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

DEFENDANT'S FACTUM
[MOTIONS TO INTERVENE – AMNESTY AND CCPI]

ATTORNEY GENERAL OF CANADA
Department of Justice
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario
M5H 1T1
Fax: (416) 954-8982

Per: David Tyndale
Asha Gafar
Tel.: (416) 256-7309
Email: David.Tyndale@justice.gc.ca
Asha.Gafar@justice.gc.ca

Lawyers for the Defendant, the
Attorney General of Canada

TO: Andrew C. Dekany
Barrister & Solicitor
5 Edenvale Crescent
Toronto, ON M9A 4A5
Tel.: (416) 888-8877
Email: andrewcdekany@gmail.com

Barbara Jackman
Jackman & Associates
1-598 St. Clair Ave. W.
Toronto, ON 6C 1A6
Tel.: (416) 653-9964 ext. 225
Email: barb@bjackman.com

James Yap
310-25 Cecil St.
Toronto, ON M5T 1N1
Tel.: (647) 874-4849
Email: mail@jamesyap.ca

Veromi Arsiradam
1 Hunter St. E., Ground Floor
Hamilton, ON L8N 3W1
Email: mail@veromiarsiradamlaw.com

Lawyers for the Plaintiff

AND TO: TORYS LLP
79 Wellington St. W., 30th Floor
Box 279, TD South Tower
Toronto, ON M5K 1N2
Fax: (416) 865-7380

Rachael Saab
Tel.: (416) 865-8172
Email: rsaab@torys.com

Alex Bogach
Tel.: (416) 865-7379
Email: abogach@torys.com

Lawyers for the Proposed Interveners, Amnesty International Canada and International Network for Economic, Social and Cultural Rights

AND TO: Yin Yuan Chen
Faculty of Law, University of Ottawa
57 Louis Pasteur

Ottawa, ON K1N 6N5
Tel.: (613) 562-5800 ext. 2077
Email: yy.chen@uottawa.ca

Martha Jackman
Faculty of Law, University of Ottawa
57 Louis Pasteur
Ottawa, ON K1N 6N5
Tel.: (613) 562-5800 ext. 3299
Email: Martha.Jackman@uottawa.ca

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

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FACTUM OF THE DEFENDANT

[MOTIONS TO INTERVENE – AMNESTY AND CCPI]

PART I – STATEMENT OF FACTS

1. The Defendant does not take issue with the evidence filed by the proposed interveners.

PART II – POINTS IN ISSUE

2. Will the proposed interveners make a useful contribution to the resolution of the action?

3. Will the participation of the proposed interveners cause an injustice to any of the parties to the motion?

PART III – SUBMISSIONS

A. RELIEF REQUESTED

4. The position of the Amnesty Coalition and the CCPI Coalition have been shifting over time. First, they wanted to participate in discoveries as "prospective intervenors", with no formal status under the Rules; with a corresponding exemption from the deemed undertaking Rule to observe discoveries and access disclosure material; and with an order exempting them from any costs order.

5. The CCPI Coalition currently seeks to intervene as a party under Rule 13.01, or in the alternative as a friend of the court under Rule 13.02; with a right to observe discoveries and access disclosure material; and with an order exempting them from any costs order.

6. The Amnesty Coalition currently seeks to intervene as a friend of the court under Rule 13.02; with a right to observe discoveries and access disclosure material; and with an order exempting them from any costs order.

B. A FRIEND OF THE COURT ASSISTS BY MAKING ARGUMENTS

7. The Rules explicitly state that an intervener acting as a friend of the Court participates "for the purpose of rendering assistance to the court by way of argument".[1] Participation beyond making arguments is an exception to the Rule. A

[1] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 13.02 [*Rules of Civil Procedure*]; *Lafarge Canada Inc v Ontario Environmental Review Tribunal*, 2008 CanLII 6870 (ON SCDC) at para 12; *Halpern v Toronto (City) Clerk*, 2000 CanLII 29029 (ON SCDC) at para 12; *Adler v Ontario*, 1992 CanLII 7415 (ON SC) at pp 9-10.

prospective intervener bears the onus of showing why they fall within an exception to the Rule. This is the status that the proposed interveners had during the motion to strike. Contrary to the suggestion of the Amnesty Coalition, the fact that they had this status before does not entitle them to the unprecedented relief that seek here.

