

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

**FACTUM OF THE PROPOSED COALITION OF INTERVENORS
(ON A MOTION SEEKING LEAVE TO INTERVENE),
CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION
AND THE FCJ REFUGEE CENTRE**

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PART I – NATURE OF THE MOTION

1. The Charter Committee on Poverty Issues, the Canadian Health Coalition and the FCJ Refugee Centre (“the CCPI Coalition”) seek leave to intervene jointly in the Defendant’s motion to strike the Amended Amended Statement of Claim and dismiss the action.

2. The focus of the proposed intervention is on Canada’s refusal to give effect to the United Nations Human Rights Committee’s (“UN Committee’s”) Views adopted in the case of [*Toussaint v Canada*](#)¹ to ensure that irregular migrants are no longer denied access to essential health care when their lives are at risk.

¹ [*Toussaint v. Canada*](#), Communication No. 2348/2014, U.N. Doc. CCPR/C/123/D/2348/2014 (2018) [[UN Committee’s Views](#)].

3. The Plaintiff, Ms. Nell Toussaint, challenges this decision on a number of grounds, including that it violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) and she seeks, *inter alia*, an order requiring the Defendant to give effect to the UN Committee’s Views in a manner that complies with the *Charter*. The Defendant seeks to strike Ms. Toussaint’s claim, arguing that it is settled law that the *Charter* does not require governments to ensure access to essential health care, even when life is at risk.

4. The CCPI Coalition has filed a Motion for Leave to Intervene seeking to assist the Court with the following issues:

- i. Whether, in light of the UN Committee’s Views in this case, a denial of access to publicly funded health care to irregular migrants to prevent reasonably foreseeable threats to their life and health contravenes sections 7 and 15 of the *Charter*;
- ii. Whether Canada’s decision not to implement the systemic remedy required in the UN Committee’s Views, to ensure that irregular migrants have access to essential health care, violates sections 7 and 15 of the *Charter*; and
- iii. Whether Canada’s decision not to implement the UN Committee’s Views constitutes an unreasonable exercise of a prerogative power.

5. This case raises unresolved questions in *Charter* jurisprudence that are at the heart of our Constitution’s promise of equal protection and benefit of its most fundamental guarantees.

6. How this Court approaches and answers these questions will have immense implications not only for irregular migrants requiring access to essential health care for the protection of their

lives, but also for the constitutional rights of many of the most disadvantaged individuals and groups in Canadian society, whose perspective the CCPI Coalition represents.

7. For more than thirty years, these issues have been the focus of research, advocacy, public education and litigation by the members of the CCPI Coalition, including numerous interventions before the Supreme Court of Canada and before this Court, as well as before UN human rights bodies and domestic parliamentary committees.

PART II – FACTS

Background

8. Nell Toussaint’s life was placed at risk and she suffered long term health consequences when she was denied coverage for essential health care under the Interim Federal Health Program (“IFHP”) in 2009, because she was deemed to be ineligible by reason of her irregular migrant status.² She challenged this exclusion before the Federal Court of Canada, and on appeal before the Federal Court of Appeal, as a violation of her rights to life, security of the person and equality under sections 7 and 15 of the *Charter*.³

9. The Federal Court and the Federal Court of Appeal agreed that Ms. Toussaint’s life had been placed at risk.⁴ However, the Courts concluded that this deprivation of the right to life was not in violation of section 7 principles of fundamental justice because it furthered Canada’s immigration law objectives.⁵ The Federal Court of Appeal also found that the operative cause of the deprivation of life was Ms. Toussaint’s decision to remain in Canada to work as an irregular

² Defendant’s Factum at paras 12-13.

³ [Toussaint v Canada \(Attorney General\), 2010 FC 810](#) [*Federal Court Decision*]; [Toussaint v. Canada \(Attorney General\), 2011 FCA 213](#) [*FCA Decision*] 10; leave to appeal denied [2012 CanLII 17813](#) (SCC).

⁴ [Federal Court Decision](#) at [para 91](#); *FCA Decision* at [paras 61-66](#).

