Plaintiff. Further, a response is not necessary for the Plaintiff to plead.

Dated at Toronto, December 20, 2023.

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RESPONSE

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SUPERIOR COURT OF JUSTICE
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REQUISITION TO ATTEND CIVIL PRACTICE COURT

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☒ **Requisition to Attend Civil Practice Court before a Judge to Schedule (select one of the following):**

☐ **Urgent Hearing** ☒ **Long Motion or Application** ☐ **Summary Judgment Motion** ☐ **Request for Case Management** ☐ **Constitutional Question** ☐ **Appeal from the Consent and Capacity Board**

*** To book a date through Civil Practice Court, please return this completed form in **Microsoft Word format** by e-mail to: civilpracticecourt@ontario.ca

Court File Number: CV-20-00649404-0000

Full Title of Proceeding (List all Parties in the Title of Proceeding):

Nell Toussaint v. Attorney General of Canada

Moving Party Is:

☐ **Plaintiff/Applicant/Appellant**

☒ **Defendant/Respondent Attorney General of Canada**

☐ **Other**

1. Estimated time for oral argument by all parties:	**3 days**
2. Nature of the action or application (e.g., personal injury, specific tort, contract or other case type identified on Form 14F):	**Constitutionl law**
3. Rule(s) or statutory provisions under which the motion / application is brought:	**Rules 21.01(1)(b); 21.01(3)(a) and (d); 25.06(1) and (2); and 25.11(b) and (c)**
4. May the motion be heard by a master or must it be heard by a judge?	**Judge only**
5. Whether a particular judge or master is seized of all motions in the proceeding or of the particular motion?	**No**
6. If the proceeding is governed by the Simplified Procedure Rule (Rule 76), does the motion concern undertakings given or refusals made on examination for discovery?	**No**
7. Is the motion seeking summary judgment?	**No**
8. Is the application or motion urgent?	**No**
9. Is any party self-represented?	**No**
10. Is this proceeding under case management?	**No**
11. Does the motion or application require a bilingual Judge or Master?	**No**

Name of Party and Lawyer Scheduling the Motion: **David Tyndale, Department of Justice Canada**

Name and Firm (please type or print clearly)

Tel. No.: (647) 256-7309 Fax: (416) 954-8982 Email: David.Tyndale@justice.gc.ca

2021-08-09

Date

Telephone Number, Fax Number and Email Address

Court File No: **CV-20-00649404-0000** **Nell Toussaint v. Attorney General of Canada**

Name of Party and Lawyer Responding:

Andrew C. Dekany Barrister and Solicitor
Name and Firm (please type or print clearly)

Tel.: (416) 888-8877 Email: andrewcdekany@gmail.com
Telephone Number, Fax Number and Email Address

Name of Party and Lawyer Responding:

Name and Firm (please type or print clearly)

Telephone Number, Fax Number and Email Address

Name of Party and Lawyer Responding:

Name and Firm (please type or print clearly)

Telephone Number, Fax Number and Email Address

Name of Party and Lawyer Responding:

Name and Firm (please type or print clearly)

Telephone Number, Fax Number and Email Address

Name of Party and Lawyer Responding:

Name and Firm (please type or print clearly)

Telephone Number, Fax Number and Email Address

For Court Use Only

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL PRACTICE COURT ENDORSEMENT
Court File No.: CV-20-00649404-0000

Nell Toussaint v. Attorney General of Canada

Presiding Judge: **CPC#: 5**

JUSTICE RAMSAY **DATE:** 2021-09-07

Counsel attending (if different than listed above):

Plaintiff:

Defendant:

Other:

ENDORSEMENT

This is a motion to strike brought by the defendant under rule 21 and 25 of the Rules, with an estimated length for the hearing of three days. There are other motions to be dealt with to determine whether a number of potential interveners will be allowed to intervene.

The moving party may requisition a date for a case conference and the case conference judge may exercise any power under rule 50.13 to set a schedule for the hearing of the motions to intervene and the motion to strike on the merits.

The schedule below has not been approved and may be addressed at the case conference.

9/9/2021

DATE: 2021-09-07 **Judge's Signature** X

Signed by: Audrey Ramsay

SCHEDULE

TIMETABLE

- **MOVING PARTY'S MOTION RECORD, APPLICATION RECORD, OR APPEAL BOOK TO BE DELIVERED[1] BY: September 8, 2021**
- **RESPONDING PARTY RECORD TO BE DELIVERED BY:**
- **REPLY RECORD, IF ANY, TO BE DELIVERED BY:**
- **CROSS-EXAMINATIONS TO BE COMPLETED BY:**
- **UNDERTAKINGS TO BE ANSWERED BY:**
- **MOTION FOR REFUSALS BY:**
- **CASE CONFERENCE TO BE CONDUCTED BY: October 4, 2021**
- **MOVING PARTY OR APPLICANT'S FACTUM TO BE DELIVERED BY: September 8, 2021, with a book of authorities within a reasonable time afterwards**
- **RESPONDING PARTY FACTUM TO BE DELIVERED BY: 8 weeks prior to the hearing date approved and fixed for the hearing of the defendant's long motion**
- **APPROVED HEARING DATE:**
- **ANY ADDITIONAL TIMETABLE ITEMS: regarding motions to intervene by prospective intereveners:**
    - **September 22, 2021- all prospective interveners, including any who have not attended Civil Practice Court, to deliver their respective motion records (notices of motion and supporting affidavits) with payment of the motion fee for their respective short motions seeking leave to intervene in the defendant moving party's long motion**
    - **October 4, 2021 – tentative case conference in the event any issues arise after service of the prospective interveners' motion records. The defendant moving party to canvass all prospective interveners who have filed motion records and the plaintiff responding party on September 29, 2021, to determine whether such a case conference is necessary, and to advise the Court by September 30, 2021 whether the case conference is to proceed or whether it may be cancelled.**
    - **October 6, 2021 - parties (defendant and plaintiff) to deliver affidavits, if any, in response to motions to intervene**
    - **November 3, 2021 - Cross-examinations, if any, on affidavits are to be completed**

[1] *Rule* 1.01: "deliver" means serve and file with proof of service, and "delivery" has a corresponding meaning.

- **November 12, 2021 – prospective interveners to deliver their respective factums for the intervention motions and also serve them on each other, and within a reasonable time afterwards serve their books of authorities**
- **November 26, 2021 - responding parties to the intervention motions to deliver their factums, if any, and also serve copies thereof on prospective interveners in each of the other motions to intervene, and within a reasonable time afterwards serve their books of authorities**
- **Week of December 5, 2021 – hearing together of all motions to intervene (in writing unless directed otherwise by the judge reviewing the prospective interveners' respective Request forms)**
- **January 17, 2021 - estimated date for release of decision in motions to intervene**
- **interveners to serve and file factums on the parties and on each other - 6 weeks prior to the hearing of the defendant's long motion, and within a reasonable time afterwards serve their books of authorities**
- **defendant moving party to deliver any factum in response to the interveners' factums or in reply to the plaintiff responding party's factum - 5 weeks prior to the hearing of the defendant's long motion, and within a reasonable time afterwards serve any further book of authorities**

THE PARTIES SHALL COMPLY WITH ALL PRACTICE DIRECTIONS ISSUED FOR THE TORONTO REGION APPLICABLE TO THIS MOTION OR APPLICATION, INCLUDING THE REQUIREMENTS FOR FILING DOCUMENTS AND UPLOADING THEM TO CASELINES AS SUMMARIZED IN THE TABLE BELOW.