8. The Defendant has been unable to find any persuasive jurisprudence that a party intervening as a friend of the court may also participate in or even observe discoveries in an action.

9. In previous submissions, the CCPI Coalition has cited *Canadian Blood Services v Freeman* and *Crees v Canada (AG)*[2] in support of the principle that a "friend of the Court" can participate in discoveries.

10. With respect, the CPPI coalition has misrepresented the finding in *Canadian Blood Services v Freeman*. The proposed intervenor in that case sought intervention "as a party with all of the attendant rights and responsibilities".[3] Ultimately, the Court granted ordered that the proposed intervenor could participate as a friend of the court, "take the record as it is", and make written and oral arguments.[4]

11. *Crees v Canada (AG)* is the only available example of a "friend of the court" attending discoveries. It is readily distinguishable. It is a complex case of claims for indigenous title, including competing claims among different First

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[2] *Crees (Eeyou Istchee) et al v Canada (AG)* et al, 2017 ONSC 3729 (CanLII) at para 30 [*Crees*] and *Canadian Blood Services v Freeman,* 2004 CanLII 35007 (ON SC) at para 39 [*Canadian Blood Services*].
[3] *Canadian Blood Services* at para 36.
[4] *Canadian Blood Services* at para 39.

Nations. One of the competing First Nations sought participation as a party.[5] It claimed (on behalf of its members) a direct interest in the outcome of the litigation.[6] The Court went out of its way to explain how unique the case was and now difficult it was to identify and manage the proper scope of the various litigants' participation. By way of example:

> [24] I raise again the complication of dealing with this as a multi-lateral as opposed to a bi-lateral problem, the willingness of the parties to do so and my concern as to how the process can be structured to fairly and with appropriate expedition reach its intended end.[23] This concern comes to the fore when the roles the two prospective intervenors would play are accounted for. After some argument, debate and discussion each of the two prospective intervenors and the plaintiff agreed that it is not possible, at this early stage, to realistically or finally define those parts of the proceeding in which each of the intervenors would have a substantive interest and could make a meaningful contribution. This understanding would evolve. There would be no prejudice to the bringing of further motions to clarify any disagreements or complications that appeared in the future. Over time the issues will be defined and the roles identified.[7]

12. The Judge in *Crees v Canada (AG)* fashioned a unique set of conditions to balance a unique set of competing interests in an exceptional fact situation. The case is not, in any way, a persuasive guide as to how to apply Rule 13.02.

13. An intervener acting as a friend of the Court takes the record as they find it.[8] Most of the caselaw discussing this principle arises in the context of applications and appeals. The record in an action is very different from the record in an application or appeal.

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[5] *Crees* at para 17.
[6] *Crees* at para 19.
[7] *Crees* at para 24.
[8] *R v McGregor*, 2023 SCC 4 at para 108.

14. The documents referred to in documentary discovery and the testimony given during examinations for discovery in an action are not "the record".

15. In an application, the record is established early in the proceeding. Each party files sworn evidence. The party filing the evidence offers it up as relevant and admissible. Evidence is also elicited in cross-examinations. The transcripts are filed as part of the record.[9] In appeals, the record has been fixed in the court below.

16. The record in this case will consist of the evidence called at trial. The Court should not apply caselaw from cases involving applications or appeals to allow the prospective interveners access to information from the discoveries as if it was "the record".