⁵ [Federal Court Decision](#) at [para 94](#); *FCA Decision* at [paras 82-88](#).

migrant and that immigration status is not a prohibited ground of discrimination under section 15 of the *Charter*.⁶

10. Having exhausted domestic remedies, Ms. Toussaint filed a communication with the UN Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights* (“*ICCPR*”).⁷ Relying on the facts accepted by the Canadian courts, the UN Committee found that Ms. Toussaint’s rights to life and non-discrimination under the *ICCPR* had been violated.⁸ The Committee directed Canada to provide appropriate compensation to Ms. Toussaint and to take steps necessary to ensure access to essential health care for irregular migrants where there is a reasonably foreseeable risk to life.⁹

11. Canada has informed the UN Committee and Ms. Toussaint that it will not take measures to give effect to the Committee’s Views because it disagrees with the Committee’s findings with respect to Canada’s international human rights obligations.¹⁰

12. Ms. Toussaint now challenges Canada’s refusal to give effect to the UN Committee’s Views, including by ensuring access to essential health care for irregular migrants. She submits that this refusal violates her rights under sections 7 and 15 of the *Charter*, interpreted in light of the UN Committee’s Views relating to Canada’s obligations under the *ICCPR* to provide health care to Ms. Toussaint and other irregular migrants facing a reasonably foreseeable risk to life.¹¹

⁶ *FCA Decision* at paras [67-73](#), [99-101](#) and [109-111](#).

⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 p. 171. Accession by Canada 19 May 1976.

⁸ *UN Committee’s Views* at paras [11.4-11.5](#), [11.8-12](#).

⁹ *UN Committee’s Views* at [para 13](#).

¹⁰ Defendant’s Factum at paras 29-30.

¹¹ Amended Amended Statement of Claim dated May 25, 2021 [Statement of Claim] at para 1(g).

The Statement of Claim additionally seeks a declaration that the decision not to give effect to the UN Committee's Views was incorrect or unreasonable.¹²

13. The Defendant's Motion submits that the Plaintiff's *Charter* claim should be struck on the basis that it is "settled law" that the *Charter* does not impose positive obligations on governments to ensure access to publicly funded health care, even where the right to life is engaged, and that the Federal Court of Appeal's finding in Ms. Toussaint's previous *Charter* challenge to her exclusion from the IFHP must stand.¹³

The Charter Committee on Poverty Issues

14. The Charter Committee on Poverty Issues ("CCPI") is a national committee founded in 1989, which brings together low-income representatives and experts in human rights, constitutional law and poverty law for the purpose of assisting disadvantaged groups in Canada to secure and assert their rights under the *Charter*, international and domestic human rights law, and other laws in Canada.¹⁴

15. CCPI has a recognized interest and expertise in the application of the *Charter* to disadvantaged groups and on the role of international human rights law in relation to the *Charter*. CCPI has intervened in 13 cases at the Supreme Court of Canada. In all of these interventions CCPI has emphasized the importance of interpreting the *Charter* to provide at least the same level of protection as is afforded by international human rights treaties ratified by Canada, and in

¹² Statement of Claim at para 1(h).

¹³ Defendant's Factum at paras 62 and 79-80.

¹⁴ Affidavit of Bonnie Morton, Charter Committee on Poverty Issues, sworn October 19, 2021 [Morton Affidavit] at para 7.

a manner that ensures the equal benefit of the *Charter* for those experiencing poverty or socio-economic disadvantage, as follows:

- [*Chaoulli v. Quebec \(Attorney General\)*](#) (“*Chaoulli*”)¹⁵ on whether governments have positive obligations, under sections 7 and 15 of the *Charter*, to protect the right to life through the provision of publicly funded health care based on need;
- [*Eldridge v. British Columbia \(Attorney General\)*](#)¹⁶ on whether the *Charter* imposes positive obligations on governments to ensure equal access to publicly funded health care, including interpretation services for the Deaf, in accordance with international human rights law;
- [*Gosselin v. Québec \(Attorney General\)*](#) (“*Gosselin*”)¹⁷ on whether section 7 of the *Charter* should be interpreted, in light of international human rights treaties ratified by Canada, to include positive obligations on governments to protect physical and mental health; and
- [*Baker v. Canada \(Minister of Citizenship and Immigration\)*](#) (“*Baker*”)¹⁸ on whether the reasonable exercise of governmental discretion must be consistent with Canada’s international human rights obligations.

16. CCPI was also granted intervener status by this Court in a Motion to Strike in [*Tanudjaja v. Canada \(Attorney General\)*](#) (“*Tanudjaja*”), raising similar issues to those in the present case,

¹⁵ [*Chaoulli v. Quebec \(Attorney General\)*](#), 2005 SCC 35, [2005] 1 SCR 791.

¹⁶ [*Eldridge v. British Columbia \(Attorney General\)*](#), 1997 CanLII 327 (SCC), [1997] 3 SCR 624.

¹⁷ [*Gosselin v. Québec \(Attorney General\)*](#), 2002 SCC 84, [2002] 4 SCR 429.

