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

(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Defendant

(Responding Party)

REPLY FACTUM OF THE MOVING PARTY, PLAINTIFF

(Returnable on October 10, 2024)

Dated: October 7, 2024

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Overview

1. The default rule for civil actions like the present case which are commenced in Toronto is that they proceed to mandatory mediation within 180 days of the filing of the first defence. The purpose is to help the parties reach a faster and less expensive resolution of the issues between them. However, the rules recognize that in certain cases mediation within the 180 days, or at all, is not likely to do so, and therefore rather than saving time and expense it actually may delay the procedure and cause greater expense or may not be appropriate for other reasons.

2. Courts have identified several criteria as relevant to whether an exception from mandatory mediation should be granted, of which two are particularly applicable in the present case. As noted in the plaintiff's initial factum, the court should determine "whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing costs and delay they ought not to be required to repeat the effort". Secondly, the court should consider "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".[1]

3. Evidence regarding attempts on behalf of the plaintiff to resolve the issues in the action by engagement with Canada through various United Nations review and follow-up procedures involving the highest levels of the Canadian government is contained in the affidavit and cross-examination of Mr. Bruce Porter. Mr. Porter is an international human rights consultant with extensive experience in United Nations procedures who co-represented Ms Toussaint before the United Nations Human Rights Committee and afterwards in these procedures, thus having first hand information to provide about how the procedures were utilized and how Canada responded to attempts at resolution.

4. It is difficult to understand why Canada objects to the admissibility of this evidence from the person with the most direct knowledge of attempts at resolution and engagement with Canada while conceding, as it does in paragraph 37 of its supplementary factum, that the evidence is accurate and could have been presented by way of some other affidavit.

5. Professor Margot Young, a professor of law, presents evidence relevant to the second factor, whether the issues are of public interest and importance and in need of adjudication.

[1] *G.O.* v *C.D.H.*, 2000 CanLII 22691 (ON SC) ("*G.O.*") at para 13

Professor Young's areas of expertise are: constitutional law, sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*; public law; and social justice and the law. The focus of much of Professor Young's work has been on access to justice by and the adjudication of *Charter* claims of marginalized and disadvantaged groups in Canada. In her opinion adjudication of the issues in the present case is timely and important to meet the needs of disadvantaged and marginalized groups, including irregular migrants. Canada characterizes Professor Young's evidence about the nature of the claims in this action as "trite" and offering "no assistance to this Court". Yet at the same time Canada recognizes in paragraph 45 of its supplementary factum that the nature of the claim is a factor that the court needs to take into account.

6. The plaintiff makes the following points as to why the evidence of Mr. Porter and Professor Young is necessary on this motion, and why Mr. Porter's evidence, characterized by Canada itself as "historical", is actually impartial evidence of facts presented by someone who has both the direct knowledge of attempts to resolve the issues through United Nations procedures and expertise in the international procedures he describes as having been utilized.

Evidence of Mr. Bruce Porter

7. Mr. Porter was not asked to, and did not, express an opinion about the "ultimate question" of whether or not this action should be exempted from mandatory mediation. Rather, his evidence, whose historical accuracy was conceded by Canada as noted above, was presented to the court so the court can consider and balance the factor of 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".[2]

8. On cross-examination Mr. Porter responded to the suggestion that his affidavit evidence was not impartial by explaining that:

> "I did ensure that I separated, and I did, I think, in my -- in the form that I signed regarding the duty of the -- of an expert, I was making clear that I -- what I was doing in this affidavit wasn't advocating for them, but rather providing information to the court about efforts that have been made to resolve the issue in the case. And some of what I'm describing is efforts that I have made as an advocate, but the affidavit itself I consider to be simply providing accurate information to the court."[3]

and later in the cross-examination stating:

> "It's true that I'm describing procedures that were used -- that I used in advocating for a particular outcome. That's true, but my description of the procedures and of the outcome of attempting to use those, I think, is entirely objective."[4]

9. As for Canada's submission in paragraph 38 of its factum that the historical events described by Mr. Porter "are clearly not attempts to settle the issues raised in this action, in the sense suggested by the Rules", it is not the Rules but rather Justice Kitely's decision in *G.O.* which lists as a factor in considering whether to exempt an action from mandatory mediation, "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*". (emphasis added)

10. Mr. Porter explains in his cross-examination how the follow-up procedure before the Human Rights Committee about the implementation of its decision in *Toussaint* v. *Canada*

