January 14, 2020

Toussaint v. Attorney General of Canada CV-20-649404

- *Martha Jackman* for CCPI Coalition
- *Kaley Pulfer, Iris Fischer and Alysha Li* for CCLA
- *Raj Anand and Megan Mah* for COP-COC Coalition
- *Rachael Saab and Alex Bogach* for Amnesty/ESCR-Net
- *David Tyndale and Asha Gafar* for the Defendant AG Canada /Responding Party
- *Andrew Dekany* for the Plaintiff (consenting to these requests for intervener status)

Motions by four proposed interveners for leave under Rule 13.02 to intervene in the defendant AG's motion to strike P's pleading - P's action raises constitutional and international human rights law issues relating to federal health care for irregular migrants – Each of the proposed intervener groups seek leave to file a 20-page factum and be granted 20 minutes for oral submissions – The AG does not dispute that the four proposed interveners are well-recognized groups with relevant expertise; have a real and substantial identifiable interest in the subject matter of this proceeding; and can provide an important and distinct perspective.

The AG opposes these motions on two grounds: *(i) the submissions of the proposed interveners will simply duplicate P's and will not assist the court, especially on a motion to strike where the legal analysis is particularly narrow,*[1] *and (ii) the added 80 pages of factums and the additional hour and twenty minutes of oral submissions will unnecessarily complicate the motion to strike and prejudice the defendant.*

Decision: The motions for leave to intervene are granted — but with modifications relating to the size of the factums and the time allocated for oral submissions — specifically, each intervener's factum cannot exceed 15 pages and although in my view 15 minutes for oral submissions would not be unreasonable, it will be up to the judge hearing the motion to strike to determine what time, if any, will be granted to the interveners for oral submissions.

Reasons: Courts have recognized that the threshold for granting intervener status in a public interest or public policy case is more relaxed than it is for a private interest case.[2] However, even without the benefit of this lower hurdle, I am satisfied that each of the four proposed interveners can usefully assist the court with the nuanced constitutional and international human rights issues that arise here — especially on the motion to strike where the legal focus is on the "no chance of success"/"doomed to fail" question. I refer in particular to the points set out in the CCPI Factum at paras. 45-70, the CCLA Factum at paras. 5 and 21, the COP-COC Factum at paras. 18-19 and the Amnesty/ESCR-Net Factum at paras. 5 and 33-47.

[1] I pause here to ask how "duplication" can even be assessed given that P has not yet filed her factum.

[2] *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada* (1990) 74 OR (2d) 164 (C.A.) at para. 6; *Trinity Western University v Law Society of Upper Canada*, 2014 ONSC 5541 at para 8.

However, I agree with the AG that the interveners' submissions should be confined to the 'no reasonable cause of action' focus and they should avoid duplication. A 20-page factum from every intervener is excessive. A 15-page maximum would be more appropriate and I so direct.

My suggested allocation of 15 minutes for oral submissions is not unreasonable. However, as already noted, and in my discretion, I am deferring the question of whether or to what extent the court will benefit from oral submissions to the judge hearing the motion to strike.

With these modifications to factum size and oral hearing time, the AG's prejudice argument loses its force. Strictly speaking, the concern in the caselaw is not "prejudice" as commonly understood but "injustice"[3] to the parties — here, the plaintiff consents and there is no injustice to the defendant AG if these interventions are granted with the modifications as noted.

A final comment. Given the history of this litigation and the very narrow focus of the motion to strike, I think all judges would benefit from the analyses that these particular interveners can provide. And, if it turns out that the motion court's review of the interveners' factums shows otherwise, the court can limit or eliminate oral submissions and nothing is lost, other than the time it took to read the short factums. I was therefore somewhat perplexed by the level of intensity in the defendant AG's opposition to these motions for intervention. It would have been more measured, in my view, to focus on factum length or oral hearing time (if these were indeed concerns).

The motions to intervene in the motion to strike are granted with the modifications as noted. I further direct that none of the interveners shall receive or be liable for costs in the motion to strike.

Draft Order: I would be obliged if counsel would prepare a single umbrella Order — one that includes all four interveners — for my signature.

Costs: No costs are sought on these motions to intervene and none are awarded.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: January 14, 2022

[3] As the Court of Appeal noted in *Foxgate Developments Inc v Jane Doe*, 2021 ONCA 745 (at para. 6), the court "must consider the general nature of the case, the issues that arise in the case, and the contribution that the proposed intervener can make to resolving those issues *without doing an injustice to the parties*". (Emphasis added),