¹⁸ [*Baker v. Canada \(Minister of Citizenship and Immigration\)*](#), 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

including what constitutes settled law with respect to section 7 of the *Charter*.¹⁹ In granting CCPI's motion for leave to intervene, Justice Lederer found that CCPI's experience at the Supreme Court of Canada and its proposed submissions "demonstrate an expertise in respect of the issue that will determine the motion: whether s. 7 and s. 15 of the *Charter* must be interpreted such that it is plain and obvious that the application cannot succeed."²⁰

17. On appeal of Justice Lederer's decision to grant the Motion to Strike in *Tanudjaja*, CCPI was granted leave to intervene before the Ontario Court of Appeal to address the same *Charter* issues.²¹

18. CCPI's contributions to these and other cases have been influential in the development of jurisprudence of direct application in the present case.²²

The Canadian Health Coalition

19. The Canadian Health Coalition ("CHC") is dedicated to preserving and enhancing Canada's public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status.²³

20. Founded in 1979, the CHC includes organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals

¹⁹ [*Tanudjaja v. Attorney General \(Canada\) \(Application\)*](#), 2013 ONSC 5410.

²⁰ [*Tanudjaja v. Attorney General \(Canada\)*](#), 2013 ONSC 1878 at [para 39](#). Morton Affidavit at para 17.

²¹ [*Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian Dubourdieu, Centre for Equality Rights in Accommodation Applicants \(Appellants\) and The Attorney General of Canada and The Attorney General of Ontario*](#) (March 31, 2014), Court of Appeal for Ontario M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) [Feldman JA (In Chambers)]; Morton affidavit at para 18.

²² Morton Affidavit at paras 15-16.

²³ Affidavit of Steven Staples, Canadian Health Coalition, sworn October 20, 2021 [Staples Affidavit] at para 6.

from across Canada. CHC promotes informed discussion and assessment of public policy and legislation linked to access to health care, based on reliable evidence and full consideration of the interests and needs of disadvantaged groups.²⁴

21. CHC provides extensive information on access to publicly funded health care and has organized national and regional conferences, hosted round-table discussions, responded to hundreds of public speaking requests, made numerous presentations to parliamentary and legislative committees and met with provincial and federal politicians as well as First Nations' leaders to promote the maintenance and enhancement of Canada's public health care and health insurance system.²⁵

22. CHC was invited to appear before the Standing Committee on Health on May 11, 2020 to provide its views on the Canadian response to the outbreak of the coronavirus, emphasizing the need to ensure access to health care for vulnerable, marginalized and low-income groups.²⁶

23. CHC has also participated in litigation to promote the maintenance and enhancement of the public health care system and protect universal access to health care based on need rather than ability to pay. In particular, CHC was granted intervener status jointly with CCPI before the Supreme Court of Canada in the *Chaoulli* case, as described above.²⁷

²⁴ Staples Affidavit at paras 6-8.

²⁵ Staples Affidavit at paras 9-11.

²⁶ Staples Affidavit at para 11.

²⁷ Staples Affidavit at paras 13-14.

The FCJ Refugee Centre

24. The FCJ Refugee Centre (“the Centre”) is a non-profit, grass-roots organization in Toronto and a registered charity that has served refugees and other migrant populations at risk for more than 30 years. The Centre’s membership and clients include irregular migrants.²⁸

25. The Centre provides supports and services to migrants in diverse circumstances in a number of different areas, such as immigration and refugee protection and support for migrant youth, survivors of human trafficking and women and children fleeing violence and abuse.²⁹

26. The Centre addresses systemic issues that migrants face in Canada, including lack of resources, marginalization, discrimination and lack of access to education, health care and other critical services.³⁰ It has supported thousands of individuals and families, many in precarious situations, in regularizing their status.³¹

27. Many of the Centre’s clients are denied access to provincial or federal health care due to their immigration status and are unable to secure privately funded health care because of financial barriers.³² The Centre has partnered with other organizations in campaigning for equal access to publicly funded health care for uninsured migrants and advocated for changes to the IFHP to ensure access to health care for irregular migrants.³³

28. In 2012 the Centre established a Primary Health Care Clinic to assist uninsured individuals to access health care. It now operates, with the support of the Inner-City Health

²⁸ Affidavit of Diana Gallego, FCJ Refugee Centre, sworn October 20, 2021 [Gallego Affidavit] at para 6.

²⁹ Gallego Affidavit at para 9.

³⁰ Gallego Affidavit at paras 8-10.

³¹ Gallego Affidavit at para 7.

³² Gallego Affidavit at para 11.

³³ Gallego Affidavit at para 12.

