CITATION: Toussaint v. Attorney General of Canada, 2025 ONSC 2007
COURT FILE NO.: CV-20-00649404-0000
DATE: 20250331

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING Plaintiff	*Andrew Dekany*, for the Plaintiff
– and –	
ATTORNEY GENERAL OF CANADA Defendant	*David Tyndale* & *Asha Gafar*, for the Defendant *Yin Yuan Chen* and *Martha Jackman* for the Proposed Intervenors, Charter Committee on Poverty Issues, Canadian Health Coalition, FCJ Refugee Centre and Madhu Verma Migrant Justice Centre **HEARD:** October 10, 2024

PAPAGEORGIOU J.

AMENDED REASONS

Overview

[1] Various intervenors seek to intervene in this proceeding which involves migrant rights to health care in Canada. I am case managing this matter.

[2] Between 2010 and 2011, Nell Toussaint (the "Plaintiff") brought judicial review proceedings to the Federal Court regarding Canada's failure to provide her with healthcare funding

as an irregular migrant worker. The Federal Court dismissed her Application. She then brought a proceeding before the United Nations Human Rights Committee (the "UN Human Rights Committee" or the "Committee"). In 2018, the Committee concluded that Canada had violated her right to life and her equality rights. It directed that Canada provide Ms. Toussaint compensation and take steps so that other similarly situated migrants would have the right to healthcare.

[3] Canada did not follow the direction of the Committee, and Ms. Toussaint brought this proceeding. She sought a declaration that Canada's failure to give effect to the Views adopted by the Committee violates ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Ms. Toussaint sought an order under s. 24(1) of the *Charter*, requiring Canada to give effect to the Views of the Human Rights Committee in a manner that complies with the *Charter.*

[4] Finally, Ms. Toussaint pleaded that Canada is in violation of articles 6 and 26 of the *International Covenant on Civil and Political Rights* and that Canada has a duty to ensure that there is an effective remedy for its violations.

[5] After Ms. Toussaint commenced this proceeding, the Defendant, the Attorney General of Canada ("Canada" or the "Defendant"), brought a motion to strike this proceeding. Justice Perell dismissed the motion.

[6] Belobaba J. granted intervenor status as friends of the court in respect of the motion before Perell J. to several of the intervenors who now seek to intervene in this action. Those intervenors are as follows:

- The Charter Committee on Poverty Issues, the Canadian Health Coalition, and the FCJ Refugee Centre, (the "CCPI Coalition")
- Amnesty International Canada ("Amnesty International")
- International Network for Economic, Social and Cultural Rights ("ESCR-Net").
- Canadian Civil Liberties Association ("CCLA") and
- Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Legal Clinic of Ontario and the Chinese Southeast Asian Legal Clinic (the "Colour of Poverty")

[7] Justice Belobaba found that these intervenors "[could] usefully assist the court with the nuanced constitutional and international human rights issues that arise [in this case]." 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."

[8] There are a variety of issues before me.

[9] One of the issues relates to the nature of these parties' proposed intervention in the proceeding, going forwards.

[10] At a case conference in or around June 2024, the CCPI Coalition, Amnesty International and ESCR-Net indicated they wished to intervene as friends of the court with the right to review all productions and attend at discovery as observers only. They did not seek any right to file pleadings, ask questions at the discovery, introduce evidence, and indicated they would not object to questions, or otherwise interfere with the proceeding. They agreed that they will accept the record as filed by the Plaintiff and Canada and that they would not seek a right of appeal. Further, they would be bound by the deemed undertaking rule. They also sought an order at the outset that they would not be liable for any costs.

[11] Canada took the position that they could not have the additional rights they sought unless they sought to intervene as a party and not merely as a friend of the court.

[12] As such, before me, the CCPI Coalition brought a motion to intervene as a party pursuant to r. 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, or alternatively as a friend of the court pursuant to r. 13.02. In either case, it seeks the right to attend discovery and see productions as set out above.

[13] Amnesty International and ESCR-Net seek only to intervene as friends of the court pursuant to r. 13.02, but again, with the right to attend discovery and see productions as set out above. They seek the exact same rights as the CCPI Coalition.

[14] Notwithstanding its position at the case conference, Canada opposes that the CCPI Coalition be permitted to intervene as a party. While it does not oppose their intervention as friends of the court, it says that they must take the record as it is at trial and cannot obtain the additional rights they seek as friends of the court.

[15] The Canadian Civil Liberties Association ("CCLA") and the Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Legal Clinic of Ontario and the Chinese and Southeast Asian Legal Clinic (the "Colour of Poverty Coalition") seek to intervene as a friend of the court at the trial of this action. They do not seek any corollary orders related to production and discovery. Canada has consented to this.

[16] There are also new proposed intervenors who bring motions:

- The J4MW-Windsor Law Migrant Farmworker Legal Clinic, the Industrial Accident Victims Group of Ontario (IAVGO) Community Legal Clinic, and Justicia for Migrant Workers (the "Migrant Worker Coalition") seeks to intervene as a friend of the court at the trial of this action. It does not seek any corollary orders related to production and discovery. Canada objects to this on the basis that there are already too many intervenors.

[17] The Plaintiff supports all the intervention motions and corollary relief sought. To the extent necessary, the Plaintiff seeks an order permitting her to disclose productions and relieving her of the implied undertaking rule.

[18] She also seeks an order at the outset that she may disclose productions and discovery information to academics, experts, and prospective experts to assist her with the litigation. She is concerned that if she discloses productions to any of these intervenors or experts, then Canada will argue that she has breached the implied undertaking rule.

[19] At the outset, I note that the Plaintiff, Ms. Nell Toussaint, passed away shortly after Perell J. dismissed the motion to strike. Her mother, Ann Toussaint, became the representative of Ms. Toussaint's Estate and has secured funding from the Court Challenges Program of Canada to continue her daughter's claim.

Decision

[20] For the reasons that follow I add the CCPI Coalition, Amnesty International and ESCR-Net as friends of the court with the rights they requested. I am not adding the CCPI Coalition as a party because this request was only driven by Canada's position at the case conference. In my view, the CCPI Coalition brought the request to be added as a party out of an abundance of caution given Canada's position. Given that adding it as a friend of the court will give it all the rights it seeks, there is no need to add it as a party.

[21] However, if I am wrong that these intervenors cannot have the rights they seek as friends of the court as a matter of law, then I have conducted the analysis and would add CCPI Coalition as a party in the alternative. It fully satisfies the test for intervention as a party and I would exercise my discretion to provide the CCPI Coalition with the corollary rights it seeks as a party.

[22] In all cases, I also order that these intervenors are shall not receive or be liable for costs.

[23] I also grant the intervention orders sought by the CCLA, the Colour of Poverty Coalition and the Migrant Worker Coalition and also order that they shall not receive or be liable for costs.

