

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

FACTUM OF THE PROPOSED COALITION OF INTERVENORS

(ON A MOTION SEEKING LEAVE TO INTERVENE)

**CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH
COALITION, THE FCJ REFUGEE CENTRE AND THE MADHU VERMA MIGRANT
JUSTICE CENTRE**

August 28, 2024

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PART I – OVERVIEW

1. The Charter Committee on Poverty Issues, the Canadian Health Coalition, the FCJ Refugee Centre, and the Madhu Verma Migrant Justice Centre (“the CCPI Coalition”) seek leave to intervene jointly in this action represented by a single legal team, and to make joint written and oral submissions at trial and at any pre-trial motions relevant to the issues to be addressed by the CCPI Coalition. The CCPI Coalition seeks access to documentary discovery and authorization to observe, but not participate in, examinations for discovery. The CCPI Coalition will not file pleadings, introduce evidence, request production, participate in or ask questions during oral examinations; it does not seek a right of appeal and agrees to accept the record as it is filed by the parties.

2. In its Case Conference Brief of May 17, 2024, the CCPI Coalition proposed that the Court facilitate an intervention on these terms by granting it intervener status under Rule 13.02 of the *Rules of Civil Procedure*¹ (the “Rules”), accompanied by an order pursuant to Rule 30.1.01(8) that the deemed undertaking rule, Rule 30.1.01(3), does not apply to documentary discovery provided to the CCPI Coalition and an order authorizing attendance at examinations for discovery in an observer capacity only.²

3. In its responding Case Conference Brief, the Attorney General of Canada (the “Attorney General”) opposed granting any participatory rights in discovery to an intervener under Rule 13.02. The Attorney General argued that “[t]he proposed interveners seek to participate in the discovery process. There is a Rule for that: Rule 13.01, intervention as a party.” It argued that

¹ *Rules of Civil Procedure*, RRO 1990, Reg 194 [Rules], [Rule 13.02](#).

² *Nell Toussaint v Attorney General of Canada* (May 17, 2024), Ontario CV-20-00649404-0000 (ONSC) ([Case Conference Brief, CCPI Coalition](#)).

“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.”³

4. The CCPI Coalition does not agree that providing access to documentary discovery and authorizing observation of examination for discovery in support of an intervener’s role under Rule 13.02 is “twisting the rules.” However, we agree that Rule 13.01 provides a more direct approach to providing the limited participatory rights the CCPI Coalition seeks in discovery while ensuring the application of the deemed undertaking rule to the CCPI Coalition. As described below, the member groups of the CCPI Coalition, which include groups working with and representing the interests of irregular migrants in need of health care, satisfy the qualifications for intervening as a party under Rule 13.01 and the Court has a broad discretion to limit participation in a Rule 13.01 intervention in the manner proposed by the CCPI Coalition.

5. The CCPI Coalition would require, however, that any order providing intervener status under Rule 13.01 be tailored by the Court to specify the restricted role in discovery sought by the CCPI Coalition and provide the same immunity from costs as is generally provided under Rule 13.02 interventions. If an intervention by the CCPI Coalition under Rule 13.01 would require it to assume more expansive participatory rights and obligations of parties that may be subject to a cost award, as has been suggested by the Attorney General, then intervention under Rule 13.01 is not an option for the members of the CCPI Coalition who are intervening with *pro bono* counsel and have no funding through which to assume liability for a potential award of costs.

³*Ann Toussaint (Appointed Representative of the Estate of Nell Toussaint) v Attorney General of Canada* (May 21, 2024), Ontario CV-20-00649404-0000 (ONSC) at paras 1, 4 ([Case Conference Brief, Defendant](#)); *Rules*, *supra* note 1, [Rule 13.01](#).

6. The CCPI Coalition proposes to focus its intervention on one component of the claim in this action. The Plaintiff seeks, *inter alia*, a declaration that the Defendant's decision not to give effect to the Views adopted by the United Nations ("UN") Human Rights Committee (the "Human Rights Committee" or the "Committee") in her case⁴, thus refusing to ensure that irregular migrants are no longer denied access to essential health care when their lives are at risk, violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").⁵ The Plaintiff further seeks an order under section 24(1) of the *Charter* requiring the Defendant to give effect to the Views in a manner that complies with the *Charter*.⁶ The CCPI Coalition seeks leave to intervene to assist the Court in assessing this element of the claim.

7. Specifically, the CCPI Coalition has filed a Motion for Leave to Intervene seeking to assist the Court with the following questions:

- i) Whether section 7 of the *Charter* imposes a positive obligation to ensure access to essential health care where the denial of such care may result in the loss of life;
- ii) Whether it is correct that, because the Views of the UN Human Rights Committee are not legally binding on Canada, domestic courts lack the jurisdiction to review Canada's decision not to implement the Committee's Views for compliance with the *Charter* or other domestic law;
- iii) Whether Canada's refusal to implement the Human Rights Committee's Views is in accordance with principles of fundamental justice under section 7 of the *Charter*,

⁴ [Toussaint v Canada](#), Communication No. 2348/2014, CCPR/C/123/D/2348/2014 (2018) [Views].

⁵ *Toussaint (Estate of) v Canada (Attorney General)* (October 6, 2023), Ontario CV-20-00649404-0000 (ONSC) ([Fresh as Amended Statement of Claim, Plaintiff](#)) [Statement of Claim] at para 1(g).