Association, a fully equipped examination room to provide health care support to uninsured patients by primary physicians along with a team of internationally trained volunteer doctors and nurses and one psychiatrist.³⁴

29. In 2021, the Centre joined with the City of Toronto in the “Toronto for All Campaign” to advocate for the rights of migrants in Toronto to access safe and secure housing, health care, and education for themselves and their children.³⁵ The Centre has worked with the City to combat stigmatization, prejudice, and systemic discrimination faced by migrants and to encourage equal treatment and respect for the human rights of irregular migrants.³⁶ The Centre has also partnered with the City to lead vaccine engagement for irregular migrants and in partnership with other organizations provided support to more than 10,000 Torontonians to receive COVID-19 vaccinations.³⁷

PART III –ISSUES

30. The issue to be decided is whether the CCPI Coalition should be granted leave to intervene in the Defendant’s Motion to Strike the Statement of Claim and dismiss the action.

PART IV – LAW AND ANALYSIS

Requirements for Intervener Standing

31. The Ontario Court of Appeal has identified three criteria for granting intervener status: A proposed intervener should: (i) have a real substantial and identifiable interest in the subject matter of the proceedings; (ii) have an important perspective distinct from the immediate parties;

³⁴ Gallego Affidavit at paras 13-15.

³⁵ Gallego Affidavit at para 16.

³⁶ Gallego Affidavit at paras 20-23.

³⁷ Gallego Affidavit at para 19.

or (iii) be a well-recognized group with a special expertise and a broadly identifiable membership. The proposed intervener must be able to make a useful contribution, in light of the nature of the case and the issues which arise, without causing injustice to the immediate parties.³⁸

32. The Ontario Court of Appeal has recognized that cases under the *Charter* may have a significant impact on others who are not immediate parties and for that reason there has been a relaxation of the rules governing leave to intervene in those cases.³⁹

33. As outlined below, the CCPI Coalition meets all three of the qualifications set out by the Ontario Court of Appeal for intervener status and the Coalition will make a useful contribution to the resolution of the Defendant's Motion.

The CCPI Coalition has a Substantial and Identifiable Interest in the Motion to Strike

34. The CCPI Coalition members have actively engaged with UN human rights treaty monitoring bodies in order to clarify Canada's obligations under ratified treaties. They have an interest in ensuring the *Charter* and other domestic law is interpreted in conformity with treaty body jurisprudence and that the Government of Canada gives effect to its obligations under such treaties.

35. The three members of the CCPI Coalition have an interest in ensuring that the right to life in section 7 of the *Charter* offers the same protection and benefit to those whose life may be at risk if denied access to publicly funded health care as those seeking private health care. They

³⁸ [Bedford v. Canada \(Attorney General\)](#), 2009 ONCA 669 [Bedford] at [para 2](#).

³⁹ [Peel \(Regional Municipality\) v. Great Atlantic & Pacific Co. of Canada Ltd. \(C.A.\)](#), 1990 CanLII 6886 (ON CA).

have advocated tirelessly for this right, including before the Supreme Court of Canada in the *Chaoulli* case.

36. The FCJ Refugee Centre's members include irregular migrants and many of its clients are denied access to provincial or federal health care due to their immigration status.⁴⁰ The Centre therefore has a direct interest in the outcome of this case, including whether immigration status is an analogous ground of discrimination under section 15.

37. The Coalition, and in particular CCPI, has a distinctive interest in the issue of what may constitute settled law with respect to positive obligations under section 7 of the *Charter*. CCPI has worked for more than thirty years to ensure that section 7 is interpreted to include the rights of members of disadvantaged groups who may require positive government measures to ensure access to health care and other basic necessities for the protection of life and security.

The CCPI Coalition has an Important Perspective Different from the Parties

38. The CCPI Coalition is not addressing the issue of compensation for the Plaintiff for previous violations of rights to life and non-discrimination addressed by the parties. Instead, the CCPI Coalition will focus on the requirement that Canada adopt measures necessary to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

39. The CCPI Coalition is uniquely positioned to provide the perspective of groups that have worked for many years, and intervened in many previous cases, on the *Charter* issues that are directly raised in this case. This perspective will be helpful to this Court in considering the

⁴⁰ Gallego Affidavit at paras 6, 11.

novelty of the claims in this case, the public interest in allowing the claims to proceed, and the key issue of what constitutes settled law under the *Charter*.