[24] I do not grant the Plaintiff's motion to declare she may share all discovery evidence and productions with proposed experts and academics, which motion I adjourn to a future date. At this stage productions are not complete, and the nature of Canada's concerns may not be fully apparent. If the parties cannot resolve this, the Plaintiff may bring this motion back for consideration after productions are complete.

Issues

- Issue 1: Do the CCPI Coalition, Amnesty International and ESCR-Net satisfy the test to intervene as friends of the court pursuant to r. 13.02?

- Issue 2: Does the court have the discretion to permit the CCPI Coalition, Amnesty International and ESCR-Net to review productions and attend at discovery, as friends of the court, and if so, should the court exercise its discretion to permit this?

- Issue 3: Should this court grant a blanket order relieving the Plaintiff from the deemed undertaking rule with respect to academics, experts and consultants that she wishes to engage to assist her in this litigation?

- Issue 4: Does the court have the discretion to make an intervention order that could also apply to unanticipated motions, like a motion for summary judgment, and if so, should it make this order?

- Issue 5: Should the court exercise its discretion to relieve the CCPI Coalition, Amnesty International, and ESCR-Net from liability for costs?

- Issue 6: In the alternative, does the CCPI Coalition satisfy the test for intervention as a party pursuant to r. 13.01?

- Issue 7: If so, should the court exercise its discretion to relieve the CCPI Coalition of liability for costs?

- Issue 8: Do the CCLA and the Colour of Poverty Coalition satisfy the test for intervention as a friend of the court?

- Issue 9: Does the Migrant Worker Coalition satisfy the test for intervention as a friend of the court and if so, should it be denied intervenors status on the basis that there are already too many intervenors?

- Issue 10: Should the court make orders either exempting this matter from mandatory mediation per r. 24.1 or extending the time for it?

Analysis

Issue 1: Do the CCPI Coalition, Amnesty International and ESCR-Net satisfy the test to intervene as friends of the court pursuant to r. 13.02?

[25] I conclude that these parties satisfy the test to intervene as friends of the court at trial, pursuant to r. 13.02. The rule states:

> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[26] In *Bedford v. Canada (Attorney General),* 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2, and *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, (Ont. C.A.), at pp. 167-168, the court directed that in order to obtain an intervention order, the proposed intervenor must: (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": at para. 2.

[27] As noted, Canada raises no issue that these parties do not satisfy the test for intervention as a friend of the court at trial, as long as they take the record as it is.

[28] Justice Belobaba concluded that these parties met the required test in respect of the r. 21 motion.

[29] The extensive motion materials before me provide considerable support for the conclusion that all of these organizations have a real and substantial identifiable interest in the subject matter of this proceeding, that they have an important perspective distinct from the immediate parties, that they are well-recognized groups with special expertise and a broadly based membership base, and that they can make a useful contribution without causing injustice.

[30] In summary, these organizations:

- Have recognized interests and expertise in both the application of the *Charter* to disadvantaged groups and the relationship between international human rights law and the *Charter*.

- Have intervened in multiple relevant cases at all levels of court and been recognized as having such an interest and expertise.

- Have influenced the development of the jurisprudence that is relevant and applicable to this case.

- Have directly researched the relationship between the *Canada Health Act* and international law with respect to migrants' health care in Canada.

- Have made submissions to various international organizations regarding Canada's compliance with its international human rights obligations, particularly with respect to migrant health care.

Issue 2: Does the court have the discretion to permit the CCPI Coalition, ESCR-Net and Amnesty International to review productions and attend at discovery as friends of the court, and if so, should it exercise its discretion in this way?

[31] The moving parties argue that where a party intervenes as a friend of the court, the court has discretion to impose terms and enhance the rights of the intervenor beyond simply offering argument. They rely upon Perell J.'s commentary in Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 5th ed. (LexisNexis Canada, 2024) at ¶4.443.

> Intervention as a friend of the court to render assistance by way of argument does entitle the intervenor to participate in the fact-finding process; however, the court can impose terms and enhance the rights of the intervenor beyond simply offering argument. Thus, sometimes there is little to distinguish between whether an intervenor order is made under rule 13.01 or 13.02.

[32] Canada argues that the clear wording of r. 13.02 prohibits this discretion. In that regard, it emphasizes the wording in r. 13.02 that the court may grant intervenor's status "for the purpose of rendering assistance to the court by way of argument." Canada says that in all cases of intervention as a friend of the court, the intervenor must take the record as they find it.

[33] However, r. 13.02 has not been so narrowly confined. In *CREES (EEYOU ISTCHEE) et al v. Canada (Attorney General) et al*, 2017 ONSC 3729, [2017] 4 C.N.L.R. 47, the court added an intervenor as a friend of the court and then gave that intervenor the right to attend all examinations for discovery, receive all documents filed by the parties, and obtain copies of transcripts to all parties in like manner. In my view, the case before me is consistent with *CREES*.

[34] Canada also argues that the Orders sought as a matter of fact will result in the intervenors doing significantly more than assisting the court. However, it provided no evidence to support this, not even an affidavit setting out this belief. It could have, but did not seek to cross examine any of the moving parties or conduct a r. 39 examination of the Plaintiff on these issues.

[35] Given the complexity of the matter, giving the intervenors the requested rights is in the service of their ability to render assistance for the court's benefit.

[36] Canada also argues that providing these intervenors with these rights will increase the costs of this matter. However, if the intervenors will not file pleadings, ask questions or make objections, I fail to see any significant impact on the costs of the litigation. Canada could not persuasively articulate any such prejudice or impact. Again, Canada did not provide any evidence or conduct any cross examinations or r. 39 examinations that supported this argument.

[37] Canada further says that this type of intervention should be curtailed because the Plaintiff has asked for a wide range of documents, including public inquiry documents, which is far-reaching. The far-reaching nature of the requested documents is not relevant to the issue of the

intervenor's ability to see productions; it is an issue of the scope of production which can be dealt with by Canada as part of the production process, and also before me since this matter is case managed.

[38] Canada also says that the deemed undertaking rule prevents the Plaintiff from sharing productions with the intervenors. I disagree.

[39] Rule 30.1.01(3) provides as follows:

> *Deemed Undertaking*
>
> (3) 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.

[40] The deemed undertaking rule "does not operate to prevent disclosure to non-parties": *Seedling Life Science Ventures LLC v. Pfizer Canada Inc*., 2017 FC 826, 152 C.P.R. (4th) 319, at para. 32. It only prevents use of the discovery information for reasons that are "collateral" or "ulterior" to the action: *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, at para. 26; *Power v. Parsons*, 2018 NLCA 30, 25 C.P.C. (8th) 1, at paras. 15-21.

