CV-20-00649404-000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELL TOUSSAINT

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: October 14, 2020

Issued by "Civil E-filed"

Local registrar

Address of court office: 330 University Avenue
Toronto, Ontario, M5G 1R7

TO: Attorney General of Canada
Ontario Regional Office, Department of Justice Canada
120 Adelaide Street West, Suite #400
Toronto, Ontario M5H 1T1

CLAIM

1. The plaintiff claims:

a) General and special damages in the amount of $1,200,000 arising out of her exclusion between July 2009 and April 30, 2013 from health care benefits essential to prevent a reasonably foreseeable risk of loss of life or irreversible negative health consequences (hereinafter referred to as "essential health care benefits") under the defendant's Interim Federal Health Program established under Order-in-Council number 157-11/848 and continued under the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26, and the defendant's failure or refusal to pay her compensation for the resulting violation of her rights to life, security of the person and non-discrimination,

i) under section 24(1) of the *Canadian Charter of Rights and Freedoms*,

ii) under domestic law requiring the defendant to perform its obligations under the International Covenant on Civil and Political Rights and the first Optional Protocol thereto in good faith, and

iii) at customary international law as incorporated into the law of Canada;

b) Pre-judgment interest on the aforesaid damages;

c) A declaration pursuant to section 52(1) of *The Constitution Act, 1982* that the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 as continued in amended form in the 2016 Interim Federal Health Program policy effective as of April 1, 2016, is unconstitutional, in that it excludes irregular migrants from access to essential health care

benefits, in a manner that violates sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*;

d) A declaration that the Minister of Citizenship and Immigration violated the plaintiff's rights under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* between April 5, 2012 and April 30, 2013 by not acting on his own initiative to pay the costs of essential health care benefits for her when it was within his power to do so pursuant to section 7 of the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26;

e) An order requiring the defendant to interpret and apply the Interim Federal Health Program in a manner consistent with sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and to provide that irregular migrants in Canada are eligible for essential health care benefits;

f) A declaration that the defendant violated the plaintiff's rights to life and non-discrimination as recognized in articles 6 and 26 of the International Covenant on Civil and Political Rights by failing to provide her essential health care benefits under the Interim Federal Health Program between July 2009 and April 30, 2013 when she was an irregular migrant, as the United Nations Human Rights Committee determined in its Views adopted July 24, 2018 in *Toussaint* v. *Canada*, CCPR/C/123/D/2348/2014, and violated her right to an effective remedy therefor as provided for in article 2.3(a) of the said Covenant by failing or refusing to pay her adequate compensation as the Committee stated the defendant was obliged to do;

g) A declaration that the defendant's decision not to give effect to the said Views of the United Nations Human Rights Committee infringed sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, interpreted in light of the Human Rights Committee's Views, and an order under section 24(1) of the *Canadian Charter of Rights and Freedoms* requiring the

defendant to give effect to the Views of the Human Rights Committee in a manner that complies with the *Canadian Charter of Rights and Freedoms*;

h) A declaration that the defendant's failure or refusal to provide adequate compensation to the plaintiff for the violation of her rights and to ensure that irregular migrants have access to essential health care benefits as determined in the aforementioned Views of the Human Rights Committee was an incorrect or, in the alternative, an unreasonable decision, contrary to Canada's international human rights obligations to act in good faith, and an order requiring the defendant to give effect to the Views of the Committee;

i) if necessary, a declaration pursuant to section 52(1) of *The Constitution Act, 1982* that section 32 of the *Crown Liability and Proceedings Act*, R.S., 1985, c. C-50, and the provisions of the *Limitations Act, 2002*, SO 2002, c 24, Sch B as made applicable by section 32, are invalid, inoperable, inapplicable and of no force or effect to the extent that they would bar a claim against the government of Canada for a breach of section 7 or 15(1) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*;

j) if necessary, a declaration pursuant to section 52(1) of *The Constitution Act, 1982* that the common law rules of *res judicata*, issue estoppel, abuse of process, and collateral attack are invalid, inoperable, inapplicable and of no force or effect to the extent that they would bar a claim against the government of Canada for a breach of section 7 or 15(1) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*;

k) Costs on a substantial indemnity basis; and

l) Such further and other relief as to this Honourable Court seems just.