REQUIRED STEPS CHECKLIST

STEP	HOW	CHECK IF DONE
File documents and pay all fees	File your documents and pay fees using the Civil Submissions Online portal . **If your matter is urgent or you are filing documents for a court date or deadline that is fewer than 5 business days away**, email your documents to the court office at : Civil Urgent Matters-SCJ-Toronto <.> Documents submitted to the court in electronic format must be named in accordance with the Superior Court's Standard Document Naming Protocol, which can be found in section C.8 of the *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media* at: . See new Rule 4.05.2. Ensure your email address is on all documents filed.	☐
30 DAYS BEFORE HEARING		
Email Motions Coordinator 30 days prior to the motion or application hearing date about the status of the motion or application including names, telephone numbers, and email addresses of all counsel and/or self-represented parties. After this is done, the parties will receive an email from CaseLines saying it is ready to use.	Send email to: .	☐
AT LEAST ONE WEEK BEFORE HEARING		
Upload materials to CaseLines including all Motion Records, Factums, and the requested Draft Order or Judgment. Upload your factum and draft Order or Judgment in WORD format.	See new Rule 4.05.3. Ensure you email address is on all documents filed. For more information about CaseLines, including answers to frequently asked questions, refer to *Supplementary Notice to the Profession and Litigants in Civil and Family Matters – Including Electronic Filings and Document Sharing (CaseLines Pilot)* September 2, 2020; updated December 17, 2020 found at .	☐

Court File No: **CV-20-00649404-0000** **Nell Toussaint v. Attorney General of Canada**

Confer with opposing counsel and email Motion Confirmation form to Motions Coordinator.	For motions, see: Rule 37.10.1 and Form 37B. For applications, see: Rule 38.09.1(1) and Form 38B.	☐

	Send email to: .	
SHORTLY BEFORE HEARING		
Upload Compendiums. For all oral motions and applications upload a Compendium to CaseLines at any time before the hearing which contain the excerpted portions of the cases and evidence which the parties intend to rely upon. Counsel and self-represented parties should familiarize themselves with the CaseLines-generated page numbering on uploaded documents for ease in directing the judge to specific pages.	See email from CaseLines.	☐
Upload any amended requested Draft Order or Judgment into CaseLines.	See uploading instructions in the Frequently Asked Questions About CaseLines at: .	☐
Exchange costs outlines not exceeding 3 pages in length.	See Rule 57.01(6) and Form 57B.	☐
AFTER THE HEARING		
Upload the costs outlines to CaseLines <u>if there have been no Rule 49 Offers to Settle</u>. If there have been Rule 49 Offers to Settle, then costs outlines should be dealt with in the manner directed by the Motions or Applications Judge.		☐

COURT FILE NO.: CV-20-00649404-0000
DATE: 20211014

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN: NELL TOUSSAINT, Plaintiff

AND:

ATTORNEY GENERAL OF CANADA, Defendant

BEFORE: S.F. Dunphy J.

COUNSEL: *Andrew Delkany* (andrewcdekany@gmail.com), for the plaintiff

David Tyndale (David.Tyndale@justice.gc.ca), for the defendant

Professor Martha Jackman (Martha.Jackman@uottawa.ca), for the possible prospective intervenor, Canadian Health Coalition (CHC) and Charter Committee on Poverty Issues (CCPI)

Alysha Li (alysha.li@blakes.com), for the possible prospective intervener, Canadian Civil Liberties Association (CCLA)

Megan Mah (MMAH@weirfoulds.com), for the possible prospective intervener, Colour of Poverty, Black Legal Action Centre (BLAC), South Asian Legal Clinic of Ontario (SALCO) and Chinese and Southeast Asian Legal Clinic (CSALC)

Rachel Saab (rsaab@torys.com), for the possible prospective intervener, Amnesty International (Al) and the International Network for Economic. Social and Cultural Rights (ESCR-Net)

HEARD at Toronto (Telephone): October 6, 2021

CASE CONFERENCE ENDORSEMENT

[1] The parties appeared before me on a case conference on October 6, 2021 to consider scheduling of a potentially complex *Charter* motion.

[2] The plaintiff's action is for damages under the *Charter.* It is alleged that the Federal Government had a duty to provide medical care analogous to OHIP to the plaintiff who, at the relevant time, was resident in Canada without legal status. The Crown has sought dates for a motion to strike the claim as disclosing no cause of action pursuant to Rule 21 of the *Rules of Civil Procedure.* I am advised that the motion record is ready to be filed. No date has yet been fixed for a hearing of that motion.

[3] Four sets of counsel representing nine advocacy or interest groups have indicated their desire to intervene on the motion in favour of the plaintiff. The Crown does not consent to the granting of intervenor status to any of them, whether for the limited purpose of the motion to strike or more generally for the action should it survive the motion.

[4] This is clearly a novel case. The plaintiff acknowledges that there is Court of Appeal jurisprudence on an analogous issue where a claim seeking declarations arising from allegedly inadequate government response to homelessness was struck: *Tanudjaja v. Canada (Attorney General*), 2014 ONCA 852 (CanLII). The plaintiff and intervenors urge that this decision is ripe for reconsideration – at least in the context of the government assistance sought in this case – as a result of a United Nations Human Rights Council report regarding the provision of health care services to persons regardless of immigration status.

[5] Obviously it is not my role on a case conference to make substantive determinations on any of the issues raised by the parties. Those are matters that will have to be reserved for the motions judge hearing the matter. While the parties have agreed to a tentative timetable, it is my job as gatekeeper to scrutinize and prioritize claims upon the limited resource which is judicial time. I approach that task by examining this proposed motion and interventions in their discrete parts.

[6] The first step in the process of resolving this dispute will be to deal with the claims for intervenor status. The jurisprudence on such applications is by now very well established and it seems to me that devoting four or more months and a day or more of motion time is excessive, particularly where our current waiting list for full day motions at this point would push such a motion back to May or June 2022.

[7] It is to be recalled that the motion of the Attorney General is one where the moving party bears the onus of establishing that it is “plain and obvious” that the plaintiff’s claim cannot succeed. That issue has been examined in depth by the Court of Appeal in the context of an analogous *Charter* case and the task of examining the points of distinction if any that might be drawn from that 2014 decision, nuances that might have been added by subsequent jurisprudence or the impact if any of the U.N. Human Rights Council decision are all comparatively narrow, law-focused exercises. It is clear (and indeed desirable) that there is a considerable degree of co-ordination between the plaintiff and the prospective intervenors. Assuming well-prepared written arguments by the intervenors and the parties to the litigation, I can see no reason why such a motion ought to take longer than one-half day to be presented.

[8] I have given directions to Ms. Parris, the Civil Trial Coordinator, to arrange to provide the intervenors with an appointment for a HALF DAY motion in this matter to be heard in mid-January or early February depending on what dates can be coordinated with counsel. This will require some co-ordination on the part of counsel to ensure that they are able to appear on whatever date Ms. Parris is able to clear for them on this short notice. If they are unable to make dates proposed by her work, then this matter will have to go back to Civil Practice Court to be scheduled in the usual course which would defer completion of this initial step to April or May, 2022.

[9] The following timetable applies to the intervenor motions:

DOJ file Motion Record: Done

All intervenor motions records to be served and filed: October 22, 2021

Responding Motion Record(s) (both for intervenor motions and AG-Can "main" motion): November 5, 2021

Moving Party Facta: December 13, 2021

Responding Party Facta: December 28, 2021

Hearing: One half day – date to be determined by Trial Coordinator in consultation with parties

Notes: The parties are reminded that Tabs do NOT appear when motion records are uploaded to Case Lines. At minimum, a detailed index WITH PAGE NUMBERS must be included. Ideally, hyperlinks will be including or else upload each document, including exhibits separately.

