

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

**FACTUM OF THE INTERVENERS
AMNESTY INTERNATIONAL CANADA AND ESCR-NET – INTERNATIONAL
NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

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PART I - OVERVIEW

1. Amnesty International, Canadian Section (English Speaking) (“Amnesty Canada”) and ESCR-Net International Network for Economic, Social and Cultural Rights (“ESCR-Net”) jointly seek leave to intervene in the defendant’s motion to strike the plaintiff’s Amended Amended Statement of Claim and dismiss the action.

2. Ms. Toussaint’s statement of claim follows the United Nations Human Rights Committee’s conclusion that Canada violated the *International Covenant on Civil and Political Rights* (the “ICCPR”) because Ms. Toussaint was denied access to essential health care, putting her life at risk given the seriousness of her health problems.¹

¹ [Toussaint v. Canada](#), Communication No. 2348/2014, U.N. Doc. CCPR/C/123/D/2348/2014 (2014), Interveners’ Book of Authorities (“BOA”) Tab 1 [[“Toussaint HR Committee”](#)].

3. Amnesty Canada and ESCR-Net each submitted legal opinions to the United Nations Human Rights Committee (the “Committee”) to aid its consideration of Ms. Toussaint’s case.

4. Ms. Toussaint’s statement of claim seeks relief arising out of the ICCPR and the Committee’s Views. Canada’s motion to strike seeks to dismiss Ms. Toussaint’s claim at a preliminary stage before her case can be heard on the merits and alongside a full evidentiary record.

5. Amnesty Canada and ESCR-Net seek leave to intervene to aid the Court in its consideration of the international human rights law issues that arise from the motion to strike. They plan to make submissions on the following issues:

- (a) whether Canada’s interpretation of its international law obligations as articulated in response to the Committee’s decision is correct, and whether it is a suitable matter for judicial determination given a domestic court’s authority to interpret international law instruments.
- (b) whether the remedies sought in this case are consistent with Canada’s international law obligation to ensure effective remedies, particularly systemic remedies, for violations of the human rights recognized in the ICCPR.

6. Having already offered a legal opinion to the Committee regarding the issues in Ms. Toussaint’s case, Amnesty Canada and ESCR-Net arrive at this Court with a unique perspective nourished by their expertise in international human rights law. As demonstrated by their prior participation, Amnesty Canada and ESCR-Net are genuinely interested and affected by the human rights issues raised in this case. Amnesty Canada and ESCR-Net seek to ensure the full

realization of the international human rights engaged in this motion to strike, which includes access to effective remedies for victims of international human rights violations.

PART II - SUMMARY OF FACTS

Procedural background

7. The claim at issue arises out of, among other things, Ms. Toussaint's December 2013 communication to the Committee under the First Optional Protocol to the ICCPR. In the communication, Ms. Toussaint claimed that her exclusion from Canada's Interim Federal Health Program violated the right to life and right to non-discrimination recognized in articles 6 and 26 of the ICCPR.²

8. Amnesty Canada, with the support of Amnesty's International Secretariat, and ESCR-Net each offered legal opinions to the Committee in its consideration of Ms. Toussaint's case.³ Amnesty Canada's legal opinion addressed how the right to life requires protection against deprivations of basic necessities of life, including access to essential health care, and that Canadian law, when interpreted in line with the ICCPR, is capable of providing effective remedies for irregular migrants deprived of essential health care.⁴ ESCR-Net's opinion spoke to, among other things, the interdependence, indivisibility and interrelatedness of human rights,⁵

² Defendant's Factum at para. 20, Motion Record of the Attorney General of Canada ("AGMR") at pp. 39-40.

³ Nivyabandi Affidavit at para. 25, Motion Record of the Intervenors, Amnesty and ESCR-Net ("IMR") at p. 29; Delgado Affidavit at para. 19(a), IMR at p. 67-68; Exhibit A to Nivyabandi Affidavit at para. 1, IMR at p. 42; Exhibit A to Delgado Affidavit at para. 1, IMR at p. 78.

⁴ Exhibit A to Nivyabandi Affidavit at paras. 4, 25-38, IMR at pp. 43, 50-56; [Toussaint HR Committee](#) at paras. 7.8-7.9, BOA Tab 1.