⁶ [Statement of Claim](#), *ibid* at para 1(g).

including the peremptory norm of good faith; the requirement that the government decision not be arbitrary but necessary to, and compatible with, the objectives of ratifying the *International Covenant on Civil and Political Rights*⁷ and its *Optional Protocol*⁸; and the requirement that the violation of the right to life not be grossly disproportionate to Canada's objectives in refusing to implement the Views;

iv) Whether, in light of the Human Rights Committee's Views in this case and other factors, immigration status should be recognized as an analogous ground of discrimination under section 15 of the *Charter*.

8. These issues are among the most critical, unresolved questions in existing *Charter* jurisprudence, and they lie at the heart of our Constitution's promise of equal protection and benefit of its most fundamental guarantees. The Court's approach and answer to these questions will have immense implications not only for irregular migrants requiring access to essential health care for the protection of their lives, but also for the constitutional rights of many of the most disadvantaged individuals and groups in Canadian society, whose perspective the CCPI Coalition represents.

9. The members of the CCPI Coalition have a real, substantial and identifiable interest in these issues. Their work will be directly affected by the outcome of the action. They have an important perspective distinct from the immediate parties, including the perspective of those

⁷ [International Covenant on Civil and Political Rights](#), 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁸ [Optional Protocol to the International Covenant on Civil and Political Rights](#), 17 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

directly affected by the ongoing denial of access to essential health care because of irregular immigration status. They are well-recognized groups with relevant policy and legal expertise.

PART II – FACTS

Background

10. In his reasons for dismissing the Motion to Strike the claim in this case, Perell J. summarized the background of the action as follows:

The action now before the court is a continuation of a two-decade dispute between Ms. 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.⁹

11. In its Motion to Strike, the Attorney General argued that the Plaintiff’s *Charter* claims should be struck. It argued that the *Charter* does not impose positive obligations on governments to ensure access to publicly funded health care and that the Federal Court of Appeal’s finding in Ms. Toussaint’s previous *Charter* challenge to her exclusion from the Interim Federal Health Program (“IFHP”) must stand.¹⁰ The Attorney General argued that the Plaintiff claimed a right to “free health care,” and that access to publicly funded health care is a socio-economic right that is excluded from the *Charter* because the *Charter* does not contain a freestanding right to health.¹¹

⁹ [Toussaint v Canada \(Attorney General\)](#) 2022 CanLII 4747 ONSC at [para 2](#) [*Toussaint 2022*].

¹⁰ *Nell Toussaint v Canada (Attorney General)* (February 10, 2022), Ontario CV-20-00649404-0000 (ONSC) ([Factum Motion to Strike, Defendant](#) at paras 62, 64, 79–80).

¹¹ *Toussaint 2022*, *supra* note 9 at [paras 134-135](#).

It further argued that Canada is free to refuse to implement the Committee’s non-binding Views and that the Court has no jurisdiction to review such decisions.

12. The CCPI Coalition was granted leave to intervene in the Attorney General’s Motion to Strike under Rule 13.02 as a friend of the court by order of Justice Belobaba, who found that the CCPI Coalition and three other proposed groups of interveners “can usefully assist the court with the nuanced constitutional and international human rights issues that arise [in this case].”¹² Justice Belobaba ordered “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.”¹³

13. In his decision to dismiss the Motion to Strike, Justice Perell summarized the submissions of the CCPI Coalition as follows:

- i) “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”¹⁴;
- ii) that “Canada has misstated the current state of *Charter* law about access to essential health care, which is in flux and not settled”¹⁵; and,

¹² [Toussaint v Canada \(Attorney General\)](#) (January 14, 2022), Ontario CV-20-649404 (ONSC) (Unreported decision on Intervention Motions, Justice Belobaba at p 1), [Brief of Pleadings, Endorsements, and Orders \(as of May 28, 2024\)](#) tab 8 at p 60 [2024 Brief].

¹³ [Toussaint v Canada \(Attorney General\)](#) (January 14, 2022), Ontario CV-20-00649404-000 (ONSC) (Order on Intervention Motions, Justice Belobaba at para 4) [Belobaba Order], [2024 Brief, supra note 12](#), tab 9 at p 63.

¹⁴ *Toussaint 2022*, *supra* note 9 at [para 79](#).

¹⁵ *Ibid* at [para 80](#).

iii) “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.”¹⁶

14. Justice Perell’s reasons for dismissing Canada’s Motion to Strike suggest that the submissions of the CCPI Coalition were of considerable assistance to the Court on these issues.¹⁷

15. Tragically, after persevering in her nearly two-decade long struggle for access to justice, Nell Toussaint died on January 14, 2023, shortly after the release of Justice Perell’s decision allowing her action to continue. Nell Toussaint’s family, with the support of human rights advocates and organizations, have committed to continuing her critically important claim in the public interest. Her mother Ann Toussaint applied to be appointed as representative of the estate of the late Nell Toussaint for the purposes of this proceeding. In her affidavit sworn on June 6, 2023 Ann Toussaint stated that she wished to pursue her late daughter’s claim “as she did, in the public interest to ensure that Canada protects the rights to life and equality of those who find themselves in the circumstances my daughter faced when she sought and was denied access to essential health care.”¹⁸ Ann Toussaint stated in her affidavit that she has authorized experienced counsel of record in this action to act for her¹⁹, that she has secured funding from the Court Challenges Program of Canada to continue her daughter’s claim in the public interest²⁰, that her legal team have been in touch with the CCPI Coalition and other prospective interveners and

¹⁶ *Ibid* at [para 82](#).

¹⁷ *Ibid* at paras [18](#), [133-135](#), [167](#) (fn [128](#)) and [200-202](#).

¹⁸ *The Estate of Nell Toussaint v Canada (Attorney General)* (June 9, 2023), Ontario CV-20-00649404-0000 (ONSC) ([Affidavit of Ann Toussaint, Motion record, Plaintiff](#) at paras 15, 17 on p 12).

