Court File No. CV-20-00649404-000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELL TOUSSAINT

Plaintiff/Respondent

- and -

ATTORNEY GENERAL OF CANADA

Defendant/Applicant

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Proposed Intervener

FACTUM OF THE PROPOSED INTERVENER ON THE MOTION TO STRIKE, CANADIAN CIVIL LIBERTIES ASSOCIATION

December 13, 2021

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PART I - OVERVIEW

1. The plaintiff, Nell Toussaint, seeks to challenge the federal government's framework regulating access to essential healthcare for individuals living in Canada with precarious immigration status. Among other things, Ms Toussaint claims that the framework as it existed in and/or applied between 2009-2013, and as it exists in its current form, is contrary to sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). Rather than address these fundamental rights-based issues raised in her claim, the Attorney General of Ontario has moved to strike the plaintiff's Amended Amended Statement of Claim (the "**Claim**") at this early stage, taking the position (among other things) that it is frivolous, vexatious and an abuse of process. The Canadian Civil Liberties Association (the "**CCLA**") seeks leave to intervene in this motion as a friend of the court, pursuant to Rule 13.02 of the *Rules of Civil Procedure* (the "***Rules***").

PART II - INTRODUCTION

2. The plaintiff's Claim raises fundamental rights-based issues, including the constitutionality of government policy that impacts the ability of individuals living in Canada to access healthcare necessary to prevent reasonably foreseeable risks of loss of life or irreversible negative health consequences. The adjudication of the plaintiff's Claim has potentially broad-ranging impacts for similarly situated individuals residing in Canada, who may not have the knowledge, means, or ability to access justice for themselves. Accordingly, and apart from Ms Toussaint's private interest in having her Claim adjudicated, there is a strong public interest in having the Claim proceed.

3. Despite this, the Attorney General seeks to prevent the adjudication of the Claim, pursuant to, *inter alia*, Rule 21.01 on grounds that it discloses no reasonable cause of action, and Rules 21.01(3)(d) and 25.11 on grounds that the action is frivolous or vexatious or is otherwise an abuse of the process of the court.

4. The CCLA, which advocates for the protection of human rights and civil liberties, including meaningful access to justice for vulnerable and marginalized individuals, has a long history of assisting courts in addressing such issues in litigation. It is well-positioned to assist the court on this motion.

5. If granted leave to intervene on the motion, the CCLA will make submissions with respect to two key issues before the Court:

(a) First, what factors ought to be considered in applying the test to strike pleadings in the particular context of rights-based claims, which transcend the private interest of the particular parties. These include consideration of the propriety of the government's use of procedural mechanisms to shield laws or policies with wide-

ranging impact from judicial scrutiny, and the impact on rights-based claimants and others affected by such litigation who may be denied meaningful access to justice as a result of such procedural motions.

(b) Second, where the doctrine of estoppel is invoked to strike a rights-based claim, what factors ought to be considered, including whether any new iterations of government legislation, policy, or rule that have not been tested in courts ought to be assessed in the particular factual matrix of the day, and with the benefit of current evidence.

6. The CCLA's submissions will provide an important perspective that goes beyond the immediate interests of the parties to this action. This includes the importance of the broader Canadian constitutional implications of this case, which ought to be adjudicated on a full record. The CCLA offers a distinct lens through which these issues may be considered, grounded in its core mandate to promote and protect fundamental rights and liberties. As a result, the CCLA's submissions will also be different from those advanced by the parties and the other proposed interveners.

