

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

MOTION RECORD

October 21, 2021

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Charter Committee on Poverty Issues,
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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MOTION RECORD

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TAB 1

Court File No. CV-20-00649404-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

NOTICE OF MOTION

THE PROPOSED INTERVENERS the Charter Committee on Poverty Issues, the Canadian Health Coalition and the FCJ Refugee Centre will make a motion to a judge on a date to be fixed, at 10:00 a.m., or as soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard

- ☐ In writing under subrule 37.12.1(1) because it is on consent;
- ☐ In writing as an opposed motion under subrule 37.12.1(4);
- ☐ In person;
- ☐ By telephone conference;
- ☒ By video conference

at the following location:

Zoom video conference (video link to be provided upon confirmation of the hearing date).

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THE MOTION IS FOR

- (a) Leave to intervene as a friend of the court in the Respondent's motion to strike the Amended Amended Statement of Claim, pursuant to Rule 13.02;
- (b) Leave to file a factum not exceeding 20 pages in length;
- (c) Leave to make oral argument of not more than 20 minutes at the hearing of the motion;
- (d) Not be granted costs, nor costs be ordered against them; and
- (e) Such further and other Relief as to this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE

- (a) The motion to strike raises issues of public concern extending beyond the interests of the immediate parties;
- (b) The proposed interveners have a real, substantial and identifiable interest in the subject matter and in the outcome of the case;
- (c) The proposed interveners have an important perspective distinct from the parties;
- (d) The proposed interveners are well-recognized groups with special expertise in the issues raised in the motion to strike;
- (e) The proposed interveners have been granted intervenor status in many previous cases addressing similar issues, including before the Supreme Court of Canada on the issue of the right to life and access to health care and before this Court and at the Court of Appeal for Ontario in a motion to strike involving similar issues under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and the interpretative effect of international human rights treaties;

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- (f) The proposed interveners do not seek costs and ask that no costs be ordered against them;
- (g) Rule 13.02 of the Rules of Civil Procedure; and
- (h) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavit of Bonnie Morton sworn October 19, 2021;
- (b) The affidavit of Diana Gallego sworn October 20, 2021;
- (c) The affidavit of Steven Staples sworn October 20, 2021; and
- (d) Such further and other evidence as counsel may advise and this Honourable Court may permit.

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October 21, 2021

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- 5 -

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NELL TOUSSAINT

Plaintiff

v. ATTORNEY GENERAL OF CANADA

Defendant

Court File No. CV-20-00649404-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

NOTICE OF MOTION

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Lawyers for the Interveners

TAB 2

Court File No. CV-20-00649404-0000

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

Attorney General of Canada

Defendant

AFFIDAVIT OF BONNIE MORTON
(sworn October 19, 2021)

I, Bonnie Morton, of the City of Regina in the Province of Saskatchewan, MAKE OATH
AND SAY:

1. I am the Anti-Poverty Minister/Advocate at Regina Anti-Poverty Ministry and the Chairperson of the Charter Committee on Poverty Issues ("CCPI") and as such, I have knowledge of the matters contained in this affidavit.

2. CCPI seeks leave to intervene jointly with the Canadian Health Coalition and the FCJ Refugee Centre in the Motion to Dismiss the Application in this case, requesting to make single written and oral submissions.

3. The proposed coalition of interveners ("the CCPI Coalition") seeks to assist the court with the following issues of broad public interest that are raised in this case and motion to strike:

i) Whether, in light of the UN Human Rights Committee's Views in this case, a denial of access to publicly funded health care to irregular migrants to prevent reasonably foreseeable threats to their life and health may be found to contravene sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*");

and

ii) Whether Canada's decision not to implement the systemic remedy required in the UN Human Rights Committee's Views, to ensure that irregular migrants have

access to essential health care, violated sections 7 and 15 of the *Charter* or is an incorrect or unreasonable exercise of a prerogative power.

4. CCPI believes the CCPI Coalition can be of assistance to the court in determining whether these key issues raised in the Statement of Claim have a reasonable prospect of success, based on existing jurisprudence and established principles of *Charter* interpretation. The CCPI Coalition can also be of assistance to the court in considering the consequences for vulnerable groups, particularly irregular migrants, of the finding sought by the defendant in this case: that the *Charter* issues raised are matters of settled law and that this claim should therefore be struck without a hearing on the evidence.

5. The CCPI Coalition can assist the court by ensuring that the interests and perspectives of disadvantaged residents of Canada who are unable to afford private health care, in particular irregular migrants who continue to be denied access to essential health care, are fully considered in the court's review of whether Canada's refusal to implement the UN Human Rights Committee's Views violates the *Charter* and Canada's international human rights treaty obligations.

6. The issues raised in the Statement of Claim in relation to Canada's domestic constitutional and international human rights obligations are among the most critical, unresolved questions in *Charter* jurisprudence. These issues deserve to be

heard with the benefit of a full evidentiary record: striking the present claim raises critical access to justice concerns for some of the most vulnerable and marginalized groups in Canada. The CCPI Coalition can offer invaluable assistance to the court in examining those issues as they are raised in the present claim.

