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
[PLAINTIFF'S MOTION RE: DEEMED UNDERTAKING AND OTHER RELIEF]

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FACTUM OF THE DEFENDANT

[PLAINTIFF'S MOTION RE: DEEMED UNDERTAKING AND OTHER RELIEF]

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. There is no evidence from the Plaintiff on this motion. There is no evidence that the Plaintiff's interests would be adversely affected if the Court leaves the normal Rules for mediation and discovery in place.

2. The onus is on the Plaintiff to demonstrate, with clear and convincing evidence, a superior public interest in disclosure that would warrant an exception to the deemed undertaking rule. The undertaking should only be set aside in exceptional circumstances. There is no evidence from the Plaintiff on this motion. There is no basis for the Court to make an exception.

3. In any event, an exception to the deemed undertaking rule cannot be granted pre-emptively, for unknown information, to be disclosed to unknown third

parties. The Court cannot, as a matter of law, presume that all of the material to de disclosed during discoveries is “public” information.

4. The deemed undertaking rule applies to government litigants. The deemed undertaking rule applies to information that would be disclosable under access to information legislation.

5. A mediation conducted before further discoveries would assist the parties in assessing the scope of this action and the chances of success.

6. The Defendant is of the view that this case urgently requires mediation before the parties continue on the costly process of documentary and oral discovery.

B. FACTS

7. There is no evidence from the Plaintiff on this motion. There is no evidence that the Plaintiff’s interests would be adversely affected if the Court leaves the normal Rules for mediation and discovery in place.

8. The Plaintiff has filed two affidavits from proposed experts. The experts have not been qualified by the Court. The Court should not consider the proposed expert evidenced until the Defendant has had a fair opportunity to respond.

PART II – POINTS IN ISSUE

9. Should the Court grant the Plaintiff an exemption from the deemed undertaking rule?

10. Should the court grant the Plaintiff an exemption from the rules respecting mandatory mediation of civil actions?

PART III – SUBMISSIONS

B. THE COURT NEEDS CONTROL OF SCOPE OF THIS ACTION

1) This case is an action by the Plaintiff for *Charter* relief and damages, not a class action or public inquiry

11. There is no need for the Court to take the exceptional and specific step of dispensing with the deemed undertaking Rule on the basis that the case raises issues of public importance.

12. The fact that the case may raise "systemic issues" and that others may be affected by the precedent set by this case makes it no different than any other case involving a *Charter* challenge to a government policy. It does not turn the case into a broad inquiry into issues beyond the harm allegedly suffered by the Plaintiff.

13. The Defendant's view is that the harm allegedly suffered by the Plaintiff is not compensable by an action in damages, on any of the grounds advanced.[1] In the Defendant's view, the law in Canada is clear. Migrants who live and work for years without regularizing their status in Canada do not qualify for federally funded health care insurance. This is not a breach of the *Charter*.[2] The

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[1] Statement of Defence, filed November 20, 2023.

[2] *Irshad (Litigation Guardian) v Ontario (Minister of Health)* (2001), 55 OR (3d) 43 (ON CA) at paras 135-137; *Covarrubias v Canada (MCI)*, 2006 FCA 365 at para 36; *Toussaint v Canada (AG)*, 2011 FCA 213 at paras 99-100; *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at paras 511-571, 867-870; *Canadian Snowbirds Association Inc v AG (Ontario)*, 2020 ONSC 5652 at para 73; see also, e.g., *Toussaint v. Ontario (Health and Long-Term Care)*, 2011 HRTO 760 at

non-binding views of a UN Committee do not change the law of Canada, and do not entitle the Plaintiff to damages in this Court.[3]

14. Obiter comments by the judge who dismissed a motion to strike in this case cannot turn this case into a broader inquiry. The Plaintiff's claim for an order on behalf of "irregular migrants in Canada" does not turn this case into a class action.