[10] The parties have indicated their desire to have a single judge appointed to hear the motions arising out of this litigation due to the complexity of the issues and the number of parties or intervenors involved. It is possible to request to have a judge designated for this purpose but an application will have to be made to the RSJ pursuant to rule 37.15(1) of the *Rules of Civil Procedure*.

[11] The intervenors strongly urged me to set aside three days for the hearing of the Attorney General's motion to strike the claim. At present, I am disinclined to accede to that demand for the following reasons:

- The intervention motions have not yet been heard, much less granted;
- The "plain and obvious" test applicable to the merits of the motion itself speaks in favour of a short and focused hearing. Whether it is "plain and obvious" is something that ought to be able to be demonstrated in a short, focused hearing where the argument ought to be well-developed in writing with oral argument emphasizing the most important points.
- The proposed intervenors all support the plaintiff and oppose the Attorney General's motion to strike. It is to be expected that the intervenors and the plaintiff can and will coordinate with each other to avoid duplication in arguments.

[12] In light of the foregoing, I am of the view that a full day ought to be more than sufficient to enable properly briefed arguments to be presented. However, should a judge be appointed under rule 37.15, it is possible that such judge – particularly with the advantage of managing the stages leading to the hearing of the motion – may find it useful

to allow for an expanded hearing. My reasons herein are not intended to tie such judge's hands in any way but merely to get the ball rolling in terms of reserving hearing dates and getting timetables in place. Should a hearing longer than one day for the substantive motion be approved, it will be up to the judge at that time to consider what alternative dates may be available.

[13] The following timetable applies to the hearing of the "main" motion and assumes a disposition of the intervenor motions (which may be with reasons to follow) by the end of January 2022:

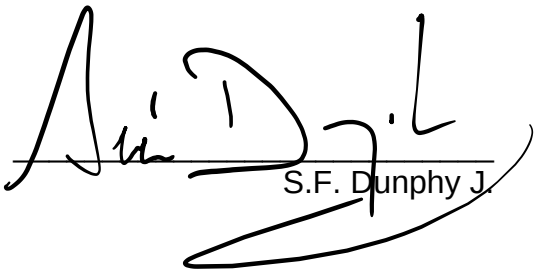
Moving Party (AG-Can) Factum: February 14, 2022

Responding/Intervenor Facta: February 28, 2022

Reply Factum DOJ (AG-Can): March 15, 2022

Hearing Date: To be Determined ONE DAY

[14] As with the date for the intervention motion, the parties will have to approach Ms. Parris in the Trial Coordinator's office to obtain a date for the hearing of the main motion. I have instructed her to set aside a FULL DAY for this purpose as soon as practicable in May or June 2022. You will need to coordinate with her directly to consider which dates she is able to propose will mesh with the calendars of the parties.



S.F. Dunphy J.

Date: October 14, 2021

January 14, 2020

Toussaint v. Attorney General of Canada CV-20-649404

- *Martha Jackman* for CCPI Coalition
- *Kaley Pulfer, Iris Fischer and Alysha Li* for CCLA
- *Raj Anand and Megan Mah* for COP-COC Coalition
- *Rachael Saab and Alex Bogach* for Amnesty/ESCR-Net
- *David Tyndale and Asha Gafar* for the Defendant AG Canada /Responding Party
- *Andrew Dekany* for the Plaintiff (consenting to these requests for intervener status)

Motions by four proposed interveners for leave under Rule 13.02 to intervene in the defendant AG's motion to strike P's pleading - P's action raises constitutional and international human rights law issues relating to federal health care for irregular migrants – Each of the proposed intervener groups seek leave to file a 20-page factum and be granted 20 minutes for oral submissions – The AG does not dispute that the four proposed interveners are well-recognized groups with relevant expertise; have a real and substantial identifiable interest in the subject matter of this proceeding; and can provide an important and distinct perspective.

The AG opposes these motions on two grounds: *(i) the submissions of the proposed interveners will simply duplicate P's and will not assist the court, especially on a motion to strike where the legal analysis is particularly narrow,*[1] *and (ii) the added 80 pages of factums and the additional hour and twenty minutes of oral submissions will unnecessarily complicate the motion to strike and prejudice the defendant.*

Decision: The motions for leave to intervene are granted — but with modifications relating to the size of the factums and the time allocated for oral submissions — specifically, each intervener's factum cannot exceed 15 pages and although in my view 15 minutes for oral submissions would not be unreasonable, it will be up to the judge hearing the motion to strike to determine what time, if any, will be granted to the interveners for oral submissions.

Reasons: Courts have recognized that the threshold for granting intervener status in a public interest or public policy case is more relaxed than it is for a private interest case.[2] However, even without the benefit of this lower hurdle, I am satisfied that each of the four proposed interveners can usefully assist the court with the nuanced constitutional and international human rights issues that arise here — especially on the motion to strike where the legal focus is on the "no chance of success"/"doomed to fail" question. I refer in particular to the points set out in the CCPI Factum at paras. 45-70, the CCLA Factum at paras. 5 and 21, the COP-COC Factum at paras. 18-19 and the Amnesty/ESCR-Net Factum at paras. 5 and 33-47.

[1] I pause here to ask how "duplication" can even be assessed given that P has not yet filed her factum.

[2] *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada* (1990) 74 OR (2d) 164 (C.A.) at para. 6; *Trinity Western University v Law Society of Upper Canada,* 2014 ONSC 5541 at para 8.

However, I agree with the AG that the interveners' submissions should be confined to the 'no reasonable cause of action' focus and they should avoid duplication. A 20-page factum from every intervener is excessive. A 15-page maximum would be more appropriate and I so direct.

My suggested allocation of 15 minutes for oral submissions is not unreasonable. However, as already noted, and in my discretion, I am deferring the question of whether or to what extent the court will benefit from oral submissions to the judge hearing the motion to strike.

With these modifications to factum size and oral hearing time, the AG's prejudice argument loses its force. Strictly speaking, the concern in the caselaw is not "prejudice" as commonly understood but "injustice"[3] to the parties — here, the plaintiff consents and there is no injustice to the defendant AG if these interventions are granted with the modifications as noted.

A final comment. Given the history of this litigation and the very narrow focus of the motion to strike, I think all judges would benefit from the analyses that these particular interveners can provide. And, if it turns out that the motion court's review of the interveners' factums shows otherwise, the court can limit or eliminate oral submissions and nothing is lost, other than the time it took to read the short factums. I was therefore somewhat perplexed by the level of intensity in the defendant AG's opposition to these motions for intervention. It would have been more measured, in my view, to focus on factum length or oral hearing time (if these were indeed concerns).

The motions to intervene in the motion to strike are granted with the modifications as noted. I further direct that none of the interveners shall receive or be liable for costs in the motion to strike.

Draft Order: I would be obliged if counsel would prepare a single umbrella Order — one that includes all four interveners — for my signature.

Costs: No costs are sought on these motions to intervene and none are awarded.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: January 14, 2022

[3] As the Court of Appeal noted in *Foxgate Developments Inc v Jane Doe*, 2021 ONCA 745 (at para. 6), the court "must consider the general nature of the case, the issues that arise in the case, and the contribution that the proposed intervener can make to resolving those issues *without doing an injustice to the parties*". (Emphasis added),

Court File No.: CV-20-00649404-000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 14TH
	)	
JUSTICE BELOBABA	)	DAY OF JANUARY, 2022

B E T W E E N:

NELL TOUSSAINT

Plaintiff/Respondent

- and -

ATTORNEY GENERAL OF CANADA

Defendant/Applicant

-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

Proposed Interveners / Moving Parties

ORDER

THIS MOTION, made by the four proposed interveners: i) Amnesty International Canadian and International Network for Economic, Social and Cultural Rights; ii) Charter Committee on Poverty Issues, Canadian Health Coalition and the FCJ Refugee Centre; iii) 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 ("Colour of Poverty Coalition") and; iv) the Canadian Civil Liberties Association, (together, "the Interveners") for an

order granting each of them leave to intervene as a friend of the Court in the motion to strike the amended amended statement of claim made by the Defendant/Respondent, the Attorney General of Canada ("AGC"), was heard by me this day by videoconference.