Description of the Charter Committee on Poverty Issues

7. CCPI is a national committee founded in 1989 which brings 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 international human rights law, the *Charter*, human rights legislation and other laws in Canada. CCPI has initiated and intervened in a significant number of cases at various levels of court to ensure that issues of socio-economic disadvantage and the perspectives of persons living in poverty are effectively presented before courts and tribunals, with high quality legal argument and reliable evidence. CCPI and its members consult with people living in poverty and members of vulnerable groups as well as experts across Canada and internationally in developing its positions on particular issues.

8. The activities of CCPI include: research and consultation with other organizations and members of marginalized and vulnerable groups; test case litigation; interventions in important cases; judicial education; public education; appearances

before United Nations and other international bodies; and collaboration with non-governmental organizations and researchers in Canada and in other countries.

9. CCPI has received funding through the Court Challenges Program of Canada to engage in legal research and to consult with affected constituencies on a wide variety of subjects of concern to people living in poverty, including the following, of relevance to the present case:

- the extent to which sections 7 and 15 of the *Charter* require positive measures by governments to ensure that vulnerable groups have access to adequate food, housing, health care and other necessities;
- and
- the role of international human rights in interpreting the scope of Canadian *Charter* guarantees.

Previous Interventions

10. CCPI has been granted intervener status in 13 cases at the Supreme Court of Canada: *R. v. Caron*, 2011 SCC 5; *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35; *R. v. Wu*, [2003] 3 S.C.R. 530; *Gosselin v. Québec (Attorney General)*, 2002 SCC 84; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Eldridge v. British Columbia (Attorney General)*, [1997] 3

S.C.R. 624; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Matheson* [1994] 3 SCR 328 and *Symes v. Canada*, [1993] 4 S.C.R. 695.

11. In all of these interventions, CCPI has emphasized the importance of interpreting *Charter* rights 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.

12. Of particular relevance to the present case was CCPI's joint intervention with the Canadian Health Coalition before the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, focussing on governments' obligations under section 7 of the *Charter* to ensure access to health care. CCPI and CHC referred to international human rights documents and to commentary from UN treaty bodies to argue that section 7 should be interpreted to include access to health care as a component of the right to life and security of the person in section 7 of the *Charter* and that disadvantaged groups living in poverty and who must rely on access to publicly funded health are entitled to equal protection of section 7 in the health care context.

13. Also of particular relevant to this case is CCPI's intervention in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, in which CCPI argued

that section 15 of the *Charter* should be interpreted to ensure equal access to publicly funded health care in accordance with international human rights law that reflects the values and principles that underlie the *Charter*.

14. Other CCPI interventions before the Supreme Court of Canada of relevance to this case include:

- *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, in which CCPI was granted standing to argue that section 7 of the *Charter* should be interpreted in light of international human rights to include positive obligations on governments to protect physical and mental health;
- *Lovelace et al. v. Ontario*, [2000] 1 S.C.R. 950, in which CCPI argued that section 15(2) of the *Charter* should be interpreted consistently with the obligation to ensure substantive equality and in accordance with international human rights norms;
- *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, in which CCPI argued that courts must ensure access to effective remedies for violations of international human rights law through *Charter* interpretation and by ensuring that any exercise of governmental discretion is consistent with international human rights obligations;

- *New Brunswick (Minister of Health and Social Services) v. G.(J.)*, [1999] 3 S.C.R. 46, in which CCPI referred to Canada's obligations under the *International Covenant on Civil and Political Rights* and other international human rights instruments to assist the court in considering the scope of section 7 of the *Charter*, and whether it may require positive measures to ensure access to justice, including through the provision of legal aid.

15. CCPI's *facta* have been relied upon by courts and have been used by researchers and advocates across Canada and internationally. CCPI has played a critical role in ensuring that courts have remained open to interpretations of the *Charter* informed by international human rights so as to provide effective remedies for those who may be deprived of basic necessities. In *Gosselin v Quebec*, for example, in which the majority of the Supreme Court found that that the appellant's rights under section 7 had not been violated by a regulation establishing lower welfare rates for young people, the Court was careful to leave the question open of whether section 7 might require positive measures to ensure access to necessities in future cases.

16. Similarly, in *Chaoulli v Quebec*, CCPI and CHC opposed the remedy sought by the appellants, which was restricted to those who could afford private health care. However, the Court's finding that failing to ensure timely access to health care within the publicly funded health care system triggers section 7,

leaves the door open to a different approach where a person at risk of life and health is unable to afford private care.

17. In *Tanudjaja v. Canada (Attorney General)* 2013 ONSC 1878, this Court granted CCPI's joint application to intervene in a motion to strike brought by the Attorney General of Canada and the Attorney General of Ontario. The motion to strike raised issues similar to those in the present case, about the scope of positive obligations under sections 7 and 15 of the *Charter*, as well as the relationship between rights protection under the *Charter* and international human rights law. In granting CCPI's motion for leave to intervene, Justice Lederer stated: "As evidenced by it having been accorded intervener status in thirteen cases at the Supreme Court of Canada, it is a 'well-recognized group'. Its experience there and the submissions the CCPI Coalition proposes to make here demonstrate an expertise in respect of the issue that will determine the motion: whether s. 7 and s. 15 of the *Charter* must be interpreted such that it is plain and obvious that the application cannot succeed."

