CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

NELL TOUSSAINT

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ REFUGEE CENTRE, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

REPLY OF THE DEFENDANT
MOTION TO STRIKE STATEMENT OF CLAIM

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Plaintiff and Interveners propose an interpretation of Canada's *Charter* and international obligations that completely upends the existing jurisprudence. Canadian law does not support the proposition that a person who chooses to remain in Canada with no status can claim a right to publically funded health benefits under the Interim Federal Health Program (IFHP). The Plaintiff's claim has no chance of success.

2. The Defendant repeats and relies on the arguments set out in the Factum of the Defendant, dated February 10, 2022.

PART II – SUBMISSIONS

A. REPLY TO THE PLAINTIFF

1) Canada's international obligations

3. Canada is bound to uphold its obligations under the *International Covenant on Civil and Political Rights* (ICCPR). Canada's obligations under the ICCPR include that it not violate the Plaintiff's right to life or the Plaintiff's right to be free from discrimination. The determination of the content of the expressions "right to life" and "right to non-discrimination", and the extent to which they inform the Plaintiff's *Charter* rights, on the particular facts of the Plaintiff's case, is a matter for Canadian courts.[1] The Federal Court of Appeal has determined, based on the facts of this case, and taking into account Canada's obligations under the ICCPR, that the Plaintiff's right to life under s.7 of the *Charter* and her right to equality under s. 15 of the Charter have not been violated.

4. The Plaintiff argues that the United Nations Human Rights Committee's (UNHRC) interpretation of the ICCPR in the Plaintiff's case, combined with the fact that virtually every state is a party to the ICCPR, means that "it is not plain and obvious that the rights claimed here have not attained sufficiently widespread acceptance to attain customary status".[2] The Plaintiff's conclusion is not sound in law, or in logic. The Plaintiff, throughout the argument, treats the UNHRC's views on the content of the expression "right to life" as if they had the same force as the general obligation under the ICCPR to protect the right to life.

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[1] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 60.
[2] Factum of the Plaintiff at para 72

5. Again, as a State party to the ICCPR, Canada is bound to protect the right to life and the right to equality, under Articles 6 and 26 of the treaty. However, while Canada has committed to engaging in good faith the UNHCR and to seriously considering the Committee's views, the interpretation that human rights treaty bodies such as the UNHCR gives to ICCPR rights and UNHRC views in individual complaints are non-binding on States Parties.[3] Canada is not bound to accept the UNHRC's definition of those terms. Moreover, there is no international consensus that those terms have the scope and meaning that the UNHRC has ascribed to them in its views, or encompass the rights claimed by the Plaintiff, and certainly no consistent state practice in this respect.

6. There is certainly no consensus in Canada that the general terms of the ICCPR include the rights claimed by the Plaintiff. On the contrary, the overwhelming weight of the Canadian jurisprudence is that the right to life and equality under the *Charter*, interpreted in the light of Canada's international obligations, do not include a right to public health care coverage for persons without status.

2) Pacta sunt servanda

7. The Plaintiff is not proposing an incremental step forward in the law of enforcing international rights obligations. The Plaintiff's argument upends the notion that the scope of Canada's international obligations are not enforceable in domestic law and that the views of human rights treaty bodies, such as the UNHRC, are non-binding on States Parties.

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[3] See, for example, *Quebec (AG) v 9147-0732 Québec Inc.*, 2020 SCC 32 at paras. 24 – 26; *Ahani v Canada (MCI)* (2002), 58 O.R. (3d) 107 (C.A.) at paras. 32-35, leave to appeal to SCC dismissed [2002] S.C.C.A. No. 62.

8. The Plaintiff's argument seems to be that:

(a) it is a basic principle of law that promises should be kept;

(b) contract law, mercantile law, and treaty law all derive from laws dating back centuries that involve enforcing promises;

(c) therefore, every provision of an international treaty like the ICCPR can be enforced today like a domestic commercial contract.

9. The argument has no foundation in fact, or in law.

10. The Plaintiff's argument amounts to an assertion that every international treaty obligation, whether or not it has been incorporated into domestic law, is enforceable against Canada in the same way that any civil contract claim may be litigated in this Court. The argument flies in the face of binding jurisprudence on the enforceability of international treaties in Canadian Courts.[4]

11. The Plaintiff's argument also implies that the views of the UNHRC committee are binding on this Court, and override the interpretation of the Canadian Courts as to the scope of s. 7 and s. 15 of the *Charter* on the facts of this case. This argument runs against all of the binding jurisprudence to date on the issue. The argument has no chance of success.