⁵ United Nations, World Conference on Human Rights, [Vienna Declaration and Programme of Action](#), A/CONF.157/24 (Part I), 25 June 1993 at para. 5 [["Vienna Declaration"](#)], BOA Tab 25

including whether the right to life in article 6 of the ICCPR encompasses access to essential health care.⁶

9. On July 24, 2018, the Committee released its decision (called its “Views”) in response to Ms. Toussaint’s communication. The Committee concluded that: (1) Canada had violated the right to life guarantee in article 6 because irregular migrants like Ms. Toussaint do not have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life; and (2) in the course of respecting and protecting the right to life, Canada drew an impermissible distinction between regular and irregular migrants in violation of article 26.⁷

10. Canada declined to take measures to give effect to the Committee’s Views on the basis that it disagreed with the Committee.⁸

11. Ms. Toussaint issued her Amended Amended Statement of Claim on May 25, 2021. The statement of claim seeks, among other things, remedies under Canadian domestic law aimed at addressing the violations of the ICCPR outlined in the Committee’s Views. In particular, Ms. Toussaint seeks declarations that: (1) Canada violated her rights to life and non-discrimination as recognized in articles 6 and 26 of the ICCPR; (2) Canada violated her right to an effective remedy provided for in article 2.3(a) of the ICCPR; and (3) Canada’s failure to give effect to the

⁶ Exhibit A to Delgado Affidavit at paras. 5-13, 24-27, 42, IMR at pp. 79-81, 84-85, 89; [Toussaint HR Committee](#) at paras. 7.5-7.7, BOA Tab 1.

⁷ Defendant’s Factum at paras. 25-26, AGMR at pp. 4243; [Toussaint HR Committee](#) at para. 12, BOA Tab 1.

⁸ Defendant’s Factum at paras. 29-30, AGMR at pp. 44-45.

Committee's Views infringed sections 7 and 15 of the *Charter*. Ms. Toussaint also seeks orders under s. 24(1) of the *Charter* requiring Canada to give effect to the Committee's Views.⁹

12. On September 8, 2021, Canada moved to strike Ms. Toussaint's Amended Amended Statement of Claim and dismiss her action. One of Canada's core arguments is that the relief sought by Ms. Toussaint—namely, access to essential, life-saving health care for her and other irregular migrants in Canada—is doomed to fail because Canadian domestic law does not provide for this relief.¹⁰ In support of this position, Canada says that violations of its obligations under an international treaty do not “automatically” translate into a breach of the *Charter* and give rise to remedies under domestic law.¹¹

Amnesty Canada

13. Founded in 1961, Amnesty International is a global movement campaigning for a world where human rights are enjoyed by all.¹² Its vision is a world in which all people can freely enjoy all the human rights enshrined in international human rights instruments.¹³

14. Amnesty International conducts research and leads efforts to advance international human rights at both the international and national levels. It is recognized as an accurate, unbiased, and credible source of research and analysis of human rights conditions around the world.¹⁴

⁹ Statement of Claim at paras. 1(f)-1(h), AGMR at pp. 12-13.

¹⁰ Defendant's Notice of Motion at paras. 10(a), (f), (g) and (h), AGMR at p. 6; Defendant's Factum at paras. 47-49, 64, 66-67, AGMR at pp. 49-50, 56.

¹¹ Defendant's Factum at para. 55, AGMR at pp. 52-53.

¹² Nivyabandi Affidavit at paras. 6, 31, IMR at pp. 8, 34

¹³ Nivyabandi Affidavit at para. 11, IMR at p. 9

¹⁴ Nivyabandi Affidavit at paras. 15-17, IMR at pp. 10-11.

15. Amnesty International has long-standing expertise and interest in states' obligations under international human rights law, including the right to life and security of the person, and right to non-discrimination.¹⁵

16. Amnesty International has more than two million members and supporters in over 162 countries. In more than 70 countries and territories, Amnesty International's work is coordinated by national sections.¹⁶ Amnesty Canada is one of these national sections. It is incorporated under the *Canada Not-For-Profit Corporations Act*, S.C. 2009, c. 23.¹⁷

17. As an arm of Amnesty International, Amnesty Canada works to protect and enhance human rights in Canada, including civil, cultural, economic, political and social rights.¹⁸ It has a special interest and concern in ensuring that Canadian law affirms the human rights of migrants and of vulnerable members of society in general.¹⁹

18. Amnesty Canada's submission of a legal opinion to the Committee in Ms. Toussaint's case is evidence of this special interest and concern. So too is Amnesty Canada and Amnesty International's participation in dozens of cases and legislative proceedings intersecting with international human rights law both within Canada and internationally.²⁰

19. Amnesty Canada has played a pivotal role in the development of jurisprudence with respect to the interpretation of the *Charter* in a manner consistent with international human rights

¹⁵ Nivyabandi Affidavit at paras. 29-33, IMR at pp. 34-35.

¹⁶ Nivyabandi Affidavit at para. 10, IMR at p. 9.