18. Justice Lederer's decision to grant the motion to strike in that case was appealed to the Ontario Court of Appeal and the CCPI Coalition again sought leave to intervene. In her decision on the motions for leave to intervene, Justice Feldman recognized that the CCPI Coalition and other interveners "are comprised of long-standing and respected organizations with valuable expertise in the areas of human rights, equality rights, constitutional law and poverty law as

well as homelessness.” Justice Feldman was “satisfied that each intervener will make a useful contribution to the appeal by framing the argument from the perspective of their constituencies, and by including submissions on the potential effects on those constituencies of the different orders that the court may make.”

Research and Public Legal Education

19. CCPI’s role in advancing an interpretation and application of the *Charter* that properly consider the perspective and rights of those living in poverty, promote *Charter* principles, and are informed by the values of international human rights law, has been widely recognized both in Canada and internationally. The National Judicial Institute has made use of CCPI’s expertise in this area on several occasions in providing social context education to judges from six different provinces. Internationally, CCPI’s expertise has been relied upon by the UN High Commissioner on Human Rights, the UN Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights, the International Commission of Jurists, Forum Asia, the Constitutional Assembly of South Africa and the Committee for the Administration of Justice in Northern Ireland, among others.

20. CCPI has made frequent submissions to governmental and other bodies in Canada with respect to the protection of the rights of poor people and people lacking access to adequate housing under domestic and international law. CCPI was invited by the Canadian Human Rights Act Review Panel, chaired by retired

Supreme Court of Canada Justice Gérard La Forest, to prepare submissions and participate in consultations on improving the protection of social and economic rights and addressing discrimination on the grounds of “social condition” of poverty or homelessness under the *Canadian Human Rights Act*.

21. CCPI was a research partner in two multi-year research projects with five universities and four non-governmental organizations on “Social Rights Accountability” and “Social Rights Practice” in Canada, funded through the Social Science and Humanities Research Council’s Community-University Research Alliance program. Important components of this research included research into the *Charter* and access to health care, international human rights and the *Charter*, and the use of international human rights procedures and mechanisms to ensure accountability of Canadian governments to international human rights norms.

Representations in International Fora

22. CCPI has played an important role, in Canada and internationally, in promoting a better integration of international human rights norms in domestic law. In 1993, 1998, 2006 and 2016, CCPI made oral and written submissions to the UN Committee on Economic, Social and Cultural Rights regarding Canada’s compliance with rights in the *International Covenant on Economic, Social and Cultural Rights*, focusing on the need for improved implementation of treaty body recommendations, the importance of ensuring access to justice by interpreting

the *Canadian Charter* and other law consistently with ratified international human rights treaties, and the importance of ensuring access to effective remedies under relevant domestic law.

23. In 1999, 2006 and 2015, CCPI made oral and written submissions to members of the UN Human Rights Committee with respect to Canada's fourth, fifth and sixth periodic reviews for compliance with the *International Covenant on Civil and Political Rights (ICCPR)* and raised similar concerns regarding the inadequate implementation of treaty body recommendations in Canada and the need to ensure equal protection of the rights to life and equality under the *Charter* for disadvantaged groups. In 2015, CCPI also made submissions to the UN Human Rights Committee regarding the denial of access to essential health care for irregular migrants under the Interim Federal Health Program, expressing concern regarding the implications of the Federal Court of Appeal's decision in *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 for Canada's compliance with its obligations under the ICCPR.

24. In 2008, 2012 and 2017, CCPI made submissions to the UN Human Rights Council, through the Office of the High Commissioner on Human Rights, with respect to the first, second and third Universal Periodic Reviews of Canada's compliance with international human rights. CCPI focused its submissions on access to effective remedies under domestic law in Canada and failures to interpret and apply the *Charter* and other law consistently with international

human rights law, including with respect to access to essential health care under the Interim Federal Health Program. CCPI's submissions outlined concerns regarding the Federal Court of Appeal's decision in *Toussaint v. Canada (Attorney General)*.

25. In all of these submissions to UN human rights bodies, CCPI has focused on the importance of the *Charter*, and particularly sections 7 and 15, in implementing the obligation to provide effective legal remedies to violations of the rights of disadvantaged Canadians.

CCPI's interest and unique perspective and expertise in the issues in this case

26. CCPI has a direct interest in whether the motion to strike in the present case is granted. As an organization advocating for the *Charter* rights of those living in poverty, CCPI is committed to ensuring the equal benefit of the right to life guaranteed under section 7 for those who cannot afford access to private health care. CCPI's perspective and expertise in promoting interpretations of the *Charter* that do not exclude or devalue the rights of those living in poverty will be of assistance to court in this case. CCPI's intervention in this case will ensure that defendant's characterization of the present case as a claim to a right to "free health care" is properly assessed from the perspective of those for whom access to publicly funded health care is necessary for the protection of life.

27. As an organization committed to ensuring access to effective remedies through consistent interpretations of sections 7 and 15 of the *Charter*, and to calling Canada to account for its failure to live up to its international human rights obligations, CCPI has a significant interest in the outcome of this case. The claim the defendant is seeking to strike raises in a unique and unprecedented fashion the effect of a UN human rights body's decision, made under a petition procedure ratified by Canada, on the proper interpretation of the scope and application of *Charter* rights.