[41] Parties often share information obtained through discovery with experts, potential witnesses, consultants, litigation funders, regulators, and "others whose advice is relevant to the carriage of the litigation": *Seedling*, at para. 32; *Winkler v. Lehndorff Management Ltd.* (1998), 28 C.P.C. (4th) 323 (Ont. C.J – Gen. Div.), at paras. 15-18; *Lithwick (In Trust) v. Hakim Optical Labroratory Ltd.* (2007), CarswellOnt 7907 (Ont. S.C.J.), at para. 20; *Abou-Elmaati v. Canada (Attorney General)*, 2014 ONSC 6301, at paras. 1-4, 25-27; *Power*, at paras. 17-18; and *Sovani v Gray et al.*; *Jampolsky v. Shattler et al.*, 2007 BCSC 403, at paras. 43-50, leave to appeal denied, 2007 BCCA 439.

[42] Providing the desired information to friends of the court does not undermine the purpose and integrity of the deemed undertaking rule because they do not seek to use the material for "collateral" or "ulterior" purposes. When a non-party receives information obtained through discovery, the non-party is automatically bound by the deemed undertaking rule: *Canadian National Railway Company v. Holmes,* 2014 ONSC 593, at paras. 26-33, 37; *Winkler*, at paras. 15-18; and *Live Face on Web, LLC v. Soldan Fence and Metals (2009) Ltd*., 2017 FC 858, 150 C.P.R. (4th) 368, at para. 14.

[43] In any event, as part of my order, I will expressly order that the intervenors are bound by the deemed undertaking rule.

[44] Even if the deemed undertaking rule applied, the court has the discretion, per r. 30.1.01(08), to order that the undertaking does not apply where the interests of justice outweigh any prejudice that would result:

[45] An exemption from the deemed undertaking rule is only granted in exceptional cases. When exercising its discretion under rule 30.1.01(8), the court must weigh the public interest at stake or interests of justice against the values protected by the deemed undertaking rule, namely privacy and the efficient conduct of civil litigation: *Juman*, at para. 32; *Kitchenham v. AXA Insurance Canada*, 2008 ONCA 877, 94 O.R. (3d) 276, at paras. 10, 57.

[46] Here, there is no meaningful countervailing privacy interest that should prevent the Plaintiff from sharing productions with the intervenors.

[47] The cases cited by Canada are not analogous.

[48] Canada cites *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (Ont. S.C.J.); however, it is not relevant. In *Drabinsky*, the non-party sought to use discovery information for extraneous purposes in a separate, threatened proceeding in the United States. In contrast, the intervenors here seek to use the discovered documents solely within the four corners of the proceeding in which they were obtained. I make a similar point with respect to the other cases Canada cites, all of which involved disclosure for purposes collateral to the litigation: *Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2022 FCA 135, 471 D.L.R. (4th) 746, at para. 53; *N.M. Paterson & Sons Ltd. V. St. Lawrence Seaway Management Corp.*, 2002 FCT 1247, at paras. 7-9, upheld on appeal, 2004 FCA 210; *XY, LLC v. Canadian Topsires Selection Inc.*, 2012 BCSC 1797, 40 B.C.L.R. (5th) 325, at para. 175; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Invest Bank PSC c. Al-Husseini,* 2022 QCCS 4031, at paras 31-36; and *Ludmer c. Canada (Attorney General)*, 2014 QCCS 4853.

[49] In addition, these intervenors are not true non-parties or "strangers" to the litigation; rather, the Plaintiff and Canada have agreed that they should have court-approved status in the proceeding. While *Drabinsky* was about preventing non-party strangers swooping into a proceeding, extracting discovery information, and deploying it elsewhere for ulterior purposes, that is not the case here.

[50] In my view, if it was required, the interests of justice would favour ordering that the deemed undertaking rule does not apply to these intervenors.

[51] Finally, I note that the court has the discretion to permit non-parties to attend discovery: *Rikhye v. Rikhye*, 2017 ONSC 4722.

Issue 3: Should this court grant a blanket order relieving the Plaintiff from the deemed undertaking rule with respect to academics, experts and consultants that she wishes to engage to assist her in this litigation?

[52] The Plaintiff also sought an Order that the deemed undertaking rule does not prevent it from sharing productions and discovery transcripts with academics, experts, and consultants.

[53] Canada's position is that the Plaintiff would have to bring a motion with respect to each and every document and each and every non-party that it seeks to consult. This makes no sense. In litigation, parties routinely communicate with such non-parties to obtain assistance with their litigation and show such non-parties documents for the purpose of the litigation. The reason why there is no precedent for such an order is that it is so obvious.

[54] I also disagree with Canada's argument that there is "no problem" with letting Canada know each time it proposes to communicate with non-parties to obtain assistance with this proceeding. Requiring the Plaintiff to bring motions with respect to each and every document and each and every non-party expert or academic would effectively require the Plaintiff to disclose its litigation strategy. It would be costly and extremely inefficient.

[55] However, I do not make this order at this time. The parties have not yet completed productions and the nature of Canada's concerns cannot be fully understood in a vacuum. It is unknown whether some documents could be confidential such that additional protections are required. The prudent course is to proceed with the production phase. If the parties cannot resolve this matter, the Plaintiff may bring the motion back on for consideration.

Issue 4: Does the court have the discretion to make an intervention order that could also apply to unanticipated dispositive motions, like a motion for summary judgment, and if so, should it make this order?

[56] I agree that the court should make an order now to apply to unanticipated dispositive motions for the following reasons.

[57] In a case conference brief filed with the court, the Plaintiff alluded to the fact that Canada may seek to bring a motion for summary judgment and or a further motion to strike. All of the above intervenors want to intervene on such motion if it is brought.

[58] This is now the second motion for intervention. If these parties have already persuaded two courts that they should be entitled to intervene in respect of a dispositive motion like a motion to strike and now at trial, then in my view, they also have a basis to intervene as a friend of the court in other motions that could dispose of this proceeding. It makes little sense to require them to re-apply for intervention status. Indeed, that would waste time, expenses, and the court's scarce resources. It is unclear what objection Canada could possibly raise given Belobaba J.'s previous order and the position it took before me.

[59] Here, I reference r. 1.04(1), and the backlog in the civil justice system.

[60] I note that the proposed Order preserves for the court ultimately hearing the trial and any dispositive motions to set limits on the oral and written submissions. If there is a dispositive motion planned, then as case management judge, I can hear submissions and then impose limits for such a motion.

Issue 5: Should the court exercise its discretion to relieve the CCPI Coalition, Amnesty International and ESCR-Net from liability for costs as friends of the court?

[61] The general rule is that a party who intervenes as a friend of the court pursuant to r. 13.02 is neither liable for, nor entitled to, costs: *Canadian Union of Postal Workers*, at para. 8; *Ogichidaakwe (Grand Chief), et al. v. Ontario Minister of Energy, et al.*, 2015 ONSC 7582, at para. 8; and see also *Keewatin v. Ontario (Natural Resources)*, 2012 ONCA 891, at para. 3.

[62] The general rule will "usually" apply when the intervention is in the public interest: *Canadian Union of Postal Workers*, at para. 43. See *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1990), 70 Man R (2d) 59 (Man. Q.B.), at para. 11.