¹⁷ Nivyabandi Affidavit at para. 1, 8, IMR at pp. 1, 9.

¹⁸ Nivyabandi Affidavit at para. 27, IMR at p. 33.

¹⁹ Nivyabandi Affidavit at para. 32, IMR at p. 35.

²⁰ Nivyabandi Affidavit at paras. 18-26, IMR at pp. 11-33.

norms and is well positioned to provide the Court with a valuable and independent analysis of the central issues in this motion.²¹ In particular, Amnesty Canada has special expertise in the interplay between international human rights law and Canadian law, including the interpretation of rights under the ICCPR and Canada's obligations to implement the Committee's Views.²²

20. Amnesty Canada's contribution to the development of the law in these areas has been recognized by this Court, as well as by the Ontario Court of Appeal, Federal Court, Federal Court of Appeal and the Supreme Court of Canada, which have granted Amnesty Canada leave to intervene in numerous cases, including on questions relating to the scope and interpretation of Canada's human rights obligations at international law.²³

ESCR-Net

21. ESCR-Net is a collaborative initiative of groups and individuals from around the world working to secure human rights and social justice. It has over 230 organizational members and some 50 individual members across 75 countries, including members who work on issues related to the human rights of migrants and access to health care for marginalized groups.²⁴

22. ESCR-Net has a Strategic Litigation Working Group that includes human rights organizations and legal experts from around the world who provide research and strategic support for domestic and international cases and access to justice initiatives.²⁵

²¹ Nivyabandi Affidavit at paras. 18-20, 32, IMR at pp. 11-20, 35.

²² Nivyabandi Affidavit at para. 31, IMR at p. 34.

²³ Nivyabandi Affidavit at paras. 18-20, IMR at pp. 11-20.

²⁴ Delgado Affidavit at para. 3, IMR at p. 8.

²⁵ Delgado Affidavit at para. 5, IMR at p. 8.

23. Under the direction of the Strategic Litigation Working Group steering committee, ESCR-Net intervenes directly in legal proceedings, including in Canada. This includes the legal opinion submitted to the Committee in Ms. Toussaint's case. ESCR-Net also intervened, jointly with Amnesty Canada, in *Tanudjaja v. Attorney General (Canada)* to provide submissions on the interaction between the *Charter* and international treaties in an application commenced in the Ontario Superior Court which faced a motion to strike from both Canada and the Province of Ontario.²⁶

24. ESCR-Net has a special interest and expertise in the interdependence, indivisibility, and interrelatedness of human rights, including the right to life and the right to essential health care.²⁷ For example, in 2015, ESCR-Net responded to a request for submissions on the right to life under article 6 of the ICCPR to consider in the Committee's drafting of a General Comment on state obligations under that article. ESCR-Net's submission addressed whether this right includes positive and negative dimensions and whether the denial of access to health care can constitute a violation of article 6 of the ICCPR.²⁸

25. ESCR-Net also has a special interest and expertise in effective remedies for violations of international human rights law, including on how the justiciability of such claims in domestic courts is interconnected with a state's obligation to uphold and protect international human rights.²⁹ For example, ESCR-Net leveraged its research in this area of law to promote the

²⁶ Delgado Affidavit at para. 19(b), IMR at p. 68; [Tanudjaja v. Canada \(Attorney General\)](#), 2014 ONCA 852, BOA Tab 2

²⁷ Delgado Affidavit at paras. 8, 11, 24-25, IMR at p. 63, 64, 70-71.

²⁸ Delgado Affidavit at para. 16, IMR at p. 66.

²⁹ Delgado Affidavit at para. 6, IMR at p. 62.

adoption of a complaints procedure to the *International Covenant on Economic, Social and Cultural Rights*. Much of the research, consultation and public education conducted in connection with the complaints procedure engaged with the indivisibility, interdependence, interrelatedness and justiciability of human rights in different domestic legal systems, including in states that do not explicitly protect cultural, economic and social rights through domestic legislation.³⁰

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

26. The sole issue to be decided is whether Amnesty Canada and ESCR-Net should be granted leave to intervene in Canada's motion to strike the Amended Amended Statement of Claim.

The relevant principles

27. Courts grant leave to intervene when the moving party meets one of the following criteria.³¹ Amnesty Canada and ESCR-Net satisfy each of these requirements:

- (a) The intervener is a well-recognized group with a special expertise and with a broad identifiable membership base;
- (b) The intervener has a real, substantial, and identifiable interest in the subject matter of the proceedings; or

³⁰ Delgado Affidavit at para. 10-12, IMR at pp. 64-65.