THE PARTIES

The Plaintiff

2. The plaintiff Nell Toussaint is a 51 year old woman of colour who is a national of Grenada. She has lived in Canada since December 1999 and currently resides in the City of Toronto in the Province of Ontario. She brings this action with funding from the Court Challenges Program of Canada that enables her to present the issues in a sufficiently concrete and well-developed factual context. As a result of the defendant failing or refusing to provide her essential health care benefits under the Interim Federal Health Program between July 2009 and April 30, 2013 when she was an irregular migrant the plaintiff currently lives with irreversible negative health consequences.

The Defendant

3. The defendant is the executive branch of the government of Canada (the "Government") and is represented herein by the Attorney General of Canada.

4. The defendant established the Interim Federal Health Program ("IFHP") under its Order-in-Council number 157-11/848 made on June 20, 1957 (the "1957 Order-in-Council"), which was replaced on April 5, 2012 by its Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 (the "2012 Order-in-Council"). The 2012 Order-in-Council was declared unconstitutional in 2014, and was ultimately replaced by the current 2016 Interim Federal Health Program policy, effective as of April 1, 2016 pursuant to the Immigration, Refugees and Citizenship Canada Notice "Changes to the Interim Federal Health Program" dated April 11, 2016 ("2016 IFHP Policy").

5. At all material times the IFHP was under the responsibility of the Government's Minister of Citizenship and Immigration until November 3, 2015 and since then the Minster of Immigration, Refugees and Citizenship.

6. The aforesaid orders-in-council were not made pursuant to any statutory authority and there is no Act of Parliament that deals with such health care benefits.

THE FACTS

7. On 11 December 1999 the plaintiff lawfully entered Canada as a visitor from Grenada. She worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. However, some of her employers made deductions from her salary to cover federal and provincial taxes, Canada Pension Plan and Employment Insurance. During this period, she managed to pay privately for any medical costs.

8. Encouraged by an employer who wished to hire her permanently, the plaintiff began to seek regularization of her status in Canada in 2005. That year, she paid a significant part of her savings to an immigration consultant who turned out to be dishonest and provided no useful service. The plaintiff could not afford to make further attempts to regularize her status for some time.

9. In 2006 the plaintiff's health began to deteriorate as she developed chronic fatigue and abscesses. In November 2008, she became unable to work due to illness, and in 2009 her health deteriorated to life-threatening status. In February 2009 she was diagnosed with pulmonary

embolism and suffered from poorly controlled diabetes with complications of renal dysfunction, proteinuria, retinopathy and peripheral neuropathy. Her neurological problems resulted in severe functional disability with marked reduction in mobility and impairment of basic activities. She also suffered from hyperlipidaemia and hypertension.

10. In 2008 the plaintiff received free assistance from a qualified immigration consultant and on September 12, 2008 made an application for permanent resident status on humanitarian and compassionate grounds to Citizenship and Immigration Canada, including a request that Citizenship and Immigration Canada waive the application fee which it incorrectly stated it did not have the authority to do.

11. In April 2009 the plaintiff was informed that she had qualified for provincial social assistance under the Ontario Works program due to her pending application for permanent residence in Canada based on humanitarian and compassionate grounds. She was also deemed eligible for social assistance from the Ontario Disability Support Program, but neither of those programs covered health care or the cost of fees for a humanitarian and compassionate application.

12. On 6 May 2009, the plaintiff applied for health-care coverage under the defendant's aforesaid program of health care for immigrants, called the IFHP, established pursuant to the 1957 Order-in-Council.

13. On 10 July 2009, the plaintiff was denied health coverage under the IFHP by an immigration officer as she did not fit into any of the four categories of immigrants eligible for IFHP coverage as

set out in the Citizenship and Immigration Canada guidelines: refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection Act* and victims of trafficking in persons. The life-threatening nature of the plaintiff's health problems was not mentioned as a consideration.

14. The plaintiff sought judicial review before the Federal Court of the decision denying her health-care coverage under the IFHP. She argued that the decision was in breach of her rights to life, to security of the person and to non-discrimination under sections 7 and 15, respectively, of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") and that the immigration officer had failed to apply domestic law in a manner consistent with the international human rights treaties ratified by Canada. The plaintiff also provided the Court with extensive medical evidence proving that her life had been put at risk.