[63] Again, I see no basis to disturb the general rule in this case and Canada could not persuasively articulate anything that should take this matter outside the general rule. These intervenors are public interest intervenors seeking to assist the court in unpacking a complex area.

[64] Canada has not been able to show how their intervention will appreciably increase the time or expense of the proceeding, even if they have the right to see productions and attend discovery.

Issue 6: Does the CCPI Coalition satisfy the test for intervention as a party pursuant to r. 13.01?

[65] I consider this in the alternative in the event that I am wrong about my conclusions that the CCPI Coalition can obtain the rights it seeks as a friend of the court.

[66] Rule 13.01 provides as follows:

> 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.
>
> (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.

[67] A court should consider the following in the exercise of its discretion

- The nature of the case
- The issues that arise
- Whether the proposed intervenor has an interest in the subject matter of the proceeding, whether they may be adversely affected, or whether there are questions of law and fact in common between the proposed intervenor and one of the parties to the proceeding
- The likelihood that the proposed intervenor will be able to make a useful contribution without causing undue delay or prejudice to the determination of rights. The court must be satisfied that the potential contribution is distinct, different from that of the Plaintiff, and sufficient to counterbalance the disruption caused by the potential increase in the magnitude, timing, complexity, and costs of the original action: *M. v. H* (1994), 20 O.R. (3d) 70, at pp. 76-7; *Halpern v. Toronto (City) Clerk* (2000), 51 O.R. (3d) 742, at paras. 13-21; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, (Ont. C.A.), at pp. 167-168; *Trempe v. Reybroek* (2002), 57 O.R. (3d) 786, at para. 21.

[68] Notably, in *Trempe*, at para 21, Molloy J. noted the broad judicial discretion and that the Court's order could provide full rights of participation or order that such rights be restricted.

[69] I find that the CCPI Coalition has satisfied all aspects of the test.

The Nature of the Case

[70] The Fresh as Amended Statement of Claim sets out that the nature of this case is both a personal claim brought by Nell Toussaint claiming that Canada violated her rights, as well as a systemic claim related to other migrants who do not receive healthcare in Canada.

The CCPI Coalition's interests in the subject matter of the proceeding and its ability to provide a distinct perspective

[71] In *Halpern*, at paras. 13-21, Lang J. reviewed the caselaw and concluded that "interest in the subject matter of the proceeding" has been interpreted to include a public interest in the proceeding, to the extent that the party's interest is over and above that of the general public. She also referenced the fact that greater latitude is given to intervenor motions in cases involving *Charter* challenges because such challenges involve a greater public interest.

[72] Notably, since *Halpern*, the Supreme Court has also recognized the ability of nonprofit public organizations to bring claims related to *Charter* breaches on the basis of public interest standing in appropriate cases.

[73] In *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, 62 B.C.L.R. (6th), a not-for-profit organization working for the rights of people living with disabilities in Canada, together with two individuals, filed a claim challenging the constitutionality of certain provisions of British Columbia's mental health legislation. They asserted that the impugned provisions violated ss. 7 and 15 of the *Charter*, which are the same provisions at issue here. The two individuals who had been affected by the provisions withdrew from the litigation, leaving only the not-for-profit organization as the plaintiff.

[74] The Supreme Court upheld the lower court's decision to allow the not-for-profit to continue the action on its own on the basis of it having public interest standing. The Court stated that "public interest standing provides an avenue to litigate the legality of government action in spite of social, political or psychological barriers to access which may preclude individuals from pursuing their legal rights": at para. 36. In particular, the Court stated at para. 33:

> The legality principle 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).

[75] The issue before me is not the same as that in *B.C. v. Council of Canadians with Disabilities.* This is a motion to intervene as a party, with far fewer requested participatory rights than a public interest litigant granted standing would have. However, the overall finding that the not-for-profit in *B.C. v. Council of Canadians with Disabilities* had a sufficient interest to bring the case on its own as a public interest litigant is important for the present motion. That finding may guide the court in its exercise of its discretion in this case.

[76] In the present case, the CCPI Coalition seeks to advance the principle of legality and access to justice as a party intervenor, which brings this within the principle expressed in B.*C. v. Council of Canadians with Disabilities*.

[77] The CCPI Coalition has also established that it has a substantial interest in the subject matter of the proceeding. It has also established that it is a well-recognized group with a special expertise and broad membership base and that it will be able to make a distinct and useful contribution to the resolution of the issues before the court. In that regard, it works with regular migrants who have a direct interest in this proceeding and who will be directly affected by the findings in this case. It has a broad membership base and is a recognized expert in respect of the impact of barriers to health care.

[78] I highlight the following background information about the CCPI Coalition from its materials in support.

(i) CCPI Coalition

[79] The CCPI Coalition 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 assert their rights under the *Charter*, international law, domestic human rights law, and other laws in Canada.

[80] The CCPI Coalition 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 has specifically intervened in the following cases involving access to health care and/or Canada's international human rights obligations:

- *Chaoulli v. Quebec (Attorney General)* ("*Chaoulli*")[1] on whether governments have positive obligations under ss. 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)*[2] on whether the *Charter* imposes positive obligations on governments to ensure equal access to publicly funded health

[1] *Chaoulli v. Quebec* (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791.
[2] *Eldridge v. British* Columbia (Attorney General), [1997] 3 S.C.R. 624.

care, including interpretation services for the Deaf, in accordance with international human rights law.

- *Gosselin v. Québec (Attorney General)*[3] on whether s. 7 of the *Charter* should be interpreted, in light of international human rights treaties ratified by Canada, to include 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)*[4] on whether the reasonable exercise of governmental discretion must be consistent with Canada's international human rights obligations.

[81] The CCPI Coalition's contributions to these cases and others have been influential in the development of jurisprudence that has direct application in the present case.

[82] As an organization committed to ensuring access to effective remedies through consistent interpretations of ss. 7 and 15 of the *Charter*, CCPI has a significant interest in the outcome of this action. It has worked to promote access to justice for disadvantaged groups under the *Charter* for alleged violations related to access to essential health care or other necessities. It will be directly affected by the outcome of this case, as will its work promoting the implementation of international human rights in Canada.

(ii) CHC

[83] The Canadian Health Coalition ("CHC"), which is a part of the CCPI Coalition, was founded in 1979 and 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. It 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.

[84] In 2022, CHC hosted a webinar launch of a report on the barriers to accessing health care based on immigration status. 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. At the roundtable, the experts addressed the relationship between the *Canada Health Act*, R.S.C., 1985, c. C-6, 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

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[3] *Gosselin v. Québec* (Attorney General), 2002 SCC 84, [2002] 4 SCR 429.
[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

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 Canada ensure access to health care without discrimination on the ground of irregular immigration status, and calling on Canada to implement the UN Human Rights Committee's decision in ICCPR, Communication No. 2348/2014*, Nell Toussaint v. Canada*, UN Doc. CCPR/C/123/D/2348/2014.