ON READING the motion records of the Interveners, the motion record of the AGC in the motion to strike the amended amended statement of claim, the facta of the Interveners and the AGC, the consent of the Plaintiff/Respondent, and on hearing the submissions of counsel for the parties and for the Interveners;

1. **THIS COURT ORDERS** that the Interveners are granted leave to intervene as friends of the Court at the hearing of the motion to strike.

2. **THIS COURT FURTHER ORDERS** that each of the Interveners shall be entitled to file a factum of no more than 15 pages.

3. **THIS COURT FURTHER ORDERS** that the length of oral argument of the Interveners, if any, will be determined in the discretion of the judge hearing the motion to strike.

4. **THIS COURT FURTHER ORDERS** that the Interveners shall not be entitled to receive and shall not be liable for costs against any party or intervener in the motion to strike.

5. **THIS COURT FURTHER ORDERS** that no costs are payable in respect of the motions for leave to intervene.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

NELL TOUSSAINT -and- Plaintiff	ATTORNEY GENERAL OF CANADA Defendant	Court File No. CV-20-00649404-000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

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Lawyers for the Proposed Interveners Charter Committee on Poverty Issues, Canadian Health Coalition and FCJ Refugee Centre

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

Contents

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;
>
> (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.).

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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

[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.

[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

Court File No. CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 17TH
MR. JUSTICE PERELL	)	DAY OF AUGUST, 2022

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

Interveners

ORDER

THIS MOTION, made by the Defendant for an order striking out the Statement of Claim, and for other related relief, was heard on June 13, 2022 by video conference.

ON READING the Notice of Motion and the Statement of Claim, and on hearing the submissions of the lawyers for the Defendant, the Plaintiff, and the Interveners.

1. **THIS COURT ORDERS** that the motion is dismissed.
2. **THIS COURT DECLARES** that:
   a) This action is within the jurisdiction of the Ontario Court;
   b) This action is timely, and not barred by a limitation period;
3. **THIS COURT FURTHER ORDERS** that:
   a) The Defendant shall have forty days to deliver its Statement of Defence, without raising a limitations period defence;
   b) No costs are awarded for or against the interveners;
   c) If the Plaintiff and Defendant cannot agree about the matter of costs, they may make submissions in writing, beginning with the Plaintiff'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

PERELL, J

Court File No. CV-20-00649404-0000

NELL TOUSSAINT	AND	**ATTORNEY GENERAL OF CANADA**
Plaintiff		Defendant

(Short title of proceeding)

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Toronto

ORDER

ATTORNEY GENERAL OF CANADA

Department of Justice
Ontario Regional Office
120 Adelaide Street West
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Toronto, Ontario
M5H 1T1
Fax: (416) 954-8982

Per: David Tyndale
Tel: (647) 256-7309
Email: David.Tyndale@justice.gc.ca
LS#: 28696K
Our File: 500033353

Lawyer for the Defendants

COURT FILE NO.: CV-20-00649404-0000
DATE: 20220914

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
NELL TOUSSAINT Plaintiff	*Andrew C. Dekany* and *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 Intervenors	*Alysha Li* for Canadian Civil Liberties Association *Martha Jackman* for Charter Committee on Poverty Issues, Canadian Health Coalition and FCJ Refugee Centre *Alex Bogach*, *Penelope Simons* and *Rebecca Amoah* for Amnesty International Canadian Sector (English Speaking) and ESCRNet – International Network for Economic, Social and Cultural Rights
	HEARD: September 14, 2022

PERELL, J.

FILE DIRECTION

[1] This is a case management conference to settle the form and content of my Order dated August 17, 2022 on Canada's motion to strike the Plaintiff's Statement of Claim. I am satisfied that Canada's draft Order should be issued and I have signed it.

[2] At the case management conference, a request was made by Canada for a ten-day extension of time for the delivery of its costs submissions and a ten-day extension of the time for the delivery of its Statement of Defence.

[3] Ms. Toussaint did not oppose the extensions and they are granted.

Perell, J.

Released: September 14, 2022

CITATION: Toussaint v. Canada (Attorney General), 2022 ONSC 5851
COURT FILE NO.: CV-20-00649404-0000
DATE: 20221014

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	)	
Intervenors	)	
	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION - COSTS

[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] Canada brought a motion to have Ms. Toussaint's action dismissed on a variety of grounds. On February 10, 2022, Canada delivered a 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 breached 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*;
>
> (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].

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

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.

[3] I dismissed Canada's motion.[2] I held 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; and (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.

[4] I directed that 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.

[5] Ms. Toussaint requests costs on a substantial indemnity basis of $181,666.71, all inclusive. Her claim for costs on a partial indemnity basis is $121,111.14, all inclusive.

[6] Canada does not dispute that Ms. Toussaint is entitled to her costs. Its position is that there is no reason to award costs on a substantial indemnity scale and that the claim for costs on a partial indemnity basis is unreasonably high. In particular, it submits that the amounts requested (a) reflect work which is unrelated to the merits of the motion; (b) are out of proportion to the nature of the motion and the amount of material filed; and (c) hugely out of proportion to similar costs awards granted in similar cases.

[7] The court's discretion in awarding costs arises under the authority of s. 131(1) of the *Courts of Justice Act*[3] and is to be exercised by a consideration of the factors in rule 57.01(1) of

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[2] *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747.
[3] R.S.O. 1990, c. C.43.

the *Rules of Civil Procedure*. These factors include the principle of indemnification, the reasonable expectations of the parties, the complexity of the proceeding, the importance of the proceeding, and the conduct of the parties in litigation.

[8] The traditional discretionary principles developed for costs awards are codified in rule 57.01(1), which states:

> *Factors in Discretion*
>
> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
>
> (iii) any other matter relevant to the question of costs.

[9] The most general rule about costs, not to be departed from without good reason, is that costs at a partial indemnity scale follow the event, which is to say that normally costs are ordered to be paid by the unsuccessful party to the successful party on a partial indemnity scale.[4]

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[4] *McCracken v. Canadian National Railway*, 2012 ONSC 6838; *Hague v. Liberty Mutual Insurance Co*., [2005] O.J. No. 1660 (S.C.J.); *Pike's Tent and Awning Ltd. v. Cormdale Genetics Inc.* (1998), 27 C.P.C. (4th) 352 (Ont. Gen. Div.); *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 (C.A.).

[10] A critical controlling principle for the awarding of costs is that the sum awarded reflect the fair and reasonable expectations of the unsuccessful litigant.[5] The overriding principle in awarding costs is reasonableness.[6]

[11] The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case. In some cases, it may be reasonable for the successful party to make exhaustive efforts and to commit enormous legal resources, and in those cases, it might be said that the unsuccessful party could reasonably expect to pay those costs. In other cases, however, the successful party may have been well served by giving his or her lawyer instructions to make exhaustive efforts, but it might be disproportionate and unreasonable to expect the unsuccessful party to pay those costs, even if he or she would have expected or anticipated that his or her foe would have marshalled those legal resources.[7]

[12] In *Davies v. Clarington (Municipality)*[8] at para. 52, Justice Epstein stated that the overriding principle in awarding costs is reasonableness. She stated:

> 52. As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)], this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said: "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

[13] Subject to the costs consequences provisions of the offer to settle rule, only in exceptional cases are costs awarded on a substantial indemnity scale[9] or on a full indemnity scale.[10] Costs on a substantial indemnity scale or full indemnity scale are reserved for rare and exceptional cases, where the conduct of the party against whom costs is ordered is reprehensible or where there are other special circumstances that justify costs on the higher scale.[11]

[14] I agree with Canada that there is nothing in the circumstances that would justify an award of costs on a substantial indemnity basis. The appropriate scale in the circumstances of the immediate case is the partial indemnity scale.