PART III - SUMMARY OF FACTS

7. The CCLA is an independent, national, non-governmental organization dedicated to promoting respect for and observance of fundamental human rights and civil liberties.[1]

8. The CCLA has a long-standing interest and expertise in the impacts of *Charter* deprivations on vulnerable and marginalized individuals, advocating for the protection of human rights and civil liberties particularly in the *Charter* context, and working to ensure access to justice.[2] This is

[1] Affidavit of Noa Mendelsohn Aviv, sworn October 21, 2021, at para 2 [**Mendelsohn Aviv Affidavit**], Motion Record of the Proposed Intervener, Canadian Civil Liberties Association [**MR-CCLA**] Tab 2 at p 9.
[2] Mendelsohn Aviv Affidavit at para 13, MR-CCLA Tab 2 at p 12.

reflected in the CCLA's extensive experience intervening on these issues before courts and in other forums.[3]

9. The CCLA has specific experience with issues raised in this Claim and on this motion. The CCLA was the sole intervener on Ms Toussaint's appeal at the Federal Court of Appeal in 2011, challenging the federal government's decision to deny her healthcare coverage under the Interim Federal Health Program ("**IFHP**"), established pursuant to the Order-in-Council 157-11/848 made on June 20, 1957 (the "**1957 OIC**").[4] In that appeal, the CCLA made submissions in support of a right to life-saving medical care for people living in Canada with precarious immigrations status, under ss. 7 and 15 of the *Charter*.[5]

10. Following that appeal, which was unsuccessful:

(a) in April 2012, the 1957 OIC was repealed and replaced with the Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 (the "**2012 OIC**").[6] The 2012 OIC did not provide healthcare coverage for individuals living in Canada with precarious immigrations status, but gave a discretionary power to the Minister of Citizenship and Immigration (the "**Minister**") on their own initiative to provide healthcare coverage in "exceptional and compelling circumstances", without guidance as to the exercise of such discretion;[7]

(b) in 2013, Ms Toussaint submitted a communication to the United Nations Human Rights Committee ("**UNHRC**") claiming that as a result of her exclusion from the

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[3] Mendelsohn Aviv Affidavit at paras 17-19, MR-CCLA Tab 2 at pp 12-16.
[4] Mendelsohn Aviv Affidavit at paras 6-8, MR-CCLA Tab 2 at pp 10-11; *Toussaint v Canada (Attorney General)*, 2011 FCA 213, Book of Authorities of the Proposed Intervener, Canadian Civil Liberties Association [**BOA-CCLA**] Tab 1, affirming 2010 FC 810 (leave to appeal to the SCC denied), BOA-CCLA Tab 2.
[5] Mendelsohn Aviv Affidavit at para 8, MR-CCLA Tab 2 at p 11.
[6] Amended Amended Statement of Claim at para 4, Motion Record of the Moving Party, the Attorney General of Canada [**MRM**] Tab 2 at p 14.
[7] Amended Amended Statement of Claim at para 19, MRM Tab 2 at p 19; Mendelsohn Aviv Affidavit at para 9, MR-CCLA Tab 2 at p 11.

IFHP, she was a victim of Canada's violations of, among others, the right to life and the right to non-discrimination, recognized in articles 6 and 26 of the International Covenant on Civil and Political Rights ("**ICCPR**");[8]

(c) in 2014, the 2012 OIC was declared unconstitutional and was replaced by the current IFHP 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**").[9] However, as with the 2012 OIC, the Minister continues to maintain unilateral discretionary powers to grant IFHP coverage;[10] and

(d) in 2018, the UNHRC found that Canada had violated the plaintiff's right to life under article 6 of the ICCPR and that the distinction drawn by Canada for the purpose of admission to the IFHP between those with legal status and those with irregular status in Canada constituted discrimination under article 26 of the ICCPR.[11] The UNHRC further concluded that Canada must ensure that those without formal immigration status have access to essential healthcare in order to prevent foreseeable risks that could result in loss of life.[12]

11. In 2021, the plaintiff commenced this action in the Ontario Superior Court of Justice, which (among other things) challenges the constitutionality of the 1957 OIC, the 2012 OIC and the 2016 IFHP Policy, as enacted and/or applied. Key issues in the Claim include whether, to the extent these various Order-in-Councils/policies have failed to ensure access to essential healthcare for Ms Toussaint, as an individual living in Canada with precarious immigration status, they are contrary to ss. 7 and 15(1) of the *Charter*. In addition, with respect to the 2012 OIC and, therefore,