40. The CCPI Coalition will also bring the important perspectives of irregular migrants who continue to be denied access to essential health care, of those working directly with migrants in need of health care, and of those working to combat discrimination and stigma faced by members of this group. The CCPI Coalition can thus assist this Court in identifying discriminatory attitudes that may taint the consideration of the human rights of irregular migrants, who are rarely able to access courts directly as rights claimants. As Ms. Toussaint stated in an Affidavit quoted by the Federal Court in her previous *Charter* challenge, she experienced the stigma of being viewed as someone who set out to “take advantage” of Canada’s healthcare system, rather than as a resident of Canada who had worked hard and contributed to society but who had become ill and needed healthcare to save her life.⁴¹

The CCPI Coalition is a Well-recognized Group with a Special Expertise and a Broad Membership Base

41. Each member of the CCPI Coalition is a well-recognized group with a special expertise in the matters to be considered in this case. CCPI’s expertise in advancing interpretations and applications of the *Charter* that properly consider the perspective of disadvantaged groups and that is consistent with international human rights law has been widely recognized both in Canada and internationally, by the Supreme Court of Canada, UN and domestic human rights bodies, the Social Sciences and Humanities Research Council of Canada and other research funders, and the National Judicial Institute, among others.⁴²

⁴¹ [Federal Court Decision](#) at [para 13](#).

⁴² Morton Affidavit at paras 17-19.

42. CHC has a broad membership base including organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals from across Canada. Its expertise in health care has been recognized by the Supreme Court of Canada, parliamentary committees and government officials.⁴³

43. The FCJ Refugee Centre has a recognized expertise in barriers facing irregular migrants in accessing services such as health care, as reflected in its partnership status and efforts with the City of Toronto to promote the human rights of irregular migrants.⁴⁴

The Coalition will make Distinct and Useful Contribution to the Resolution of the Motion to Strike

44. The CCPI Coalition can assist this Court in considering the doctrinal foundation and the likelihood of success of key components of the Statement of Claim, given its extensive experience with the relevant jurisprudence and established principles of *Charter* interpretation. The Coalition can also assist this Court in considering the consequences of the finding sought by the Defendant in this case for vulnerable groups, particularly irregular migrants.

45. Drawing on the expertise and interests of all three members of the CCPI Coalition and consulting closely with other interveners to avoid duplication, the CCPI Coalition proposes to assist the Court in considering three critical questions.

i) Whether the Denial of Access to Essential Health Care to Irregular Migrants Contravenes Sections 7 and 15 of the Charter

46. The Defendant's Motion asserts that a challenge to Canada's refusal to give effect to the UN Committee's Views has no prospect of success. It asserts that the Federal Court of Appeal's

⁴³ Staples Affidavit at paras 6, 8-12.

⁴⁴ Gallego Affidavit at paras 19-21.

finding in the Plaintiff's previous *Charter* challenge, that the *Charter* does not impose an obligation to provide publicly funded health care to protect the right to life, "was settled law and remains so today."⁴⁵

47. In support of this argument the Defendant relies on the Supreme Court of Canada's decision in *Chaoulli* and on this Court's decision in *Tanudjaja* – two cases in which CCPI Coalition members intervened.

48. First, the Defendant relies on the statement by former Chief Justice McLachlin in *Chaoulli* that "[t]he *Charter* does not confer a freestanding constitutional right to health care."⁴⁶ However, as noted by Justice Zinn in response to the same argument when it was advanced before the Federal Court in Ms. Toussaint's original *Charter* challenge, this oft-quoted statement in *Chaoulli* has been misinterpreted.

49. In the very next sentence of her judgment, Chief Justice McLachlin underscored that "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."⁴⁷ Justice Zinn noted that Ms. Toussaint's *Charter* claim concerned a denial of access to an existing health care scheme, "not with whether non-citizens, or citizens for that matter, have a freestanding right to healthcare."⁴⁸

50. The Defendant also relies on Justice Lederer's assertion in his Superior Court judgment in *Tanudjaja* that "there can be no cause of action where, as here, the application is based on the

⁴⁵ Defendant's Factum at para 62.

⁴⁶ [Chaoulli](#) at [para 104](#).

⁴⁷ [Chaoulli](#) at [para 104](#).