15. The Plaintiff is seeking 1.2 million dollars in damages.

16. A claim for 1.2 million dollars in a damages is not "public interest" litigation simply because it is brought against a government and involves policy issues:

> *The plaintiffs characterize their action as public interest litigation because there is a "clear public interest in deciding the issues of tort liability and issues of Charter rights". The defendant describes the matter as a private action in which the plaintiffs sought more than $3,000,000 in damage. From the Crown's perspective, the mere fact that the action involved a public authority is insufficient to transform the "nature of this negligence/personal injury litigation". I agree with the defendant in this respect.*[4]

17. As the Supreme Court has held:

> *…I have difficulty conceptualizing the plaintiffs in the present appeal as public interest litigants. In the plaintiffs' own submissions, there are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g., a non-profit organization); and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings. The plaintiffs in the present case do not fit into either category — and thus do not fit their own definition of a public interest litigant. Indeed, it is difficult*

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para 7; *Chaoulli v Québec (AG)*, 2005 SCC 35 at para 104; *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 at para 220, *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at paras 106-108; *Tanudjaja v AG (Canada)*, 2013 ONSC 5410 at paras 32, 37-40, upheld 2014 ONCA 852; *R v Ferkul*, 2019 ONCJ 893 at paras 16-17.

[3] *Ahani v Canada (AG)*, 58 OR (3d) 107 at paras 31-34; *Dumont c Québec (PG)*, 2009 QCCS 3213 at para 127 ; *Dumont v Canada*, CCPR/C/98/D/1467/2006, UN Human Rights Committee (HRC), 21 May 2010; *Dumont c Québec (PG)*, 2012 QCCA 2039 at paras 107-118.

[4] *Khalil v Canada*, 2007 FC 1184 at para 9.

> *to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.*[5]

18. 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 government funded health care to all categories of migrants in Canada.

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

20. The issue of whether Canada should fund heath care insurance to all categories of migrants is an interesting and important public policy debate.

21. The Plaintiff and the interveners have strong views on that broad policy debate. Cogent arguments can be made on both sides of that debate.

22. 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.

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[5] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 76.

23. The decision in this case may be one steps step in that policy debate. That doesn't mean the Court should allow this civil action should become the forum for that policy debate.

C. NO REASON TO DISPENSE WITH THE DEEMED UNDERTAKING RULE

1) General principles

24. All parties and their lawyers are deemed to undertake not to use evidence or information obtained during discoveries for any purposes other than those of the proceeding in which the evidence was obtained.[6]

25. The leading case outlining the principles governing the application of the rule is the Supreme Court's Decision in *Juman v Doucette*.[7]

26. The test for granting an application to modify or relieve against an implied or deemed undertaking requires the applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.[8]

27. The onus is on the Plaintiff to demonstrate a superior public interest in disclosure. The undertaking should only be set aside in exceptional circumstances.[9] The Court should only lift the deemed undertaking rule when there is shown to exist "clear and convincing evidence of a public interest requiring it".[10]

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[6] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 30.1 [*Rules of Civil Procedure*].
[7] *Juman v Doucette*, 2008 SCC 8 [*Juman*]
[8] *Juman* at para 32.
[9] *Juman* at para 38.
[10] *Givogue et al v Burke et al*, 2010 ONSC 5075 at para 73, citing *Juman*, *supra*, and *Livent Inc v Drabinsky*, 2001 CanLII 28039 (ON SC) at paras 15-17.

28. The Rule is not qualified and does not set out categories of parties to which the Rule doesn't apply.

2) <u>There is no evidence to support the Plaintiff's request</u>

29. There is no evidence from the Plaintiff on this motion. The Court cannot reasonably make a finding that the Plaintiff has met the onus of demonstrating a superior public interest in disclosure.

30. The Plaintiff has filed two affidavits from proposed experts. The experts have not bee n qualified by the Courts. The Court should not consider the proposed expert evidenced until the Defendant has had a fair opportunity to respond.

31. The Plaintiff, who bears the onus, has failed to demonstrate any prejudice which would warrant granting this motion.

3) <u>A government litigant is entitled to rely on the deemed undertaking Rule</u>

32. The Rule applies to government litigants. The fact that material produced on discovery is a government record, potentially disclosable through assess to information legislation, does not mean the same material should be exempted from the deemed undertaking Rule.