¹⁹ *Ibid* at paras 11-14 on pp 7-8.

²⁰ *Ibid* at para 15.

“will ensure that all necessary evidence is adduced to provide an evidentiary foundation for the court to consider my late daughter’s claims.”²¹

16. Noting that the Defendant did not oppose Ann Toussaint’s motion to continue her daughter’s claim but did not concede that any of the causes of action survive the death of the late Nell Toussaint, Justice Vermette ordered on October 6, 2023, that Ann Toussaint be appointed the representative of the estate of the late Plaintiff, Nell Toussaint, for the purposes of this proceeding.²²

17. The Plaintiff filed a Fresh Amended Statement of Claim on October 19, 2023, which continues to advance the central *Charter* claims that were the focus of the CCPI Coalition’s intervention in the Motion to Strike before Justice Perell.²³ In particular, the Plaintiff seeks:

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*.²⁴

18. The Attorney General filed its Statement of Defence on November 20, 2023, advancing largely the same arguments with respect to the *Charter* claims as in the Motion to Strike. It argues, *inter alia*, that Canada’s decision on whether and how to implement treaty body Views is

²¹ *Ibid* at para 18.

²² *Ann Toussaint (Appointed representative of the Estate of Nell Toussaint) v Canada (Attorney General)* (October 6, 2023), Ontario CV-20-00649404-000 (ONSC) ([Order, Justice Vermette](#)), [2024 Brief, supra note 12](#), tab 17 at pp 152–154.

²³ [Statement of Claim](#), *supra* note 5.

²⁴ *Ibid* at para 1(g).

not a justiciable issue;²⁵ that domestic courts do not have the jurisdiction to review these matters;²⁶ that the UN Human Rights Committee’s finding of a violation of the rights to life and non-discrimination under the *International Covenant on Civil and Political Rights* bear no impact on the *Charter* analysis;²⁷ that Canada’s decision not to implement the Views was reasonable and made in good faith;²⁸ and that the rights to life and non-discrimination under both international law and under the *Charter* do not impose positive obligations to provide publicly funded health care for irregular migrants.²⁹ In addition, the Attorney General now argues that “any cause of action raised or relief requested is personal to Ms. Toussaint and does not survive the death of Ms. Toussaint”³⁰ and that the Plaintiff is not “entitled to seek relief on behalf of all irregular migrants.”³¹

Qualifications of the Members of the CCPI Coalition

i) The Charter Committee on Poverty Issues

19. The Charter Committee on Poverty Issues (“CCPI”) is a national committee founded in 1989 to bring together low-income representatives and experts in human rights, constitutional law and poverty law for the purpose of assisting disadvantaged groups in Canada to secure and

²⁵ *Ann Toussaint (Appointed representative of the Estate of Nell Toussaint) v Canada (Attorney General)* (November 20, 2023), Ontario CV-20-00649404-0000 (ONSC) ([Statement of Defence, Attorney General Canada](#)) at para 134, [2024 Brief, supra note 12](#), tab 2 at p 28.

²⁶ *Ibid* at para 132, tab 2 at p 28.

²⁷ *Ibid* at para 118, tab 2 at p 25.

²⁸ *Ibid* at paras 131, 141, tab 2 at pp 28, 29–30.

²⁹ *Ibid* at paras 101, 106–108, tab 2 at pp 21–22, 23.

³⁰ *Ibid* at para 150, tab 2 at p 31.

³¹ *Ibid* at para 120, tab 2 at p 26.

assert their rights under the *Charter*, international and domestic human rights law, and other laws in Canada.³²

20. CCPI has a recognized interest and expertise in the application of the *Charter* to disadvantaged groups and in the relationship between international human rights law and the *Charter*. CCPI has intervened in 13 cases at the Supreme Court of Canada. In all these interventions, CCPI has emphasized the importance of interpreting the *Charter* to provide at least the same level of protection as is afforded by international human rights treaties ratified by Canada, and in a manner that ensures the equal benefit of the *Charter* for those experiencing poverty or socio-economic disadvantage. Among others, CCPI intervened in:

- *Chaoulli v Quebec (Attorney General)* (“*Chaoulli*”)³³ on whether governments have positive obligations under sections 7 and 15 of the *Charter* to protect the right to life through the provision of publicly funded health care based on need;
- *Eldridge v British Columbia (Attorney General)*³⁴ on whether the *Charter* imposes positive obligations on governments to ensure equal access to publicly funded health care, including interpretation services for the Deaf, in accordance with international human rights law;
- *Gosselin v Québec (Attorney General)*³⁵ on whether section 7 of the *Charter* should be interpreted, in light of international human rights treaties ratified by Canada, to include

³² Affidavit of Bonnie Morton, Charter Committee on Poverty Issues, sworn August 5, 2024 at paras 9–10 [Morton Affidavit], CCPI Motion Record tab 2 at pp 11–12.

³³ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

³⁴ *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC).

³⁵ *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429.

positive obligations on governments to provide an adequate level of social assistance in order to protect physical and mental health; and

- *Baker v Canada (Minister of Citizenship and Immigration)*³⁶ on whether the reasonable exercise of governmental discretion must be consistent with Canada’s international human rights obligations.