15. The Federal Court in its August 6, 2010 judgment, 2010 FC 810 accepted that the evidence before it established that the plaintiff experienced extreme delay in receiving medical treatment and suffered severe psychological stress resulting from the uncertainty surrounding whether she would receive the medical treatment she needed. The Federal Court also found that the evidence established a deprivation of the plaintiff's right to life and security of the person that was caused by her exclusion from the IFHP. However, the Court found that the deprivation of the rights to life and security of the person in the plaintiff's case was not contrary to section 7 of the *Canadian Charter*, that denying financial coverage for health care to persons who have chosen to enter or remain in Canada "illegally" is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws. The Federal Court raised,

but did not decide, whether the plaintiff's right to non-discrimination on the basis of her immigration status as an irregular migrant had been violated.

16. The plaintiff then appealed to the Federal Court of Appeal, arguing, among other things, that the Federal Court's decision was contrary to the right to life under article 6 of the International Covenant on Civil and Political Rights (the "ICCPR") and to protection from discrimination on the ground of immigration status under international human rights law.

17. The Federal Court of Appeal in its June 27, 2011 judgment, 2011 FCA 2013 upheld the Federal Court's finding that the plaintiff "was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person". The Court held, however, that the "operative cause" of the risk to her life was her decision to remain in Canada without legal status and agreed with the lower court's finding that the deprivation of the right to life and security of the person in this case accorded with the principles of fundamental justice. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status did not qualify for protection as an "analogous ground" of discrimination under the *Canadian Charter*. The Court also commented that in assessing whether the exclusion of immigrants without legal status from access to health care was justifiable as a reasonable limit under section 1 of the *Canadian Charter*, appropriate weight should be given to the interests of the State in defending its immigration laws. The Court held that while international human rights law could be considered in interpreting the *Canadian Charter*, it was not relevant in this case.

18. The plaintiff then sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. Her application for leave to appeal was denied on April 5, 2012.

19. On April 5, 2012 the defendant repealed the 1957 Order-in-Council and replaced it with the 2012 Order-in-Council. In relation to access to the IFHP the 2012 Order-in-Council does not, however, provide irregular migrants with health-care coverage under the Program and makes no explicit exception for situations where life or health is at risk, except where there is a clear health risk to the public. This remains the case in the 2016 IFHP Policy.

20. At all material times the Minister of Citizenship and Immigration or his delegates both before and after the making of the 2012 Order-in-Council on occasion granted benefits to persons who did not clearly meet the criteria then in place under the IFHP, but negligently, in bad faith or in abuse of their powers refused to do so for the plaintiff, despite knowing that she was then ineligible for provincial health insurance coverage and that her medical problems were serious and urgent, even after being made aware of medical opinions to that effect, and even after learning of the finding of the Federal Court, upheld by the Federal Court of Appeal, that the plaintiff was exposed to a significant risk to her life and health, so significant that her rights to life and security of the person were violated.

21. On April 30, 2013, the plaintiff became eligible for health-care coverage as a result of her application for permanent residence based on spousal sponsorship and a confirmation by Citizenship and Immigration Canada that she met the criteria for spousal sponsorship. Since then,

the plaintiff has been granted health-care coverage under the provincial Ontario Health Insurance Plan and has been receiving health care.

22. In December, 2013 the plaintiff submitted a communication to the United Nations Human Rights Committee (the "Committee") under the First Optional Protocol to the International Covenant on Civil and Political Rights (the "Optional Protocol"). The Committee is an independent body established by the ICCPR specifically to supervise the application of the ICCPR and is recognized as an authority on the interpretation of the scope and nature of the obligations thereunder. The plaintiff claimed that as a result of her exclusion from the IFHP she was a victim of violations of, among others, the right to life and the right to non-discrimination recognized in articles 6 and 26 of the ICCPR.