28. CCPI is also concerned that, if the motion to strike is upheld, the court will be prevented from considering evidence regarding the effects of Canada's decision not to implement the UN Human Rights Committee's Views on irregular migrants.

Proposed Submissions of the CCPI Coalition

5. Drawing on the expertise and interests of all three members of the coalition, and consulting with other interveners to avoid duplication, the CCPI Coalition proposes to assist the court by expanding on the following submissions:

- There is no basis in existing *Charter* jurisprudence for a finding, sought by the defendant in this case, that it is settled law that section 7 imposes no government obligation to ensure access to publicly funded

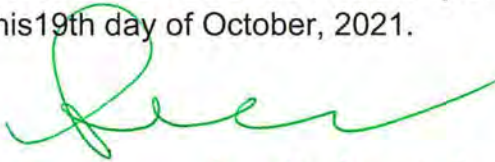
health care, where such care is necessary for the protection of the life or health.

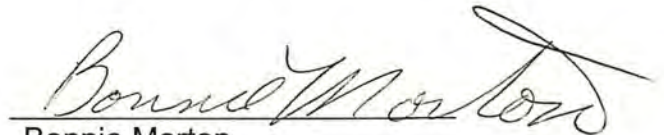
- The plaintiff's claim, that Canada's decision not to implement the UN Human Rights Committee's Views and its continuing failure to ensure access to essential health care for irregular migrants violate sections 7 and 15 of the *Charter*, has a reasonable prospect of success based on existing *Charter* jurisprudence and an interpretation of *Charter* rights that properly considers the UN Human Rights Committee's Views.
- The section 7 claim in this case is supported by Canada's obligation of *pacta sunt servanda*, to perform its treaty obligations in good faith, as a peremptory norm of international law, and a principle of fundamental justice under section 7 of the *Charter*.
- The section 15 claim in this case is supported by the UN Human Rights Committee's Views, which should be considered in the court's assessment of whether immigration status may be recognized as an analogous ground of discrimination under section 15 of the *Charter*.

29. This affidavit is made in support of a motion by the Charter Committee on Poverty Issues for leave to intervene jointly with the Canadian

Health Coalition and the FCJ Refugee Centre with respect to the defendant's motion to strike in this case; to file a factum and to present oral argument.

SWORN BEFORE ME in the City of Regina
this 19th day of October, 2021.


Being A Solicitor.


Bonnie Morton

TAB 3

Court File No. CV-20-00649404-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and –

ATTORNEY GENERAL OF CANADA

Defendant

**AFFIDAVIT OF DIANA GALLEGO
(sworn October 20, 2021)**

**I, Diana Gallego, of the City of Toronto, in the Province of Ontario, MAKE OATH
AND SAY:**

1. I am the Interim Director of the FCJ Refugee Centre and as such, I have knowledge of the matters contained in this affidavit.
2. The FCJ Refugee Centre is seeking leave to intervene jointly with the Charter Committee on Poverty Issues and the Canadian Health Coalition in the Motion to Strike the Amended Statement of Claim (“the Statement of Claim”) in this case, requesting to make single written and oral submissions. The proposed coalition of interveners (“the CCPI Coalition”) seeks to assist the court with the following issues of broad public interest that are raised in this case and motion to strike:

i) Whether, in light of the UN Human Rights Committee's Views in this case, a denial of access to publicly funded health care to irregular migrants to prevent reasonably foreseeable threats to their life and health may be found to contravene sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*");

ii) Whether Canada's decision not to implement the systemic remedy required in the UN Human Rights Committee's Views, to ensure that irregular migrants have access to essential health care, violated sections 7 and 15 of the *Charter* or is an incorrect or unreasonable exercise of a prerogative power.

3. CCPI believes the CCPI Coalition can be of assistance to the court in determining whether these key issues raised in the Statement of Claim have a reasonable prospect of success, based on existing jurisprudence and established principles of *Charter* interpretation. The CCPI Coalition can also be of assistance to the court in considering the consequences for vulnerable groups, particularly irregular migrants, of the finding sought by the defendant in this case: that the *Charter* issues raised are matters of settled law and that this claim should therefore be struck without a hearing on the evidence.

4. The CCPI Coalition can assist the court by ensuring that the interests and perspectives of disadvantaged residents of Canada who are unable to afford private health care, in particular irregular migrants who continue to be denied access to essential health care, are fully considered in the court's review of whether Canada's

refusal to implement the UN Human Rights Committee's Views violates the *Charter* and Canada's international human rights treaty obligations.

5. The issues raised in the Statement of Claim in relation to Canada's domestic constitutional and international human rights obligations are among the most critical, unresolved questions in *Charter* jurisprudence. These issues deserve to be heard with the benefit of a full evidentiary record: striking the present claim raises critical access to justice concerns for some of the most vulnerable and marginalized groups in Canada. The CCPI Coalition can offer invaluable assistance to the court in examining those issues as they are raised in the present claim.