[85] 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 before the Supreme Court of Canada in *Chaoulli*, as described above, and in the Motion to Strike in the present case.

[86] 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 compared to 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* (the "ICCPR").

(iii) The Centre

[87] 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.

[88] 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.

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

[90] 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. 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 Canadian legislation to ensure access to health care for irregular migrants.

[91] In 2012, the Centre established their 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.

[92] 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. The Centre has worked with the City of Toronto to combat stigmatization, prejudice, and systemic discrimination faced by migrants, and to encourage equal treatment and respect for the human rights of irregular migrants.

[93] Additionally, the Centre provides health care to irregular migrants who have been denied access to publicly funded essential health care. Therefore, it has a direct interest in the outcome of this action.

(iv) Madhu Centre

[94] 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. The individuals it supports includes 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.

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

[96] The Madhu Centre operates the 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.

[97] Therefore, it has a direct interest in the outcome of this proceeding.

[98] The Madhu Centre also contributes to research and raising awareness 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. 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. The Madhu Centre has also assisted Professor Tomoya Obokata, UN Special Rapporteur on contemporary 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.

The Issues and the distinct contribution that the CCPI Coalition will make

[99] The CCPI Coalition proposes to focus its intervention on one component of the claim in this action. Its proposed intervention relates to the Plaintiff's request for a declaration that the Defendant's decision not to give effect to the Views adopted by the UN Human Rights Committee (the decision in *Nell Toussaint v. Canada*), thus refusing to ensure that irregular migrants are no longer denied access to essential health care when their lives are at risk, violates ss. 7 and 15 of the *Charter*. The Plaintiff further seeks an order under section 24(1) of the *Charter*, requiring Canada to give effect to the Views in a manner that complies with the Charter. The CCPI Coalition seeks leave to intervene to assist the court in assessing this element.

[100] Specifically, the CCPI Coalition seeks to assist the court with the following questions:

i. Whether s. 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 Committee's Views is in accordance with the principles of fundamental justice under s. 7 of the *Charter*, 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 ICCPR and its Optional Protocol, 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 Committee's Views in this case and other factors, immigration status should be recognized as an analogous ground of discrimination under s. 15 of the *Charter*.

[101] The CCPI Coalition says that 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.

[102] The CCPI Coalition brings together the perspective of those who experience the same harms as the Plaintiff did. The CCPI Coalition is uniquely positioned to assist with the resolution of this matter and to ensure that the court has a full record upon which to decide the issues, as it is fully attuned to the perspective of those directly affected. It is uniquely positioned to address systemic issues as well as the issues of legality, accountability, and access to justice.

[103] Its perspective is different because unlike the Plaintiff, it will not be addressing the issue of compensation for a past violation; rather, it will address whether Canada's ongoing failure to implement the Views of the Committee violates the *Charter* rights which it says are essential to protect migrant lives.

[104] Notably, there is no evidence before me that the Plaintiff is someone who has the perspective of all migrants or those denied health care, on whom the CCPI Coalition intends to focus. Nor do I have evidence before me that the Plaintiff has available to her all of the research and expertise that the CCPI Coalition has assembled over the years, and which may be relevant to the wider issue of alleged systemic discrimination.

[105] The decision in this matter will impact many individuals who are not immediate parties to this proceeding. For this reason, it is critical that the court has the benefit of various perspectives.

[106] Perell J.'s decision on the motion to strike also supports the conclusion that it has a valuable and distinct perspective.

Undue Delay and Prejudice from the Proposed Intervention

[107] For the same reasons set out above with respect to its intervention as a friend of the court, there is no persuasive argument or evidence before me that the kind of participation it seeks will cause undue delay or prejudice.

Issue 7: If so, should the court exercise its discretion to relieve the CCPI Coalition of liability for costs?

[108] I also exercise my discretion to relieve liability for the following reasons.

[109] As noted, pursuant to r. 13.02, immunity from costs is the norm.

[110] Courts have provided immunity from costs awards to public interest groups granted intervenor status under r. 13.01 in some *Charter* cases, even when the intervenors played a more active role than that proposed by the CCPI Coalition: *Affleck v. AGO*, 2019 ONSC 1292, 49 C.P.C. (8th) 431, at para. 28; *CanWest Media Works Inc. v. Canada (Attorney General),* 2006 CanLII 37258, at paras. 14-15.

[111] Indeed, the general rule is that a public interest intervenor is neither liable for nor entitled to costs: *North American Financial Group Inc, v. Ontario Securities Commission*, 2018 ONSC 1281, at para. 14; *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2017 ONSC 6503, 19 C.P.C. (8th) 136, at para. 11.

[112] In *Whirlpool Canada Co. v. Chavila Holdings Limited*, 2015 ONSC 2080, Master Short suggested that the approach to be taken to costs protections in *Charter* cases is different from the approach in private disputes: at paras. 60-62. He observed that protection from costs in a 13.01 intervention by EGALE in a *Charter* case "reflects the role the court expects an intervenor to play": at para. 61.

[113] The CCPI Coalition is a not-for-profit relying on pro bono counsel. It will not be able to participate at all if it could be liable for costs. I accept the point that groups like migrants, who are already economically challenged, would have difficulty bringing forth this case and that they must rely upon not-for-profits like the CCPI Coalition. The CCPI Coalition's participation is important for the proper adjudication of this matter, but it would not be able to participate without an order that it not be liable for costs.

[114] Given the scope of this intervention, its involvement, even if as a party, will not increase costs in any significant way beyond what would be incurred if it merely intervened as a friend of the court without such rights.

[115] I reject Canada's argument that the fact that Ann Toussaint is a non-resident should somehow mean that the proposed intervenors should not be immune from costs. Canada provided no evidence on this issue.

[116] I also reject its argument that this claim is so tenuous that there should not be a no costs order so as to discourage the parties from pursuing this case where public resources are expended. Canada raised that argument with Perell J. and failed to persuade him that the claim was so tenuous that it should be dismissed. I also do not see how the arguments that the Plaintiff should have brought this action as a class proceeding are relevant to the issue of costs.

Issue 8: Do the CCLA and Colour of Poverty Coalition satisfy the test for intervention as a friend of the court?

[117] This matter is going on consent. The CCLA and the Colour of Poverty Coalition were intervenors at the motion before Perell J. and it was determined that they satisfy the test to intervene as a friend of the court. Canada raises no issues that their intervention will increase the time and expense of the proceeding or will cause it any prejudice. I agree that there is a sufficient basis for these interventions.

Issue 9: Does the Migrant Worker Coalition satisfy the test for intervention as a friend of the court and if so, should it be denied intervenors status on the basis that there are already too many intervenors?

[118] The Migrant Worker Coalition seeks to intervene as a friend of the court and file a factum and present oral argument at the trial of this matter.

