

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

**CASE CONFERENCE BRIEF OF THE PROSPECTIVE COALITION OF INTERVENERS: THE
CHARTER COMMITTEE ON POVERTY ISSUES, THE CANADIAN HEALTH COALITION
THE FCJ REFUGEE CENTR AND THE MADHU VERMA MIGRANT JUSTICE CENTRE**

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Centre, and Madhu Verma Migrant Justice
Centre

Overview

1. The Charter Committee on Poverty Issues Coalition (“CCPI Coalition”) consists of four organizations: Charter Committee on Poverty Issues, the Canadian Health Coalition, the FCJ Refugee Centre and the Madhu Verma Migrant Justice Centre. These organizations have recognized expertise both in the novel *Charter* issues and the systemic issues this action raises with respect to access to essential health care for irregular migrants in Canada. They are represented by a single legal team and make joint submissions.

2. The CCPI Coalition was granted leave to intervene in the Motion to Strike in the current proceeding as a coalition of three organizations.¹ With the addition of the Madhu Verma Migrant Justice Centre, it wishes to continue to assist this Court with critically important public interest issues affecting the *Charter* rights of one of the most vulnerable groups in Canadian society, the integrity of Canada’s international human rights commitments, and access to health care for the protection of life for irregular migrants.

3. As discussed at the April 30, 2024 Case Conference, in order to ensure that this Court fully benefits from the CCPI Coalition’s expertise, it will be important it to have access to documentary evidence obtained in discovery and to observe selective oral examination for discovery. As noted by Justice Papageorgiou: “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.”²

¹ [Decision of Justice Belobaba on Intervention Motions](#) CV-20-649404 (Jan 14, 2022); [Order of Justice Belobaba on intervention Motions](#) CV-20-00649404-000 (Jan 19, 2022).

² Order of Justice Papageorgiou, Civic Endorsement Form, V-20-649404-00000, April 30, 2024.

4. Justice Papageorgiou directed that “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.” Although in communication with counsel for the Attorney General it was clarified that the proposed interveners seek only to have access to documentary discovery and to observe selective examinations for discovery, the Attorney General of Canada has not, to date, consented to an order to facilitate this. Counsel for the Attorney suggested that there is no provision in the rules for the involvement of “prospective interveners” in an action.

5. The CCPI Coalition agrees with and adopts the submissions of Amnesty International and ESCR-Net that there is no bar to providing relief from the deemed undertaking rule for “prospective interveners”. However, if it would facilitate consent from the Attorney General of Canada and if this Court agrees, the CCPI Coalition is fully willing to proceed with a motion for leave to intervene in the action under Rule 13.02. As a part of this motion, the CCPI Coalition intends to seek an order providing it access to evidence produced in discovery, permitting it to observe oral examinations for discovery, granting oral and written submissions at trial and specifying that it “would not be entitled to receive and would not be liable for costs against any party or intervener.”³

6. Rule 13.02 provides for adding a person to “a proceeding” and “proceeding” is defined in Rule 1.03(1) to mean “an action or application.” Accordingly, in previous cases,

³ This was included in Justice Belobaba’s order granting intervener status in the Motion to Strike. [Order of Justice Belobaba](#) (Jan 19, 2022) Court File No.: CV-20-00649404-000.

this Court has granted leave to intervene under Rule 13.02 in actions at the discovery stage, providing for written and oral submissions at trial as well as access to discovery.⁴

7. Either as an intervener or a prospective intervener, the CCPI Coalition does not wish to actively participate in the discovery process, such as by requesting production of documents or asking questions in oral examinations. The request is for observer status only, and the CCPI Coalition would adapt to any schedule agreed by the parties.

The Relevant Expertise of the CCPI Coalition in this Action

8. The central issue in this case is whether Canada's refusal to implement the Human Rights Committee's decision in the case of [Toussaint v Canada CCPR/C/123/D/2348/2014 \(30 August 2018\)](#), requiring Canada "to take all steps necessary to ensure that irregular migrants have access to essential health care", violates sections 7 and 15 of the *Charter*.