Description of the FCJ Refugee Centre

6. The FCJ Refugee Centre ("the Centre") is a non-profit, grass-roots organization in Toronto and a registered charity. The Centre's membership and clients include irregular migrants. For more than 30 years, the Centre has served refugees and other migrant populations at risk due to their immigration status, and welcomes anyone asking for advice, counsel and support regarding their refugee or immigration claim process. The Centre addresses systemic issues that migrants face in Canada, including lack of resources, marginalization, discrimination and lack of access to education, health care and other critical services.

7. The Centre recognizes that all uprooted people have strengths and capacities to contribute to the host country, including where their migration status is irregular. It understands and empathizes with the experiences of irregular migrants (i.e. those that hold some form of uncertain migration status) and strives to offer holistic support and

find ways and means to help people regularize their status where possible. The Centre has supported thousands of individuals and families, many in precarious situations, in regularizing their status.

8. The Centre recognizes that irregular migrants face prejudice, stigma and systemic discrimination based on immigration status, which is intersectional with other characteristics including race, sexual orientation, age, religion, creed, disability, gender and socio-economic status.

9. By utilizing a human rights perspective, the Centre provides supports and services to migrants in diverse circumstances, and works in a number of different areas, such as immigration and refugee protection, supporting migrant youth, reducing barriers to accessing education, supporting survivors of human trafficking, and supporting women and children who have fled violence and abuse.

10. The Centre shares information with people with irregular status about access to services, possibilities for regularizing their immigration status, and their rights. It offers an integrated model of protection; settlement services and education, including shelter for women and their children; timely counselling and support, including interpretation, referral to legal assistance, programs on Canadian culture and life; and other educational workshops. It also provides primary health care for uninsured individuals, as described below.

Addressing Barriers to Access to Health Care

11. For the marginalized communities supported by the Centre, access to health care is often a critical need, particularly for those who are uninsured. 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. These communities often experience food insecurity and face difficulties in accessing employment and safe and secure housing. These social determinants of health create additional risks and make access to health care even more essential.

12. The Centre has partnered with many other organizations in campaigning for equal access to publicly funded health care for uninsured migrants. Through this work, the Centre has advocated for changes to the Interim Federal Health Program to ensure access to health care for irregular migrants.

13. In 2012, after drastic cuts were implemented to the Interim Federal Health Program (IFHP) that affected many of the Centre's clients, the Centre created a Primary Health Care Clinic to assist uninsured individuals to access health care, relying on the outstanding generosity and volunteerism of clinic support staff. The Centre now operates, with the support of the Inner-City Health Association, a fully equipped examination room which is open two days per week, with health care support provided to uninsured patients by primary physicians along with a team of internationally trained volunteer doctors and nurses and one psychiatrist.

14. From January to August, 2021, 299 clients have attended the Centre's primary health care clinic. Where specialist care is required, the Centre does what it can to arrange for this, and in this period more than 25 patients have been referred to specialists. In addition, during this time 123 appointments have been provided to clients for mental health care services. The numbers thus far in 2021 far surpass those of 2020. The Centre is now in the process of developing a health care clinic for children dealing with precarious migration status.

15. The Centre's primary health care clinic is only able to provide assistance to a small fraction of the estimated 10,000 to 250,000 irregular migrants in Toronto, many of whom remain hidden and who are unaware of the clinic or afraid to reveal their identity. The clinic's capacity is also severely limited, and the wait time to see a doctor is often weeks or even months.

16. In 2021, the Centre partnered with the City of Toronto in the Toronto for All Campaign to advocate for the rights of migrants in Toronto. After the Mayor of Toronto proclaimed August 24th the Day of Undocumented Residents in Toronto, a proclamation was issued stating that "Undocumented residents lack access to safe and secure housing, health care, and education for themselves and their children. The COVID-19 pandemic has only intensified the vast challenges they continue to face. Although the City of Toronto's Access to City Services for Undocumented Torontonians policy strives to ensure access to all City services regardless of immigration status, the reality is that undocumented residents continue to face barriers in their communities." In support of the proclamation the Centre stated that "We are proud to continue working alongside the City to invite all Torontonians to increase awareness, engage in discussion, and

embrace Toronto as a true Sanctuary City, where everyone is welcome and treated with dignity.”

17. In the last year as a response to the COVID-19 pandemic, the Centre partnered with the City of Toronto to lead vaccine engagement for irregular migrants and other uninsured Torontonians. To date, the Centre has hosted eight Covid-19 vaccination clinics, supporting more than 740 individuals receiving vaccines on site, as well as providing over-the-phone booking support to 1,0126 uninsured Torontonians in recent months.

18. The Centre also provides one-on-one advocacy support when families – particularly those who are a part of mixed status households – face barriers in accessing health care they are legally entitled to. For example, the Centre has worked to advocate for children born in Canada to receive OHIP coverage previously denied to them, due to their parents' irregular immigration status.

19. The Centre has also been integrally involved in partnership with the City of Toronto to raise awareness of, and improve access to, services for irregular migrants in Toronto. In the last year, these collaborations include the following advocacy and achievements:

- COVID-19 Isolation Emergency Support Fund for irregular migrants in contact with COVID-19 or tested positive for COVID-19: This fund allows irregular migrants to receive emergency financial assistance in line with the Ontario Works family scale, in order to allow recovery from COVID-19, or the necessary isolation period.