[119] Canada's main arguments are that Nell Toussaint was not a migrant worker and that there are already so many intervenors from interested parties that the court should exercise its discretion to control the scope of this proceeding.

[120] Here, I return to the *Bedford* test.

[121] The Migrant Worker Coalition has a real substantial and identifiable interest in the subject matter of this proceeding and is a well-recognized group with special expertise and a broadly identifiable membership base. It consists of public interest organizations working towards the fair and just treatment of migrant agricultural workers in Ontario and throughout Canada. The outcome of this case will have serious implications for its constituents' rights to health care.

[122] The Migrant Worker Coalition is composed of Justicia for Migrant Workers ("J4MW"), the Migrant Farmworker Legal Clinic ("MWFC"), and the Industrial Accident Victims Group of Ontario ("IAVGO"). They are reputable community-based organizations with a long history of community service and advocacy, representing diverse racialized and/or immigrant communities and workers in Ontario. Collectively, they have developed specialized expertise on issues facing migrant agricultural workers, and this expertise has been recognized by various levels of government, the courts, and international bodies.

[123] J4MW is a non-profit, grassroots collective based in Toronto, Ontario, advocating for the fair and just treatment of migrant agricultural workers in Ontario and throughout Canada. J4MW creates inclusive spaces for marginalized agricultural workers and community labour advocates to engage in anti-oppressive social, political, and legal learning and action. J4MW works closely with migrant workers who face both precarious immigration and employment status in Canada, and who often have to work in hazardous workplaces, leading to serious injuries, illness, or death. The majority of J4MW members are also racialized persons.

[124] MWFC was established in 2020 by a joint collaboration between J4MW and the University of Windsor, Faculty of Law, with funding from the Law Foundation of Ontario. The MFWC has represented and given summary advice and public legal education to hundreds of migrant farm workers in Southern Ontario since then. The clinic is administered by a dedicated staff lawyer, Windsor Law academics, J4MW organizers, and other lawyers and legal professionals on a pro bono basis. It is also supported by the Transnational Law and Racial Justice Centre at Windsor Law. The clinic provided extensive legal and other support during the COVID-19 pandemic in the

Windsor-Essex region and is especially attuned to the risk of death, disease, and disability for racialized individuals due to the absence of universal health care.

[125] IAVGO is a specialty community legal clinic funded pursuant to the Ontario *Legal Aid Services Act, 2020*, S.O. 2020, c. 11, Sched. 15. For 49 years, IAVGO has worked on behalf of injured workers and the surviving family members of workers killed on the job. It has represented thousands of injured workers in appeals before the Workplace Safety and Insurance Board and Workplace Safety and Insurance Appeals Tribunal. IAVGO also conducts public legal education about workers' compensation law, trains hundreds of law students, and engages in policy and law reform work. Most of its clients are marginalized workers who were injured or sickened in the course of precarious employment. Because of their exceptional vulnerability, IAVGO has chosen to prioritize the issues facing migrant farmworkers and their families when they are injured, sickened, or killed on the job. Many of IAVGO's clients, especially those who are migrant workers, struggle to access health care because of their precarious and fluctuating immigration status.

[126] The members of the Migrant Worker Coalition have extensive experience representing migrant farmworkers in accessing their rights. Both collectively and separately, they have also intervened in cases addressing racially discriminatory legislation/policy, workplace safety, and immigrant rights at various levels of court, including the Supreme Court of Canada. They have been granted status to intervene in cases including, but not limited to, the following: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R v. Peart*, 2017 ONSC 782 (Div. Ct.); *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711; *O.P.T. v. Presteve Foods Ltd* ., 2015 HRTO 675; *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35.

[127] In *Fraser*, the Migrant Worker Coalition assisted the Court to understand how its decision about agricultural workers' ability to unionize would affect racialized migrant agricultural workers. IAVGO and J4MW have also represented farm workers in cases about their right to health care. For example, in *OHIP v. Clarke & Williams*, 2014 ONSC 2009, 119 O.R. (3d) 782, they advocated for two migrant farmworkers who were denied health care coverage because their work permits had expired through the TFW program.

[128] J4MW and IAVGO also intervened at the Divisional Court in *Schuyler Farms Limited* to advocate in favour of public health protections to reduce migrant workers' risk of getting infected with COVID- 19. In its decision, the court cited the Migrant Worker Coalition's submissions in observing that "MFWs are exceptionally vulnerable to health risks because of their immigration status, race and the precarious employment relationships imposed by the structure of the programs under which they are employed": at para. 86.

[129] The Migrant Worker Coalition seeks to intervene to make a useful and distinct contribution based on its knowledge and expertise by showing how the denial of access to essential federal health care violates the rights of migrant farmworkers under the *Charter* and international human

rights law. Their expertise and direct experience in issues related to systemic barriers and vulnerability faced by migrant workers places them in a unique position to offer a useful contribution to the analysis in this case.

[130] In particular, the decision in this case will have a significant effect on the legal rights of the injured and racialized migrant farmworkers they represent and assist. Notably, this case will bring attention to the migrant farmworkers who perform dangerous work on Canada's farms and greenhouses, a particular class of precarious migrants who are not otherwise being represented before the court and highlight the impact of Canada's determination on this particular class of migrants.

[131] The Migrant Worker Coalition will provide the following arguments to assist the court, which are distinct from the Plaintiff's arguments and those of other intervenors:

- Migrant farmworkers are systemically excluded from any decision-making power in workplaces: they have no power around their contracts, their housing, or the terms of their employment. In this context, it is more important for the court to ensure that the voices of migrant farm workers are heard in decisions that matter to them.

- Migrant workers are brought to work in Canada through Canada's federal temporary foreign worker (TFW) system. As a result of the structures of the TFW system, migrant farmworkers have precarious status. They work in conditions of "unfree" labour, where their status to live and work is dependent on the employers to whom they are tied. Their right to remain in Canada is conditional on their employer's wishes. When they suffer injuries or disabilities or report health and safety risks, they often lose their jobs, their status and with it, their access to health care because their access to health care is tied to their legal status to work in Canada and to their continued ability to work for their employers.

- Many are also required to live on their employers' rural farms relying on their employer for access to health care. By the terms of these programs, employers generally have carte blanche to fire workers for any reason, including health reasons and injuries. For example, in the Seasonal Agricultural Worker Program (the "SAWP"), employers are entitled to fire workers and have them repatriated for "non-compliance, refusal to work, or any other sufficient reason." The UN Special Rapporteur on contemporary forms of slavery recently stated that Canada's temporary foreign work program "serves as a breeding ground for contemporary forms of slavery, as it institutionalizes asymmetries of power that favour employers and prevent workers from exercising their rights."