⁴⁸ [Federal Court Decision](#) at [paras 74-75](#).

premise that there is a positive right to the protections provided by s. 7 of the *Charter*.”⁴⁹

However, this doctrinal finding by Justice Lederer, which was inconsistent with the Supreme Court of Canada’s ruling in [Gosselin](#) that section 7 might impose positive obligations on governments, was not upheld on appeal.⁵⁰

51. The majority of the Ontario Court of Appeal dismissed the *Charter* application in *Tanudjaja* as non-justiciable on other grounds, concluding that it was unnecessary to decide “the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*.”⁵¹ In dissent, Justice Feldman reviewed the relevant jurisprudence and found that Justice Lederer “erred in stating that the s. 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled.”⁵²

52. If granted leave to intervene, the CCPI Coalition will provide clarification that the question of positive obligations to protect and ensure the right to life is an evolving area of law. As noted by the British Columbia Superior Court in its recent decision in [Cambie Surgeries v British Columbia \(Attorney General\)](#) (*Cambie Surgeries*), scholars and authorities “have criticized *Tanudjaja* and other section 7 authorities, including *Chaoulli*, because they did not acknowledge the rights to life, liberty and security of the person as providing positive rights to housing and healthcare.”⁵³ The Court referred to the Supreme Court of Canada’s decision in

⁴⁹ Defendant’s Factum, para 62, fn 41, citing [Tanudjaja v AG \(Canada\) 2013 ONSC 5410](#) at paras [32](#), [37-40](#).

⁵⁰ [Gosselin](#) at paras [82-83](#).

⁵¹ [Tanudjaja v. Canada \(Attorney General\)](#), 2014 ONCA 852 at [para 37](#).

⁵² *Ibid* at [para 52](#).

⁵³ [Cambie Surgeries Corporation v British Columbia \(Attorney General\)](#), 2020 BCSC 1310 at [para 2052](#).

Gosselin and concluded in *Cambie Surgeries* that: “the scope of the rights under s. 7 may be considered unsettled.”⁵⁴

53. The CCPI Coalition will submit that it is particularly important in the context of a novel claim such as the present one, in which the Court is being called upon to consider the scope of *Charter* rights in light of new jurisprudence from the UN Committee, to exercise caution in characterizing contested *Charter* jurisprudence as “settled law.” Granting the Motion to Strike in this case risks depriving the disadvantaged individuals and groups the CCPI Coalition represents of the equal protection and benefit of the *Charter*’s life and equality guarantees.

ii) Whether Canada’s Decision not to Implement the Systemic Remedy Required in the UN Committee’s Views Violates Sections 7 and 15 of the Charter

54. The Plaintiff seeks, among other remedies, a declaration that the Defendant’s decision not to give effect to UN Committee’s Views infringes sections 7 and 15 of the *Charter* and an order under section 24(1) of the *Charter* requiring the Defendant to give effect to the UN Committee’s Views in a manner that complies with *Charter*.⁵⁵

55. The Defendant appears to argue that the Plaintiff’s claim, seeking *Charter* review of Canada’s decision not to give effect to the UN Committee’s Views, should be dismissed on the bases that:

- i. The UN Committee’s Views are not binding in international law or domestic law and Canada is within its rights to disagree with the Committee’s Views and to choose not to implement the UN Committee’s recommendations;

⁵⁴ *Ibid.*

⁵⁵ Statement of Claim at para 1(g).

- ii. A finding that the Defendant has violated rights under the *ICCPR* does not “automatically translate into a *Charter* breach”; and
- iii. The issue has already been decided in the context of the Plaintiff’s previous challenge to the IFHP and is *res judicata*.

56. With respect to the first point, the Coalition will clarify that, while the federal executive’s prerogative powers may provide significant discretion with respect to whether to implement the UN Committee’s Views, such discretion is not absolute.

57. It has been well-established since the Supreme Court’s decision in [*Operation Dismantle v the Queen*](#)⁵⁶ that decisions made pursuant to prerogative powers are reviewable under the *Charter*.⁵⁷ As the Supreme Court affirmed more recently in [*Canada \(Attorney General\) v PHS Community Services Society \(Insite\)*](#), all exercises of discretion must conform to the *Charter*.⁵⁸

58. The Supreme Court found in the *Insite* case that a discretionary executive decision, not to provide an exemption from the *Controlled Drugs and Substances Act*, threatened the lives and health of injection drug users, thereby engaging their section 7 rights.⁵⁹ The Court concluded this rights violation was not in accordance with section 7 principles of fundamental justice because it was arbitrary, contrary to the purpose of protecting public health and safety, and grossly disproportionate.⁶⁰

⁵⁶ [*Operation Dismantle v. The Queen*, 1985 CanLII 74 \(SCC\), \[1985\] 1 SCR 441](#) [*Operation Dismantle*].

⁵⁷ [*Operation Dismantle*](#) at [para 50](#).

⁵⁸ [*Canada \(Attorney General\) v. PHS Community Services Society*](#), 2011 SCC 44 [*Insite*] at [para 117](#).

⁵⁹ *Insite* at [paras 91-94](#).

⁶⁰ *Insite* at [paras 127-133](#).

