CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NELL TOUSSAINT

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

and

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

Factum of the Plaintiff

Part I: OVERVIEW AND STATEMENT OF FACTS

1. The Federal Court of Appeal ruled that the denial of essential health care benefits to irregular migrants in Canada, even when failure to do so can lead to their death or irreversible negative health consequences, does not violate the *Charter*. However, the United Nations Human Rights Committee (the "Committee") subsequently determined that such a denial is a violation of the rights to life and non-discrimination under the International Covenant on Civil and Political Rights (the "Covenant" or "ICCPR"). Canada assumed obligations under the ICCPR with the intention to be legally bound. This case now raises the novel question of whether Canada's obligations under the ICCPR, as well as the accompanying adjudicative mechanism set out in the Optional

Protocol to the ICCPR, have any legal ramifications or relevance domestically. In the plaintiff's submission, it is not plain and obvious that they do not.

A. FACTS

2. The plaintiff suffered serious irreversible health consequences caused by the defendant's denial of benefits under the Interim Federal Health Program (IFHP). She had one leg amputated above the knee. She became blind. Her kidneys failed. She had a stroke. She had an anoxic brain injury due to heart failure. She currently lives with those irreversible consequences (claim, paras. 34(g) and 49).

3. The defendant's denial of benefits was ongoing from July 10, 2009 until April 30, 2013 when the plaintiff became eligible for OHIP (claim, paras. 12-13 and 21). During this time, the defendant did grant such benefits to others who did not clearly meet the eligibility criteria (claim, para. 20).

4. An Order in Council made on April 5, 2012 (the "2012 OIC")[1] empowered the Minister "on his or her own initiative" to grant IFHP benefits to those not otherwise entitled thereto in "exceptional and compelling circumstances" (claim, paras. 19 and 34(f)). Subsequently, the Minister persisted in his refusal to grant the plaintiff access to IFHP benefits (claim, para. 20). Through his delegate he in effect stated that not excluding her from these benefits under the IFHP would "[*encourage*] persons not lawfully present in Canada to take steps to regularize their status" (claim, para. 34(d)).

5. The plaintiff complained to the Committee under the Optional Protocol that the defendant's refusal to provide her access to essential health care benefits under the IFHP violated her rights to life and non-discrimination recognized in articles 6 and 26,

[1] Order Respecting the Interim Federal Health Program, 2012, SI/2012-26

respectively, of the ICCPR. The Committee determined on July 24, 2018[2] that the defendant had violated those rights when it discriminated against the plaintiff as an irregular migrant by excluding her from, not health care at large, but specifically from readily accessible health care benefits "essential to prevent a risk of loss of her life or irreversible negative health consequences". The Committee stated that the defendant was obliged to take appropriate steps to provide the plaintiff with adequate compensation and to take all steps necessary to prevent similar violations in the future to others.

6. On or about September 15, 2020 the defendant, through the Minister's delegate, informed the plaintiff that it would not take any measures to provide the plaintiff with an effective remedy for the violation of her rights (claim, paras. 31 to 33).

Additional Background on the Human Rights Committee and the Optional Protocol

7. Part IV of the ICCPR establishes a Human Rights Committee comprised of 18 individuals recognized as experts in the field of human rights. The Committee has various tasks and responsibilities generally relating to monitoring and evaluating states parties' compliance with the Covenant. For example, article 41 allows a state party that believes another state party is violating its obligations under the Covenant to refer the matter to the Committee, which may then receive and consider submissions and submit a report.
8. The Optional Protocol supplements this by adding a procedure that allows individuals to present a complaint to the Committee in a similar way. Article 1 of the Optional Protocol provides that if a state party to the Covenant also becomes a party to the Optional Protocol, the Committee may "receive and consider communications from individuals subject to [the state party's] jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

[2] Communication No. 2348/2014, *Toussaint* v. *Canada* (CCPR/C/123/D/2348/2014)

9. Articles 2 and 5 of the Optional Protocol require that any individual who wishes to submit such a communication must first exhaust all available domestic remedies. So in this instance, for example, the plaintiff would not have had access to this mechanism had she not first sought relief under the *Charter* in her Federal Court application.

10. The Views of the Committee are not considered binding under international law. However, they are highly persuasive. The highest judicial authority on international law, the International Court of Justice, has stated:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[3]

11. The Committee's proceedings are quasi-judicial in nature. Its views are "arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions."[4]

12. The procedure under the Optional Protocol has now terminated in favour of the plaintiff, and the defendant has rejected the Committee's views and denied the plaintiff a remedy. No Canadian court has considered what legal recourse, if any, the plaintiff should have at

[3] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, (2011) 50 ILM 37 at para. 66.
[4] UN Human Rights Committee, *General Comment No. 33 (The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights)* (ADVANCE UNEDITED VERSION as of 5 November 2008) at para. 11.

this stage. The Views of the Committee are not in and of themselves binding.[5] However they are persuasive,[6] and the obligations under the Covenant are binding. The defendant undertook these binding obligations voluntarily and in the full knowledge that they were intended to be binding. In this context, the plaintiff argues that the Views of the Committee in the plaintiff's case establish a persuasive *prima facie* case that the defendant breached the Covenant, and further that this breach grounds civil liability in Canada because, *inter alia*, the defendant is bound in Canada as well as internationally by the legal principle *pacta sunt servanda*.