³¹ [Bedford v. Canada \(Attorney General\)](#), 2009 ONCA 669 at para. 2, BOA Tab3; [Ontario \(Attorney General\) v. Dieleman](#) (1993), 16 OR (3d) 32 (Ont. Gen. Div.) at para. 14 [*Dieleman*], BOA Tab 4.

(c) The intervener has an important perspective distinct from the immediate parties.³²

28. In cases involving the *Charter* or other public interest and public policy issues, courts apply the test for intervention more flexibly given the increased need for broader perspectives.³³

Amnesty Canada and ESCR-Net have a genuine interest and expertise in this motion to strike

29. Both Amnesty Canada and ESCR-Net submitted legal opinions to the Committee to aid its consideration of Ms. Toussaint's case.³⁴ When interveners have already participated at prior procedural stages of a case, leave to intervene is usually granted as a matter of course or is uncontested.³⁵ This makes sense: in addition to the experience and unique perspective that the intervener can offer from having already been an active participant in the proceeding, early and eager engagement is often a sign that the intervener's interests in the matter are genuine.³⁶

30. The Committee's reliance on Amnesty Canada and ESCR-Net's legal opinions in its decision reflects the extensive experience and credibility that Amnesty Canada and ESCR-Net

³² The mere possibility of overlap between an intervener and a party is not a ground to deny leave to intervene, particularly when the intervener has committed to refrain from repeating arguments already made by the parties: *Fair Change v. Her Majesty the Queen*, 2021 ONSC 2108 at para. 15, BoA Tab 5; *P.S. v. Ontario*, 2014 ONCA 160 at para. 13 [*P.S. v. Ontario*], BOA Tab 6.

³³ *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990)*, 74 OR (2d) 164 (C.A.) at para. 6, BOA Tab 7; *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 at paras. 8-9, BOA Tab 8, citing *Dieleman* at para. 7, BOA Tab 4

³⁴ Nivyabandi Affidavit at para. 25, IMR at p. 29; Delgado Affidavit at para. 19(a), IMR at pp. 67-68; Exhibit A to Nivyabandi Affidavit, IMR at p. 39; Exhibit A to Delgado Affidavit, IMR at p. 76.

³⁵ *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2020 ONCA 842 at para. 9, BOA Tab 9; *Tanudjaja v. Attorney General of Canada*, (unreported) Court File Number C57714, March 31, 2014 at para. 1 (Ont. C.A.) BOA Tab 10; See also *Canada (Attorney General) v. Canadian Wheat Board*, 2012 FCA 114 at paras. 6-9, BOA Tab 11

³⁶ *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at para. 28, BOA Tab 12

possess in relation to the international human rights law issues raised by this case, including (1) the right to life and non-discrimination for all—including non-citizens—within the health care context, (2) the indivisibility, interdependence and interrelatedness of the right to life in article 6 of the ICCPR and the right to essential health care, and (3) ensuring access to justice through effective domestic remedies for violations of international human rights law.³⁷ The motion to strike will confront these issues directly because Canada alleges (among other things) that it is plain and obvious that there is no obligation to provide a remedy under domestic law for the violations identified in the Committee’s decision.

31. Amnesty Canada and ESCR-Net are experienced and trusted with respect to the interpretation of international human rights law: they participate in dozens of judicial proceedings in Canada and across the world;³⁸ make submissions to and consult with legislative bodies and international organizations;³⁹ shape and advocate for new international instruments;⁴⁰ generate reports, publications, and databases for public learning;⁴¹ and maintain large, international membership bases.⁴²

³⁷ [*Toussaint HR Committee*](#) at paras. 7.4-7.9, BOA Tab 1; Nivyabandi Affidavit at paras. 28-29, 31-32, IMR at pp. 33-34, 34-35; Delgado Affidavit at paras. 4, 8, 23-25, IMR at pp. 61, 63, 69-71.

³⁸ Nivyabandi Affidavit at paras. 18-20, 22, IMR at pp. 11-20; Delgado Affidavit at para. 19, IMR at pp. 67-69.

³⁹ Nivyabandi Affidavit at paras. 23, 25, IMR at pp. 24, 29; Delgado Affidavit at paras. 12, 16, IMR at pp. 65, 66.

⁴⁰ Nivyabandi Affidavit at para. 37, IMR at pp. 36-37; Delgado Affidavit at para. 10, IMR at p. 64.

⁴¹ Nivyabandi Affidavit at paras. 14-16, IMR at pp. 10-11; Delgado Affidavit at paras. 7-9, IMR at pp. 8-9.