12. The Plaintiff's argument is not an incremental extension of the existing law. It would completely upend the findings of the Court of Appeal on the enforceability of international treaties:

> [32] …**The Party states that ratified the Covenant and the Optional Protocol turned their minds to the question of whether they should agree to be bound by the Committee's views**, or whether they should at least agree to refrain from taking any action against an individual who

[4] See Factum of the Defendant, paras.40-56

> had sought the Committee's views until they were known. **They decided as a matter of policy that they should not, leaving each party state, on a case-by-case basis, free to accept or reject the Committee's final views**, and equally free to accede to or not accede to an interim measures request.
>
> [33] **To give effect to Ahani's position, however, would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result.**
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> [34] **The principle that international treaties and conventions not incorporated into Canadian law have no domestic legal consequences has been affirmed by a long line of authority in the Supreme Court of Canada**.[5] [emphasis added]

3) No promise to the Plaintiff

13. The Plaintiff makes the argument that Canada's acceding to the ICCPR, and to its Optional Protocol establishing the individual complaints mechanism of the UNHRC, constituted a promise to the Plaintiff: that Canada would be bound by the Committee's legal interpretation of the scope and content of the right to life and the right to equality and non-discrimination; and that Canada would enforce, without reservation, any remedies that the Committee recommends in its views.

14. The argument is not based in fact or in law. At the time the Plaintiff made her complaint to the UNHRC, it was clear that Canada had not agreed to be bound by the views of the UNHRC.[6]

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[5] *Ahani . Canada (AG),* 2002 19 Imm LR (3d) 231, 208 DLR (4th) 66, CanLII 23589 (ON CA), at paras 32-34, citing *Capital Cities Communications Inc. v Canada (CRTC),* 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141 at p. 173, *Baker v. Canada (MCI),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at p. 861

[6] *Ahani v Canada*, *supra,* at paras 32-42*; Dumont c. Québec (PG), 2009 QCCS 3213, at para. 127; Dumont c. Québec (Procureur général), 2012 QCCA 2039 at paras. 107-118*

4) Plaintiff novel claim of positive obligation does not raise a reasonable cause of action

15. In *Tanudjaja*,[7] the motions judge raised a concern that, if *Gosselin*[8] is always read as leaving the door open for the imposition of positive obligations on governments under s. 7, then no proceeding alleging a positive obligation could ever be struck at the pleadings stage. In the Court of Appeal, in dissent, Feldman, JA found that the concern was misplaced:

> There may well be cases where the facts pleaded raise an issue that has been clearly decided in another case, or where the facts as pleaded do not raise a Charter issue, although Charter relief is requested.[9]

16. The Defendant submits that this is a case where the issue has been clearly decided in the Plaintiff's own previous litigation; where the overwhelming weight of authority supports the Defendant's position; and where the facts alleged clearly do not give rise to a *Charter* remedy.

5) Judicial review jurisdiction

17. The Plaintiff argues that the Minister's response to the UNHCR's views is an exercise of Crown Prerogative, and therefore reviewable in the Court. The Defendant submits that the Minister's actions throughout are grounded in the Minister's authority under the IFHP policy. In any event, even if this Court has jurisdiction to entertain the claim, the Defendant repeats that the claim does not raise a reasonable cause of action, in any jurisdiction.

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[7] *Tanudjaja v AG (Canada)* 2013 ONSC 5410, at paras. 67
[8] *Tanudjaja v AG (Canada)* 2014 ONCA 852 at paras. 32, 37-40
[9] Tanudjaja v AG (Canada) 2014 ONCA 852 at paras. 32, 37-40

B. RESPONSE TO THE INTERVENERS CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ REFUGEE CENTRE

18. The Court of Appeal has rejected the proposition that Canada, if it does not implement the views of the UNHRC, is violating the ICCPR, acting in bad faith, or violating the Vienna Convention on the Law of Treaties.[10]

19. Canada gave serious consideration to the UNHRC's views. Canada is entitled to disagree with the Committee's views and to choose not to give effect to the Committee's recommendations. It is doing nothing more than it is entitled to do under the terms of the Protocol.[11]

20. The Intervener argues that the key question on this motion is not whether publically funded health care is a principle of fundamental justice, but rather whether the Minister's decision not to implement the Committee's Views "accords with the basic tenets and principles on which the international and domestic legal systems are founded".

21. With respect, in order for the Plaintiff to advance her claim in a way that s. 7 of the *Charter* can provide relief, she will have to persuade the Court that the "basic tenets and principles" referred to include the proposition that publically funded health care is a principle of fundamental justice. The Defendant repeats that this claim has no chance of success.

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[10] Ahani v Canada (AG), supra at para 45
[11] Ahani v Canada (AG), supra at para 46

C. RESPONSE TO THE INTERVENERS AMNESTY INTERNATIONAL CANADA, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS

22. The Intervener argues that Canada's failure to implement the UNHRC's views is at odds with both the ICCPR and the broader international consensus on the indivisibility, interdependence, and interrelatedness of human rights, and ignores a "widely accepted" approach to international human rights obligations. The Defendant disputes that the Plaintiff's interpretation is widely accepted. The Plaintiff's interpretation not accepted in the Canadian jurisprudence on these issues.