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[5] *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 at para. 24 (C.A.); *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004] O.J. No. 2102 at para. 97 (C.A.); *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 at para. 4 (Ont. C.A.); *McGee v. London Life Insurance Co*., [2008] O.J. No. 5312 at paras. 5-8 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 at paras. 23-25 (S.C.J.); *Lee v. General Motors Co. of Canada*, [2004] O.J. No. 2245 (S.C.J.).

[6] *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 at para. 52 (C.A.).

[7] *Das v. George Weston Limited*, 2017 ONSC 5583 at para. 65, var'd 2018 ONCA 1053.

[8] (2009), 100 O.R. (3d) 66 (C.A.).

[9] *United States of America v. Yemec* (2007), 85 O.R. (3d) 751 (Div. Ct.); *Foulis v. Robinson*, [1978] O.J. No. 3596, 21 O.R. (2d) 769 (C.A.).

[10] *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.).

[11] *Whitfield v. Whitfield*, 2016 ONCA 720 at para. 23; *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, supp. reasons 2010 ONCA 479; *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.); *McBride Metal Fabricating Corp. v. H & W Sales Co.* (2002), 59 O.R. (3d) 97 at para. 38 (C.A.).

[15] For somewhat different reasons, I also agree with Canada's submissions that the claim for costs on a partial indemnity basis is unreasonably high.

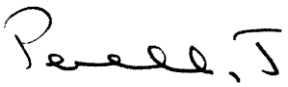
[16] As to the reasonableness of the hours expended on the motion, I do not see much work unrelated to the merits of the motion and I see nothing wrong and a great deal that was right in the extra work expended to consider the submissions of the Intervenors.

[17] The circumstance that Canada identified what it said were similar cases where the costs award was much less was not of much assistance given that the argument is subjective as to where similarity lies, and the immediate case is not easily comparable to any other case.

[18] I do know the many legal subject matters covered on the motion were difficult, and I know that the case called for a great deal of research and preparation.

[19] And Canada's submissions of an unreasonable expenditure are significantly weakened by the circumstance that it did not reveal the hours it expended to prepare for the motion.

[20] Having regard to the various factors set out in in rule 57.01(1), the appropriate award in the circumstances of the immediate case is **$92,000**, all inclusive.



Perell, J.

Released: October 14, 2022

CITATION: Toussaint v. Canada (Attorney General), 2022 ONSC 5851
COURT FILE NO.: CV-20-00649404-0000
DATE: 20221014

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

Intervenors

REASONS FOR DECISION – COSTS

PERELL J.

Released: October 14, 2022

COURT OF APPEAL FOR ONTARIO

BEFORE: THE HONOURABLE JUSTICE TROTTER

DATE: WEDNESDAY, SEPTEMBER 28, 2022

COURT FILE NO.: M53747.COA-22-CV-0101

TITLE OF PROCEEDING: TOUSSAINT, NELL V. AG OF CANADA

DISPOSITION OF COURT HEARING:

This is a motion to stay of the order of a Superior Court judge on a pleadings motion. It emerges in litigation with a long history, as set out in the motion judge's reasons for judgment: *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747.

The Attorney General brought a motion under Rule 21 for an order to strike out the Statement of Claim, and for other relief. No evidence was adduced on the motion. Indeed, the Attorney General had yet to file a Statement of Defence.

The Attorney General's motion was dismissed. In doing so, the motion judge made the following declarations: (1) "[t]his action is within the jurisdiction of the Ontario Court"; and (2) "[t]he action is timely, and not barred by a limitation period." The motion judge also ordered the Attorney General to file a Statement of Defence within a specified time. He prohibited the Attorney General from raising a defence based on a limitation period. This was despite the fact that, on the original motion, the plaintiff took the position that the limitations issue was best left to be decided as a defence to the action.

The Attorney General has appealed the motion judge's order. It now seeks a stay of the order pending the appeal. It contends that it is prejudiced by the motion judge's declarations and by his prohibition on pleading a limitations defence.

For the following reasons, I allow the application.

The parties agree that, for the purpose of this motion, the contested aspects of the motion judge's order are "final", thereby triggering the jurisdiction. I proceed on this basis, but it will be for the panel hearing this appeal to decide this issue.

Moreover, I am satisfied that all criteria for granting a stay of the motion judge's order have been satisfied: *RJR MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311, at p. 334. The overarching question is whether the interests of justice call for a stay: *Tisi v. St. Amand*, 2017 ONCA 539, at para. 4.

There are serious issues to be determined – whether the motion judge overstepped his bounds in the declarations that he made, and by limiting the scope of the Attorney General's pleadings. The Attorney General claims that it was taken by surprise by the motions judge's final determinations on important issues that are very much in dispute (i.e., the jurisdiction of the Ontario courts vs. the Federal Court, as well as whether the proceeding is time-barred). The respondent contends that the Attorney

General was not taken by surprise by the outcome of the procedural step that it initiated. These issues will be determined by the panel hearing the appeal.

The Attorney General will be prejudiced if it is forced to proceed while this preliminary pleadings litigation remains outstanding before this court. I accept that, a failure to stay the underlying order will result in a fragmented, inefficient, and unsatisfactory discovery process.

I acknowledge that the respondent has made constructive suggestions for moving forward. For example, during discoveries, it undertakes to permit questions to be answered relating to the matters that are presently foreclosed by the motion judge's order. The respondent also suggests that case management in the Superior Court could also provide solutions as the discovery process unfolds. Moreover, the respondent emphasizes the prejudice that the respondent will suffer health-related repercussions if the litigation is brought to a standstill by a stay order.

The balance of convenience also favours a stay. It would be unfair to force the Attorney General to move forward on this basis. The issues raised on this appeal must be resolved now so that the litigation may move ahead smoothly and not haltingly, in a bifurcated fashion. I am not persuaded that the respondent's proposals to move ahead will be problem-free.

I acknowledge the respondent's health concerns. But this may be addressed, at least to some extent, in the following way. This is an appropriate case in which to order that the appeal be expedited, especially given that it is presently stuck at the pleadings stage. If the parties cannot agree on the timing of the steps required to move this straightforward appeal to a hearing, either may seek directions from any member of this court, or request case management through the court's Executive Legal Officer.

The motion is allowed, a stay is imposed pending the determination of this appeal, and the appeal is ordered expedited. Costs of this motion are reserved to the panel that will hear this appeal.

COURT OF APPEAL FOR ONTARIO

CITATION: Toussaint v. Canada (Attorney General), 2023 ONCA 117
DATE: 20230223
DOCKET: COA-22-CV-0101

Huscroft, Coroza and Favreau JJ.A.

BETWEEN

Nell Toussaint

Plaintiff (Respondent)

and

Attorney General of Canada

Defendant (Appellant)

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

Interveners[1]

David Tyndale and Asha Gafar, for the appellant

Andrew C. Dekany and James Yap, for the respondent

Heard: December 2, 2022

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[1] Interveners were involved in the proceedings before Perell J. but did not participate in the appeal.