⁴² Nivyabandi Affidavit at paras. 9-10, IMR at p. 9; Delgado Affidavit at para. 3, IMR at p. 61.

Amnesty Canada and ESCR-Net will make distinct and useful submissions

32. As was the case before the Committee, Amnesty Canada and ESCR-Net's goal is to leverage their expertise to aid in the adjudication of the international human rights law issues that arise from the case.

33. International human rights law, including the proper interpretation of international instruments by domestic courts and the meaning and scope of the obligation to ensure effective remedies, is at the core of Ms. Toussaint's statement of claim and Canada's motion to strike. Ms. Toussaint's claim seeks, among other things, systemic remedies based on the violations of ICCPR identified by the Committee; Canada argues that it is plain and obvious that there is no obligation to provide a remedy for those violations. Amnesty Canada and ESCR-Net aim to aid the Court as it encounters and navigates these legal issues. They plan to accomplish this goal with two submissions: (1) addressing the proper interpretation of the ICCPR; and (2) providing context on what access to effective remedies means both internationally and domestically in Canada.⁴³

34. *Interpretation of the ICCPR.* Canada's executive branch has refused to implement the Committee's Views on the basis that it disagrees with the Committee's legal interpretation, and in particular its interpretation of Canada's obligations under the ICCPR.⁴⁴ Amnesty Canada and ESCR-Net intend to make submissions on the international human rights law that grounds the Committee's Views, and the competing interpretations of those obligations offered by Canada.

⁴³ Nivyabandi Affidavit at paras. 35-36, IMR at pp. 35-36; Delgado Affidavit at paras. 29-30, IMR at pp. 71-72.

⁴⁴ Defendant's Factum at para. 30, AGMR at pp. 44-45.

35. The crux of Amnesty Canada and ESCR-Net's submission is that human rights are indivisible, interdependent and interrelated, and should not be subjected to formalistic interpretations.⁴⁵ Access to essential health care is not dependent on an expressly codified right to health; it is also required to fully protect the right to life, security of the person, and non-discrimination, especially when lack of access exposes an individual to a foreseeable risk that could result in loss of life. Rights to life and rights to health care do not protect two entirely distinct and isolated terrains of human rights. They overlap, support, and interact with each other. Artificial characterizations of human rights claims, with some being "life" claims and others being "health" claims, ignores the practical and well-recognized interdependence, interrelatedness and indivisibility of these rights.

36. The Committee accepted this in its analysis of the right to life under article 6 of the ICCPR. It concluded that state parties, at a minimum, "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."⁴⁶

37. This submission will help the Court determine the motion to strike. Canada asserts that it is plain and obvious that domestic laws, including the *Charter*, do not require that individuals have access to essential health care, and that, as a result, the plaintiff's claim is doomed to fail.⁴⁷

⁴⁵ [Vienna Declaration](#) at para. 5, BOA Tab 25.

⁴⁶ [Toussaint HR Committee](#) at para. 11.3, BOA Tab 1; *See also* United Nations, Human Rights Committee, [General comment no. 36, Article 6 \(Right to Life\)](#), 3 September 2019, CCPR/C/GC/36 at paras. 3, 26, BOA Tab 26.

⁴⁷ Defendant's Factum at para. 47, AGMR at pp. 49-50.

Canada's position raises the issue of the proper scope of the right to life under the ICCPR, and the correctness of its interpretation of its obligations as a state party in light of the indivisibility, interdependence, and interrelatedness of human rights.

38. In deciding whether to strike the plaintiff's claim, this Court will be called upon to interpret Canada's domestic laws in conformity with international law.⁴⁸ The obligation to interpret domestic laws, including the *Charter*, in conformity with Canada's international law obligations applies even where international human rights law instruments and principles have not been implemented by a domestic legislature.⁴⁹

39. The presumption of conformity operates in harmony with the *pacta sunt servanda* principle. As the Supreme Court recently explained, *pacta sunt servanda* means that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith."⁵⁰ Codified in the *Vienna Convention on the Law of Treaties*,⁵¹ which was acceded to by Canada in 1970, *pacta sunt servanda* is a core ingredient for preserving the rule of law between states, and ensures that state parties cannot simply disregard or redefine their international legal obligations as contained in treaties and interpreted by "authoritative" international organs like the

⁴⁸ [R. v. Hape, 2007 SCC 26](#) at para. 53, BOA Tab 13.

⁴⁹ [Baker v. Canada \(Minister of Citizenship and Immigration\) \(1999\)](#), [1999] 2 SCR 817 at paras. 69-71, BOA Tab 14 (noting that these international human rights values still have a "a critical influence on the interpretation of the scope of the rights included in the *Charter*").