59. If granted leave to intervene, the CCPI Coalition will submit the same analysis can be applied in the present case. The Canadian government's decision not to give effect to the UN Committee's Views similarly threatens the health and life of irregular migrants in need of essential health care. It is also arbitrary and contrary to the purpose of ratifying the *Optional Protocol* to the *ICCPR*, which is "to achieve the purposes of the *ICCPR* and the implementation of its provisions."⁶¹ Further, the consequences imposed on the lives of irregular migrants is grossly disproportionate to any benefit of refusing to give effect to the UN Committee's Views.

60. With respect to the Defendant's second argument, while it is true that a finding of a violation of *ICCPR* rights does not "automatically" translate into a *Charter* breach, the UN Committee's Views may nevertheless have a significant effect on this Court's interpretation of the scope of *Charter* rights in the present context, which in turn may call into question the constitutionality of the Defendant's exercise of discretion.

61. Binding obligations under ratified international human rights treaties are particularly important in interpreting the scope of *Charter* protections and the UN Committee's Views are relied on by Canadian courts to clarify Canada's obligations under the *ICCPR*.⁶² The Court has affirmed that "similarity between the policies and provisions of the *Charter* and those of

⁶¹ [Optional Protocol to the International Covenant on Civil and Political Rights](#). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9. Accession by Canada 19 May 1976, [Preface and article 1](#).

⁶² [Quebec \(Attorney General\) v. 9147-0732 Québec inc](#) 2020 SCC 32 (CanLII) at [paras 31-33](#); See for example [Saskatchewan Federation of Labour v. Saskatchewan](#), 2015 SCC 4 at [para 154](#); [Newsun Resources Ltd. v. Araya](#), 2020 SCC 5; [R. v. Poulin](#), 2019 SCC 47.

international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies ...”⁶³

62. With respect to the Defendant’s third point, that the *Charter* issues in the present challenge have been settled by the previous decision of the Federal Court of Appeal, it is difficult to imagine the purpose of ratifying the *Optional Protocol* to the *ICCPR* if both the executive and the judicial branches simply stand by the interpretations of domestic law that previously denied the victim access to effective remedies. The CCPI Coalition will submit that such a position is contrary to the obligation to engage in good faith with the ratified *Optional Protocol* procedure and that this is a relevant consideration in determining whether the Canadian government’s decision not to implement the UN Committee’s Views is in compliance with the *Charter*.

63. The requirement under the *Vienna Convention on the Law of Treaties* that treaty obligations to which States have agreed be interpreted and performed “in good faith” (*pacta sunt servanda*) are “universally recognized” as fundamental principles or rules of international law that “are not open to question.”⁶⁴ The obligation to perform treaty obligations in good faith has been described as “a norm which sets the very foundations of the international legal system.”⁶⁵

64. In assessing the scope of the rights in sections 7 and 15 of the *Charter* and the principles of fundamental justice in this case, the Coalition will submit that this Court should consider

⁶³ [Quebec \(Attorney General\) v. 9147-0732 Québec inc](#) at [para 30](#), citing Dickson C.J. in dissent in [Reference Re Public Service Employee Relations Act \(Alta.\)](#), 1987 CanLII 88 (SCC), [1987] 1 SCR 313 at [para 58](#).

⁶⁴ United Nations, [Vienna Convention on the Law of Treaties](#), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Preamble, articles 26, 31. [Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others](#), [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004 at para 19 (per Lord Bingham) and paras [57 – 62](#) (per Lord Hope).

⁶⁵ Mark W. Janis, “Nature of Jus Cogens,” 3 Conn J Int’l L 359 (1988) at 362.

whether Canada's response to the UN Committee's Views met a standard of good faith under international human rights law.

65. The Coalition will also submit that the UN Committee's Views are a relevant consideration in determining whether irregular immigration status should be accepted as an analogous ground of discrimination under section 15 of the *Charter*, based on similar considerations relating to the importance of ensuring conformity of *Charter* interpretation with international human rights norms.

iii) Whether Canada's Decision not to Implement the UN Committee's Views Constitutes an Unreasonable Exercise of a Prerogative Power

66. The CCPI Coalition takes the position that the Canada's decision not to give effect to the UN Committee's Views should be reviewed for its *Charter* compliance.

67. However, the CCPI Coalition also supports Ms. Toussaint's submission that Canada's decision not to implement the UN Committee's Views is unreasonable based on an administrative law standard of review and that the claim in paragraph 1(h) of the Plaintiff's Statement of Claim should therefore not be struck.

