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

DEFENDANT'S CASE CONFERENCE BRIEF

(Case Conference: May 22, 2024)

Date: May 21, 2024

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CASE CONFERENCE MEMORANDUM OF THE DEFENDANT

A. INTERVENERS

1) Overview

1. The proposed interveners seek to participate in the discovery process. There is a Rule for that: Rule 13.01, intervention as a party.[1]

2. The proposed interveners say that they simply want to observe discoveries and access disclosed documents as "prospective interveners." There is no Rule for that. The Court does not have jurisdiction to grant a status which does not exist in the Rules.

3. The proposed interveners suggest they may want to intervene as friends of the court. There *is* a Rule for that: Rule 13.02, which says that friends of the court provide "assistance to the court by way of argument."[2]

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[1] Rule 13.01
[2] Rule 13.02

4. The Court cannot twist the Rules into shapes they cannot bear and make unprecedented exceptions to important Rules governing discovery when there is a Rule which will suit the proposed intervener's purpose.

5. At paragraph 3 of its submissions, The CCPI coalition misleadingly cites this Court's April 30 endorsement out of context, to make it look like the Court has endorsed the CCPI coalition's view on this issue. Clearly, the Court was simply summarizing the proposed intervenors' views, leading up to a request for further submissions:

> **They [the proposed interveners] 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**.[3]

2) <u>There is no category of "prospective interveners"</u>

6. The Court does not have jurisdiction to grant a status that does not exist in the Rules. This is, in the words of the Amnesty Coalition's submissions, "an obstacle" to the proposed intervenors' request. The Rules contemplate two types of intervention: as a party, or as a friend of the Court. The Court can impose various conditions, and allow for various levels of participation, for both categories. There is no category in the Rules for "prospective interveners".

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[3] Order of Justice Papageorgiou, Civic Endorsement Form, V-20-649404-00000, April 30, 2024 [emphasis added]

7. There certainly is no precedent for an order permitting "prospective interveners" from participating in discoveries over the objection of one of the parties.

3) <u>A friend of the Court assists by making arguments</u>

8. 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".[4] Participation beyond making arguments is an exception to the Rule. A 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.

9. 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.

10. The CCPI coalition cites *Canadian Blood Services v. Freeman* and *Crees v Canada (AG)*[5] in support of its position.

11. The CCPPI coalition misrepresents 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".[6] Ultimately, the Court

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[4] Rule 13.02; *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

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

[6] *Canadian Blood Services v. Freeman, supra*, at para. 36

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.[7]

12. *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 Nations. One of the competing First Nations sought participation as a party.[8] It claimed (on behalf of its members) a direct interest in the outcome of the litigation.[9] 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.[10]

13. 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

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[7] *Canadian Blood Services v. Freeman, supra*, at para. 39
[8] Crees v Canada (AG), supra, para. 17
[9] Crees v Canada (AG), supra, para. 19
[10] *Crees v Canada (AG)*, supra, para. 24

situation. The case is not, in any way, a persuasive guide as to how to apply Rule 13.02.

4) No right to participate in discovery

14. An intervener acting as a friend of the Court takes the record as they find it.[11] 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.

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

16. 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.[12] In appeals, the record has been fixed in the court below.

17. 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".

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[11] *R v McGregor*, 2023 SCC 4 at para. 108
[12] See, e.g., *Friends of Lansdowne v Ottawa*, 2011 ONSC 1015 at paras. 16 – 17; 63

18. The information gathered is not admissible evidence.[13] A party may argue at trial that a document is irrelevant, even if it has been disclosed and produced.[14]

19. 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.[15]

20. The Court may exempt the parties from the obligations of the deemed undertaking Rule in the interests of justice.[16] The Rule makes no mention of non-parties seeking this relief.[17] It is unusual for a non-party to invoke this Rule.[18] The Supreme Court of Canada has held that the exemption is granted only in "exceptional circumstances".[19]

21. The CCPI Coalition agrees to be subject to the same deemed undertaking as would apply to the parties, but does not include any such condition in the orders it seeks.