⁵⁰ [Canada v. Alta Energy Luxembourg S.A.R.L.](#), 2021 SCC 49 at para. 59, BOA Tab 15.

⁵¹ [Vienna Convention on the Law of Treaties](#), Can. T.S. 1980 No. 38, Preamble, art. 26; United Nations Human Rights Committee, [General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant](#), 26 May 2004, CCPR/C/21/Rev.1/Add.13, at para. 3 [["General comment no. 31"](#)], BOA Tab 27.

Committee.⁵² The presumption of conformity reinforces *pacta sunt servanda* by interpreting domestic laws in a manner that honours Canada's commitment to keep and perform its treaty promises.

40. In applying the presumption of conformity, this Court must interpret the ICCPR's human rights guarantees to determine their meaning, just as it would when faced with any other question of law.⁵³ If this Court determines that the Committee's interpretation of the ICCPR is correct, this Court must then read the *Charter* in conformity with the ICCPR as interpreted by the Committee,⁵⁴ including the Committee's affirmation of the indivisibility, interdependence, and interrelatedness of all human rights.

41. Amnesty Canada and ESCR-Net's expertise in the interpretation of the ICCPR and other related international law instruments will ensure the Court is well-equipped to understand the ICCPR, and in turn Canada's submission that it is plain and obvious that Canada's domestic laws do not provide the remedies sought in this case.

42. ***Access to effective remedies.*** Under article 2.3(a) of the ICCPR, state parties undertake to ensure that any person whose rights or freedoms under the ICCPR are violated has an

⁵² United Nations Human Rights Committee, [General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights](#), 25 June 2009, CCPR/C/GC/33 at para. 13, BOA Tab 28.

⁵³ Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. Toronto: Irwin Law, 2008 at p. 41 ("The balance of Canadian authority...indicates that Canadian courts should generally treat international law questions as legal matters to be decided by the courts and not factual matters to be pleaded and proved in evidence"), BOA Tab 29.

⁵⁴ [Reference Re Public Service Employee Relations Act \(Alta.\) \(1987\)](#), [1987] 1 SCR 313 at para. 57, BOA Tab 16 (per Dickson CJ, dissenting), cited approvingly in [Quebec \(Attorney General\) v. 9147-0732 Québec inc.](#), 2020 SCC 32 at para. 30, BOA Tab 17; [R. v. Keegstra \[1990\] 3 SCR 697](#) at p. 750, BOA Tab 18.

“effective remedy.” In the context of this case, in addition to a compensatory remedy for Ms. Toussaint, the Committee also affirmed the importance of a systemic remedy—namely, that Canada take steps to prevent future, similar violations of the ICCPR by ensuring that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.⁵⁵

43. Canada says that the plaintiff’s pursuit of this systemic remedy is also doomed to fail because international law obligations cannot “amend domestic legislation or policy”⁵⁶ and because Canada is free to simply disagree with the Committee’s Views and can decline to implement the decision.⁵⁷

44. Amnesty Canada and ESCR-Net will submit that, interpreted properly and in conformity with international law, Canadian domestic law can provide claimants with these types of remedies. Like the right to an “effective remedy” in article 2.3(a), section 24(1) of the *Charter* provides a wide berth for remedial responses, allowing courts to safeguard rights with “effective remedies”⁵⁸ that they consider “appropriate and just in the circumstances.”⁵⁹

45. Systemic remedies are essential to the *Charter* and the rule of law. Section 52(1) of the *Constitution Act, 1982* provides that laws inconsistent with Canada’s Constitution are “of no force and effect.”⁶⁰ *Charter* claimants can accordingly seek relief to vindicate not only their

⁵⁵ Defendant’s Factum at para. 26, AGMR at pp. 42-43; [Toussaint HR Committee](#) at para. 13, BOA Tab 1.

⁵⁶ Defendant’s Factum at paras. 66-67, AGMR at p. 56.

⁵⁷ Defendant’s Factum at para. 70, AGMR at p. 57.

⁵⁸ [Ontario \(Attorney General\) v. G, 2020 SCC 38](#) at paras. 94-95, BOA Tab 19.

⁵⁹ [Canadian Charter of Rights and Freedoms](#) at s. 24(1);

⁶⁰ [Constitution Act, 1982](#) at s. 52(1).

rights but also the rights of third parties.⁶¹ The principle of non-repetition—which is recognized in international law as a core element of the right to an effective remedy and guarantees that initial violations of international human rights law are accompanied by corrective systemic measures⁶²—further bolsters the view that Canadian law can accommodate these systemic remedies.

