Court File No.: M53747

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

NELL TOUSSAINT

Plaintiff
(Respondent)

and

ATTORNEY GENERAL OF CANADA

Defendant
(Appellant)

FACTUM OF THE RESPONDENT, NELL TOUSSAINT
RESPONDING PARTY TO THE MOTION

Part I – STATEMENT OF FACTS

1. The respondent notes only that the following developments have occurred since the appellant delivered its factum

   - The wording of the order was finalized and signed by Justice Perell during a case conference on September 14, 2022.

   - During the same case conference, Justice Perell granted the appellant a ten-day extension for the delivery of a statement of defence, which is now due on October 6, 2022.

Part II – POINTS IN ISSUE

2. A stay of the impugned orders should not be granted. Granting a stay would actually cause more delay than not granting one, and thus the balance of convenience weighs in favour of dismissing the motion.

Part III – SUBMISSIONS

A. TEST FOR A STAY

3. The respondent accepts that the test for a stay comprises the same three elements set out by the appellant in its factum

   (i) There is a serious issue to be tried

   (ii) The party seeking the stay would suffer irreparable harm should the stay not be granted; and

   (iii) The balance of convenience and public interest considerations favour a stay.

4. However, the respondent does not fully agree with the appellant's assertion that the three requirements operate as "interrelated considerations," such that "The strength of one criterion may compensate for the weakness of another." More typically, the first criterion merely operates as a threshold question that sets a low bar, and the analysis turns primarily on the other two factors[1] (outside the special circumstance of motions for stays pending leave to appeal applications to the Supreme Court of Canada,[2] which is not the case here).

B. SERIOUS ISSUE

5. This criterion is merely a threshold question and for the purposes of this motion the respondent does not contest that it has been met.

C. IRREPARABLE HARM

---

1 *Tisi* v. *St. Amand*, 2017 ONCA 539, at para. 14.
2 *Yaiguaje* v. *Chevron Corporation*, 2014 ONCA 40, at para. 5.

6. As the appellant suggests, if it is successful on this appeal, its right to litigate the arguments it wishes to will not be irretrievably lost if this stay is not granted. Rather, the fundamental harm that is risked primarily takes the form of delay. As the appellant observes in its notice of motion:

> "The Defendant will suffer irreparable harm if the impugned provisions of the Decision are not stayed. The pleadings define the scope of discovery and of the trial. This appeal may not be heard for some time. In the interim, if the order is not stayed, the Defendant will have to proceed to discovery without being able to rely on important defences, or raise important factual issues. The Statement of Defence could be amended after an appeal, but this would involve significant wasted time in the discovery process."

7. The appellant further elaborates in its factum on this motion:

> "If a stay is not granted, and the Appellant is successful, the Statement of Defence could be amended. The Defendant would presumably recover the right to discovery that had been foreclosed. In the meantime, the parties will have spent unnecessary time and resources on pleadings and discoveries that were unfairly restrictive to the Defendant."

8. The problem cited by the appellant is not intractable. For instance, one option may be to bifurcate discovery such that special examination for discovery sessions could be scheduled and held specifically on the issue of limitations should the appellant prevail on this appeal. Other solutions may also be possible, such as finding a way to include any limitations issues raised by the appellant within the scope of discovery on a contingent basis pending the outcome of this appeal. The respondent would be

prepared to give any undertaking required to enable the litigation process to move forward in a sensible and expedient manner. Ultimately, the respondent's point is that the problem raised by the appellant is one that is solvable.

9. Even if the prospect of one or two extra examination for discovery sessions is unduly burdensome, that does not mean the litigation process needs to stop in its tracks right now. The appellant could still move forward with a statement of defence, affidavits of documents, and the mandatory mediation that this claim is subject to, and seek a suspension of the discovery process if and when it becomes clear that it would be inefficient to proceed with examinations for discovery while this appeal is still pending.