23. The Interveners argue that the *Charter*, interpreted in the light of the ICCPR and of the UNHCR's decision, supports a "systemic" remedy which would prevent violation of the rights of others besides the Plaintiff.

24. A Charter remedy, such as striking down legislation, will obviously have an impact beyond the individual parties to a proceeding. But there is no support in Canadian law for the proposition that this Court can direct the Minister to amend existing legislation or policy based on the views of the UNHRC

25. The Plaintiff has never been subject to, not made any claim for relief under the IFHP which is currently in effect. It may be that a challenge to the current IFHP can be made by a person who is actually affected by it. The Plaintiff's attempt to strike down or amend the current IFHP, therefore, has no chance of success.

D. RESPONSE TO THE INTERVENERS THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC

26. The Defendant does not take issue with the Intervener's submission

that Courts should take into account systemic discrimination and conditions affecting vulnerable groups. In a particular case this principle must be grounded in the nature of the proceeding, the facts that have been pleaded and the claims made by the parties.

27. The Plaintiff's action does not allege discrimination based on race. The Plaintiff takes issue with distinctions drawn between "regular" and "irregular" migrants. The action does not allege that any decision or policy in issue creates, directly or indirectly, a disproportionate impact on any racialized group.

28. The decision of *Zoghbi*[12], cited by the Intervener, is distinguishable. The applicant in *Zoghbi* squarely raised an argument that a violation of his rights as a member of a protected group gave rise to a breach of s. 15 of the *Charter*. The Federal Court held that, since the tribunal below had dismissed the applicant's human rights complaint on preliminary grounds, there was no evidence on which the Federal Court could decide the Charter issue. *Zoghbi* stands for the proposition that where a claim of discrimination against a protected group is made, evidence of the situation of that group will be important. In this case, the Plaintiff has not made a claim of discrimination based on race.

E. RESPONSE TO THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

29. The Defendant takes issue with the Intervener's characterization of the Plaintiff's immigration status as "precarious". The Plaintiff asked for temporary entry into Canada as a visitor. The Plaintiff overstayed her visa. She worked in

[12] *Zoghbi v Air Canada*, 2021 FC 1154 (CanLII)

Canada without authorization for several years before beginning to seek to regularize her status, and did not regularize her status for over ten years. The Intervener's position suggests that the Plaintiff had some sort of tenuous right to remain in Canada. There is no legal right to migration, in Canadian or international law.[13]

30. The Defendant does not take issue with the proposition that the Court should be cautious in granting motions to strike in rights-based cases. The Defendant repeats that this is a case where the weight of binding jurisprudence, and the fact that a Canadian Court has already determined the Charter issues in question, make it clear that the Plaintiff's case cannot succeed.

31. The Defendant repeats that the Plaintiff has not pleaded that she applied for health coverage after the IFHP was amended in 2012. The facts alleged in the Statement of Claim do not disclose any real or potential breach of the Plaintiff's Charter rights between 2012 and 2013, or put in issue the 2016 IFHP policy.

32. The Intervener argues that the current IFHP, in place since 2016, ought to be reviewed on a full evidentiary record. The Plaintiff has never been subject to, not made any claim for relief under the IFHP which is currently in effect. It may be that a challenge to the current IFHP can be made by a person who is

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[13] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v Canada (MEI)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733; see also *Medovarski v Canada (MCI)*, 2005 SCC 51 at para. 46; Article 12 of the ICCPR protects the freedom of mobility of persons "lawfully within the territory of a State" as well as the right of persons to leave any country and to return to their own country, but it does not confer a freestanding right to migration

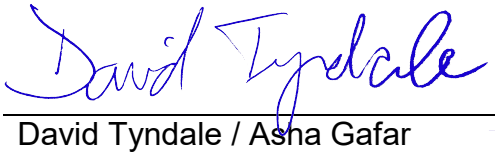
actually affected by it. The Plaintiff's attempt to strike down or amend the current IFHP, however, has no chance of success.

F. CONCLUSION

33. The facts pleaded in the Statement of Claim do not raise any claim that is recognized as a compensable violation of the Plaintiff's rights. The Court would be unable to grant a remedy even if the Plaintiff proved all the facts alleged. To permit the Plaintiff to litigate the claim through discovery and trial would be a waste of both the parties' and the Court's time.[14]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, March 15, 2022.



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Of Counsel for the Defendants

[14] *Dawson v Rexcraft Storage and Warehouse Inc.*, [1998] OJ 3240 (ONCA) at para 8

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NELL TOUSSAINT
Plaintiff

AND

ATTORNEY GENERAL OF CANADA
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

REPLY OF THE DEFENDANTS

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