23. After consultation with provincial governments the defendant acceded both to the ICCPR and the Optional Protocol on May 19, 1976 and caused to be tabled copies thereof in the House of Commons on February 17, 1977 and in the Senate on February 22, 1977. By so acceding the defendant undertook and agreed to binding international obligations, among other things, to act as follows in the plaintiff's interests, intending to provide to the plaintiff as well as other individuals within Canada and subject to Canada's jurisdiction the benefits contained in such undertakings and agreements:

a) undertook to respect and to ensure to the plaintiff the rights to life and to non-discrimination without distinction of any kind;

b) undertook to take the necessary steps to adopt measures as may be necessary to give effect to such rights;

c) agreed that it may not derogate from its obligations to protect by law the plaintiff's inherent right to life and to prohibit any discrimination against the plaintiff and guarantee to the plaintiff equal and effective protection against discrimination (other than a limited right of derogation in times of emergency from its obligation to prohibit discrimination but no derogation under any circumstances from the obligation to protect the right to life);

d) agreed to recognize the competence of the Committee to receive and consider the plaintiff's claims to violations of her rights recognized in the ICCPR, and to engage in good faith in those proceedings before the Committee including submitting to the Committee written explanations or statements clarifying the matter in response to the plaintiff's communication and any additional written information or observations requested by the Committee, including remedial measures that have been taken;

e) undertook to ensure that the plaintiff shall have an effective remedy for the violation of such rights, notwithstanding that the violation has been committed by persons acting in an official capacity; and

f) undertook to ensure that the plaintiff shall have her right to an effective remedy determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by Canada's legal system, and to develop the possibilities of judicial remedy.

24. On October 14, 1970 the defendant acceded to the Vienna Convention on the Law of Treaties (the "VCLT") and caused to be tabled copies thereof in both the House of Commons and the Senate on December 17, 1970. The VCLT entered into force on January 27, 1980. By so acceding the defendant agreed to perform its obligations under, among other treaties, the ICCPR and the Optional

Protocol, to do so in good faith, and not to invoke any provisions of its internal law as a justification for its failure to perform such obligations. The aforesaid provisions of the VCLT codify the rule of customary international law known as *pacta sunt servanda*, which is a peremptory norm and forms part of *jus cogens*.

25. Between 2014 and 2017 the Committee received from the defendant and forwarded to the plaintiff various submissions and observations contesting both the admissibility and merits of the plaintiff's claims, and also received from the plaintiff her submissions and observations in response thereto which in turn the Committee forwarded to the defendant.

26. Among other things, the plaintiff brought to the Committee's attention that in *Canada* v. *Bedford*, 2013 SCC 72 the Supreme Court of Canada held that the standard for causation between a law and the violation of the rights to life and security of the person under section 7 of the *Canadian Charter* is not that of a "direct" causal connection, which is how "operative cause" was used by the Federal Court of Appeal, but rather a "sufficient causal connection", which does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant.

27. On July 24, 2018 the Committee in *Toussaint* v. C*anada*, CCPR/C/123/D/2348/2014 determined that the defendant had violated the plaintiff's right to life recognized in article 6 of the ICCPR, noting both the Federal Court and the Federal Court of Appeal acknowledged that, despite the care the plaintiff may have received, she had been exposed to a serious threat to her life and health because she had been excluded from the benefits of the IFHP. The Committee also noted the

medical opinions to this effect which were accepted by the Federal Court. The Committee noted the plaintiff did not claim a right to health, but that specific rights under the International Covenant on Civil and Political Rights have been violated in the context of access to health care. It stated that the obligation to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life, and includes the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

28. The Committee also determined that the defendant is not entitled to make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants. The Committee stated that in the particular circumstances of the plaintiff's case where, as recognized by the Federal Court and the Federal Court of Appeal, the exclusion of the plaintiff from the IFHP could result in her loss of life or irreversible, negative consequences for her health, the distinction drawn by the defendant for the purpose of admission to the IFHP between those with legal status in Canada and those with irregular status was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26 of the ICCPR.