- COVID-19 Vaccine engagement: The Centre and other organizations worked with the City of Toronto to ensure that irregular migrants and other Torontonians without OHIP coverage, receive equitable access to the COVID-19 Vaccine. In partnership with the City of Toronto and Toronto Public Health, the Centre and other organizations have provided support to more than 10,000 Torontonians to receive COVID-19 vaccinations.

Addressing Discrimination Against Irregular Migrants

20. The Centre also works through public education and advocacy to combat stigmatization, prejudice, and systemic discrimination faced by migrants in Canada because of their immigration status. The Centre's collaborative projects with the City of Toronto have included work to address these forms of discrimination and to encourage equal treatment and respect for the human rights of irregular migrants, many of whom are in the process of seeking to regularize their immigration status.

21. The Centre has participated in Policing Reform through the City of Toronto's Youth Advisory Roundtable. Youth and staff from our community participated in roundtable discussions to provide recommendations on appropriate police and community interventions for racialized and irregular migrant populations.

22. The Centre has also provided training to City of Toronto staff to help them better understand how to ensure equal rights and dignity for irregular migrants, in accordance with the City's declaration that it is a sanctuary city.

The FCJ Refugee Centre's Interest, Unique Perspective and Expertise Relating to the Issues in this Case

23. The FCJ Refugee Centre, its members and its clients have a direct interest in whether the Motion to Strike in the present case is granted. In particular, as an organization committed to ensuring access to essential health care for migrants and to combatting discrimination and stigmatization against irregular migrants, the Centre has a direct interest in:

- whether Canada's decision not to review its laws and policies to ensure access to essential health care for irregular migrants is upheld;
- whether immigration status may be considered as an analogous ground of discrimination under section 15 of the *Charter*,
- and
- whether denying access to essential health care, including life-saving publicly funded health care, violates section 7 of the *Charter*, once due consideration has been given to the Views of the Human Rights Committee in this case.

24. The Centre is concerned that, if the Motion to Strike is upheld, the court will be prevented from considering evidence regarding the effects of Canada's decision not to implement the Human Rights Committee's Views on irregular migrants, in order to determine if the decision violated the *Charter* or, alternatively, was an incorrect or unreasonable exercise of a prerogative power.

25. As an organization that works to overcome discriminatory prejudice and stereotypes about irregular migrants, and assists them to affirm their human rights, the Centre believes that its intervention in this case may also be of assistance to the court in avoiding discriminatory stereotypes and stigmatization of irregular migrants that are commonly applied when members of this disadvantaged group seek access to essential, publicly-funded services, such as health care or when they assert their human rights.

Proposed Submissions of the CCPI Coalition


26. Drawing on the expertise and interests of all three members of the coalition, and consulting with other interveners to avoid duplication, the CCPI Coalition proposes to assist the court by expanding on the following submissions:

- There is no basis in existing *Charter* jurisprudence for a finding, sought by the defendant in this case, that it is settled law that section 7 imposes no government obligation to ensure access to publicly funded health care, where such care is necessary for the protection of the life or health.
- The plaintiff's claim, that Canada's decision not to implement the UN Human Rights Committee's Views and its continuing failure to ensure access to essential health care for irregular migrants violate sections 7 and 15 of the *Charter*, has a reasonable prospect of success based on existing *Charter* jurisprudence and an interpretation of *Charter* rights that properly considers the UN Human Rights Committee's Views.

- The section 7 claim in this case is supported by Canada's obligation of *pacta sunt servanda*, to perform its treaty obligations in good faith, as a peremptory norm of international law, and a principle of fundamental justice under section 7 of the *Charter*.
- The section 15 claim in this case is supported by the UN Human Rights Committee's Views, which should be considered in the court's assessment of whether immigration status may be recognized as an analogous ground of discrimination under section 15 of the *Charter*.

27. This affidavit is made in support of a motion by the FCJ Refugee Centre for leave to intervene jointly with the Charter Committee on Poverty Issues and the Canadian Health Coalition with respect to the Motion to Dismiss the Application in this case; to file a joint factum; and to present oral argument, and for no other or improper purpose.

SWORN BEFORE ME)
 via video teleconference this)
 20th day of October, 2021)


 Ameena Sultan
 A Commissioner, etc.


 DIANA GALLEGGO

TAB 4

Court File No. CV-20-00649404-0000

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

Attorney General of Canada.

Defendant

**AFFIDAVIT OF STEVEN STAPLES
(sworn October 18, 2021)**

**I, Steven Staples, of the City of Toronto in the Province of Ontario, MAKE OATH
AND SAY:**

1. I am the Director of Policy and Advocacy for the Canadian Health Coalition (CHC) and as such, I have knowledge of the matters referred to in this affidavit.