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[8] Amended Amended Statement of Claim at para 22, MRM Tab 2 at p 20.
[9] Amended Amended Statement of Claim at para 4, MRM Tab 2 at p 14.
[10] Amended Amended Statement of Claim at para 19, MRM Tab 2 at p 19; Mendelsohn Aviv Affidavit at para 10, MR-CCLA Tab 2 at p 11.
[11] Amended Amended Statement of Claim at paras 27-28, MRM Tab 2 at pp 22-23; *Toussaint v Canada*, CCPR/C/123/D/2348/2014 at paras 11.5 and 11.8, BOA-CCLA Tab 3.
[12] Amended Amended Statement of Claim at para 29, MRM Tab 2 at pp 23; *Toussaint v Canada*, CCPR/C/123/D/2348/2014 at para 13, BOA-CCLA Tab 3.

the 2016 IFHP Policy, the Claim raises an important issue in Canadian constitutional law: whether government can immunize laws from constitutional scrutiny simply by relying on a provision allowing for Ministerial discretion.[13]

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

12. The only issue on this motion is whether the CCLA ought to be granted leave to intervene as a friend of the court in the Attorney General's motion to strike the plaintiff's Claim.

A. The Test for Leave to Intervene

13. Rule 13.02 of the *Rules* provides:

> **13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.[14]

14. While the granting or refusal of leave to intervene is an exercise of discretion, courts have recognized that there are well-established principles applicable to intervention motions:

(a) the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties;

(b) where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervener: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base;

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[13] Amended Amended Statement of Claim at paras 1 and 45, MRM Tab 2 at pp 11-13, 30-31.
[14] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 13.02.

(c) the submissions to be offered by the proposed intervener must be useful and different from those of the parties;

(d) the threshold for granting intervener status in a public interest or public policy case is lower than it is for a private interest case;

(e) in *Charter* cases, it is recognized that it is important for the court "to receive a diversity of representations reflecting the wide-ranging impact of its decision"; and

(f) the fact that the proposed intervener is not indifferent to the outcome of the appeal is not a reason to deny it the right to intervene.[15]

15. Canadian courts have supported granting leave to intervene where matters of public interest or public policy are at issue, especially where constitutional and *Charter* issues may arise.[16] The Ontario Court of Appeal has recognized "the valid and important contribution that can be made in appropriate cases by friends of the court who may be advocates for a particular interpretation of the law."[17] The Court of Appeal also expressed the desirability of having "all of the relevant possibilities brought to its attention, including submissions on the impact of its judgment, not only on the parties, but on those not before the court".[18]

B. Application of the Law to CCLA's Motion

16. Given the strong public interest and public policy considerations in issue in this case, including the potential far-reaching impacts of a decision on individuals other than the plaintiff, the threshold for granting intervener status is lower in this proceeding than it would be in a case

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[15] *Groia v Law Society of Upper Canada*, 2014 ONSC 6026 (Div Ct) at para 4 (citations omitted), BOA-CCLA Tab 4.
[16] *Jones v Tsige* (2011), 106 O.R. (3d) 721 (ON CA) at para 23, BOA-CCLA Tab 5, citing *Childs v Desormeaux* (2003), 67 OR (3d) 385 (CA) at paras 3, 10, BOA-CCLA Tab 6 [***Childs***].
[17] *Childs*, *supra* note 16 at para 15, BOA-CCLA Tab 6
[18] *Louie v Lastman* (2001), 208 DLR (4th) 380 (ON CA) at para 12, BOA-CCLA Tab 7.

involving solely private litigants. Nevertheless, whichever threshold is applied, the CCLA satisfies the requirements for granting leave to intervene.