21. CCPI’s contributions to these and other cases have been influential in the development of jurisprudence that has direct application in the present case.³⁷

ii) The Canadian Health Coalition

22. The Canadian Health Coalition (“CHC”) is dedicated to preserving and enhancing Canada’s public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status.³⁸

23. Founded in 1979, CHC includes organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals from across Canada. CHC promotes informed discussion and assessment of public policy and legislation linked to access to health care, based on reliable evidence and full consideration of the interests and needs of disadvantaged groups.³⁹

24. CHC provides extensive information on access to publicly funded health care and has organized national and regional conferences, hosted round-table discussions, responded to

³⁶ *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

³⁷ Morton Affidavit at paras 16–17, CCPI Motion Record, *supra* note 32 tab 2 at pp 14–15.

³⁸ Affidavit of Steven Staples, Canadian Health Coalition, affirmed August 19, 2024, CCPI Motion Record, *supra* note 32, tab 4 at p 45 [Staples Affidavit].

³⁹ *Ibid.*

hundreds of public speaking requests, made numerous presentations to parliamentary and legislative committees and met with provincial and federal politicians as well as First Nations' leaders to promote the maintenance and enhancement of Canada's public health care and health insurance system.⁴⁰

25. In 2022 CHC hosted a webinar launch of a report on the barriers to accessing health care based on immigration status.⁴¹ In 2024, CHC and the University of Ottawa's Centre for Health Law, Policy and Ethics organized the *Canada Health Act at 40 Research Roundtable* at the University of Ottawa with 75 researchers. One of the subjects addressed by experts at the roundtable was the relationship between the *Canada Health Act* and international law with regards to migrants' health care in Canada. In January 2024, CHC organized the sending of a letter signed by a number of human rights and health care experts and 500 supporting letters to federal ministers calling on Canada to accept recommendations made at the UN Human Rights Council that it ensure access to health care without discrimination on the ground of irregular immigration status and that it implement the UN Human Rights Committee's decision in *Toussaint v Canada*.⁴²

26. CHC has also participated in litigation to promote the maintenance and enhancement of the public health care system and protect universal access to health care based on need. In particular, CHC was granted intervener status jointly with CCPI before the Supreme Court of Canada in the *Chaoulli* case, as described above and in the Motion to Strike in the present case.⁴³

⁴⁰ *Ibid* at para 12, tab 4 at p 48.

⁴¹ *Ibid* at para 15, tab 4 at p 49.

⁴² *Ibid* at paras 16–17, tab 2 at pp 49–50.

⁴³ *Ibid* at para 22, tab 2 at p 52.

iii) The FCJ Refugee Centre

27. The FCJ Refugee Centre (“the Centre”) is a non-profit, grassroots organization in Toronto and a registered charity that has served refugees and other vulnerable migrant populations for more than 30 years. The Centre’s membership and clients include irregular migrants.⁴⁴

28. The Centre provides support and services to migrants in diverse circumstances in several areas, such as immigration and refugee protection and one-on-one assistance for migrant youth, survivors of human trafficking, and women and children fleeing violence and abuse.⁴⁵

29. The Centre addresses systemic issues that migrants face in Canada, including the lack of resources, marginalization, discrimination and the lack of access to education, health care, and other critical services.⁴⁶ It has supported thousands of individuals and families, many in precarious situations, to regularize their status.⁴⁷

30. Many of the Centre’s clients are denied access to provincial or federal health care due to their immigration status and are unable to secure privately funded health care because of financial barriers.⁴⁸ The Centre has partnered with other organizations in campaigning for equal access to publicly funded health care for uninsured migrants and advocated for changes to the IFHP to ensure access to health care for irregular migrants.⁴⁹

⁴⁴ Affidavit of Diana Gallego, FCJ Refugee Centre, sworn August 6, 2024 at para 8 [Gallego Affidavit], CCPI Motion Record, *supra* note 32, tab 3 at pp 32–33.

⁴⁵ *Ibid* at para 11, tab 3 at p 33.

⁴⁶ *Ibid*, at para 11, tab 3 at pp 32–33.

⁴⁷ *Ibid* at para 9, tab 3 at p 33.

⁴⁸ *Ibid* at para 13, tab 3 at p 34.

⁴⁹ *Ibid* at para 14, tab 3 at p 34.

31. In 2012, the Centre established a Primary Health Care Clinic to assist uninsured individuals to access health care. With the support of the Inner-City Health Association, it now operates a fully equipped examination room for uninsured patients, staffed by primary physicians, a team of internationally trained volunteer doctors and nurses, and one psychiatrist.⁵⁰

32. In 2021, the Centre joined the City of Toronto in the “Toronto for All Campaign” to advocate for the rights of migrants in Toronto to access safe and secure housing, health care and education for themselves and their children.⁵¹ The Centre has worked with the City to combat stigmatization, prejudice, and systemic discrimination faced by migrants and to encourage equal treatment and respect for the human rights of irregular migrants.⁵²

iv) The Madhu Verma Migrant Justice Centre

33. The Madhu Verma Migrant Justice Centre (the “Madhu Centre”) is a non-profit organization dedicated to advancing migrant justice and supporting the struggles of migrants with precarious status in New Brunswick, including migrant workers, underserved migrants, refugee claimants, international students, people with undocumented or irregular immigration status and seasonal migrant workers who leave their workplaces due to abuse, illness or another reason and find themselves without any health care coverage.⁵³

⁵⁰ *Ibid* at para 15, tab 3 at p 35.

⁵¹ *Ibid* at para 18, tab 3 at p 36.

⁵² *Ibid* at paras 20–22, tab 3 at p 37–38.

⁵³ Affidavit of Aditya Rao, Madhu Verma Migrant Justice Centre, affirmed August 6, 2024 at paras 3, 12 [Rao Affidavit], CCPI Motion Record, *supra* note 32, tab 5 at pp 62, 65.