17. The information gathered is not admissible evidence.[10] A party may argue at trial that a document is irrelevant, even if it has been disclosed and produced.[11]

18. The information is subject to a deemed undertaking, binding the parties and their lawyers not to use the information for any purposes other than those of the proceeding.[12]

19. The Court may exempt the parties from the obligations of the deemed undertaking Rule in the interests of justice.[13] The Rule makes no mention

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[9] See e.g., *Friends of Lansdowne v Ottawa*, 2011 ONSC 1015 at paras 16-17, 63.
[10] *Rules of Civil Procedure*, Rule 30.05.
[11] *Ernewein v Honda Canada*, 2017 ONSC 1181 at para 87; *Air Canada v Westjet Airlines Ltd*, 2006 CanLII 14966 (ON SC) at para 21; *Slough Estates Canada Ltd v Federal Pioneer Ltd*, 1994 CanLII 7313 (ON SC) at pp 29-30.
[12] *Rules of Civil Procedure*, Rule 30.1 - Deemed Undertaking.
[13] *Rules of Civil Procedure*, Rule 30.1.01(8).

of non-parties seeking this relief.[14] It is unusual for a non-party to invoke this Rule.[15] The Supreme Court of Canada has held that the exemption is granted only in "exceptional circumstances".[16]

20. The proposed interveners are not restricted in any way from assisting the Plaintiff outside of the litigation:

> [38] In this regard, I am mindful of and refer to the comments of Rowe J. in McGregor. The purpose of granting intervenor status to an entity is not to enable that entity to provide further support to one side or the other in the litigation. While that supportive role may take place outside the litigation, it is the parties who conduct the litigation and advance the issues as they determine. Additional support is not required within the action and intervention should not be granted if that is all that the proposed intervenor seeks to bring to the litigation.[17]

21. The prospective interveners are seeking rights to participate and rights to disclosure of discovery material that equate to intervention as a party, or public interest standing.[18]

22. The prospective interveners want to tailor the record, by way of their observation, participation, and subsequent consultation with the Plaintiff's counsel, to support particular perspectives they wish to advance and arguments they wish to make in support of the Plaintiff. The prospective interveners clearly want to go well beyond "taking the record as they find it".

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[14] *Livent Inc v Drabinsky*, 2001 CanLII 28039 (ON SC) at paras 7-15; see also *Fontaine v Canada (AG)*, 2018 ONCA 421 at para 66 [*Livent*].
[15] *Livent*, *supra*.
[16] *Juman v Doucette*, 2008 SCC 8 at para 32; *755568 Ontario Ltd v Linchris Homes Ltd* (Gen Div), 1990 CanLII 6665 (ON SC); *Livent*, *supra.*
[17] *Ur Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2023 SKKB 197 at para 38; see also *Dorsey, Newton, and Salah v Canada (AG)*, 2021 ONSC 2464 [*Dorsey*]; *Canadian Blood Services v Freeman*, 2004 CanLII 35007 (ON SC) at para 39; *Ontario (AG) v Dieleman*, 1993 CanLII 5478 (ON SC) at p 9.
[18] *Dorsey*, *supra*; *Six Nations of the Grand River Band of Indians v Canada (AG) and Ontario*, 2023 ONSC 3604.

1) <u>Proposed Interventions are Prejudicial to the Defendant</u>

23. The proposed interventions are prejudicial to the Defendant.

24. The Plaintiff and the interveners seem to be arguing that because Ms. Toussaint made a claim under a policy that provides government-funded health care insurance for some categories of migrants, the Court should allow the discovery process to become an open-ended inquiry into all government policy on the availability of health care to all categories of migrants in Canada.

25. The issues on discovery are defined by the Statement of Claim, in which Ms. Toussaint seeks relief because of what happened to her.

26. The issue of whether Canada's policies about finding heath care insurance to all categories of migrants is an interesting public policy debate.

27. The Plaintiff and the interveners have strong views on that broad policy debate. Cogent arguments can be made in favour of a more generous policy. Cogent arguments can be made against a more generous policy.

28. This action is not about resolving that policy debate. The Court should not permit this action to be treated as some sort of inquiry for the purposes of raising awareness of that debate, or resolving that debate. This action is about whether the policy in effect in 2009, which excluded Ms. Toussaint from publicly funded health insurance, infringed her *Charter* rights and/or caused her harm that can be compensated by this Court.