17. In particular, the CCLA offers a distinct perspective that will be useful to the court in making its decision, without causing prejudice to any party. As a well-recognized organization with thousands of supporters across Canada, and substantial interest and expertise in the issues before the court, the CCLA is well-positioned to ensure that the court receives "a diversity of representations reflecting the wide-ranging impact of its decision".

18. The CCLA's history of contributions to the development of law in relation to fundamental rights and freedoms has been recognized by the courts and has drawn supporters from all walks of life in communities across Canada.[19] The CCLA's extensive record of contributing to the jurisprudence on ss. 7 and 15 of the *Charter*, the rights of migrants and refugees, and importance of access to justice, reflects judicial acknowledgement of the CCLA's special perspective and expertise in these areas.[20] As noted above, the CCLA's interest in the rights implications of the IFHP policies over the years is directly demonstrated by its intervention in the plaintiff's appeal before the Federal Court of Appeal in 2011.[21]

19. The CCLA also has a longstanding interest in and extensive experience advocating against government attempts to immunize unconstitutional legislation from challenge by relying on discretionary powers granted to decision-makers, such as the Ministerial discretionary powers contained in the 2012 OIC and the 2016 IFHP Policy.[22] This issue, which is raised in the Claim and has not yet been litigated in the context of the IFHP, is an important constitutional issue that

[19] Mendelsohn Aviv Affidavit at paras 2, 14, MR-CCLA Tab 2 at pp 9, 12.
[20] Mendelsohn Aviv Affidavit at paras 16-19, MR-CCLA Tab 2 at pp 12-16.
[21] Mendelsohn Aviv Affidavit at para 16, MR-CCLA Tab 2 at p 12.
[22] Mendelsohn Aviv Affidavit at paras 9-10, 15, MR-CCLA Tab 2 at pp 11-12.

need to be addressed by this Court. Given its interest and expertise in these matters, CCLA will be able to make useful submissions to the Court.

20. The CCLA's submissions would be made from its perspective, unique from the parties and the other proposed interveners, grounded in the CCLA's mandate to promote and protect fundamental rights and liberties and its extensive experience in addressing issues similar to those in this motion and this claim. If granted leave to intervene, the CCLA commits to working with the parties and other proposed interveners to avoid duplication of arguments.[23]

21. If granted leave to intervene, the CCLA intends to make the following submissions to the Court:

(a) When applying the test to strike out pleadings in the context of rights-based claims, courts ought to consider the following:

(i) the public interest in having rights-base claims adjudicated on their merits and the importance of interpreting and applying *Charter* rights in context and on a full evidentiary record;[24]

(ii) the imbalance of power between individual rights-claimants and the state[25] and the potential impact of the decision on other rights-holders, many of whom may not be able to access the justice system themselves. In particular, government's use of procedural mechanisms to block individual claims adds to the temporal, financial and emotional costs of litigation, and can create barriers to access to justice in this case and for similarly situated non-litigants. The use of such procedural mechanisms may also deter

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[23] Mendelsohn Aviv Affidavit at para 28, MR-CCLA Tab 2 at p 18.
[24] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 145 (Brown, Rowe JJ., dissenting in part), BOA-CCLA Tab 8.
[25] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59, BOA-CCLA Tab 9.

marginalized communities and public interest bodies, with fewer resources than the government, from advancing rights-based claims and, even if initiated, may impede those claims from proceeding;

(iii) the public importance of the issues advanced in the Claim which the government seeks to strike. Cases which raise important issues with potentially wide-ranging impacts ought not to be struck out at an early stage except in the clearest of cases. Here, whether the government policies which resulted in the plaintiff's exclusion from the IFHP (including the 1957 OIC and the 2012 OIC), and which continue in the form of the 2016 IFHP Policy today, comply with the *Charter* is a crucial issue which impacts the health and well-being of other people living in Canada; and

(iv) the high threshold for striking out constitutional claims at the pleadings stage, and the need for courts to use principled restraint when being asked to prevent such claims from being heard on their merits. This approach helps to mitigate the power imbalance between parties and allows for the development of *Charter* jurisprudence.