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[2] *Ibid.*
[3] Transcript of Porter cross-examination, Q. 10, p. 5, l. 14 to p. 6, l. 3
[4] Transcript of Porter cross-examination, p. 13, ll. 4 to 8

provides an opportunity for dialogue to resolve the dispute where he concludes his answer, quoted only partially in Canada's Supplementary Factum, by saying in the italicized passage:

> " . . . what the follow-up procedures that the UN Human Rights Committee generally involve is engaging with the state party around implementing the views, and they certainly can be involved in dialogue with the state party about trying to encourage them to do better or to -- you know, to make changes that are necessary and so on. So it's not mediation in the way that you might be describing it, but it's attempting to settle the issue, and there's some flexibility around compromise and so on. *It's not as if the committee has, in its follow-up measures, is saying you have to do precisely this. They're engaged in dialogue with the state party to try to ensure as much as possible that the issues that they've identified of concern are resolved, and so it's a form of mediation in my view, but it's a different form*.[5]

11. Mr. Porter's evidence demonstrates that Canada's response to multiple attempts to resolve the issues in this case through United Nations human rights procedures has been a consistent refusal by Canada to implement recommendations to ensure access to essential health care for irregular migrants and to provide the plaintiff with compensation.

12. Canada's response to the Human Rights Committee's attempt to encourage a resolution in April 2022, one and a half years after the start of this action, was that Canada "would not be taking any further measures to give effect to the Committee's views". Canada maintained that position in its report to the United Nations Human Rights Council in April 2024 after the Canadian delegation, headed by the Minister of Justice and Attorney General of Canada, received recommendations to resolve the issue during the Council's Universal Periodic Review of Canada. The most plausible conclusion is that Canada is not prepared to compromise it's position and that mandatory mediation would be a waste of time and money.

[5] Transcript of Porter cross-examination, Q. 36, p. 18, l. 9 to p. 19, l. 5,

Evidence of Professor Margot Young

13. Professor Young is not giving an opinion on the "ultimate issue" that the court is called on to decide on this motion, namely whether the action should or should not be exempted from mediation or whether mediation should be postponed until after discovery. Her opinion is as to whether the issues in the action involve matters of public interest or importance which require adjudication, one of the factors that the Honourable Justice Kitely in *G.O.*[6] identified that the court may take into account in deciding whether to exempt an action from mandatory mediation. Professor Young provides evidence relevant to the court's consideration of this factor.

14. Professor Young's evidence in paragraph 7 of her affidavit that ". . . the issues in this action engage matters of significant public interest" is in stark contrast to Canada's characterization of this action as one for damages and Canada's position that it "is not 'public interest' litigation simply because it is brought against a government and involves policy issues."[7] Professor Young's evidence is in line with views expressed by the learned Justice Perell in dismissing Canada's motion to strike, that this action presents "a complex factual and legal matrix that may affect others by the precedent set by Ms. Toussaint's sad case."[8] Canada has characterized Justice Perell's views as "obiter comments"[9], although not pointing to

[6] *G.O.*, at para 13
[7] Factum of Canada, paras. 15 and 16
[8] *Toussaint* v. *Canada (Attorney General)* 2022 ONSC 4747, at para. 11
[9] Factum of Canada, paras. 14

specific passages of the decision. Canada's different characterizations highlight the need for and usefulness of the independent evidence of Professor Young.

15. Professor Young expresses her opinion as to the importance of the issues in the present case being adjudicated for marginalized and disadvantaged groups. She states that "Adjudication of these issues is timely and important, in particular, for groups for whom the rights protected in the *Charter* are too often beyond their reach because of access to justice issues and lacunae in an evolving jurisprudence."[10] The balance of her affidavit sets out the reasons for her opinion. Her opinion was not shaken on her cross-examination. This evidence goes directly to the existence and nature of the second factor listed above, whether the issues in this case are of public interest and importance that need to be adjudicated.

16. In her cross-examination Professor Young answered why the implications of this particular case are broader and more important than in other section 7 and 15 *Charter* cases, where she stated:

> "specific to the context and the circumstances of the claimant involved in this case, there is an added emphasis that needs to be understood that *these rights have particular salience to those who most need access to Charter rights because of their marginalized and disempowered status in Canadian society.*
> So the context of the expert evidence I give you is very specific to the character of the claimant or the cast of claimants, let me put it that way, that are involved in this case.
> So I am referencing a sector, a group of those resident in Canada who are among the most marginalized and the most disempowered, and *it is my expert opinion that Charter rights are most significant, of telling importance for this group, that indeed, they are the ones in Canadian society who have one of the most acute needs to have judicial consideration of the extent and import of the rights they have under the Charter*."[11] (emphasis added)