9. As described in its *factum* for leave to intervene in the Motion to Strike, the CCPI Coalition has significant expertise and interest in both the legal issues and the practical outcome of this critically important case, and it satisfies all of the criteria for intervener status.⁵ The Charter Committee on Poverty Issues has intervened in thirteen *Charter* cases before the Supreme Court of Canada, including the two seminal cases on access to health care, *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. The Canadian Health Coalition is the leading civil

⁴ See [Crees \(Eeyou Istchee\) et al v Canada \(Attorney General\) et al](#), 2017 ONSC 3729 (CanLII) at [para 30](#) and [Canadian Blood Services v. Freeman](#), 2004 CanLII 35007 (ON SC) at [para 39](#).

⁵ [Charter Committee on Poverty Issues/Canadian Health Coalition/FCJ Factum for Leave to Intervene](#) Court File No. Court File No. CV-20-00649404-0000 (Dec 10, 2021)

society organization in Canada promoting access to publicly funded health care and includes organizations representing seniors, women, faith groups, students, consumers, labour unions, migrants and health care professionals. The FCJ Refugee Centre has direct experience in providing health care to irregular migrants and in assisting irregular migrants access health care. The Madhu Verma Migrant Justice Centre works directly with irregular migrants and has expertise in the circumstances of those directly affected by the outcome of this case.

10. The CCPI Coalition played a central role in the hearing before Justice Perell in the motion to strike the current action, by clarifying the jurisprudential basis for the *Charter* claims. In his decision dismissing the motion to strike, Justice Perell noted that the submissions of the CCPI Coalition addressed the proper characterization of Ms. Toussaint's claim, the current state of *Charter* law, and this Court's jurisdiction to review Canada's decision not to implement the Human Rights Committee's Views. In his reasons for dismissing the Motion to Strike, Justice Perell agreed with the key submissions of the CCPI Coalition on all these points.

The Timing of Motions for Leave to Intervene in the Action

11. At a Case Conference held on October 6, 2023, Justice Vermette granted a motion to appoint Ann Toussaint as representative of the Estate for the purpose of this proceeding and considered the scheduling of motions for leave to intervene in the action.

12. Justice Vermette declined to schedule motions for leave to intervene at that time, for a number of reasons. She noted that the "pleadings are not closed and, as a result, the scope

of the dispute has not been defined.” She also explained that “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 contributions, if any, they can make to the various stages of the proceedings; and how they can render ‘assistance to the court, by way of argument’ (see Rule 13.02).”⁶

13. The plaintiff filed a “Fresh as Amended Statement of Claim” on October 19, 2023.⁷ The defendant filed its Statement of Defense on November 20, 2023.⁸ The plaintiff continues to advance the key *Charter* claims that the CCPI Coalition addressed in its intervention before Justice Perell. The Statement of Defence indicates that the defendant will contest these claims on many of the same grounds as in the Motion to Strike. The negotiation of a discovery plan between the parties has further shed light on the scope of the dispute. As a result, the CCPI Coalition is now able to clarify the contributions it can make and the role it proposes to play in discovery, and we respectfully submit that it would be appropriate for this Court to consider motions for leave to intervene, in accordance with the directions of Justice Vermette.

⁶ [Endorsement Order of Justice Vermette April 30, 2024](#)

⁷ [Fresh as Amended Statement of Claim October 19, 2023](#)

⁸ [Statement of Defense](#) November 20, 2023

Relief from the Deemed Undertaking Rule

14. The CCPI Coalition adopts the submissions of Amnesty International and ESCR-Net on the application of Rule 30.1.01(8). As noted in those submissions, this Court has a discretionary power to provide relief from the deemed undertaking rule and may impose any terms or give directions as are just. Such relief will be provided where the court is “satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence.”⁹

15. As Justice Binnie explained in *Juman v Doucette*,¹⁰ “an application to modify or relieve against an implied undertaking requires an 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.”¹¹

16. The prejudice that Rule 30.1 is designed to address is the use of information disclosed in one action in another action or outside of the proceeding. Justice Binnie stated in *Juman v Doucette* that “where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted.”¹² In the present case, the CCPI Coalition seeks only to use the information in the very same action for which the discovery is produced. The CCPI Coalition agrees to be

⁹ *Rules of Civil Procedure*, Rule 30.1.01(8).