29. The Committee further determined that pursuant to article 2.3(a) of the ICCPR the defendant is under an obligation to provide the plaintiff with an effective remedy and is therefore obliged, among other things, to take appropriate steps to provide the plaintiff with adequate compensation, and is also under an obligation to take all steps necessary to prevent similar violations in the future and ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

30. The defendant undertook, pursuant to article 2 of the ICCPR, to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR. The defendant has also recognized the competence of the Committee to determine whether there has been a violation of rights under the ICCPR, and undertook to provide an effective and enforceable remedy to the extent the Committee determines that a violation has occurred. Moreover, the defendant acceded to the jurisdiction of the Committee to determine whether the plaintiff's rights under the ICCPR had been violated, participating in the proceedings initiated by the plaintiff before the Committee. As a result, the plaintiff reasonably believed that the defendant would respond to the Committee's finding that it had violated the plaintiff's rights under the ICCPR, including, but not limited to, by making reparations to her. The defendant's failure to do so violated her reasonable expectations, and constituted a breach of the defendant's duty to act in good faith in complying with its obligations under international law.

31. The plaintiff by her counsel wrote to the Prime Minister of Canada on August 30, 2018 asking for his assurance that the defendant will make good on its obligation to provide her with redress and to amend its regulatory scheme. The Prime Minister's office replied that the matter is the responsibility of the Minister of Immigration, Refugees and Citizenship. On September 25, 2018 the plaintiff's counsel wrote to the then Minister asking for the same assurance. The Minister's office replied that the correspondence had been forwarded to the appropriate Departmental officials for their information and consideration. However, neither the Minister nor any Departmental officials replied to the plaintiff.

32. On July 16, 2020 as part of the follow-up procedure to its Views the Committee assigned the defendant two E grades (the worst possible, indicating that the information provided or measures taken by the defendant were contrary to or reflected rejection of the Committee's Views) for failing to meet its obligations to provide the plaintiff with adequate compensation and for failing to take all steps necessary to prevent non-repetition, noting that the defendant had rejected the Committee's assessment of the case and mistakenly viewed the follow-up procedure as an opportunity to reargue the case.

33. On July 17, 2020 the plaintiff's counsel wrote to the current Minister of Immigration, Refugees and Citizenship asking that the defendant provide the plaintiff with an effective remedy for the violation of her rights. On September 15, 2020 the Director General, Migration Health at Immigration, Refugees and Citizenship Canada responded that the defendant would not take any measures to do so. The defendant relied on the same reasons it gave to the Committee as part of the follow-up procedure, which the defendant mistakenly used as an opportunity to reargue the case.

34. The defendant incorrectly, in bad faith and unreasonably refused to give effect to the Committee's decision by relying on its own, different interpretation of its obligations under the ICCPR and on the decisions of the Federal Court and Federal Court of Appeal in relation to rights under the *Canadian Charter*, thereby failing to meet the standard of good faith performance of the obligations it undertook by acceding to the Optional Protocol and the ICCPR. In particular, the defendant:

a) asserted that a serious risk to the plaintiff's life was in no way a reasonably foreseeable outcome of the denial of coverage under the IFHP, despite the Federal Court finding, after a full

and fair opportunity to litigate the issue, that the plaintiff was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person, and despite the acceptance of the Federal Court's finding by the Federal Court of Appeal and the Committee;

b) continued to rely on the Federal Court of Appeal's "operative cause" standard of causation without any regard to or mention of the Supreme Court of Canada's subsequent jurisprudence that effectively rejected that standard in favour of a "sufficient causal connection" standard that supports the Federal Court's finding that the deprivation of the plaintiff's right to life was caused by her exclusion from the IFHP, and without any regard to or mention of the June 3, 2016 opinion of nine Canadian constitutional and health law experts submitted by the plaintiff in the proceedings before the Committee that it was reasonable for the plaintiff as an irregular migrant to seek a remedy against the defendant rather than against the provincial government;

c) continued to rely on the incorrect characterization of the plaintiff's claim as asserting a right to publicly funded healthcare or a right to health as guaranteed under the International Covenant on Economic, Social and Cultural Rights, rather than a right to life and to non-discrimination under articles 6 and 26 of the International Covenant on Civil and Political Rights, in the context of access to existing health care services;

d) continued to assert that excluding irregular migrants from the IFHP, even when it could result in loss of life or irreversible, negative consequences for their health, "advances a legitimate aim of encouraging persons not lawfully present in Canada to take steps to regularize their status", without giving due weight and consideration i) to the interpretation of the right to life and to non-discrimination adopted by the Committee, ii) to other authoritative international bodies such as the Inter-American Court of Human Rights which the Committee cited in support

