

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

NELL TOUSSAINT

Plaintiff
(Respondent)

and

ATTORNEY GENERAL OF CANADA

Defendant
(Appellant)

NOTICE OF APPEAL

THE ATTORNEY GENERAL OF CANADA APPEALS to the Court of Appeal from the Order of Justice Perell (the “Motions Judge”) dated August 17, 2022, made at Toronto.

THE APPELLANT ASKS for:

1. An order striking the Motions Judge’s Order that Canada shall have forty days to deliver its Statement of Defence, without raising a limitations period defence; and substituting an order that the Attorney General of Canada (hereinafter “the Defendant”) deliver its Statement of Defence within twenty days of this Courts’ decision;
2. An order striking the Motions Judge’s declaration that the action of the Respondent (hereinafter “the Plaintiff”) is within the jurisdiction of the Ontario Court;
3. An order striking the Motions Judge’s declaration that the Plaintiff’s action is timely, and not barred by a limitation period;

4. An order staying the effect of the Motion Judge's order, pending the outcome of the appeal to this Court; and
5. If necessary, an interim order staying the effect of the Motion Judge's order, pending the outcome of a motion for the relief requested in paragraph 4.

THE GROUNDS OF APPEAL are as follows:

1. The Plaintiff commenced an action by Amended Statement of Claim issued October 14, 2020, further amended on May 25, 2021 (the "Statement of Claim").
2. The Plaintiff seeks damages, *Charter* declarations and other related relief.

In very brief summary, the Statement of Claim alleges that:

- a) The Plaintiff entered Canada as a visitor in 1999, and remained and worked in Canada after her status had expired. She suffered serious medical issues while in Canada;
- b) In 2009, the Plaintiff applied for, and was denied medical coverage under Canada's Interim Federal Health Program. Through 2009 – 2012, the Plaintiff sought judicial review of this decision in the Federal Courts and the Supreme Court, without success;
- c) In 2013 the Plaintiff filed a complaint with the United Nations Human Rights Committee (UNHRC). In 2018, the UNHRC released its views, in which it found that Canada had violated the Plaintiff's rights under the International Covenant on Civil and Political Rights, and that Canada should compensate the Plaintiff;
- d) The Plaintiff sought compensation from the Defendant following the UNHCR's decision. The Defendant refused to compensate the Plaintiff. The Plaintiff commenced the underlying action.

3. The Defendant brought a motion to dismiss the action or strike all or parts of the Statement of Claim the Claim. The grounds for the motion included:

a) That the Statement of Claim discloses no reasonable cause of action:

b) That the action is statute barred by the *Limitations Act, 2002*;

c) That the action is frivolous and vexatious, and an abuse of process:

d) That the court has no jurisdiction over parts of the relief claimed in the Statement of Claim.

4. In the alternative to striking the Statement of Claim, the Defendant requested an order extending the time for delivery of the Statement of Defence, to 60 days following the Court's order.

5. There was no evidence filed on the motion.

6. The Plaintiff did not argue on the motion that the Defendant should be precluded from raising a limitations defence. The Plaintiff's position on the motion was that limitations issues should be left to be decided as a defence in the action.

7. The motion to strike was heard on June 13, 2022, by video conference.

8. On August 17, 2022, the Motions Judge dismissed the motion, and released his Reasons For Decision (the "Decision").

9. As of the date of this Notice of Appeal, the parties have not settled the wording of the Order.

10. In the Decision, the Motions Judge ordered that "Canada shall have forty days to deliver its Statement of Defence in accordance with these Reasons for Decision; i.e. without raising a limitations period defence". The Decision therefore requires the Defendant to file a Statement of Defence, without raising any limitations defence, on or before September 26, 2022.

11. In the Decision, the Motions Judge also:
 - a) Declared that the Plaintiff's claim was within the jurisdiction of the Ontario Court;
 - b) Declared that the Plaintiff's action was timely, and was not statute barred;
 - c) Ordered that the Defendant could not rely on a limitations defence;
 - d) Made findings of fact regarding the discoverability of the Plaintiff's cause of action, and specifically, found that it was plain and obvious that the Respondent had not discovered her cause of action, within the meaning of the *Limitations Act 2002*, until September 15, 2020;
12. The Motions Judge exceeded his jurisdiction on a motion to strike, and erred in law by making orders that went beyond assessing the strength of Plaintiff's cause of action, and specifically erred by making final orders and declarations regarding the merits of the Plaintiff's claim; the merits of the Defendant's defences; and the credibility of facts alleged in the Statement of Claim.
13. The Motions Judge exceeded his jurisdiction and erred in law by making an order which precludes the Defendant from raising a limitations defence.
14. The Motions Judge exceeded his jurisdiction and erred in law by declaring that the Plaintiff's claim was within the jurisdiction of the Ontario Court.
15. The Motions Judge erred by granting relief in the nature of a motion to strike parts of the Statement of Defence, before a Statement of Defence had been filed.

16. The Motions Judge erred by making orders and declarations based on findings of fact regarding the discoverability of the Plaintiff's cause of action on a pleadings motion, without evidence, before the Defendant had responded to the factual allegations in the Statement of Claim.

17. The Motions Judge acted unfairly and erred in law by granting relief, without notice, which prejudices the Defendant's defence of the action, when neither party had requested the relief.

18. Rules 21.01(1)(b); 21.01(3)(a) and (d); 25.06(1) and (2); and 25.11(b) and (c) of the *Rules of Civil Procedure*.

19. Rules 61.04(1) and 63.02(1) of the *Rules of Civil Procedure*.

20. Sections 6(1)(b) and 134 of the *Courts of Justice Act*.

21. Such further and other grounds as counsel may advise and this Honourable Court may accept.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION is:

1. Section 6(1)(b) of the *Courts of Justice Act*.

2. The Appellant is appealing orders and declarations which the Motions Judge clearly intended to be final.

3. The Decision explicitly states that the Motions Judge's order that the Ontario Court has jurisdiction; and his order that the plaintiff's claims are timely and not statute-barred are meant to be a determination of the merits of Ms. Toussaint's claim or Canada's defence.

4. An order dismissing a motion to strike is typically an interlocutory order. The Appellant is appealing parts of the Order in which the Motions Judge went

beyond the appropriate relief on a motion to strike, and made orders and declarations which finally determined substantive issues and rights in the action.

5. Such further and other grounds as counsel may advise and this Honourable Court may accept.

The Appellant requests that this appeal be heard at Toronto.

Date: September 8, 2022

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