

**IN THE SUPREME COURT OF CANADA**  
**(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN

**NELL TOUSSAINT**

Applicant (Appellant)

and

**ATTORNEY GENERAL OF CANADA**

Respondent (Respondent)

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**NOTICE OF MOTION OF THE APPLICANT  
FOR RECONSIDERATION OF HER APPLICATION FOR LEAVE TO APPEAL AND  
FOR AN EXTENSION OF TIME  
(pursuant to Rules 6, 47 and 73 of the *Rules of the Supreme Court of Canada*)**

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TAKE NOTICE that the Applicant Nell Toussaint hereby applies to the Registrar and the Court pursuant to Rules 6 and 73 of the Rules of the Supreme Court of Canada, as amended, for the following:

- (a) submission by the Registrar of this motion to the Court;

- (b) reconsideration of the application for leave to appeal to the Court (decided April 5, 2012) from the judgment of the Federal Court of Appeal (also referred to as the “FCA”), court file no. A-362-10, dated June 27, 2011 and for an order granting leave to appeal; or any further order that the Court may deem appropriate;
- (c) an extension of time in which to serve and file this motion to the dates of service and filing hereof; and
- (d) if leave to appeal is granted, an order expediting the Applicant’s appeal on terms to be set by the Registrar.

AND FURTHER TAKE NOTICE that the motion is made on the following grounds:

1. The Applicant respectfully requests that the within Application for Leave to Appeal from the Federal Court of Appeal’s decision be reconsidered in light of the exceedingly rare circumstance of the United Nations Human Rights Committee subsequently finding – on the same facts between the same parties - that Canada violated the Applicant’s right to life and to non-discrimination under the *International Covenant on Civil and Political Rights (ICCPR)* by excluding her from access to essential health services available through the Interim Federal Health Program and thereby exposing her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences.
2. Because of this rare development, the decision of the Federal Court of Appeal now raises an extremely serious issue of non-compliance with Canada’s international human rights obligations with respect to two fundamental human rights: the right to life and the right to equality (non-discrimination). When this Honourable Court considered the Applicant’s application for leave to appeal, there was no authoritative international jurisprudence as to whether the guarantees of the right to life and to non-discrimination under international human rights law require States to ensure that irregular migrants have access to essential health care necessary for the protection of life. The UN Human Rights Committee now has provided authoritative jurisprudence on this point applied to the facts that were before the Federal Court of Appeal in the Applicant’s case. Following the Committee decision, the question of whether the similar guarantees of the right to life and to equality and non-

discrimination in the *Canadian Charter of Rights and Freedoms* provide comparable protection of these fundamental human rights is of such a nature and significance as to warrant decision by this Court.

3. On July 24, 2018 the Human Rights Committee adopted Views in the Applicant's complaint against Canada brought on December 28, 2013 under the First Optional Protocol to the *ICCPR*. The Committee relied on the findings of fact by the Federal Court, subsequently accepted by the Federal Court of Appeal, that the Applicant was denied access to essential health care because of her status as an irregular migrant and that such denial "exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences." The Committee determined that the Applicant's right to life (under article 6 of the *ICCPR*) and her right not to be discriminated against (under article 26) had been violated by such exclusion, which exposed her to a "serious threat to her life and health." The Committee stated that Canada is obligated under article 2(3) of the *ICCPR* to take measures to remedy this violation including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life and providing the Applicant compensation.
4. The Human Rights Committee's Views are at odds with the Federal Court of Appeal's decision that there was no violation of the Applicant's rights to life and non-discrimination under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The Federal Court of Appeal held that while the denial of access to essential health care created serious health risks for the Applicant, the Applicant's right to life and non-discrimination were not violated because the "operative cause" of the denial of health care was that the Applicant "by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally."
5. The Government of Canada has informed the Human Rights Committee that it does not agree with the Committee's Views as to the scope of the protections afforded by the rights to life and to non-discrimination and that it will continue to rely on the decision of the

Federal Court of Appeal to determine its obligations regarding access to essential health care for irregular migrants. Canada therefore has stated that it will not adopt the requested measures to ensure access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life of irregular migrants in Canada or provide compensation to the Applicant.

6. This Court has held that generally:
  - a. rights under the *Canadian Charter of Rights and Freedoms* should be interpreted to afford at least as much protection as under international human rights law,
  - b. international law is highly relevant to interpreting the *Charter*, and
  - c. courts should, where possible, avoid placing Canada in violation of its treaty obligations.
7. Unless this Court reconsiders the Applicant's case and grants leave to appeal, the Applicant's right to a remedy and the question of whether Canada's domestic law lives up to its obligations under the *ICCPR* will not be settled. The contradictions between the decisions of the Federal Court of Appeal and the Human Rights Committee have serious implications for Canada's undertaking in article 2(3)(a) of the *ICCPR* to ensure that the Applicant has an effective remedy for the violation of her article 6 and 26 rights; and also for its undertaking under 2(3)(b) to ensure that her right to such remedy be determined by competent judicial authority. This Court is the most appropriate judicial authority to make such a determination given the existence of the factual record in the courts below.
8. This application for reconsideration was not made previously because it was not germane until the Human Rights Committee transmitted to the Applicant a copy of Canada's response that it would not abide by the Committee's Views. Canada submitted its response to the Human Rights Committee by letter dated February 1, 2019. On March 13, 2019 the Applicant received the official transmittal letter from the Office of the High Commissioner for Human Rights with Canada's response. The letter gave the Applicant until May 13, 2019 to submit comments on Canada's response, which she did on May 13, 2019. The

Applicant sought funding from the Court Challenges Program to bring this motion and on April 8, 2019 was notified that funding had been approved. The Applicant's counsel has since worked diligently to prepare these motion materials.

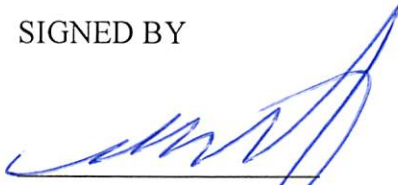
9. It is respectfully submitted that the Court should reconsider the Leave Application in the full context of the recently-developed and now-conflicting international jurisprudence. It is also a matter of fairness and justice to the Applicant Nell Toussaint.
10. As such, the Applicant requests that the motion be granted and that the Judgment of this Court in respect of the Leave Application be reconsidered pursuant to Rule 73 of the *Rules*.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

- (a) the affidavit of Bruce Porter sworn on June 1, 2019; and
- (b) such further and other materials as counsel may advise and the Registrar or the Court may permit.

Dated at Toronto, Ontario this 5<sup>th</sup> day of June, 2019.

SIGNED BY



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**Ottawa Agent to Counsel for the Respondent, Attorney General of Canada**

**NOTICE TO THE RESPONDENT TO THE MOTION:** A respondent to the motion may serve and file a response to this motion within 10 days after it is accepted for filing. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.