33. There is no support in the jurisprudence for the proposition that the deemed undertaking rule should be dispensed with simply because one of the litigants is a government authority.

34. The effect of the order requested by the Plaintiff would be to create a category of government litigants to which the deemed undertaking Rule would presumptively not apply. The Court should not make an order with such broad, unprecedented consequences.

4) The Rule applies to non-confidential information

35. The fact that material is not confidential does not mean it is exempt from the deemed undertaking Rule:[11]

> *The implied undertaking rule applies at a minimum to all documents produced under compulsion, regardless of how they are treated or distributed according to the terms of any agreement between the parties. It applies to confidential documents and public documents, relevant documents and irrelevant documents, documents which would be admissible at trial, and documents that would never be admissible at trial. The implied undertaking governs documents produced under compulsion as part of the pre-trial proceedings and continues afterwards with respect to documents that do not become part of the public record.*[12]

36. The fact that there is no privacy or confidentiality interest at stake is not a sufficient reason for concluding that the implied undertaking rule is not engaged. The rule is underpinned by other rationales, not the least of which is that of promoting litigation efficiency.[13]

37. In any event, the onus is on the Plaintiff to show that an exemption should be granted. That means that the onus is on the Plaintiff to show that the material in question is not confidential:

> *…any document or any information produced or given under compulsion as a result of the civil process of this Court by any*

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[11] *Juman* at paras 24-28.
[12] *Fibrogen, Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 at para 53, citing *Juman*, *supra*.
[13] *Juman* at para 30.

> *person, if it is not given in open Court,* ***is confidential to that person unless and until the contrary is shown****…*
>
> *…information which is confidential under the rule… is not publicly available unless and until it is shown to be publicly available*.[14]

38. The Plaintiff cannot meet that onus on this motion, at this stage of the proceeding. The Plaintiff cannot identify documents which it seeks to exempt from the Rule:

> *[175] The plaintiff did not make any effort to identify the documents that it sought to have exempted from the implied undertaking. Instead, it sought an exemption for all documents that had been seized and since disclosed by various defendants. Such a broad exemption would not properly recognize the importance of the implied undertaking rule nor would it allow for the kind of balancing exercise that the Court contemplated in Juman v. Doucette, 2008 SCC 8, [2008] 1 S.C.R. 157. I do not consider that the plaintiff can succeed on this application. The plaintiff may, however, reapply on a properly advanced and more measured application.*[15]

39. In *Lac d'Amiante,*[16] the Supreme Court noted that:

> *78 The rule of confidentiality will apply only to information obtained solely from that examination, however, and not to information that is otherwise accessible to the public. If the information is available to the public from other sources, a party should not be given the burden of applying to the court for leave before using it merely because it was also communicated at an examination on discovery. The obligation of confidentiality applies only to information that would have remained confidential if the examination on discovery had not taken place.*[17]

40. The Court cannot grant a blanket exemption from the deemed undertaking Rule, before the fact, to any material produced during discoveries by Canada. What the paragraph above means is that, for example, if Canada

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[14] *NM Paterson & Sons Ltd v St Lawrence Seaway Management Corp*, 2002 FCT 1247 at paras 7-9, upheld on appeal 2004 FCA 210.
[15] *XY, LLC v Canadian Topsires Selection Inc*, 2012 BCSC 1797 at para 175 [*XY*]
[16] *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, 2001 SCC 51 [*Lac d'Amiante*].
[17] *Lac d'Amiante* at para 78; see also *Power v Parsons*, 2018 NLCA 30 [*Power*], *Eli Lilly and Co v Interpharm Inc* (1993), 50 CPR (3d) 208.

produces a document during the discovery, and if the party seeking to use it can demonstrate that it is publicly available, then the party does not need to bring a motion to be exempted from the Rule in order to refer to the document outside of the litigation.[18] To quote the Nova Scotia Court of Appeal:

> *…it would be perverse to prevent a party who can access material by means other than the disclosure process from using that material simply because another copy of it surfaces in the discovery process.*[19]

41. The fact that there is no privacy or confidentiality interest at stake is not a sufficient reason for concluding that the implied undertaking rule is not engaged:

> *The rule is underpinned by other rationales, not the least of which is that of promoting litigation efficiency. As a means of promoting disclosure, parties to litigation need to be assured that in disclosing documents or information in their possession or within their knowledge they can do so in the confidence that the material will not be used by the other parties for a purpose collateral to the subject litigation, unless authorized by* ***subsequent*** *court order, where the respective rights and interests can be fully addressed* ***before*** *further use is made of the material* [emphasis added].[20]

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[18] See e.g., *Invest Bank PSC c Al-Husseini*, 2022 QCCS 4031 at paras 31-36: "The information that the Bank wishes to disclose has **already partly been made publicly available**…" [emphasis added]; see also *Power*, *supra*, at para 12: "to the extent that the respondents **obtained** the documents independently of the disclosure process in the civil action, the documents were not subject to the implied undertaking rule" [emphasis added]; see also *Kirkbi AG v Ritvik Holdings Inc*, 2000 CanLII 16454 (FC) at para 33: "the defendants have not demonstrated that any of the pleadings, trial and appeal transcripts, affidavits and declarations from related hearings in other international jurisdictions are no longer available from the respective court registries. Therefore, the Prothonotary rightly concluded that the set of documents produced on discovery is protected by the implied undertaking rule. **If the documents sought are publicly available elsewhere, then it is for the defendants to seek them out**, because it is not for this Court to determine what evidence may be heard in proceedings conducted outside its territorial jurisdiction This Court dismisses the remainder of the appeal, since the defendants have not demonstrated that any of the pleadings, trial and appeal transcripts, affidavits and declarations from related hearings in other international jurisdictions are no longer available from the respective court registries. Therefore, the Prothonotary rightly concluded that the set of documents produced on discovery is protected by the implied undertaking rule. If the documents sought are publicly available elsewhere, then it is for the defendants to seek them out, because it is not for this Court to determine what evidence may be heard in proceedings conducted outside its territorial jurisdiction [emphasis added].

[19] *Power* at para 51.

[20] *Power* at para 49.

42. The sequence is important. A party most show that a document is publicly available, and **subsequently** obtain an order that the same document. The order must be obtained **before** the document is used outside of the discovery.

43. The Court cannot, on this motion, pre-emptively decide that all of Canada's discovery material is "publicly available" or exempt from the Rule.[21]

5) Relief requested is too broad – the Court cannot dispense with the rule for unspecified material, and unnamed recipients

44. Exceptions are made to the Rule to allow parties to share information with specific parties, for specific purposes, such as

(a) statutory exceptions to the rule;

(b) public safety concerns

(c) impeaching inconsistent testimony in another proceeding;

(d) disclosure of criminal conduct.[22]

45. In *Ludmer c Canada (AG)*[23], the Quebec Superior Court dismissed an argument that a blanket exemption from an implied undertaking rule should be granted, where the issue was whether the material was publicly available under access to information legislation:

> *[37] The general waiver requested by the Plaintiffs, however, is too broad.*
>
> *[38] Even recognizing the quasi-constitutional nature of access to information legislation and that "[t]he transparency and accountability of government are issues of enormous public importance",[22] I am not prepared to hold either that the test set out by the Supreme Court in Juman does not apply when the witness is a government employee and the subject matter of the examination is access to information, or that the test is necessarily*

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[21] *XY* at para 175.
[22] *Juman* at paras 39-42.
[23] *Ludmer c Canada (AG)*, 2014 QCCS 4853.