46. Systemic remedies that correct *Charter*-infringing under-inclusiveness by requiring legislators to expand the scope and protection of legislation are not novel. For example, the Supreme Court has ordered for provincial human rights legislation to include “sexual orientation” as a protected ground and, in another case, has directed the government to provide state-funded sign language interpreters to ensure health care legislation is administered in a non-discriminatory manner.⁶³ Amnesty Canada and ESCR-Net will submit that these types of remedies are essential to and consistent with Canada’s international law obligations to ensure an effective remedy under the ICCPR. This will help this Court determine whether Canada’s

⁶¹ [R. v. Nur, 2015 SCC 15](#) at para. 51, BOA Tab 20, citing [R. v. Ferguson, 2008 SCC 6](#) at para. 59, BOA Tab 21.

⁶² [General comment no. 31](#) at para. 17, BOA Tab 27; United Nations, General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), GA Res. 60/147, 16 December 2005 at paras. 18, 23(h), BOA Tab 30; International Law Commission, [Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session](#), A/56/10, August 2001, UN GAOR. 56th Sess Supp No 10, UN Doc A/56/10(SUPP) (2001) at Art 30, BOA Tab 31.

⁶³ [Vriend v. Alberta \(1998\)](#), [1998] 1 SCR 493 at para. 179, BOA Tab 22; [Eldridge v. British Columbia \(Attorney General\)](#), [1997] 3 SCR 624 at paras. 95-96, BOA Tab 23.

assertion that international law obligations cannot “amend domestic legislation or policy”⁶⁴ means that Ms. Toussaint’s claim is doomed to fail.

47. In addition to its expertise and interest in ensuring that individuals have effective domestic remedies for violations of international law, Amnesty Canada and ESCR-Net’s involvement in this motion is critical to ensuring this Court is provided with perspectives and insights on the broader systemic implications of international human rights law violations. Amnesty Canada and ESCR-Net’s longstanding commitment to these issues provides an important perspective to the court—one that looks beyond Ms. Toussaint’s specific circumstances. This perspective is essential to understanding why remedies for human rights violations should reflect the systemic nature of the underlying violation.⁶⁵

Amnesty Canada and ESCR-Net will not impair the effective and efficient determination of this motion

48. If granted leave to intervene, Amnesty Canada and ESCR-Net are committed to presenting their unique perspective and expertise so that this Court can achieve an effective resolution of this motion in the most expeditious and least expensive manner.⁶⁶

49. Court orders and schedules will be carefully followed. Submissions will be limited to helping the Court resolve issues already raised by the plaintiff’s statement of claim and Canada’s motion. Issues that are specific and personal to Ms. Toussaint, including her right to

⁶⁴ Defendant’s Factum at paras. 66-67, AGMR at p. 56.

⁶⁵ [P.S. v. Ontario](#) at para. 11, BOA Tab 6; [W.W. v. X.X. and Y.Y.](#), 2013 ONSC 1509 at para. 22, BOA Tab 24.

⁶⁶ Nivyabandi Affidavit at para. 38, IMR at p. 37; Delgado Affidavit at para. 33, IMR at p.74.

compensation, will be left to her counsel to address.⁶⁷ Duplication and repetition between Amnesty Canada and ESCR-Net and other parties and proposed interveners will be avoided. Indeed, Amnesty Canada and ESCR-Net have asked to intervene jointly, just as they did in the *Tanudjaja* proceeding, to provide the Court with the benefit of their combined expertise in international human rights law while avoiding duplication and inefficiencies.

PART IV - ORDER REQUESTED

50. Amnesty Canada and ESCR-Net request an order:

- (a) granting Amnesty Canada and ESCR-Net leave to intervene in the defendant's Motion to Strike the Amended Amended Statement of Claim;
- (b) permitting Amnesty Canada and ESCR-Net to file a factum not exceeding 20 pages with respect to the defendant's motion;
- (c) permitting Amnesty Canada and ESCR-Net to present oral argument not exceeding 20 minutes at the hearing of the defendant's motion;
- (d) not to be granted costs, nor for costs to be ordered against them; and

⁶⁷ Nivyabandi Affidavit at para. 34, IMR at p. 35; Delgado Affidavit at para. 29, IMR at pp. 71-72.

(e) such further and other Relief as to this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2021.