- The UN Special Rapporteur on contemporary forms of slavery also observed that the fact that migrant workers do not have access to federal settlement services (which includes the Interim Federal Health Program ("IFHP")) is one of the discriminatory conditions that produces their vulnerability to abuse and adverse health conditions. Even in the arbitrary,

singular cases where a worker does receive IFHP (often in extraordinary, extenuating cases), they face prohibitively long processing times without any health care as their status is ascertained. For example, a Jamaican migrant worker in Nova Scotia was diagnosed with cancer in 2022, but only received access to the IFHP in August 2023, and only received that care up until January 2024. In most cases, workers have no chance of receiving IFHP when they need it the most: Professor Tomoya Obokata *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* (UN, July 22, 2024) at para. 25.

- As such, temporary foreign worker programs create systems that invite migrant labourers into the workforce and economy in Canada but leave a vacuum of support when these same workers are seriously injured or sickened. Many of the migrant workers are invited to Canada through contractual agreements that promise them employment, fair working conditions, and healthcare. However, by denying these workers access to healthcare when they suffer injuries and disabilities, Canada is not only failing to uphold its own commitments but also disregarding the legitimate expectations of humane treatment and dignified access to health care when individuals come to contribute to the economy.

- Further, migrant farm agricultural workers do disproportionately hazardous work, which is recognized as dangerous, dirty, and demeaning. They are unlikely to report health and safety violations or accidents because of their justified fear that employers will fire them and repatriate them when they challenge unsafe working conditions. This magnifies impacts on their health and subjects them to extreme exploitation.

- Thus, the Migrant Worker Coalition will argue that tying access to healthcare to immigration status precludes migrants, including migrant farmworkers, from accessing essential and life-saving health care when they need it the most. As a result, the deprivation of essential health care to migrants with precarious status is inconsistent with the principles of fundamental justice. The denial is overbroad and arbitrary and is a form of jurisdictional neglect.

- The government's denial of essential health care based on precarious immigration status discriminates against migrant farmworkers, contrary to s. 15 of the *Charter*, based on the analogous ground of being an injured migrant worker. Migrant workers who are racialized and made disabled are a historically disadvantaged group, lacking in political power and are vulnerable to having their interests disregarded. The federal government has been historically discriminatory in providing federal medical care, even to those legally admitted to the country to work in farms. As noted by the Federal Court of Canada in *Toussaint v. Canada (Attorney General)*, 2010 FC 810, [2011] 4 F.C.R. 367, ex-members of the Polish military were given federal health care through an Order-in-Council for working in agriculture. Yet, racialized migrant farmworkers today are given no access: *Toussaint*, at para. 32.

- The status of an injured migrant worker is difficult or impossible to change because the Government of Canada has designed its migrant worker programs to prevent workers from regularizing their immigration status. Migrant workers represent a subset of the non-citizen population that faces unique forms of exclusion arising from intersecting identity markers. The status of many migrant workers intersects with and is embedded within the enumerated grounds of race, disability, and national origin, as well as the analogous ground of citizenship. Status as an injured migrant worker therefore arises from the unique intersection of enumerated and analogous grounds and cannot be decided simply by reference to a finding that immigration status is not a protected ground: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 13, 15; Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) 54:3 Alta. L. Rev. 649 at 651.

- The exclusion of health care for disabled migrant workers perpetuates disadvantage against them by exposing them to potential irreversible negative health consequences that could kill or seriously injure them. Exclusion from the health care system leaves migrant farmworkers who are disabled and with precarious status without access to potentially life-saving health care: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 335; *Fraser*, at para. 125.

[132] The fact that Nell Toussaint was not a migrant farmworker or injured in an industrial accident does not change the fact that the issues in this proceeding will have an impact on such workers. Although Nell Toussaint came to Canada as a visitor who remained in Canada and worked without obtaining residency status or permission to work, and not as a migrant farmworker, the precarity of her access to health care is analogous to the situation of migrant farmworkers. As such, it is crucial that the Migrant Workers Coalition's perspective be heard.

[133] With respect to Canada's argument that there are already too many intervenors, Canada indicated that it would consent to intervention of any intervenor granted intervenor status for the r. 21 motion, as friends of the court at trial. The following intervenors were granted status for that motion:

- Amnesty International.

- The International Network for Economic, Social and Cultural Rights

- The CCPI Coalition, which as noted is composed of three entities. Although Canada lists these as separate intervenors, they are represented by the same counsel, made one joint submission at the r. 21 motion and will do so again. In my view, they do not count as separate intervenors.

- Canadian Civil Liberties Association.

- Colour of Poverty/Colour of Change Network, Black Legal Action Centre, the South Asian Legal Clinic of Ontario and the Chinese and Southeast Asian Legal Clinic. Although Canada has listed these intervenors as separate intervenors, they were represented at the r. 21 motion by the same clinic and made one submission and they are also represented by the same counsel for this motion. In my view, they do not count as separate intervenors.

[134] I note that at the motion before Perell J., these parties all made submissions and the matter was heard in one day, with the decision rendered approximately three months later. Therefore, having this many intervenors did not appreciably increase the scope of this matter or cause any delay. It was Canada's argument to make with evidence, if the number of intervenors was a big problem; however, Canada failed to provide any evidence of any specific increase in costs occasioned to it because of the number of intervenors at the r. 21 motion.

[135] If the Migrant Worker Coalition is added as an intervenor, it would mean that there are six intervenors at trial, each making submissions to the court. The court is able to limit both the length of their written and oral submissions.

[136] I am not persuaded that there are significant concerns about increased costs by virtue of this one additional intervenor, particularly when compared to the unique and important perspective that it will offer with respect to situated parties. Indeed, the fact that this perspective is not yet before the court supports permitting it to be an intervenor.

Issue 10: Should the court make orders either exempting this matter from mandatory mediation per r. 24.1, or extending the time for it?

[137] I grant the Plaintiff's motion to exempt the matter from mandatory mediation.

[138] Pursuant to r. 24.1, all matters must proceed to mandatory mediation within 180 days after the first defence is filed. The court may exempt a matter pursuant to r. 24.1.05. It may also extend the time pursuant to r. 24.1.09(2).

[139] As set out in *G.O. et al. v C.D.H* (2000), 50 O.R. (3d) 82 (Ont. S.C.J.), at pp. 86-87, the following criteria are relevant in this case to determine whether an exemption should be made:

- 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.

- 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.

- 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.

- 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.

[140] All of these factors weigh in favour of the Plaintiff here.

[141] Canada's argument that these matters require urgent mediation to assess the Plaintiff's chance of success and reduce costs is unpersuasive. The parties have already obtained a detailed analysis and evaluation of the scope of the issues in Perell J.'s decision on the motion to strike. Perell J. described Canada's motion to strike as a "land, sea, submarine, and celestial attack."