of its interpretation that the defendant cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants, iii) to opinions of international organizations and others such as the opinions dated August 21, 2015 of Amnesty International and August 22, 2015 of the International Network for Economic, Social & Cultural Rights submitted by the plaintiff in the proceedings before the Committee and the studies and reports referred to therein, or iv) to the fact that at all material times the plaintiff had taken steps to regularize her status, which had been impeded by the wrongful failure of Citizenship and Immigration Canada to consider her request for a fee waiver, all of which the defendant was, or ought to have been, aware of;

e) recognizing that it has obligations under the ICCPR, asserted that the provision of life-saving emergency medical services to irregular migrants at Canadian hospitals is sufficient to meet such obligations, despite the rejection of that assertion by the Federal Court and Federal Court of Appeal in the context of the violation of the plaintiff's right to life and security of the person under the *Canadian Charter*, and despite knowing that irregular migrants are not entitled even to emergency care under legislation in Saskatchewan, Manitoba, Newfoundland and Labrador, and Prince Edward Island or in any of Canada's three territories, and that in Ontario, British Columbia, Alberta and New Brunswick, apart from situations where there is immediate danger to life, legislation does not mandate access to other medical services that may be required in order to prevent endangering life and thereby protect the right to life;

f) asserted that it meets its obligations under the ICCPR by the 2012 Order-in-Council giving a discretionary power to the Minister of Immigration, Refugees and Citizenship on his or her own initiative to grant IFHP benefits in exceptional and compelling circumstances to persons otherwise not entitled thereto, when there are no guidelines for the exercise of such discretion

nor is there any provision for any judicial or administrative review thereof and there are significant hurdles for an individual to access this remedy as there is no provision for an individual to apply for or seek the application of the Minister's discretion. In any event, the provision of discretion in exceptional circumstances to a general policy of denying access to essential health care to irregular migrants does not satisfy the "minimum" requirement which the Committee described as follows in paragraph 11.3 of its Views. "In particular, as a minimum States parties have the obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life."; and

g) asserted that any compensation whatsoever to the plaintiff is unwarranted, when, in addition to the extreme psychological stress which the Federal Court found the plaintiff had suffered, the defendant had been informed that the plaintiff came to suffer many of the serious consequences of inadequate preventative and diagnostic care for her conditions identified in the opinions of the medical experts accepted by the Federal Court, including stroke, leg amputation above the knee, partial blindness, kidney failure requiring dialysis several times a week, and heart failure resulting in an anoxic brain injury.

The defendant, in discharging its duty to honour its obligations under the ICCPR, failed, and continues to fail, to take into consideration the interests of the plaintiff as a vulnerable affected person, a vulnerability created by the defendant's violation of her rights to life and security of the person.

LEGAL BASES

35. The Committee determined that the defendant had violated the plaintiff's rights to life and non-discrimination under articles 6 and 26 of the ICCPR by the defendant's failure or refusal to provide essential health care benefits to the plaintiff under the IFHP, and that the defendant was therefore under an obligation to provide an effective remedy, including providing the plaintiff with adequate compensation.

36. The defendant decided not to comply with this obligation. The basis of this decision was its opinion that no violation of the rights to life and non-discrimination under articles 6 and 26 had occurred.

37. The right to life is a universally recognized human right. As such, aside from being encapsulated in article 6 of the ICCPR, it is also a rule of customary international law.

38. Likewise, the prohibition against discrimination, as encapsulated in article 26 of the ICCPR, is also a universally recognized right under customary international law.

39. Both are also rules of Canadian common law, by virtue of the fact that rules of customary international law are automatically incorporated into domestic common law.

40. Accordingly, an administrative decision that is premised on a determination that these rules of international (and therefore Canadian) law have not been violated is a question of law, reviewable on a correctness standard.

41. *Pacta sunt servanda* – the international law rule that states must comply with their obligations under the international treaties they are parties to – is also a rule of customary international law. Further, as one of the central organizing principles of the international legal order, it is also a rule of *jus cogens*, and thus among a small number of peremptory norms from which no state may derogate.