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated August 17, 2020, with reasons reported at 2022 ONSC 4747.

REASONS FOR DECISION

[1] This is an appeal from the order of the motion judge dismissing the appellant's motion to strike the proceedings under r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge found it was not plain and obvious that the respondent's action was doomed to fail. In addition, the motion judge declared that the respondent's claims were timely, not statute barred pursuant to the *Limitations Act,* 2002, S.O. 2002, c. 24, Sched. B ("*Limitations Act*"), and within the jurisdiction of the Ontario court.

[2] The appellant argues that the motion judge exceeded his jurisdiction, erred by making declarations as to the rights of the parties, and violated procedural fairness by granting relief, without notice, that the parties had not requested. We agree that the motion judge erred in declaring that the respondent's claim was timely, rather than simply dismissing the appellant's motion to strike the claim. We do not agree that the motion judge erred in declaring that the respondent's claim was within the jurisdiction of the Ontario court.

[3] The appeal is allowed, in part, for the reasons that follow.

BACKGROUND

[4] The respondent, Ms. Toussaint, lawfully entered Canada as a visitor from Grenada in 1999. Her action arises out of a decision to deny her healthcare

coverage pursuant to the Interim Federal Health Program between 2009 and 2013. She brought an application for judicial review to the Federal Court of Canada, appealed to the Federal Court of Appeal, and sought (and was refused) leave to appeal to the Supreme Court of Canada. Throughout this legal process, the respondent suffered serious and irreversible health consequences.

[5] In 2013, the respondent made a submission to the United Nations Human Rights Committee ("UNHRC") alleging that Canada had violated several obligations under international law including her right to life and non-discrimination under the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47. 6 I.L.M. 368 (entered into force 23 March 1976) ("*ICCPR*"). In 2018 the UNHRC stated that Canada had violated the respondent's right to life recognized in the *ICCPR* and that Canada was required to provide the respondent with an effective remedy, including compensation and taking all steps necessary to prevent similar violations in the future. Canada disagreed with the UNHRC's views and stated that it would not follow its recommendations.

[6] The respondent commenced an action against the federal government on October 14, 2020. Her action includes several causes of action grounded in the *Canadian Charter of Rights and Freedoms*, customary international law, and administrative law. She seeks several forms of relief, including general and special damages in the amount of $1,200,000.

DISCUSSION

[7] Canada challenged the respondent's claim in many respects and its position was the subject of critical comment by the motion judge. The motion judge variously describes Canada's position as a "land, sea, air, submarine, and celestial procedural attack" on the respondent's position; "a dog whistle argument that reeks of … prejudicial stereotype"; and "pejorative arguments" that he did "not propose to dignify further".

[8] It suffices to say that these comments are gratuitous.

[9] Canada challenges the motion judge's order concerning only the limitations and jurisdiction issues. These issues are addressed below.

The motion judge erred in precluding the appellant from raising the limitations defence in their Statement of Defence

[10] The motion judge did not simply dismiss the motion on the basis that it was not plain and obvious that the limitations defence could not succeed; he ordered that the claim was *not* statute barred pursuant to the *Limitations Act* and precluded the appellant from raising a limitations defence at the trial. He erred in doing so.

[11] We begin by reiterating that limitations issues can rarely be decided on pre-trial motions to strike under r. 21.01 of the *Rules of Civil Procedure*. Factfinding is required to assess whether a claim is discovered under s. 5 of the *Limitations Act*, but factfinding is not contemplated on a pleadings motion. Thus, this court has in

several cases discouraged the use of r. 21.01(1)(a) to determine limitation issues: see e.g., *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 31; *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, at para. 81; *Clark v. Ontario (Attorney General)*, 2019 ONCA 311, at paras. 42-48, rev'd on other grounds 2021 SCC 18, 456 D.L.R. (4th) 361; *Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 19-21; *Salewski v. Lalonde*, 2017 ONCA 515, 137 O.R. (3d) 750, at paras. 45-46, 50; and *Ridel v. Goldberg*, 2017 ONCA 739, at paras. 11-12. In general, it is appropriate to address limitations issues on a pleadings motion only "where pleadings are closed and the facts relevant to the limitation period are undisputed": *Beaudoin Estate*, at para. 31; see also *Clark*, at para. 44, *Salewski*, at para. 45. This is true whether the motion is brought under r. 21.01(1)(a) or (b).

[12] In this case, the motion judge's determination that the action is not statute barred is even more problematic than in the cases referred to above because the determination was made in the context of a r. 21 motion brought by Canada. The motion raised the issue of whether it was plain and obvious based on the statement of claim that the action was statute barred. Instead of confining himself to this issue, the motion judge went beyond the confines of the relief sought on the motion and made a finding against Canada that the action was not statute barred. It is difficult to conceive of a case where it would ever be appropriate to make such a finding against a moving party on a r. 21 motion.

[13] Without the benefit of a statement of defence from Canada or any evidence, the motion judge found that it is plain and obvious that the respondent did not have the knowledge necessary to advance her claims against Canada until after Canada indicated that it did not accept the views of the UNHCR or, alternatively, the UNHCR released its decision. However, this was not conceded by the appellant, which argued that the limitations issue involved factual and legal issues regarding discoverability. Thus, the facts surrounding the limitations issue are disputed and the motion judge was not in a position to make binding determinations of fact on a pleadings motion.

[14] The limitations issue in this case is complicated by the nature of the claims. The motion judge acknowledged the complexity of the claims and characterized the respondent's legal theory as "extraordinarily complex" and "a solution for three partial differential equations that impose relations between the various partial causes of action of a multivariable cause of action." The complexity of the claims augments the difficulty of determining the limitations issue on a r. 21.01(1)(b) motion, particularly given the factual discoverability issues.

[15] In summary, although it was open to the motion judge to dismiss the r. 21.01(1)(b) motion, he erred in going further by ordering that the claim was *not* statute barred pursuant to the *Limitations Act* and precluding the appellant from raising a limitations defence at the trial. The motion judge's conclusion that it was not plain and obvious that Ms. Toussaint's action was statute barred pursuant to

the *Limitations Act* does not entail the further conclusion that the action is timely.

[16] Accordingly, this ground of appeal must be allowed.

The motion judge did not err in concluding the Ontario court has jurisdiction

[17] The motion judge rejected the appellant's argument that the action was in essence a matter of judicial review within the exclusive jurisdiction of the Federal Court. He noted, first, that the Ontario court has concurrent jurisdiction with the Federal Court with respect to *Charter* claims against the federal government; and second, that the Minister's decision on whether to implement a recommendation of the UNHRC was an exercise of a Crown prerogative, and thus was outside the exclusive jurisdiction of the Federal Court.

[18] The appellant argues that the motion judge was asked only to dismiss the claim under r. 21.01(3)(a) of the *Rules of Civil Procedure* but went further by ruling that the action was within the jurisdiction of the Ontario court. We do not agree.

[19] Jurisdiction is an either/or concept: the decision not to dismiss the claim on the basis that it was beyond the jurisdiction of the Ontario court necessarily means that it is within the jurisdiction of the Ontario court. The order allows the action to proceed in the Superior Court of Justice in Ontario, and consequently the appellant is precluded from continuing to dispute the Ontario court's jurisdiction over the subject matter of the action: see *Skof v. Bordeleau*, 2020 ONCA 729, 456 D.L.R.

(4th) 236, at para. 8, leave to appeal refused, [2021] S.C.C.A. No. 17. It is well settled that this is a final order: see e.g., *Hopkins v. Kay*, 2014 ONCA 514, at para. 12.