[142] Additionally, this case is not merely about minor monetary compensation. As noted, the Plaintiff seeks declarations relating to the constitutionality of Canada's conduct when it made an Order in Council in 2012, that it violated the *Charter* protections, and that the interim Federal Health Plan be interpreted consistent with ss. 7 and 15 of the *Charter*. It seeks a declaration that the rights to life and the non-discrimination guarantee in the ICCPR has been violated. It also seeks a declaration that Canada's refusal to implement the views of the Human Rights Committee violates the *Charter*, and is an unreasonable decision not taken in good faith. These kinds of issues are not easily amenable to settlement.

[143] As well, these are matters of public interest, the importance of which requires adjudication to address longstanding concerns about access to justice for marginalized groups, such as racialized women with irregular immigration status who are facing serious health issues: see also *Juanita Drodge et al. v. Jeffrey Martin et al*., 2005 NLTD 73, 247 Nfld. & P.E.I.R. 223, at paras. 19-22. Perell J. acknowledged that this case presented a complex legal and factual matrix that may affect others.

[144] There have been significant attempts to resolve the dispute with Canada over its failure to implement the Views of the Human Rights Committee since 2014. These efforts are also detailed in paragraph 5 of the Plaintiff's factum and its materials. On April 6, 2022, Canada replied to the Human Rights Committee that "it would not be taking any further measures to give effect to the Committee's views" and Canada has maintained that position to date. It advised that it was closing its file and asked that the Human Rights Committee do so as well. I reject the argument that I cannot consider the evidence filed, which sets out all of these efforts on the basis that this constitutes expert evidence. While there may be opinions on some issues in these affidavits, the description of the historical attempts to resolve this matter with Canada are facts. Notably, Canada filed no evidence to dispute the factual assertions.

[145] Although the history set out is not mediation in the traditional sense, it has been a forum in which the parties have been able to canvass their positions. The parties are clearly entrenched in their positions. It is unclear what the point of mediation would be, other than to delay this matter further.

[146] The action was commenced in 2020 and there is still no discovery plan. Given the cost and delay, the parties should not be put to the time and expense of a process that will add cost and delay without any chance of success. There is a "real, human impact": *Bocchini v. Attorney General of Canada*, 2024 ONSC 4181, at para 8; *Allen v. Kumar*, 2021 ONSC 5529, at paras. 10-12; *Dunning v. Colliers Macaulay Nicolls,* 2023 ONSC 7115, at para. 7.

[147] I also reject the argument that Ann Toussaint, newly appointed as representative, would be open to mediation and to settling Nell Toussaint's personal claim, absent Canada addressing similarly situated migrants. She has counsel who argued this motion and requested this exemption. I have no reason to conclude that counsel is not following her instructions.

[148] Furthermore, she stated that she wished to pursue her late daughter's claim "as [her daughter] did, in the public interest, to ensure that Canada protects the rights to life and equality of those who find themselves in the circumstances of [her] daughter" referencing what she faced "when she sought and was denied access to essential healthcare."

Conclusion

[149] Therefore,

[150] I grant leave to the CCPI Coalition, Amnesty International and ESCR-Net to intervene as friends of the court with the right to see documents produced by the parties, observe examinations for discovery, file a factum and make argument at the trial of this matter.

[151] I grant leave to the CCPI Coalition, Amnesty International and ESCR-Net to intervene in any pre-trial motions that could be dispositive of the Plaintiff's claims.

[152] I order that the CCPI Coalition, Amnesty International and ESCR-Net are bound by the deemed undertaking rule.

[153] I grant leave to the Migrant Worker Coalition, the CCLA, and the Colour of Poverty Coalition to intervene as a friend of the court with the right to file a factum and make argument at the trial of this matter.

[154] I order that the CCPI Coalition, the CCLA, Amnesty International, ESCR-Net, the Migrant Worker Coalition and the Colour of Poverty Coalition shall not be granted costs in this matter and that no costs shall be ordered against them.

[155] I order that this matter is exempt from the requirement for mandatory mediation.

[156] I adjourn the plaintiff's motion for a declaration that it may communicate with third parties until after productions are complete.
[157] I order that there shall be no costs of this motion.

Corrigendum

[158] The word "Tribunal" is changed to Committee in paragraph 3.

[159] The words "and the Madhu Verma Migrant Justice Centre" is removed from the first bullet of paragraph 6. The words "Canadian Civil Liberties Association ("CCLA")" and "Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Legal Clinic of Ontario and the Chinese and Southeast Asian Legal Clinic (the "Colour of Poverty Coalition")" are added to paragraph 6.

[160] The words "The Canadian Civil Liberties Association" and "the Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Legal Clinic of Ontario and the Chinese and Southeast Asian Legal Clinic (the "Colour of Poverty Coalition") seek to intervene as a friend of the court at the trial of this action. They do not seek any corollary orders related to production and discovery. Canada has consented to this" are removed from the old paragraph 15 and made a new paragraph 15 above. Paragraph 15 becomes paragraph 16.

[161] The words "J4MW-Windsor Law" and "the Industrial Accident Victims Group of Ontario (IAVGO) Community Legal Clinic, and" are added to the new paragraph 16 (previously 15).

[162] The word "be" is added to the new paragraph 20, (previously 19).

[163] The words "the CCLA" are added to the new paragraph 23 (previously 22), Issue 8, the new paragraph 117 (previously 116) the heading above the new paragraph 117 (previously 116) and to paragraphs 153 and 154 (previously 152 and 153).

[164] The word "Does" is changed to "Do" in Issue 8.

[165] The words "for the court's benefit" are added to paragraph 35, (previously 34).

[166] The words "the" and "Coalition" are deleted from paragraph 82, (previously 81).

[167] The word "status" is added to paragraph 85 (previously 84).

[168] The word "Coalition" is added to the heading above the new paragraph 99, (previously 98).

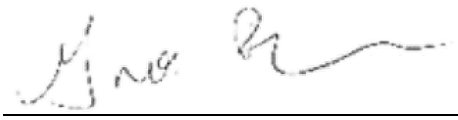
[169] The word “was” changed to “were” and the words “this” is changed to “these” and an “s” is added to the word “intervention.” In paragraph 117 (previously 116).

[170] The word “Women” is replaced with the word “Worker” and the word “Industrial” is replaced with the word “Migrant” and the word “Legal” is inserted after “Farmworker, in the new paragraph 122 (previously 121).

[171] The words “pursuant to an authorized work permit” are changed to “as a visitor who remained in Canada and worked without obtaining residency status or permission to work” in paragraph 132 (previously 131).

[172] The words “although they have not yet made a motion to intervene at trial” are removed from the fourth bullet in paragraph 133 (previously 132).

[173] The duplicated words “are added as friends of the court” are removed from the new paragraph 150 (previously 149).



Papageorgiou J.

Released: March 31, 2025

CITATION: Toussaint v. Attorney General of Canada, 2025 ONSC 2007
COURT FILE NO.: CV-20-00649404-0000
DATE: 20250331

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

– and –

ATTORNEY GENERAL OF CANADA

Defendant

AMENDED REASONS

Papageorgiou J.

Released: March 31, 2025