¹⁰ *Juman v. Doucette*, 2008 SCC 8 (CanLII), [2008] 1 SCR 157.

¹¹ *Juman v. Doucette*, at [para 32](#).

¹² *Juman v. Doucette* at [para 35](#).

subject to the same deemed undertaking as would apply to the parties, preventing the evidence from being used outside of the context of the current action. There would therefore be no prejudice to the disclosing party.

17. As noted by Amnesty International and ESCR-Net, it is questionable whether Rule 30.1.01(3) applies when documentary discovery is provided for the purposes of an intervention in the same proceeding, since it is not being used for a purpose “other than those of the proceeding in which the evidence was obtained.”

18. Moreover, the privacy interests that Rule 30.1 aims to protect in private litigation do not apply to the defendant in this case. The discovery documents and oral testimonies that the CCPI Coalition seeks to access relate to the Government of Canada’s response to a widely publicized decision of the UN Human Rights Committee, and the Government’s assessment of the effects of continuing to deny essential health care to irregular migrants. The Government has no privacy interests in relation to its consideration of the Views of UN bodies or the impacts of its decisions on those whose lives may be at risk.

19. In fact, the Government of Canada has adopted a number of “foundational principles” to guide the sharing of information about its consideration of the Views and recommendations from UN human rights bodies. These include: i) “a proactive dissemination and sharing of information that takes into account the principles of good governance”; ii) “encourag[ing] the participation and dissemination of accessible information to the broadest range of interested individuals and groups as possible”; and iii)

“a collaborative approach with civil society and Indigenous representatives and groups.”¹³

Providing relief from the deemed undertaking rule for the sharing of documents with the CCPI Coalition in this case would fully align with those principles.

20. A central issue in this action – one in which the CCPI Coalition has particular expertise and interest – concerns whether Canada’s response to the Human Rights Committee’s Views complies with the *Charter*, interpreted in light of international law standards of good faith and *pacta sunt servanda* principles. Effective submissions by the CCPI Coalition on this point will require a thorough review of documents obtained by the plaintiff in discovery and any additional evidence obtained in oral examinations for discovery regarding the considerations that informed Canada’s refusal to give effect to the Human Rights Committee’s decision.

21. The defendant’s refusal to provide the remedy sought by the plaintiff and required by the UN Human Rights Committee in her case does not only affect the plaintiff. It directly impacts the lives of countless others, many of whom the CCPI Coalition members work with. In public interest litigation of this sort, assistance from public interest interveners with relevant expertise and experience is helpful to ensuring the efficient conduct of the litigation. Even in the context of an adversarial legal system, the Government of Canada has an over-riding interest in complying with the *Charter* and in assessing the impact of its policies on vulnerable groups through a *Charter* lens. As such, it may find the expertise provided by interveners like the CCPI Coalition helpful in resolving the systemic issues raised in this action. It is perhaps for this reason that Justice Belobaba stated, in relation to

¹³ Government of Canada, [Engagement Strategy on Canada’s International Human Rights Reporting Process](#).

the current proceeding, that he was “somewhat perplexed by the level of intensity in the defendant AG’s opposition to these motions for intervention in the Motion to Strike.”¹⁴

22. In the current action, it is also in the interests of the efficient administration of justice to ensure that an individual plaintiff advancing a claim in the public interest, and wishing to share information with and benefit from the expertise of intervening groups with relevant expertise, is not prevented from doing so.

Order Sought

23. The CCPI Coalition seeks an order pursuant to Rule 30.1.01(8) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, that the Deemed Undertaking Rule 30.1.01(3) neither applies to documentary evidence provided to the CCPI Coalition nor prohibits representatives of the CCPI Coalition from observing oral examinations for discovery in the present action.

24. The CCPI Coalition requests that this order either be incorporated into an order granting leave to intervene in the action under Rules 13.02 or as an order applying to the CCPI Coalition as a “prospective intervener”.

¹⁴ [Decision of Justice Belobaba on Intervention Motions](#) (Jan 14, 2022)

All of which is respectfully submitted,



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