D. BALANCE OF CONVENIENCE AND PUBLIC INTEREST CONSIDERATION

10. In the respondent's submission, this motion turns on the question of delay. Delay is the key potential harm cited by the appellant in its submissions, and the respondent's argument in response is that the threat of delay is greater if a stay is granted.

11. To be clear, the respondent is also concerned with, and prejudiced by, delay.

12. The respondent, who is in a disadvantaged socioeconomic and health situation, is anxious to make progress towards the resolution of what Justice Perell described as "a continuation of a two-decade dispute between Toussaint and Canada." But aside from the respondent's own personal interest in obtaining compensation for the violation of her rights, there is a clear and over-riding public interest in resolving the constitutional issues raised without delay, given the potential effect of any delay on the lives and well-being of irregular migrants. As Justice Perell noted, one issue at stake in this litigation

is the UN Human Rights Committee's direction that Canada "take positive steps to fix its health care legislation so that others similarly situated as Ms. Toussaint would have their rights to health care protected."

13. The appellant has not sought leave to appeal to the Divisional Court Justice Perell's finding that it is not plain and obvious that, in light of the UN Human Rights Committee's Views, Canada's refusal to implement the Committee's decision may not be found to violate sections 7 and 15 of the *Canadian Charter*. This means that there is a live constitutional issue, and there may be irregular migrants who are currently being denied access to treatment for life-threatening conditions in a manner that violates their constitutional rights. Delay in resolving that critical constitutional issue may cause irreparable harm to these individuals.

14. The appellant does not contest the Superior Court of Justice's jurisdiction over the constitutional issues raised. It also seems clear that a limitations defence would not apply to a *Charter* review of Canada's refusal to implement the Human Rights Committee's Views to prevent recurrence of similar rights violations in the future. It is therefore in the public interest that the constitutional issues and other aspects of the amended amended statement of claim that are unaffected by the present appeal be allowed to proceed.

15. Moreover, as this case involves access to justice and effective remedies for alleged violations of international human rights law, the Court, in our submission, may also be guided by the principle of ensuring that access to justice and effective remedies are not unreasonably prolonged. Assessing whether a delay is unreasonable includes

consideration of the interests affected and the circumstances of the victim. All of these factors weigh in favour of allowing the action to proceed – at least with respect to the central issues that are unaffected by the appeal.

16. The appellant's motion to strike has been dismissed, which part of Justice Perell's order it does not appeal from here. As such, the claim will proceed to some form of mediation and discovery irrespective of the outcome of this appeal. If the stay is granted, discovery cannot take place at all, and neither can the mandatory mediation that this claim is subject to. In this case, the ultimate delay is sure to be greater than if no stay is granted and a statement of defence is delivered on time, potentially affecting the constitutional rights of an unknown number of people in a critical way. As such, it is not in the interests of justice to order this process to a complete halt pending the outcome of this appeal.

17. The responding party estimates 20 minutes for her oral argument of the motion.

Part IV – ORDER SOUGHT

18. The respondent seeks an order dismissing the appellant's motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 16th day of September, 2022.

Andrew Dekany

by Andrew Dekany/James Yap
of counsel for the respondent

TO: Registry Office,
Court of Appeal for Ontario

TO: Attorney General of Canada
Department of Justice
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario
M5H 1T1
Fax: (416) 954-8982
Attention: David Tyndale
Tel: (647) 256-7309
Email: David.Tyndale@justice.gc.ca
LS#: 28696K

lawyers for the appellant

NELL TOUSSAINT Respondent (Plaintiff)	-and-	ATTORNEY GENERAL OF CANADA Appellant (Defendant)

Court File No. M53747

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE RESPONDENT, NELL TOUSSAINT
RESPONDING PARTY TO THE MOTION

Andrew C. Dekany
Barrister and Solicitor
5 Edenvale Crescent
Toronto, Ontario M9A 4A5
email: andrewcdekany@gmail.com
telephone: 416.888.8877
LSO # 18383F

lawyer for the respondent (plaintiff)