68. In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada stated that "in some administrative decision-making contexts, international law will operate as an important constraint on an administrative decision maker."⁶⁶ The Court noted that: "Since *Baker*, it has also been clear that international treaties and

⁶⁶ [*Canada \(Minister of Citizenship and Immigration\) v. Vavilov*, 2019 SCC 65 at para 114.](#)

conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power.⁶⁷




69. The CCPI Coalition will argue that international human rights and *Charter* values, as well as the obligation to engage in good faith with the authoritative Views of the UN Committee in this case, may lead to a finding that the decision not to give effect to the Committee's Views was unreasonable.

70. The CCPI Coalition does not agree with the Defendant that the proposed review of the exercise of a prerogative power in this case is beyond the jurisdiction of this Court.⁶⁸

PART V – ORDER SOUGHT

71. CCPI, CHC and the FCJ Refugee Centre respectfully request an order that they jointly:
- a) be granted leave to intervene in the Defendant's Motion to Strike;
 - b) be permitted to file a factum not exceeding twenty (20) pages;
 - c) be permitted to present oral argument not exceeding twenty (20) minutes at the hearing of the Defendant's motion;
 - d) not be granted costs, nor costs be ordered against them; and
 - e) such further or other order as the Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

 _____ Martha Jackman	 _____ Vanessa Gruben	 _____ Yin Yuan Chen
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Lawyers for the Moving Party, CCPI, CHC, FCJ Refugee Centre

⁶⁷ *Ibid.*

⁶⁸ Defendant's Factum para 72. See [Black v. Canada \(Prime Minister\)](#), 2001 CanLII 8537 (ON CA) at [paras 74-76](#).

SCHEDULE “A” – LIST OF AUTHORITIES

		Factum Paragraph(s)
Case Law		
1	<i>Toussaint v Canada</i> CCPR/C/123/D/2348/2014 (30 August 2018)	2, 10
2	<i>Toussaint v Canada (Attorney General)</i>, 2010 FC 810	8, 9, 40, 48
3	<i>Toussaint v. Canada (Attorney General)</i>, 2011 FCA 213	8, 9
4	<i>Chaoulli v. Quebec (Attorney General)</i>, 2005 SCC 35, [2005] 1 SCR 791.	15, 47, 48
5	<i>Eldridge v. British Columbia (Attorney General)</i>, 1997 CanLII 327 (SCC), [1997] 3 SCR 624.	16
6	<i>Gosselin v. Québec (Attorney General)</i>, 2002 SCC 84, [2002] 4 SCR 429.	15
7	<i>Baker v. Canada (Minister of Citizenship and Immigration)</i>, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.	15
8	<i>Tanudjaja v. Attorney General (Canada) (Application)</i>, 2013 ONSC 5410.	16, 50
9	<i>Tanudjaja v. Attorney General (Canada)</i>, 2013 ONSC 1878.	16
10	<i>Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian Dubourdieu, Centre for Equality Rights in Accommodation Applicants (Appellants) and The Attorney General of Canada and The Attorney General of Ontario</i> (March 31, 2014), Court of Appeal for Ontario M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) [Feldman JA (In Chambers)].	17
11	<i>Tanudjaja v. Canada (Attorney General)</i>, 2014 ONCA 852	51
12	<i>Bedford v. Canada (Attorney General)</i>, 2009 ONCA 669	31

14	<i>Cambie Surgeries Corporation v British Columbia (Attorney General)</i> , 2020 BCSC 1310.	52
15	<i>Operation Dismantle v. The Queen</i> , 1985 CanLII 74 (SCC), [1985] 1 SCR 441.	57
16	<i>Canada (Attorney General) v. PHS Community Services Society</i> , 2011 SCC 44.	57
17	<i>Quebec (Attorney General) v. 9147-0732 Québec inc</i> 2020 SCC 32.	58
18	<i>Nevsun Resources Ltd. v. Araya</i> , 2020 SCC 5.	61
	<i>R. v. Poulin</i> , 2019 SCC 47.	61
18	<i>Reference Re Public Service Employee Relations Act (Alta.)</i> .	61
19	<i>Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others</i> , [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004.	63
20	<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65.	67
21	<i>Black v. Canada (Prime Minister)</i> , 2001 CanLII 8537 (ON CA)	70
International Documents		
21	UN General Assembly, <i>International Covenant on Civil and Political Rights</i> , 16 December 1966, United Nations, Treaty Series, vol. 999 p. 171.	10
22	<i>Optional Protocol to the International Covenant on Civil and Political Rights</i> . Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9.	59, 62
23	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.	63
Secondary Sources		
24	Mark W. Janis, “Nature of Jus Cogens,” 3 Conn J Int'l L 359 (1988) at 362.	63

SCHEDULE “B” – STATUTES CITED***Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11***

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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.