42. Article 2.3(a) of the ICCPR obliges all states parties to ensure an effective remedy for violations of the rights and freedoms protected therein. Having acceded to the ICCPR, the defendant is bound by the *pacta sunt servanda* principle under customary international law – and therefore under domestic law – to observe its obligations under ICCPR article 2.3(a).

43. Thus, an administrative decision whether to provide a remedy for alleged violations of rights protected under the ICCPR is a question of law, also reviewable on a correctness standard.

44. In the alternative, such administrative decisions are reviewable on a reasonableness standard.

45. By excluding irregular migrants, and/or failing or refusing to consider the Views in applying the IFHP in a manner that continues to exclude irregular migrants, the IFHP breaches section 7 and section 15(1) of the *Canadian Charter*. In particular, the exclusion of irregular migrants such as the plaintiff, from essential health care benefits violates their right to life and security of the person, in a grossly disproportionate manner that is arbitrary and not in accordance with the principles of fundamental justice, including but not limited to the government's obligation to perform treaty obligations in good faith. The exclusion of certain groups of migrants is also discriminatory, in purpose and/or effect, based on the distinction drawn by the government, for the purpose of

admission to the IFHP, between those having legal status in the country, and those who have not been fully admitted to Canada, when the exclusion of those migrants could result in loss of life or irreversible negative consequences for their health, as was held in the Views of United Nations Human Rights Committee. Moreover, the addition of Ministerial discretion - the discretionary power of the Minister of Immigration, Refugees and Citizenship on his or her own initiative to grant IFHP benefits in exceptional and compelling circumstances - to the 2012 Order-in-Council, as continued in the current 2016 IFHP Policy, does not render the policy constitutional, nor can the violations be justified under section 1 of the *Canadian Charter*.

46. Independently of any administrative law remedies and remedies under the *Canadian Charter*, violations of rules of customary international law that have been incorporated into domestic common law may also give rise directly to civil remedies. Justifications for violations of the rights to life and non-discrimination under the *Canadian Charter* found by the Federal Court and Federal Court of Appeal do not *per se* apply to violations of the right to life and non-discrimination protected under customary international law.

47. The defendant's decision not to give effect to the Views of the Committee to provide the plaintiff with a remedy was therefore incorrect and/or unreasonable. Moreover, the plaintiff is entitled to a civil remedy directly for the violation of her customary international law rights to life and non-discrimination.

48. Further, the customary international law rights to life and freedom from discrimination as protected under the ICCPR are similar to the domestic *Canadian Charter* rights to life and equality

protected under sections 7 and 15(1) respectively. The Supreme Court of Canada has on multiple occasions stated to the effect that "the *Canadian Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." Thus, a finding of a violation of the rights to life and freedom from discrimination as protected under the ICCPR creates a presumption that the corresponding *Canadian Charter* rights have been violated as well. The common law rules of *res judicata*, issue estoppel, abuse of process and collateral attack do not apply in this case as there has been a new United Nations Human Rights Committee decision since the Federal Court of Appeal decision in *Toussaint* v. *Canada* so that the plaintiff is not relitigating an old issue, but seeking to give effect to that new Human Rights Committee decision.

49. As a direct and proximate result of the breaches by the defendant Government and by the Minister of Citizenship and Immigration and his delegates of their aforementioned obligations the plaintiff suffered personal injury, economic, and non-economic damages, and will continue to suffer such harm, damages, and economic loss in the future. Damages are a just and appropriate remedy to compensate the plaintiff, vindicate her rights, and deter future breaches of such rights.

Date of issue: October 14, 2020

Andrew C. Dekany
Barrister & Solicitor
5 Edenvale Crescent
Toronto, Ontario M9A 4A5
LSO # 18383F
Telephone: 416.888.8877
e-mail: andrewcdekany@gmail.com

Solicitor for the plaintiff

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AMENDED AMENDED STATEMENT OF CLAIM

Andrew C. Dekany
Barrister & Solicitor
5 Edenvale Crescent
Toronto, Ontario M9A 4A5
Telephone: 416.888.8877
e-mail: andrewcdekany@gmail.com

LSO membership no. 18383F

Solicitor for the plaintiff