34. Since its founding, the Madhu Centre has assisted over 100 individuals with such applications as open work permits for vulnerable workers, humanitarian and compassionate applications, temporary resident permits, pre-removal risk assessments, and judicial reviews.⁵⁴

35. The Madhu Centre operates a Migrant Worker Legal Clinic (the “Clinic”), funded by the New Brunswick Law Foundation. Launched in November 2023, the Clinic supports migrant workers and underserved migrants, including those who are in the process of securing access to health care and those excluded from public health care. It does so by helping clients secure essential health care from service providers on a voluntary basis and raise funds to cover necessary medical expenses.⁵⁵

36. The Madhu Centre also contributes to research and awareness raising about the circumstances faced by vulnerable migrants. It contributed to a report with researchers from Dalhousie University and St. Thomas University on migrant workers in New Brunswick’s seafood industry, which documented the unique challenges these migrants encountered when accessing health care.⁵⁶ In June 2023, the Madhu Centre was invited to appear before the Standing Senate Committee on Social Affairs, Science and Technology to provide testimony on the ways in which migrant workers face abuse and discrimination in their workplaces. A few months later, it participated in and helped convene a special visit by the Standing Senate Committee to New Brunswick to meet with migrant workers in order to learn more about their experiences.⁵⁷ The Madhu Centre has also assisted the UN Special Rapporteur on contemporary

⁵⁴ *Ibid* at para 9, tab 5 at p 64.

⁵⁵ *Ibid* at paras 10–11, tab 5 at p 64–65.

⁵⁶ *Ibid* at para 13, tab 5 at p 65–66.

⁵⁷ *Ibid* at para 14, tab 5 at p 66.

forms of slavery to assess the situation with respect to closed work permits in Canada in June 2023, including by convening a symposium for the Rapporteur to meet migrant workers.⁵⁸

PART III – ISSUES AND ANALYSIS

37. The issue to be decided is whether the CCPI Coalition should be granted leave to intervene in the action under Rule 13.01 of the *Rules of Civil Procedure* as an intervening party with strictly limited participatory rights and immunity from costs or, in the alternative, under Rule 13.02 as a friend of the court in conjunction with an order providing access to documentary discovery and authorization to observe examinations for discovery.

Leave to Intervene as a Party under Rule 13.01

Rule 13.01 states that:

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

38. The *Rules* should be liberally interpreted “to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”⁵⁹ As the Court noted in *M v H*,

⁵⁸ *Ibid* at para 15, tab 5 at p 66.

⁵⁹ *Rules*, *supra* note 1 [r 1.04.1](#).

[r]egardless of whether the proposed intervention is sought under rule 13.01 or rule 13.02, the court's focus should be on determining whether the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original action.⁶⁰

39. The Court has recognized that cases involving the *Charter* may have a significant impact on others who are not immediate parties, and for that reason there has been a relaxation of the rules governing leave to intervene in those cases.⁶¹

40. The CCPI Coalition satisfies the requirements described in Rule 13.01(1)(a) and (b). Its members include organizations that have both direct legal interests and significant practical interests in the issues on which they seek to assist the Court, and they will be significantly affected by the Court's judgment.

41. The CCPI Coalition also satisfies all of the three criteria identified by the Ontario Court of Appeal, namely that a proposed intervenor should: (i) "ha[ve] a real substantial and identifiable interest in the subject matter of the proceedings"; (ii) "ha[ve] an important perspective distinct from the immediate parties"; or (iii) be "a well-recognized group with a special expertise and a broadly identifiable membership base." The proposed intervenor must be able to make a useful contribution, in light of the nature of the case and the issues that arise, without causing injustice to the immediate parties.⁶²

42. The terms on which the CCPI Coalition proposes to intervene as a party have been designed to ensure that the Court and the parties are able to benefit from the significant expertise and unique perspectives of the Coalition's member groups without any significant effect on the

⁶⁰ *M v H*, 1994 CanLII 7324 (ONSC) at [p 16](#).

⁶¹ *Bedford v Canada (Attorney General)*, 2009 ONCA 669 (CanLII) at [para 2](#); *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)*, 1990 CanLII 6886 (ONCA) at [pp 4-5](#).

⁶² *Ibid.*

magnitude, timing, complexity or costs of this action. As a party intervener, the CCPI Coalition agrees to work within the discovery plan and schedule agreed by the parties or ordered by the Court. There would be no cost consequences associated with the observer role requested by the CCPI Coalition at examinations for discovery.

The Members of the CCPI Coalition have a Substantial and Identifiable Interest in the Action and are likely to be Affected by the Outcome

43. The FCJ Refugee Centre includes irregular migrants among its members and clients and provides health care to irregular migrants who have been denied access to publicly funded essential health care.⁶³ It therefore has a direct interest in the outcome of this action and, in particular, whether Canada's refusal to implement the Human Rights Committee's Views is upheld; whether immigration status is found to be an analogous ground; and whether denying essential health care is found to violate section 7 of the *Charter*.⁶⁴

44. The Madhu Centre works with irregular migrants on many issues of discrimination and provides services to irregular migrants to find safe sources of health care when they are denied access to publicly funded health care.⁶⁵ "The Madhu Centre is frequently called upon to allocate time and resources to assist migrants with problems related to the denial of access to publicly funded health care and the work of the organization would be significantly advanced if the systemic remedy required by the UN Human Rights Committee's Views, and sought by the Plaintiff in this case, is implemented."⁶⁶

⁶³ Gallego Affidavit, *supra* note 44, at paras 8, 13-15, CCPI Motion Record pp 32-33, 34-35.

⁶⁴ Gallego Affidavit, *ibid*, at paras 8, 13-15, CCPI Motion Record pp 34-35.