29. The decision in this case may be an important step in that policy debate. That doesn't mean this civil action should become the forum for that policy debate.

30. There is no need for the participation of interveners in the discoveries in this action.

31. Plaintiff's counsel is an experienced litigator. He has been conducting litigation on behalf of Ms. Toussaint since 2009 in the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, and before the United Nations Human Rights Committee. There is no evidence on this record by which the Court could reasonably conclude that the plaintiff cannot go through discoveries as all other litigants do, and prepare for trial as all other litigants do.

32. If the parties seek information to inform a public debate about Canada's migrant health care policy, the discovery process in a civil action is not the appropriate place to collect the information.

33. The proposed interventions would also add complexity to the action. Interventions always add costs and complexity to proceedings and so should only be entertained if there are compelling reasons.[19] No such compelling reasons exist at this stage of the proceeding.

C. NO BASIS FOR A COSTS EXEMPTION

34. If the proposed interveners are grated status as a party, there is no reason for a blanket order, at this stage of the proceeding, exempting them from any prospective costs order.

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[19] *M v H*, 20 OR (3d) 70 (Gen Div) at para 55.

35. Participation as a party comes with obligations, as well as rights.[20] If the proposed interveners seek the rights of parties, they must agree to take on the corresponding obligations.

36. The position of the proposed interveners on costs is especially concerning in light of the fact that

> (a) It appears that the Plaintiff is not resident in Ontario, and it may be difficult to enforce any costs ordered in favour of the Defendant;
>
> (b) The Plaintiff and the proposed interveners want to turn this action for damages into a wide-ranging commission of inquiry into all aspects of Canda's involvement in health care funding for migrants, and specifically of all aspects of Canada's administration of the Interim Federal Health Program.

37. One of the ways the Court can keep a proceeding on track is by way of costs orders. The Court should not abandon this control mechanism at this stage of the proceeding. Where interveners are participating as parties, the court should leave the issue of costs for any step in the proceeding to the discretion of the Court.

> *It is significant that the Supreme Court of Canada took the opportunity to restate the test and to expand on the purpose of the Court's not permitting certain claims to proceed.*
>
> […]
>
> *The use of the phrase "reasonable prospect" suggests something other than an absolute; some degree of assessment is required and this assessment is to be informed by the objective of improving access to justice by facilitating fair effective and focused 'real issue' litigation. In other words, there are wider interests at stake than just those of the immediate parties.*[21]

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[20] See *North American Financial Group Inc v Securities Commission*, 2018 ONSC 1282 at para 13; *2356802 Ontario Corp v 285 Spadina SPV Inc*, 2022 ONSC 4755.

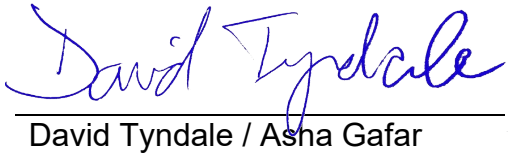
[21] *Seascape 2000 Inc v Attorney General of Canada,* 2012 CanLII 78018 (NL SC) at paras 19, 23.

38. While the Defendant acknowledges the considerable expertise and experience of the interveners, and their valuable contributions in other contexts, the interveners have not shown that they will make a useful contribution to the disposition of the action by participating in discoveries.

39. Their motions should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, September 6, 2024



David Tyndale / Asha Gafar
Of Counsel for the Defendants

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TOUSSAINT	AND	ATTORNEY GENERAL OF CANADA
Plaintiff		Defendant

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Proceeding Commenced at Toronto

FACTUM OF THE DEFENDANT

[MOTIONS TO INTERVENE – AMNESTY AND CCPI]

ATTORNEY GENERAL OF CANADA

Department of Justice
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario
M5H 1T1
Fax: (416) 954-8982

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

Our File: LEX-500033353

Lawyer for the Defendant