PART II: ARGUMENT

13. The plaintiff seeks civil damages based on rules of customary international law. Under the doctrine of incorporation, rules of customary international law are automatically adopted into the common law. Further, the Supreme Court of Canada recently held in *Nevsun Resources Ltd. v. Araya*[7] that breaches of customary international law may be civilly actionable under the common law. The plaintiff has invoked three rules of

[5] However, the Supreme Court of Spain has given binding effect to the decision of a similar treaty body, the Committee on the Elimination of Discrimination against Women under the Convention on the Elimination of All Forms of Discrimination against Women, under the Optional Protocol to that treaty in the Court's Judgment 1263/2018. The Court stated that that Committee's decision had a "binding/obligatory character" on a State party that has ratified that Convention and Optional Protocol since article 24 of the Convention (comparable to article 2(2) of the ICCPR) provides an undertaking to take all necessary measures to ensure the full realization of the rights recognized in the Convention. The Court's opinion was reinforced by the express recognition of the competence of that Committee in article 1 of the Optional Protocol, which the Court noted was voluntarily assumed by Spain. (See page 24 of the decision, cited in para. 22, footnote 649 of International Law Commission's Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries.)

[6] The stature of the Committee was recognized by Rosenberg, J. A. (in dissent) in *Ahani v. Canada (Attorney General)*, 2002 CanLII 23589 (ON CA), at para. 94, citing the decision of Lord Millett in *Tangiora* v. *Wellington District Legal Services Committee*, [2000] 1 W.L.R. 240, [1999] UKPC 42 (P.C.) at pp. 244-245 (para. 14) and also noting (at note 6) that the late Walter Tarnopolsky had been a member of the Committee before joining the Court of Appeal for Ontario. Currently the Committee has a Canadian member, Marcia V.J. Kran, although she recused herself from taking part in the plaintiff's communication.

[7] *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5.

customary international law that it claims have been breached here: the rule of *pacta sunt servanda* (Lat.: agreements are to be kept), the right to life, and the right to non-discrimination. The plaintiff has pleaded that the defendant has breached all three and that these breaches give rise to a right to a civil remedy under the common law.

14. Further, there is a firmly established principle that the *Charter* is presumed to provide protections at least as great as those contained in Canada's international human rights obligations. As such, a violation of these obligations raises a serious question as to whether a *Charter* violation has occurred as well. The plaintiff therefore seeks *Charter* remedies for violations of the corresponding *Charter* rights.

15. Finally, the plaintiff seeks administrative law remedies to the extent that the defendant's decision not to honour the Views of the Committee was an exercise of prerogative powers falling within the jurisdiction of this Court.

A. The Applicable Test

16. These claims should only be struck if it is plain and obvious that they are bound to fail. In particular, the Supreme Court of Canada has cautioned that restraint must be exercised where the claims present novel issues:

> The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike...The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[8]

17. As Wilson J. further emphasized in *Hunt v. Carey Canada Inc.*:

> I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed.[9]

[8] *R.* v. *Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21.
[9] *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959, at paras. 990-91.

B. The Private Law Claims Are Novel and Not Plainly and Obviously Bound to Fail

18. The Supreme Court of Canada confirmed definitively for the first time in *R.* v. *Hape* that "the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation."[10]

19. Notably, *Hape* emphasized that the doctrine of adoption "operates automatically."[11] Lebel J. writing for the majority cited *Trendtex Trading Corp. v. Central Bank of Nigeria*, in which Lord Denning wrote that the doctrine of incorporation (as it is known in England)[12] operates such that "the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament."[13] In doing so, Lord Denning rejected the alternative doctrine of transformation, which "says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom."[14]

20. Lord Denning contrasted the effect of the two competing theories as follows:

> Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.[15]

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[10] *R.* v. *Hape*, 2007 SCC 26, at para. 39.
[11] *Ibid.*, at paras. 36, 39.
[12] *Nevsun*, *supra*, at para. 86.
[13] *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, at 364.
[14] *Ibid.*
[15] *Ibid.*

21. In *Hape* Lebel J. applied the doctrine of adoption to find that two principles of customary international law – the principles of non-intervention and territorial sovereignty – were part of the common law of Canada.[16] In *Nevsun* the Supreme Court affirmed that the doctrine of adoption may operate to give rise to civil remedies for violations of customary international law.[17] Beyond this, modern examples of the application of the doctrine of adoption in Canadian courts remain few. All that is clear is that the law on the relationship between customary international law and the common law is very much in development, which makes it all the more important that claims which raise novel issues not be dismissed prematurely.