⁶⁵ Rao affidavit, *supra* note 53, at paras 11-12, CCPI Motion Record pp 64-65.

⁶⁶ Rao Affidavit, *ibid*, at para 40, CCPI Motion Record p 68.

45. As an organization committed to ensuring access to effective remedies through consistent interpretations of sections 7 and 15 of the *Charter* and to calling Canada to account when it fails to live up to its international human rights obligations, CCPI has a significant interest in the outcome of this action. Its work to promote access to justice for disadvantaged groups under the *Charter* for violations related to access to essential health care or other necessities and will be directly affected by the outcome of this case, as will their work promoting implementation of international human rights in Canada.⁶⁷

46. The Canadian Health Coalition CHC has a direct interest in the Court's determination in this case of whether the *Charter* is to be interpreted as providing the same level of protection of the right to life and non-discrimination in access to publicly funded health care as in access to privately funded health care, and whether the protections accorded by these rights under the *Charter* are of the same level as those found in the *International Covenant on Civil and Political Rights*.⁶⁸

The CCPI Coalition has an Important Perspective Different from the Parties

47. Unlike the parties, the CCPI Coalition is not addressing the issue of compensation for the Plaintiff for previous violations of rights to life and non-discrimination. Instead, the CCPI Coalition will focus on the requirement that Canada adopt measures necessary to ensure irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

⁶⁷ Morton Affidavit, *supra* note 32, at para 35, CCPI Motion Record p 24.

⁶⁸ Staples Affidavit, *supra* note 38, para 29, CCPI Motion Record p 55.

48. The CCPI Coalition is uniquely positioned to provide the perspective of groups that have worked for many years, and intervened in many previous cases, on the *Charter* issues that are directly raised in this case. This perspective will be helpful to the Court in considering the novelty of the claims in this case, the public interest in allowing the claims to proceed, and the key issue of what constitutes settled law under the *Charter*.

49. The CCPI Coalition will also bring the important perspectives of irregular migrants who continue to be denied access to essential health care, of those working directly with migrants in need of health care, and of those working to combat discrimination and stigma faced by members of this group. Each member of the CCPI Coalition is a well-recognized group with a special expertise in the matters to be considered in this case. In particular, CCPI's expertise in advancing interpretations and applications of the *Charter* that properly consider the perspective of disadvantaged groups and are consistent with international human rights law has been widely recognized both in Canada and internationally, including by the Supreme Court of Canada, UN and domestic human rights bodies, the Social Sciences and Humanities Research Council of Canada and other research funders, and the National Judicial Institute, among others.

The CCPI Coalition is a Well-recognized Group with a Special Expertise and a Broad Membership Base

50. CHC has a broad membership base including organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals from across Canada. Its expertise in health care has been recognized by the Supreme Court of Canada, parliamentary committees and government officials.⁶⁹

⁶⁹ Staples Affidavit, *supra* note 38 at paras 3, 12, 21, 32, CCPI Motion Record, tab 4 at pp 45, 48, 51, 56.

51. The FCJ Refugee Centre has a recognized expertise in the barriers facing irregular migrants when accessing services such as health care, as reflected in its partnership status and efforts with the City of Toronto to promote the human rights of irregular migrants.⁷⁰

52. The Madhu Centre has recognized legal and policy expertise in the diverse experiences of migrants denied access to health care, often because of breakdowns in relations with employers and the resulting loss of formal immigration status, including in rural and remote communities.⁷¹

The CCPI Coalition will Make Distinct and Useful Contribution to the Resolution of the Matter Before the Court

53. Drawing on the expertise and interests of all four member groups and consulting closely with other interveners to avoid duplication, the CCPI Coalition proposes to assist the Court in considering the critical issues about the scope of sections 7 and 15 of the *Charter*, and the application of these sections to irregular migrants when their lives are placed at risk by the denial of access to essential health care. It will also provide assistance to the Court in considering the novel questions raised by this case about the effect of a human rights treaty body's Views on the interpretation of *Charter* rights.

The Proposed Intervention is Consistent with Rule 13.01 and with Principles of Legality and Access to Justice

54. While the rights of intervening parties usually extend to broader participatory rights, including the rights to adduce evidence and cross examine witnesses, the Court has a broad discretion to specify the terms of any participation in discovery under Rule 13.01 and in this

⁷⁰ Gallego Affidavit, *supra* note 44 at paras 18, 20–22, CCPI Motion Record, tab 3 at pp 36–38.

⁷¹ Rao Affidavit, *supra* note 53 at para 18, CCPI Motion Record, tab 5 at p 67.

case, to limit the CCPI Coalition's participation in discovery in the manner described above. As Justice Molloy explains in *Trempe v Reybroek*,⁷²

Rule 13.01 contains a built-in safeguard in the form of judicial discretion. The right to intervene is not automatic upon meeting one of the three tests set out in the sub-clauses of the rule. Rather, there is an overriding discretion set out in rule 13.01(2) based on whether the intervention would “delay or prejudice the determination of the rights of the parties to the proceeding”. Further, the intervention may be granted on such terms as the court considers just. That might extend to granting full rights to participate on the same basis as any party, but might also be more restrictive. For example, the intervening party might be restricted to argument only with no right to file evidence. The broad judicial discretion afforded by this sub-rule prevents the addition of a party if this would cause an injustice to the existing parties.⁷³

55. Courts have imposed a wide range of restrictions on the participation of interveners under Rule 13.01, and the manner in which the CCPI Coalition proposes to participate in discovery is well within the range of options described by Justice Molloy.