[20] It cannot be said that the motion judge's order was made unfairly because it granted relief that the parties did not request. If the appellant did not contemplate this result, it should have. The appellant offers no basis to conclude that the motion judge's decision is erroneous as a matter of law and we see none. Accordingly, this ground of appeal must be rejected.

Conclusion

[21] The appeal is allowed in part.

[22] The order requiring filing of the appellant's Statement of Defence within 40 days, without raising a limitations period defence, is struck.

[23] Unfortunately, prior to the release of this decision the court was informed that Ms. Toussaint has passed away. The court sought submissions from the parties as to the appropriate course of action. The parties agreed that the decision should be released but disagreed on the status of the action and the steps that may need to be taken for the action to continue.

[24] Counsel for the respondent informed the court that the respondent's mother intends to bring a motion for an order appointing her as representative of her daughter's estate so that she can continue the action in the public interest. An

application for funding from the Court Challenges Program is pending.

[25] In these circumstances, we make no further orders. Should the action continue, the timing of any further steps in the litigation is left to the court below.

[26] The appellant is not seeking costs on the appeal or on the stay below, and none are ordered.

“Grant Huscroft J.A.”
“S. Coroza J.A.”
“L. Favreau J.A.”

CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	Judge Vermette J.	Court File Number: CV-20-00649404-0000

Title of Proceeding:

NELL TOUSSAINT — Plaintiff

-v-

ATTORNEY GENERAL OF CANADA — Defendant

Case Management: ☐ Yes If so, by whom:	X No

Participants and Non-Participants: *(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	James Yap Barbara Jackman	mail@jamesyap.ca barb@bjackman.com		Y
2) Defendant	David Tyndale Asha Gafar	david.tyndale@justice.gc.ca asha.gafar@justice.gc.ca		Y
3) Proposed interveners Charter Committee on Poverty Issues, Canadian Health Coalition and FCJ Refugee Centre	Yin Yuan Chen	yy.chen@uottawa.ca		Y
4) Proposed intervener Canadian Civil Liberties Association	Iris Fisher Alysha Li	iris.fisher@blakes.com alysha.li@blakes.com		Y
5) Proposed interveners Amnesty International Canadian Sector (English Speaking) and ESCRNet – International Network for Economic, Social and Cultural Rights	Alex Bogach	abogach@torys.com		Y
6) Proposed interveners Justicia/Justice for Migrant Workers (J4MW), the Industrial Accident Victims Group of Ontario (IAVGO) legal clinic, and the J4MW-Windsor Law Migrant Farmworker Clinic (MFWC)	Maryth Yachnin Taneeta Doma	maryth.yachnin@iavgo.clcj.ca domat@uwindsor.ca		Y
7) Proposed interveners 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	Anchal Bhatia	anchal.bhatia@salco.clcj.ca		Y

Date Heard: *(Rule 59.02(2)(c)(iii))* **October 6, 2023**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☒ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing ☐ Telephone ☒ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

1. **Order that Ann Toussaint be appointed as the representative of the Estate of the late Plaintiff, Nell Toussaint, for the purposes of this proceeding.**

2. **Scheduling of motions to intervene.**

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The motion to appoint Ann Toussaint as the representative of the Estate of the late Plaintiff, Nell Toussaint, for the purposes of this proceeding is granted. I have signed the draft Order provided by the Plaintiff's counsel.

Another case conference will be held before me on December 14, 2023 at 9:00 a.m. to discuss the next steps in this action, including the potential scheduling of motions to intervene.

Costs: On a **N/A** indemnity basis, fixed at $ are payable by to [when]

Brief Reasons, if any: *(Rule 59.02(2)(b))*

The Defendant does not object to the wording of the Plaintiff's draft order with respect to the appointment of Ann Toussaint as the representative of the Estate of the late Plaintiff, Nell Toussaint, for the purposes of this proceeding. Based on the materials before me, including the Plaintiff's Motion Record, I am satisfied that it is appropriate to make the requested order.

The Plaintiff intends to amend her Statement of Claim. This will be done shortly. The Defendant has agreed to serve a Statement of Defence within 30 days of the service of the Amended Statement of Claim.

I strongly encourage the parties to make a request for assignment to case management under Rule 77.05 of the *Rules of Civil Procedure*. The request form can be found on this Court's website at https://www.ontariocourts.ca/scj/practice/regional-practice-directions/toronto/. The completed form should be sent to the office of the Regional Senior Judge. Given the nature of this case, the complexity of the issues and the number of proposed interveners, among other factors, I am of the view that case management would be beneficial to the parties and the Court.

In my view, it is premature to schedule motions to intervene at this stage. The pleadings are not closed and, as a result, the scope of the dispute has not been defined. In addition, it is unlikely that all proposed interveners would be in a position to file a Notice of Motion within 10 business days, as required by the *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region* dated September 4, 2023 (see Part I, section B.4). Further, if the parties make a request for assignment to case management and the request is granted, the Case Management Judge will be able to deal with the requests for intervention in due course.

I also note that this proceeding is an action, not an application or a motion. As a result, the proposed interveners who wish to intervene as friends of the court under Rule 13.02 will have to consider, among other things: the role that they will be asking the Court to play throughout the various stages of this action (which include documentary discovery, examinations for discovery, etc.); what useful contribution, if any, they can make to the various stages of the proceeding; and how they can render "assistance to the court by way of argument" (see Rule 13.02) throughout the action. This action is at a very early stage, and if the proposed interveners' contribution will only be at the time of closing arguments at trial, query whether motions to intervene should be scheduled and heard at this stage of the action, before the issues are refined through the process of discovery. It will take significant time for this action to proceed to trial – potentially, a number of years, and it may also take some time for the Court to be in a position to determine what kind of contributions will be useful to the resolution of the dispute.

Another case conference will be held before me on December 14, 2023 at 9:00 a.m., which should be after the close of pleadings. At that time, we will discuss the next steps in this action, including the potential scheduling of motions to intervene. The parties and proposed interveners should consider the points raised above before the case conference. If a Case Management Judge is appointed, counsel are to advise my assistant so that the December 14, 2023 case conference is cancelled.

Additional pages attached: ☐ Yes **X** No

October 6, 20 **23**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge *(Rule 59.02(2)(c)(i))*

Court File No.: CV-20-00649404-000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 6th
JUSTICE VERMETTE	)	DAY OF OCTOBER, 2023

B E T W E E N:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

THIS MOTION, made by the applicant, Ann Toussaint, for an order appointing her to represent the estate of the late plaintiff, Nell Toussaint, for the purposes of this proceeding, was heard this day.

ON READING the applicant's motion record, and on being advised that the defendant does not oppose the relief sought; and

WHEREAS the defendant does not concede that any of the causes of action set out in the amended amended statement of claim dated May 25, 2021 survive the death of the late plaintiff,

1. THIS COURT ORDERS that Ann Toussaint is hereby appointed as the representative of the estate of the late plaintiff, Nell Toussaint, for the purposes of this proceeding.

2. THIS COURT ORDERS that the title of this proceeding be amended to show the plaintiff as "Ann Toussaint, appointed representative of the estate of Nell Toussaint, deceased, for the purposes of this proceeding".
3. THIS COURT ORDERS that there be no costs of this motion.

Signed: 

TOUSSAINT -and- Plaintiff	ATTORNEY GENERAL OF CANADA Defendant	Court File No. CV-20-00649404-000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

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THE HONOURABLE
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ONTARIO

L'HONORABLE JUGE
WILLIAM S. CHALMERS
COUR SUPÉRIEURE DE JUSTICE

PALAIS DE JUSTICE
361, AVENUE UNIVERSITY
TORONTO (ONTARIO) M5G 1T3
Tél. (416) 327-5284
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December 4, 2023

Via E-mail

Mr. Andrew C. Dekany
5 Edenvale Crescent
Toronto, Ontario M9A 4A5

Dear Mr. Dekany:

Re: <u>Case Management Request</u>
The Estate of Toussaint v. The Attorney General of Canada
Court File Nos.: CV-20-00649404-0000

The Regional Senior Justice has delegated the responsibility for determining requests for case management to me as the Civil Team Leader in the Toronto Region.