22. 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

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[13] Rule 30.05
[14] *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
[15] Rule 30.1 - Deemed undertaking
[16] 30.1.01 (8) Ruloe
[17] *Livent Inc. v Drabinsky*, 2001 CanLII 28039 (ON SC), at paras. 7-15; see *Fontaine v. Canada (AG)*, 2018 ONCA 421 at para 66
[18] *Livent Inc. v Drabinsky*, supra
[19] *Juman v Doucette*, 2008 SCC 8 at para. 32; *755568 Ontario Ltd. v Linchris Homes Ltd*. (Gen. Div.), 1990 CanLII 6665 (ON SC); *Livent Inc. v Drabinsky*, *supra*

> 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.[20]

23. The participation in discoveries of an "prospective intervener" or an intervener acting as a friend of the Court would, among other things:

(a) create issues with respect to the deemed undertaking;

(b) complicate the finalization of the Discovery Plan;

(c) create issues with respect to scheduling, leading to delay;

(d) create issues with respect to possible objections and refusals during discovery.

5) <u>Prospective interveners are actually seeking standing or party status</u>

24. 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.[21]

25. 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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[20] *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; *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

[21] *Dorsey, Newton, and Salah v. Canada (AG)*, 2021 ONSC 2464; *Six Nations of the Grand River Band of Indians v. Canada (AG) and Ontario*, 2023 ONSC 3604

26. Participation as a party comes with obligations, as well as rights.[22] If the prospective interveners seek the rights of parties, and agree to take on the corresponding obligations, they can bring the appropriate motion. The Defendant reserves its right to oppose any such motion, or to request conditions on any such relief.

27. 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 seek to strike down 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 that may have broad impacts all the time. People sue for damages (including Charter damages) all the time. In those proceedings, the Rules on intervention apply. They also apply here.

B. MEDIATION - TIMING

28. The Defendant repeats that this case urgently requires mediation before the parties embark on the costly process of documentary and oral discovery.

29. The party seeking an exemption from mandatory mediation has the onus of establishing that the exemption should be granted.[23]

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[22] 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

[23] Rule 24.1.05 - Exemption from mediation

30. The following criteria are relevant to whether an exemption order should be granted:[24]

> (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
>
> (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." (para 13)

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

C. DISCOVERY PLAN

32. The Defendant has proposed its own draft Discovery Plan (which will be filed with these submissions), and the Plaintiff has delivered a response. We are seeking instructions on a further response.

33. The Defendant's draft Discovery Plan reflects a realistic projection of the amount of time it will take to identify and list documents, given the expected volume of material; the nature of the material requested; the need to review documents for privilege; the nature of the action; and the time period in question.

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[24] Owen v Hiebert, 2000 CanLII 22691 (ON SC), [2000] OJ No 1882, 11th C.P.C (5th) 302 (Ont. S.C.J)

34. The parties are far apart on the issues of timing for delivery of Affidavits of Documents, production of documents, and dates for oral examinations.

35. The Plaintiff refuses to participate documentary discovery. The Plaintiff's position seems to be that, in this action seeking 1.2 million dollars from the Crown arising out of Nell Toussaint's health condition, the Plaintiff is excused from producing information relevant to Nell Toussaint's health condition.

36. The Statement of Defence puts the Plaintiff to the strict proof of her case. The Plaintiff apparently relies on the allegation in the Statement of Claim that the Federal Court of Appeal accepted that the evidence before it established that the Nell Toussaint experienced serious health issues and established that she had been deprived of her right to life and security of the person by her exclusion from the Interim Federal Health Program. The Defendant admitted this paragraph. This paragraph is true. That's what the Federal Court of Appeal said. The Plaintiff seems to think that this attempt at a backhanded rhetorical trick about that the defendant "admitted" will exempt her from the requirements of discoveries. With respect, liability aside, the Plaintiff is going to have to prove why, and how, we get to $1.2 milllion.

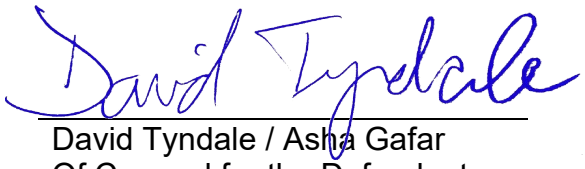
37. There is a fundamental disagreement between the parties as to the extent of the Plaintiff's discovery obligations. The Defendant anticipates that the disagreement will not be resolved without full argument on the issue.

38. The Defendant repeats its objection to the idea that the issues and discovery in this matter should be bifurcated.

D. COSTS

39. The Defendant submits that there should be no order as to costs.

Dated at Toronto, May 21, 2024.



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TOUSSAINT (ESTATE OF)	AND	ATTORNEY GENERAL OF CANADA
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Proceeding Commenced at Toronto

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