(b) The Court's discretionary powers in relation to estoppel doctrines should not be mechanically applied[26] and ought to include consideration of the following factors:

(i) any intervening changes in the law;[27]

(ii) the presence of several interested interveners,[28] such as the proposed interveners on this motion;

(iii) the interest of other persons, besides the litigants, in resolving the validity of certain legislation[29] - in this case, other similarly situated rights-based

[26] *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44 at para 33, BOA-CCLA Tab 10.
[27] *Bedford v Canada*, 2013 SCC 72 at para 48, BOA-CCLA Tab 11.
[28] *Apotex Inc v Canada (Attorney General),* [1997] 1 FC 518 at para 48, BOA-CCLA Tab 12.
[29] *Ibid*.

claimants with precarious immigration status in need of essential healthcare; and

(iv) the principle that the constitutionality of government legislation, policies and rules should proceed on "relevant, current evidence", specific to the objectives and effects of the legislation, policy or rule, and properly tested through the normal processes of tendering evidence.[30] This principle applies here to the 2012 OIC and the 2016 IFHP Policy.

22. Finally, there is no prejudice to the litigants, nor would any delay be caused by granting CCLA leave to intervene. The CCLA would focus its submissions on the issues set forth above and does not seek leave to file any new evidence.[31]

23. If the Claim is permitted to proceed, the CCLA intends to seek leave to intervene in the action. The CCLA anticipates making submissions regarding (among other things) the constitutionality of the IFHP, insofar as it precludes access to essential healthcare for individuals living in Canada with precarious immigration status, and any attempted use of Ministerial discretion to shield unconstitutional policies or rules. That is an issue that ought to be adjudicated on its merits.

PART V - ORDER REQUESTED

24. CCLA requests an order:

(a) granting CCLA leave to intervene in this motion as a friend of the court, for the purpose of rendering assistance to the court by way of argument;

(b) permitting CCLA to file a Memorandum of Argument not exceeding 20 pages;

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[30] *Lamb v Canada (Attorney General),* 2018 BCCA 266 at para 100, BOA-CCLA Tab 13.
[31] Mendelsohn Aviv Affidavit at para 29, MR-CCLA Tab 2 at p 18.

(c) permitting CCLA to present 20 minutes of oral argument at the hearing of this motion;

(d) that costs not be awarded against it; and

(e) such further or other orders as this Court may deem appropriate.

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

December 13, 2021

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Toussaint v Canada (Attorney General)*, 2011 FCA 213

2. *Toussaint v Canada (Attorney General)*, 2010 FC 810

3. *Toussaint v Canada*, CCPR/C/123/D/2348/2014

4. *Groia v Law Society of Upper Canada*, 2014 ONSC 6026 (Div Ct)

5. *Jones v Tsige* (2011), 106 O.R. (3d) 721 (ON CA)

6. *Childs v Desormeaux* (2003), 67 OR (3d) 385 (ON CA)

7. *Louie v Lastman* (2001), 208 DLR (4th) 380 (ON CA)

8. *Nevsun Resources Ltd v Araya*, 2020 SCC 5

9. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59

10. *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44

11. *Bedford v Canada*, 2013 SCC 72

12. *Apotex Inc v Canada (Attorney General),* [1997] 1 FC 518

13. *Lamb v Canada (Attorney General),* 2018 BCCA 266

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY – LAWS

***Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 13.02**

RULE 13 INTERVENTION

Leave to Intervene as Friend of the Court
13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or case management master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

Where Available
To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

RULE 25 PLEADINGS IN AN ACTION

Striking out a Pleading or Other Document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

NELL TOUSSAINT Plaintiff	-and-	ATTORNEY GENERAL OF CANADA Defendant

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