56. Granting the CCPI Coalition intervener party status under Rule 13.01 on the proposed terms is consistent with the important objective of ensuring access to justice by way of public interest litigation in this case. It will also enable the Plaintiff to benefit from the CCPI Coalition's perspective and expertise in providing the Court with a concrete and well-developed factual setting informed by the perspective of those directly affected by the outcome.

57. The Attorney General pleads in this case that “any cause of action raised or relief requested is personal to Ms. Toussaint, and does not survive the death of Ms. Toussaint.” It

⁷² *Trempe v Reybroek*, 2002 CanLII 49410 (ONSC) [*Trempe v Reybroek*].

⁷³ *Ibid* at [para 21](#).

argues that the Plaintiff is not entitled to seek systemic relief for other irregular migrants affected by Canada's refusal to give effect to the Committee's Views.⁷⁴

58. Any challenge by the Attorney General to the Plaintiff's standing to continue with her daughter's *Charter* claims will need to be considered in light of the purposes of granting public interest standing in this case as well as the role of public interest interveners. As the Supreme Court of Canada has stated: "Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights."⁷⁵

The principle of legality encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), [2014] 3 S.C.R. 31, at para. 40). may also guide the Court in considering the potential role of public interest intervening parties.⁷⁶

59. The Supreme Court of Canada has established that a public interest *Charter* claim, including a claim under sections 7 and 15 of the *Charter*, may proceed without a directly affected plaintiff where a sufficiently concrete and well-developed factual setting can be established.⁷⁷ Lower courts have applied the principle of legality and access to justice to grant public interest standing to family members as representatives of the estate of deceased plaintiffs

⁷⁴ [Statement of Defence, Attorney General Canada](#)), *supra* note 25 at paras 150, 120, 2024 Brief, *supra* note 25, tab 2 at pp 26, 31.

⁷⁵ *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 (CanLII) [BC v CCD] at [para 36](#).

⁷⁶ *Ibid*, at [para 33](#).

⁷⁷ *Ibid*, at [paras 66-67](#); *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45](#), [2012] 2 S.C.R. 524 at [para 31](#).

to continue *Charter* claims.⁷⁸ In the present case, the CCPI Coalition seeks to advance the principle of legality and access to justice not by assuming the role of a public interest plaintiff but rather, by providing assistance to the existing, eminently qualified public interest Plaintiff as well as to the Court.

60. This case raises, in the starkest terms the issues of legality and access to justice as well as concerns related to the efficient allocation of judicial resources. The Attorney General proposes that after Nell Toussaint's two-decade long effort to secure access to justice to ensure that what happened to her should not happen to others, her *Charter* claims must go unheard and the decision of the UN Human Rights Committee in her case unimplemented. It is unlikely that in the foreseeable future another person in Nell Toussaint's circumstances will have the opportunity to secure a decision from the UN Human Rights Committee and bring this issue again before the courts.

61. As representative of the estate for the purposes of the action, Ann Toussaint has a direct interest in the implementation of the Human Rights Committee's Views. As described in paragraph 15 above, she has an intimate connection to the dignity issues experienced by her daughter, the benefit of an expert legal team, and public interest test case litigation funding. In order to ensure that she is able to provide the Court with a full record on which to assess the systemic claims affecting irregular migrants as well as the critically important issues of *Charter* interpretation at issue in this case, she and her legal team wish to draw on the expertise and perspectives of public interest interveners during the discovery process. The CCPI Coalition

⁷⁸ [*Grant v. Winnipeg Regional Health Authority et al.*, 2015 MBCA 44 \(CanLII\) at para 92](#); [*Selkirk et. al. v. Trillium Gift of Life Network et. al.*, 2021 ONSC 2355 \(CanLII\) at paras 67-68](#).

wishes to play as helpful a role as possible in this respect and, as outlined above, is especially well placed to do so.

62. The CCPI Coalition’s proposed role of providing useful expertise and advice during the discovery process and providing the Court with the perspective of those directly affected by the ongoing denial of access to essential health care as an intervening party, through written and oral submissions, is informed by and in accord with principles of access to justice and legality. Granting the CCPI Coalition intervener status on the proposed terms is fully consistent with the objective of “secur[ing] the just, most expeditious and least expensive determination”⁷⁹ of the issues in the present action.

Immunity from Costs

63. Immunity from cost awards is the norm under Rule 13.02 where interventions have generally been restricted to making written and oral arguments at trial. In his order granting the CCPI Coalition leave to intervene in the Motion to Strike under Rule 13.02, Justice Belobaba ordered “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.”⁸⁰ The Attorney General has consented to such immunity for interveners under Rule 13.02 in this action.

64. Although different considerations apply to intervening parties under Rule 13.01, courts have provided immunity from cost awards to public interest groups granted intervener status under Rule 13.01 in some *Charter* cases, even when interveners played a more active role than

⁷⁹ *Rules, supra* note 1 r 1.04(1).

⁸⁰ *Toussaint 2022, supra* note 9.

is proposed by the CCPI Coalition in this case.⁸¹ In *Whirlpool Canada Co v Chavila Holdings Limited*,⁸² Master Short suggested that the approach to be taken to costs protections in *Charter* cases is different from the approach in private disputes. He observed that protection from costs on consent in a 13.01 intervention by EGALE in a *Charter* case “reflects the role the court expects an intervenor to play.”⁸³

65. The terms of intervention under Rule 13.01 sought by the CCPI Coalition in the present case are unique, in that the cost consequences of the proposed intervention are no different from those of an intervention under Rule 13.02 to make oral and written submissions. The CCPI Coalition’s proposed participation in discovery would have no significant cost consequences for either party. In these circumstances, it is submitted that protection from a potential cost award is appropriate.