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Lawyers for the Moving Parties, Amnesty
Canada and ESCR-Net

SCHEDULE “A”

LIST OF AUTHORITIES

Tab	Title	Pinpoints
JURISPRUDENCE		
1.	<u>Toussaint v. Canada</u> Communication No. 2348/2014, U.N. Doc. CCPR/C/123/D/2348/2014 (2014)	7.4-7.9, 11.3, 12, 13
2.	<u>Tanudjaja v. Canada (Attorney General)</u> , 2014 ONCA 852	
3.	<u>Bedford v. Canada (Attorney General)</u> , 2009 ONCA 669	2
4.	<u>Ontario (Attorney General) v. Dieleman (1993)</u> , 16 OR (3d) 32 (Ont. Gen. Div.)	7, 14
5.	<u>Fair Change v. Her Majesty the Queen</u> , 2021 ONSC 2108	15
6.	<u>P.S. v. Ontario</u> , 2014 ONCA 160	11, 13
7.	<u>Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990)</u> , 74 OR (2d) 164 (C.A.)	6
8.	<u>Trinity Western University v. Law Society of Upper Canada</u> , 2014 ONSC 5541	8-9
9.	<u>Canadian Federation of Students v. Ontario (Colleges and Universities)</u> , 2020 ONCA 842	9
10.	<i>Tanudjaja v. Attorney General of Canada</i> , (unreported) Court File Number C57714, March 31, 2014 (Ont. C.A.)	1
11.	<u>Canada (Attorney General) v. Canadian Wheat Board</u> , 2012 FCA 114	6-9
12.	<u>Canada (Attorney General) v. Canadian Doctors for Refugee Care</u> , 2015 FCA 34	28
13.	<u>R. v. Hape</u> , 2007 SCC 26, 2007 SCC 26	53
14.	<u>Baker v. Canada (Minister of Citizenship and Immigration) (1999)</u> , [1999] 2 SCR 817	69-71
15.	<u>Canada v. Alta Energy Luxembourg S.A.R.L.</u> , 2021 SCC 49	59
16.	<u>Reference Re Public Service Employee Relations Act (Alta.) (1987)</u> , [1987] 1 SCR 313	57
17.	<u>Quebec (Attorney General) v. 9147-0732 Québec inc.</u> , 2020 SCC 32	30
18.	<u>R. v. Keegstra</u> [1990] 3 SCR 697	p. 750
19.	<u>Ontario (Attorney General) v. G</u> , 2020 SCC 38, 2020 SCC 38	94-95
20.	<u>R. v. Nur</u> , 2015 SCC 15	51
21.	<u>R. v. Ferguson</u> , 2008 SCC 6	59
22.	<u>Vriend v. Alberta (1998)</u> , [1998] 1 SCR 493	179
23.	<u>Eldridge v. British Columbia (Attorney General)</u> , [1997] 3 SCR 624	95-96
24.	<u>W.W. v. X.X. and Y.Y.</u> , 2013 ONSC 1509	22

Tab	Title	Pinpoints
SECONDARY SOURCES		
25.	United Nations, World Conference on Human Rights, <i>Vienna Declaration and Programme of Action</i> , A/CONF.157/24 (Part I), 25 June 1993	5
26.	United Nations, Human Rights Committee, <i>General comment no. 36, Article 6 (Right to Life)</i> , 3 September 2019, CCPR/C/GC/36	3, 26
27.	United Nations Human Rights Committee, <i>General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant</i> , 26 May 2004, CCPR/C/21/Rev.1/Add.13	3, 17
28.	United Nations Human Rights Committee, <i>General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights</i> , 25 June 2009, CCPR/C/GC/33 at para. 13.	13
29.	Gib van Ert, <i>Using International Law in Canadian Courts</i> , 2 nd ed. Toronto: Irwin Law, 2008	p. 41
30.	United Nations, General Assembly, <i>Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law</i> , GA Res. 60/147, 16 December 2005	18, 23(h)
31.	International Law Commission, <i>Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session</i> , A/56/10, August 2001, UN GAOR. 56th Sess Supp No 10, UN Doc A/56/10(SUPP) (2001)	Art. 30

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Vienna Convention on the Law of Treaties](#), *Can. T.S. 1980 No. 38*

PREAMBLE

The States Parties to the present Convention

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART III
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES
SECTION 1. OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27 Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

2. [*The Constitution Act, 1982*](#), Schedule B to the Canada Act 1982 (UK), 1982, c 11.

PART I
Canadian Charter of Rights and Freedoms
Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

PART VII
General

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

NELL TOUSSAINT v. ATTORNEY GENERAL OF CANADA
Plaintiff Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE INTERVENER AMNESTY
INTERNATIONAL CANADA AND
ESCR-NET – INTERNATIONAL
NETWORK FOR ECONOMIC, SOCIAL
AND CULTURAL RIGHTS⁶⁸**

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