> *met in all circumstances such that it is not necessary to know the use that the Plaintiffs intend to make of the information. In my view, the Plaintiffs must make an application to the Court for any use that they intend to make of the information, and must convince the Court that the specific use meets the test set out in Juman.*
>
> *[39] As a result, I will dismiss the Plaintiffs' request for a general waiver of the implied obligation of confidentiality.*

46. The Plaintiff proposes to share discovery material with unnamed "third partes". The deemed undertaking Rule does not bind third parties.[24]

47. The Plaintiff has not cited a single case that would suggest that the Court has the authority, or should exercise discretion to grant the sweeping relief requested. There is no precedent for a Court granting an exception to the deemed undertaking rule to a plaintiff to share information with "third parties", to "assist" the plaintiff.

48. 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.

6) <u>The fact that there is a public interest component to the litigation does not satisfy the Plaintiff's burden of proof on this motion</u>

49. The Plaintiff's case has a unique set of facts. The legal issues raised, however, do not dictate an unprecedented departure from the usual rules of how litigants participate in an action. People sue governments, seeking to strike down

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[24] *Power* at para 10.

government policies all the time. People take issue with government decisions, including government decisions about the scope of international obligations, all the time. People seek Charter relief against governments that may have broad impacts all the time. People sue for governments for damages (including *Charter* damages) all the time. In those proceedings, the deemed undertaking Rule applies to the discovery material of all parties, including government litigants. There is no reason to dispense with the Rule here.

50. The issue of whether Canada's policies about funding heath care insurance to all categories of migrants is an interesting public policy debate. If the parties seek information to inform a public debate about migrant health care policy, there is material publicly available on Canada's policy with respect to:

> (a) publicly funded health care for migrants;
>
> (b) Canada's international obligations with respect to migrants, and specifically heath care for migrants;
>
> (c) Canada's position with respect to international treaties, and decisions of UN Committees, and specifically Canada's record and positions taken of responses to views of international committees, and specifically with respect to health care for migrants.[25]

51. If the parties seek information to inform a public debate about Canada's migrant health care policy, the *Access to Information Act* is one place to find it. The discovery process in a civil action is not the appropriate source.

52. The general policy debate about levels of publicly funded health insurance available to migrants is a public debate. It does not follow from that, as

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[25] *Access to Information Act*, RSC 1985, c A-1, s 2.

a matter of law or logic, that the debate can be cited in a civil action as an interest to be weighed in the balance within the meaning of the deemed undertaking Rule.

D. MANDATORY MEDIATION

53. The Plaintiff has filed two affidavits from proposed experts. The experts have not bee n qualified by the Courts. The Court should not consider the proposed expert evidenced until the Defendant has had a fair opportunity to respond.

54. A mediation conducted before further discoveries would assist the parties in assessing the scope of this action and the chances of success.

55. The Defendant is of the view that this case urgently requires mediation before the parties continue on the costly process of documentary and oral discovery.

56. It would benefit the parties and the Court to have an impartial mediator assess the parties' positions and mediate a possible resolution.

57. The party seeking an exemption from mandatory mediation has the onus of establishing that the exemption should be granted.[26]

58. The following criteria are relevant to whether an exemption order should be granted:[27]

> (a) whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost and delay, they ought not to be required to repeat the effort

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[26] *Rules of Civil Procedure*, Rule 24.1.05 - Exemption from Mediation.
[27] *GO v CDH*, 2000 CanLII 22691 (ON SC).

(b) whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases

(c) whether the issue involves a claim of a modest amount with little complexity which is amenable to a settlement conference presided over by a judicial officer without examination for discovery

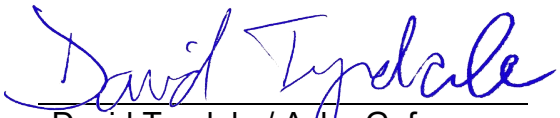
(d) whether one of the litigants is out of the province and not readily available

(e) whether the exemption for any other reason would be consistent with the stated objectives of reducing cost and delay in litigation and facilitating early and fair resolution."

59. The Defendant does not object to a reasonable extension of the deadline for mandatory meditation, provided that mediation take place before discoveries.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, September 6, 2024.



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Plaintiff		Defendant

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Proceeding Commenced at Toronto

FACTUM OF THE DEFENDANT

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