2. CHC seeks leave to intervene jointly with the Charter Committee on Poverty Issues and the FCJ Refugee Centre in the Motion to Strike the Amended Amended Statement of Claim ("the Statement of Claim") in this case, requesting to make single written and oral submissions. The proposed coalition of interveners ("the CCPI Coalition") seeks to assist the court with the following issues of broad public interest that are raised in this case and motion to strike:

i) Whether, in light of the UN Human Rights Committee's Views in this case, denying access to publicly funded health care to irregular migrants to prevent reasonably foreseeable threats to their life and health contravenes sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");

and

ii) Whether Canada's decision not to implement the systemic remedy required in the UN Human Rights Committee's Views, so as to ensure that irregular migrants have access to essential health care, violates sections 7 and 15 of the *Charter* or is an incorrect or unreasonable exercise of a prerogative power.

3. CHC believes the CCPI Coalition can be of assistance to the court in determining whether these key issues raised in the Statement of Claim have a reasonable prospect of success, based on existing jurisprudence and established principles of *Charter* interpretation. The CCPI Coalition can also be of assistance to the court in considering the consequences for vulnerable groups, particularly irregular migrants, of the finding sought by the defendant in this case: that the *Charter* issues raised are matters of settled law and that this claim should therefore be struck without a hearing on the evidence.

4. The CCPI Coalition can assist the court by ensuring that the interests and perspectives of disadvantaged residents of Canada who are unable to afford private health care, in particular irregular migrants who continue to be denied access to essential health care, are fully considered in the court's review of whether Canada's refusal to implement the UN Human Rights Committee's Views violates the *Charter* and Canada's international human rights treaty obligations.

5. The issues raised in the Statement of Claim in relation to Canada's domestic constitutional and international human rights obligations are among the most critical, unresolved questions in *Charter* jurisprudence. These issues deserve to be heard with the benefit of a full evidentiary record: striking the present claim raises critical access to justice concerns for some of the most vulnerable and marginalized groups in Canada. The CCPI Coalition can offer

invaluable assistance to the court in examining those issues as they are raised in the present claim.

The Canadian Health Coalition

6. The Canadian Health Coalition (CHC) is dedicated to preserving and enhancing Canada's public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status. Founded in 1979, CHC includes organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals from across Canada. CHC is dedicated to promoting 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.

7. CHC believes that access to health care is of such direct and fundamental importance to every resident of Canada that the administration and operation of Canada's health care and publicly funded health insurance system must be thoroughly transparent, accountable and subject to rigorous scrutiny for compliance with rights guaranteed by the *Charter* and international human rights law.

8. CHC provides extensive information on access to publicly funded health care through its website, which is the repository for a substantial library of

archival material and is widely recognized as one of the best sources of up-to-date and topical information about Canada's health care system. In particular, CHC has provided information on eligibility for the IFHP.

Research, Public Education and Advocacy

9. CHC has organized national and regional conferences, hosted round-table discussions, circulated petitions, organized public services announcements, initiated and coordinated traditional and social media campaigns and responded to hundreds of public speaking requests on the subjects of health and access to health care. CHC is frequently called upon to provide national and regional media with analysis and commentary concerning Canada's health care system. CHC has also made numerous presentations to parliamentary and legislative committees, met with provincial and federal politicians as well as First Nations' leaders, organized teach-ins and lobby sessions on Parliament Hill and otherwise engaged in public advocacy intended to promote the maintenance and enhancement of the public health care and health insurance system and ensure universal access to health care.

10. CHC assesses changes to law or policy for their effects on access to publicly funded health care and disseminates the results of its research to the public as well as to policy makers and governments. For example, CHC has conducted research into the effects of the Canada-European Union Free Trade Agreement on the public health care system in Canada and made submissions

providing the results of its research to the Parliamentary Committee on International Trade in 2014.

11. CHC was invited to appear before the Standing Committee on Health (HESA) on May 11, 2020 to provide its views on the Canadian response to the outbreak of COVID-19, emphasizing the need to ensure access to health care for vulnerable, marginalized and low income groups. CHC was also invited to appear before the Standing Committee on Finance on September 26, 2018, to participate in pre-budget consultations in advance of the 2019 federal budget.

12. CHC has conducted extensive research and advocacy on the issue of access to health care and medications by disadvantaged groups and the need for a universal pharmacare plan, advocating for universal access to pharmaceuticals based on need rather than ability to pay consistent with the principles of the medicare system. CHC was invited to appear before the HESA on May 16, 2016 to provide its views on the development of a national pharmacare program.

Participation in Court Cases

13. CHC has also engaged in litigation to promote the maintenance and enhancement of the public health care system and protect universal access to health care based on need rather than ability to pay. For example, in light of criticisms from Auditors General of Canada of the performance of the Federal

Minister of Health in regard to transparency and accountability requirements under the *Canada Health Act*, and in response to CHC members' own observations and concerns, CHC sought and was granted standing jointly with several other non-governmental organizations to bring an action in the Federal Court - Trial Division for declaratory and other relief under the *Canada Health Act* in *Canadian Union of Public Employees v. Canada (Minister of Health)*, 2004 FC 1334.

14. CHC was also granted intervener status jointly with the Charter Committee on Poverty Issues (CCPI) before the Supreme Court of Canada in the case of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791. CCPI and CHC argued that access to health care is a component of the rights to life and security of the person protected under section 7 of the *Charter* and that section 7 should be interpreted in light of Canada's international human rights obligations to guarantee access to health care based on need, and not ability to pay. CCPI and CHC emphasized that the *Charter* should ensure equal protection of the life and security of the person rights of those who lack the means to access private health care.