Intervention under Rule 13.02 as a Friend of the Court

66. Alternatively, the Court may grant leave to the CCPI Coalition to intervene under Rule 13.02 as a friend of the court, in conjunction with additional orders providing access to documentary discovery and permitting attendance at examinations for discovery as an observer. The CCPI Coalition adopts and relies on the submission of Amnesty International and ESCR-Net in support of this alternative.

67. Since the CCPI Coalition does not propose to actively participate in discovery other than in an observer capacity, the Court may grant leave to intervene on the proposed terms under Rule

⁸¹ See, for example, *Affleck v AGO*, 2019 ONSC 1292 (CanLII) at [para 28](#); *CanWest Media Works Inc v Canada (Attorney General)* at [para 14](#), 2006 CanLII 37258 (ONSC).

⁸² *Whirlpool Canada Co v Chavila Holdings Limited*, 2015 ONSC 2080 (CanLII).

⁸³ *Whirlpool Canada Co v Chavila Holdings Limited*, at [para 61](#).

13.02 including the same order as was granted by Justice Belobaba granting leave to intervene in the Motion to Strike “that 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.”⁸⁴

Access to Documentary Discovery

68. Rule 30.1.01(3) states that: “All parties and their lawyers are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.” The Court has discretion under Rule 30.1.01(8) to provide relief from the deemed undertaking rule and “may impose such terms and give such 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.”

69. The CCPI Coalition relies on the submissions of Amnesty International and ESCR-Net in support of an order providing access to documentary discovery in conjunction with a Rule 13.02 intervention. In line with the arguments made above with respect to principles of access to justice and legality, it is consistent with these principles to ensure that an individual plaintiff advancing a claim in the public interest and wishing benefit from the relevant expertise of intervening groups is not prevented from seeking advice about documentary discovery by the deemed undertaking rule.

Attending Examinations for Discovery

70. In *Rikhye v Rikhye*,⁸⁵ Bloom J. summarized the principles concerning non-parties’ attendance at cross-examinations and examinations for discovery as follows:

⁸⁴ [Belobaba Order](#), *supra* note 13, 2024 Brief, *supra* note 12.

⁸⁵ [Rikhye v Rikhye](#), 2017 ONSC 4722 (CanLII).

The following principles emerge from two judgments of the Ontario Superior Court of Justice, the judgment of Master Dash in *Poulton v. A.&P. Properties Limited*, [2005 CanLII 4105](#) and the judgment of Master Muir in *DeGrandis v. 1123951 Ontario Limited*, [2016 ONSC 4335](#):

1. since a cross-examination on an affidavit is not a public hearing, a non-party may attend to assist a party only on the consent of the other side or on the order of the court;
2. the onus is on the party seeking such an order to prove entitlement to it;
3. the non-party should not be a witness at the subsequent trial;
4. the attendance of the non-party must not disrupt the examination process; and
5. the non-party must not take the role of witness or assist the witness in answering questions.

I add to those principles the principle, which is inherent in our system of justice, that a court in exercising its jurisdiction as to whether to allow the presence of a non-party must do so having regard to both substantive fairness to the parties and the appearance of fairness.”⁸⁶

71. The attendance of a representative of the CCPI Coalition to observe examinations, where these are relevant to the issues with which CCPI Coalition wishes to address in its intervention and where the CCPI Coalition may provide useful expertise or advice to the plaintiff, is consistent with the above considerations.

72. This case deals with complex systemic issues affecting groups represented in the CCPI Coalition, including irregular migrants in need of health care for the protection of their lives. Considerations of both substantive fairness and the appearance of fairness are enhanced by permitting organizations familiar with the circumstances of groups directly affected by Canada’s refusal to implement the Human Rights Committee’s Views to attend and observe examinations for discovery. This would ensure that the parties can benefit from these organizations’ expertise and perspective in the assessment of evidence, particularly when the Plaintiff may not have the resources to pay for transcripts. In turn, the CCPI Coalition’s attendance at examinations will

⁸⁶ *Ibid* at [paras 7 - 8](#).

contribute to the completeness of the record filed by the parties, thus allowing it to provide the greatest possible assistance to the Court by way of argument at trial respecting the systemic issues involved.

PART IV – ORDER SOUGHT

73. The Charter Committee on Poverty Issues, the Canadian Health Coalition, the FCJ Refugee Centre and the Madhu Verma Centre for Migrant Justice (the CCPI Coalition) respectfully request:

- a) Leave to intervene as a party in this action pursuant to Rule 13.01 to file a factum and make oral argument at trial and at any pre-trial motions that are relevant to the issues to be addressed by the CCPI Coalition, on terms to be determined by the presiding judge, to access documentary discovery produced by the immediate parties and to observe examinations for discovery; and
- b) An order that the CCPI Coalition not be granted costs, nor costs be ordered against them as an intervening party in this action; or

In the alternative

- c) Leave for the CCPI Coalition to intervene as a friend of the court pursuant to Rule 13.02 to file a factum and make oral argument at trial or at any pre-trial motions relevant to the issues to be addressed by the CCPI Coalition, on terms to be determined by the presiding judge;
- d) An order that the CCPI Coalition be provided access to documents produced by the immediate parties in discovery and be authorized to observe examinations for discovery, with an order that it be then bound by Rule 30.1 concerning deemed undertaking; and

- e) An order that the CCPI Coalition not be granted costs, nor costs be ordered against them as a friend of the court in this action; and
- f) Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Martha Jackman



Yin Yuan Chen

Lawyers for the Moving Party, CCPI, CHC, FCJ Refugee Centre and the Madhu Verma Migrant Justice Centre