[10] *Ibid.*
[11] Transcript of Young cross-examination, Q. 15, p. 8, l. 10 to p. 9 l. 6

17. Canada incorrectly states in paragraph 16 of its Supplementary Factum that "Prof. Young would not acknowledge that the efforts of proposed intervenors in this case, outside of this litigation, are one avenue to bring attention to issues raised by marginalized groups." Professor Young was asked if the proposed interveners Amnesty and Charter Committee on Poverty Issues, and the intervener Canadian Civil Liberties Association, do "extensive" work to bring attention to issues affecting marginalized groups in Canada outside of this action. She responded that all of these groups "are certainly commentators in public" although the national body of the Canadian Civil Liberties Association was more litigation oriented than the B.C.-based civil liberties association.

18. Professor Young expanded in her cross-examination on her opinion in paragraph 14 of her affidavit that "too often there are few other avenues through which attention can be brought to issues of marginalized groups", referring specifically to undocumented migrants when she stated:

> "I would amplify that statement in my affidavit by saying that *when you deal with marginalized and vulnerable groups, such as the intersection of groups that characterize Ms. Toussaint's identity,* that the avenue is more powerful and centrally located individuals in groups like political lobbying, any other ways in which one might partake in civil discourse around one's issues. *They are not that accessible for resource reasons for the dangers inherent in being an undocumented migrant, for example, and taking a public role, so I think the statement stands that individuals who have access to resources and who occupy the mainstream of Canadian society face many more options and meaningful options for having their perspectives, their rights, and their issues of well being brought to public attention and entering into public discourse*."[12] (emphasis added)

[12] Transcript of Young cross-examination, Q. 26, p. 15, ll. 4 to 22

19. In responding to the suggestion that one of the purposes of mediation in a civil action is to conserve judicial resources, Professor Young answered as follows:

> "What I am saying here is that there are circumstances to this particular case that I would argue point in the direction of fuller adjudication of the rights at issue, and one of those circumstances is that this case involves key constitutional rights of a significantly marginalized and disadvantaged individual and group to which she belongs."[13] (emphasis added)

20. Professor Young disagreed with the suggestion of counsel for the defendant that there are already many court decisions at all levels and in all jurisdictions under sections 7 and 15 of the *Charter* involving positive rights and socioeconomic interests and under section 15 involving analogous grounds. She expressed the opinion that:

> "So no, I disagree with your statement. *I think on all three of those counts, coverage of social and economic rights, the possibility of positive obligations or at least of understanding that some of our key rights are a mix of both positive and negative obligations, and I am just looking for the third, positive rights and analogous grounds under section 15. Those are underdeveloped areas of law, particularly at courts of appeal and the Supreme Court of Canada. There is much argument to be had and much more certainty to be reached about the extent of those issues under sections 7 and 15.* (emphasis added)[14]

21. Finally, Professor Young disagreed with the suggestion that her opinion was to the effect that the jurisprudence in this area had not "come down in favour of people like Ms. Toussaint often enough". She explained her opinion evidence as follows:

> "*No, that is absolutely not what I mean. By insufficiently developed, I mean that questions are still open ones, so I am not speaking to some sort of criterion of the right result has yet to be reached. That is absolutely not my evidence.*

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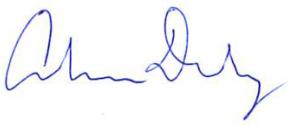
[13] Transcript of Young cross-examination, p. 18, ll. 12 to 19
[14] Transcript of Young cross-examination, p. 20, l. 18 to p. 21, l. 5

My evidence is that these questions are still open questions and that they raise important issues that because they are still open are deserving of full judicial consideration and that this case in particular provides that opportunity."[15] (emphasis added)

Plaintiff's alternative submissions

22. The plaintiff's initial factum on this motion sets out alternative submissions regarding postponement of the hearing of this motion for exemption, or in the further alternative postponing mandatory mediation, until after discovery is completed should this Honourable Court not exempt the action from mandatory mediation at this time. The evidence of Professor Young about the public interest and importance of the case supports the plaintiff's earlier submission that the "complexity and novelty of this matter would warrant a thoughtful review by the Plaintiff of materials and testimony obtained through discovery, prior to engaging in mediation".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of October, 2024.



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[15] Transcript of Young cross-examination, Q. 34, p. 21, l. 25 to p. 22, l. 11

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Toussaint (Estate of) plaintiff (moving party)	-and-	Canada (Attorney General) defendant (responding party)

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PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF THE PLAINTIFF

(motion returnable on October 10, 2024)

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