CHC's Interest, Unique Perspective and Expertise in the Issues in This Case

15. CHC believes that, although access to publicly funded health care is not explicitly recognized as a self-standing right in the *Charter*, access to health care

based on need rather than ability to pay is understood as a fundamental right in Canada, as it is in international human rights treaties ratified by Canada. CHC therefore has a direct interest in the court's determination in this case of whether the *Charter* is to be interpreted in light of Canada's obligations to protect the right to life under the *International Covenant on Civil and Political Rights*, with due consideration of the authoritative Views of the UN Human Rights Committee in this case. CHC believes that an approach to section 7 that denies the protection of the right to life and security of the person to irregular migrants needing access to publicly funded health care for the protection of life and health, and instead only protects these *Charter* rights in the context of access to privately funded health care, would be at odds with the core values underlying both the publicly funded health care system and the *Charter* – values which CHC is dedicated to promoting.

16. CHC has decided to seek leave to intervene in this case jointly with CCPI and the FCJ Centre for Refugees to ensure that laws, policies or decisions of governments that deny access to publicly funded health care necessary for the protection of the right to life or security of the person, including for irregular migrants, are subject to judicial scrutiny to determine if they accord with principles of fundamental justice and can be justified under section 1 of the *Charter*. CHC similarly seeks to ensure that Canada's decision not to implement

the Views of the UN Human Rights Committee is subject to review to determine if that decision complies with the *Charter*.

17. The longstanding engagement of CHC in research and advocacy on the issue of access to publicly funded health care will be of significant benefit to the Court and supports the granting of intervener status to the CCPI Coalition in this case.

18. CHC's interests in the issues raised in this case are directly related to its core mandate – to ensure access to publicly funded health care based on need rather than ability to pay and to ensure that the *Charter* is interpreted and applied in a manner that affords full recognition to, and equal protection of, the right of access to publicly funded health care, including for the most vulnerable groups in Canadian society.

19. CHC's perspective and expertise in addressing barriers in access to publicly funded health care will be of assistance to court in this case, to ensure that defendant's characterization of the claim as a claim to a right to "free health care" is properly assessed from the perspective of those who rely on access to publicly funded health care for the protection of their lives.

20. As an organization committed to ensuring that Canada lives up to its obligations under international human rights law, ensuring access to effective remedies through consistent interpretations of sections 7 and 15 of the *Charter*,

CHC has a significant interest in the outcome of this case. This case raises in a unique and unprecedented fashion the effect of a UN human rights body's decision, made under a ratified petition procedure, on the proper interpretation of the scope and application of rights under the *Charter*.

21. CHC is also concerned that if the Motion to Strike is upheld, the court will be prevented from considering evidence regarding the effects of Canada's decision not to implement the UN Human Rights Committee's Views on precarious migrants.

Proposed Submissions of the CCPI Coalition

22. Drawing on the expertise and interests of all three members of the coalition, and consulting with other interveners to avoid duplication, the CCPI Coalition proposes to assist the Court by expanding on the following submissions:

- There is no basis in existing *Charter* jurisprudence for a finding, as sought by the defendant, that it is settled law that section 7 of the *Charter* imposes no obligation to ensure access to publicly funded, as opposed to privately funded healthcare, where such care is necessary for the protection of the life or long-term health.

- The plaintiff's claim that Canada's decision not to implement the UN Human Rights Committee's Views and ensure access to essential health care for irregular migrants is contrary to sections 7 and 15 of the *Charter* has a reasonable prospect of success based on existing *Charter* jurisprudence and an interpretation of *Charter* rights that properly considers the Committee's Views. The section 7 claim is supported by Canada's obligation of *pacta sunt servanda*, to perform its treaty obligations in good faith, as a peremptory norm of international law and a principle of fundamental justice under section 7 of the *Charter*. The section 15 claim is supported by the Committee's Views, which should be considered in the court's assessment of whether immigration status may be recognized as an analogous ground of discrimination under section 15.

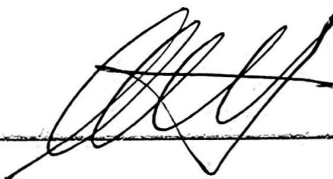
23. This affidavit is made in support of a motion by the Canadian Health Coalition Issues for leave to intervene jointly with the Charter Committee on Poverty Issues and the FCJ Refugee Centre with respect to the defendant's motion to strike in this case; to file a factum and to present oral argument.

SWORN remotely by *video conference* by
Steven Staples states as being located in
the City of Toronto, in the Province of



Steven Staples

Ontario, before me at the City of Ottawa,
in the Province of Ontario, on this 20th
day of October, 2021, in accordance with
O. Reg 431/20, Administering Oath or
Declaration Remotely.



Commissioner for Taking Affidavits

(or as may be)

VANESSA GRUBEN

*a Commissioner, etc, Province of
Ontario,*

NELL TOUSSAINT

Plaintiff

v. ATTORNEY GENERAL OF CANADA

Defendant

Court File No. CV-20-00649404-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

MOTION RECORD

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