I have reviewed the materials provided. I am satisfied that case management is appropriate in the circumstances. I am assigning Justice Papageorgiou as the case management judge. Justice Papageorgiou's assistant will contact counsel directly.

Yours Truly,

William S. Chalmers
WSC/at

cc. Justice Papageorgiou
Polly Diamante
D. Tyndale – david.tyndale@justice.gc.ca

CITATION: TOUSSAINT v. ATTORNEY GENERAL OF CANADA

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	**Justice Papageorgiou**	**Court File Number**: **CV-20-649404-00000**

Title of Proceeding:

TOUSSAINT Plaintiff(s)

-v-

ATTORNEY GENERAL OF CANADA Defendants(s)

Case Management: ☐ **Yes** If so, by whom: ☒ **No**

Participants and Non-Participants:*(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	Andrew Dekany Veromi Arsiradam James Yap	Mail@veromiarsiradamlaw.com mail@jamesyap.ca		Y
2) Applicant estate	Barbara Jackman Lawyer for the Applicant Estate	barb@bjackman.com		Y
3) Charter Committee Coalition (Charter Committee on pverty issues, Canadian Health Coalition, FCK Refugee Centre, Madhu verma Migrant Justice Centre	Martha Jackman	Martha.jackman@uottawa.ca		Y
4) Attorney General of Canada	Charlene Cho David Tyndale Asha Gafar	Charlene.cho@justice.gc.ca David.tyndale@justice.gc.ca Asha.gafar@justice.gc.ca		Y
5)Canadian Civil Liberties Association	Alysha Li	Alysha.li@blakes.com		Y
6) Amnesty International and ESCR-NET	Alex Bogach	abogach@torys.com		Y

Date Heard: *(Rule 59.02(2)(c)(iii))* **April 30, 2024**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☒ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing	☐ Telephone	☒ Videoconference	☐ In Person

If in person, indicate courthouse address:

Relief Requested:

I have been assigned to case manage this matter.

This case conference was scheduled to address principally two matters: a discovery schedule and the participation of proposed intervenors in the discovery process and mediation. There is also an issue as to whether mediation should be delayed until after discovery.

All issues are adjourned to may 22 at 4:00 pm before me. This will give the parties time to further discuss these matters.

Regarding discovery, Canada has advised the plaintiff that it will provide its position on the discovery plan by may 10.

Regarding the intervenor's participation, the intervenors participated in the motion to strike before Perell J. They advise that they do not wish to act as a party, but wish to be able to observe because they have expertise in the underlying issues. Without being able to observe, there is an implied undertaking rule and they will not be able to give their views to the plaintiff and/or be able to participate fully when and if they are given leave to intervene.

At this stage, I do not have any written submissions on this issue. The parties should seek to communicate about the role that the proposed intervenors wish to play prior to trial and see if they can arrive at a resolution that addresses both the intervenor's, the plaintiff's and Canada's concerns.

If they cannot come to a resolution, they may each provide me with written submissions prior to the next case conference no longer than ten pages. If I can decide this at that time I will. If it requires full blown argument I will schedule a motion on an urgent basis so that this matter is not delayed.

Regarding the timing of the mediation, I will also consider this at the next case conference and the parties are encouraged to come to an agreement. Pending consideration of the timing of mediation, I am temporarily extending the time until the end of May, 2024.

The parties need not attend and costs are reserved.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Costs on a **N/A** indemnity basis, fixed at $

by to by:

Brief Reasons, if any: *(Rule 59.02(2)(b))N/A*

Additional pages attached: ☐ Yes ☒ No

April 30th , , 20 **24**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*

CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	**Justice Papageorgiou**	**Court File Number**: **CV-20-649404-00000**

Title of Proceeding:

TOUSSAINT Plaintiff(s)

-v-

ATTORNEY GENERAL OF CANADA Defendants(s)

Case Management: ☐ **Yes** If so, by whom: ☒ **No**

Participants and Non-Participants:*(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	Andrew Dekany Veromi Arsiradam James Yap	veromi@veromiarsiradamlaw.com andrewcdekany@gmail.com mail@jamesyap.ca		Y
2) Applicant estate	Barbara Jackman Lawyer for the Applicant Estate	barb@bjackman.com		Y
3) Charter Committee Coalition (Charter Committee on pverty issues, Canadian Health Coalition, FCK Refugee Centre, Madhu verma Migrant Justice Centre	Martha Jackman	Martha.jackman@uottawa.ca		Y
4) Attorney General of Canada	Charlene Cho David Tyndale Asha Gafar	Charlene.cho@justice.gc.ca David.tyndale@justice.gc.ca Asha.gafar@justice.gc.ca		Y
5) Canadian Civil Liberties Association	Brittany Town	Brittany.town@blakes.com		Y
6) Amnesty International and ESCR-NET	Alex Bogach	abogach@torys.com		Y

Date Heard: *(Rule 59.02(2)(c)(iii))* **May22, 2024**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☒ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing ☐ Telephone ☒ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested:

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

1. The plaintiff and Canada have exchanged discovery plans. The most recent is Canada's and they shall seek instructions and respond by Friday May 31, 2024.
2. If the parties cannot agree on a discovery plan then I am scheduling a motion for July 10, 2024.
3. The parties have exchanged case conference briefs on the issue of the proposed intervenors participating prior to the trial. The proposed intervenors indicate that they would like to see the productions and then attend at the discovery but not ask any questions. They propose to do this because they have expertise in poverty law, constitution law and international law and they say that their expertise would be valuable to the court. Their preference is that they intervene at this time as a friend of the court. They have provided at least one example where an intervenor has been permitted to intervene as a friend of the court at the discovery stage. As part of this, they would seek an order that immunizes them from costs. They point out that this litigation is about the rights of migrants to healthcare insuarnce at the public expense. They say that this is a case that is clearly in the public interest and that they do not have the funds to participate with the threat of costs hanging over their heads. In the alternative, they refer to rule 30.1.01(8) that permits exceptions to the deemed undertaking rule. Canada says that what the proposed intervenors really want is to be a party. Canada does not consent to this but indicates that if the intervenors want to participate in the way they have said, then they should apply to be intervene as a party pursuant to rule 13.01 instead of rule 13.02, and that there should be no costs exemption.

   I think that the parties should seek to resolve this matter.

Canada's case conference brief was mistakenly not sent to me by court staff and so I have not had a chance to review Canada's brief. As well, plaintiff counsel made some submissions not in his case conference memo and he will be sending me a brief summary of the additional points within a few days. As a result, I am making no order at this time. I will review all the materials, reflect and consider whether I can make an Order without a full motion being argued, or whether I must schedule a motion. If I determine that I must schedule a motion, I will advise the parties quickly and then seek to schedule such motion during the week of July 8, 2024.

I am also scheduling a further case conference for July 29 at 10:00 for two hours to ensure that this matter continues to move forward efficiently.

As well, I have asked and the parties have agreed to send me a brief of all endorsements and orders made so far in this case which can also be sent to my assistant.

Costs on a **N/A** indemnity basis, fixed at $

by to by:

Brief Reasons, if any: *(Rule 59.02(2)(b))N/A*
Additional pages attached: ☐ Yes ☒ No

May22 , 20 **24**
Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*