22. In the present case the plaintiff pleads that three rules of customary international law have been breached, and that these breaches give rise to civil remedies as the Supreme Court suggested is possible in *Nevsun*. These rules are the principle of *pacta sunt servanda*, the right to life, and the right to non-discrimination.

1) *Pacta Sunt Servanda*

23. *Pacta sunt servanda* is the principle that all treaties are binding and must be performed in good faith. As the defendant acknowledges, it is a principle of *jus cogens* and has been described as a central unifying principle of the international legal system.[18]

24. The customary international law rule that treaties are binding combines with the doctrine of adoption to entail that treaty obligations are binding on the federal executive under the common law. Therefore, to the extent that Canada is in breach of its commitments under

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[16] *Hape*, at para. 46.
[17] *Nevsun*, supra, at para. 127.
[18] John H Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008). Chapter 4 "The Law of Treaties" at p. 154; Mark W. Janis, "Nature of Jus Cogens", 3 Conn. J. Int'l L. 359 (1988) at pp. 361-362; and A. A. Cançado Trindade, "*Jus Cogens*: The Determination And The Gradual Expansion Of Its Material Content In Contemporary International Case-Law", p. 28, citing at note 78 "R. Kolb, Théorie du jus cogens international, Paris, PUF, 2001, pp. 98-100, 105, 110 and 112."

Articles 6 and 26 of the ICCPR to guarantee the right to life and the right to non-discrimination, respectively – as well as its commitment under Article 2(3) of the Covenant to ensure an effective remedy for these breaches –*Nevsun* establishes that it is not plain and obvious that these breaches do not give rise to a civil remedy.

25. It is generally true, as the defendant notes, that unlike customary international law, conventional international law requires legislative implementation to have direct legal effect domestically. However the plaintiff's argument does not violate this rule, as a mere promissory obligation does not need to become law in order to be binding. In effect, international promissory obligations, through the customary international rule *pacta sunt servanda,* have the same status as conventional domestic contractual obligations that the federal government is free to assume via contract. In this case, there is a customary international law rule that treaties are binding and must be performed in good faith, and it is through this that Canada's obligations under the Covenant are binding domestically.

26. To be clear, the plaintiff is not arguing here that a promise made by the federal executive would be binding on provincial governments in this way, or that it could override or invalidate existing legislation. This extension of the principle may conflict with Canada's constitutional structure. The plaintiff only argues that a legally binding promise made by the federal executive to execute the terms of a treaty is binding on the federal executive itself.

27. Indeed, it may not even be necessary to frame the cause of action through the application of the customary international law rule of *pacta sunt servanda* adopted into the common law. This is because the common law already recognizes its own principle of *pacta sunt*

servanda, and has an entire field of law—the law of contracts—devoted to upholding formal promises made with the intention to be legally bound.

28. For example, John McCamus has written:

> The basic animating principle of the law of contracts is *pacta sunt servanda*, that is, as a matter of general principle, promises ought to be performed.[19]

29. This principle of *pacta sunt servanda* underlying our law of contracts is the same as the core international law principle of the same name.[20]

30. The doctrine originates in medieval canon law. It developed in opposition to the position in Roman law, which was that only certain agreements that took very specific forms, e.g. a sale of goods, were enforceable.[21] In contrast, canon law scholars supported the sanctity of promises generally and developed the notion that, in Professor McCamus' words, "as a matter of general principle, promises ought to be performed."

31. This principle entered the private law of England through the ecclesiastical courts and later the Chancery (the early Chancellors all being clergymen). The principle quickly became firmly entrenched in equity:

> Almost all [promissory] cases in Chancery can be reduced to this simple formula, and the answer of conscience was as simple: promises have to be kept – pacta sunt servanda – as long as they do not violate the laws of God and reason, that is, unless they are against good conscience themselves.[22]

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[19] McCamus, John D., The Law of Contracts, 3rd ed. (2020, Irwin Law), at p. 14

[20] In fact, it is an international law scholar – Hugo Grotius, often referred to as the father of international law – who first popularized the term *pacta sunt servanda*. See Kaius Tuori, "The Reception of Ancient Legal Thought in Early Modern International Law," in Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* 1012 at 1027 (Oxford University Press: Oxford, 2012).

[21] Anthony Jeremy, "Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations," *Law & Just.-Christian L. Rev.* 144 (2000): 4 at 4-7.

[22] Franz Metzger, "The Last Phase of the Medieval Chancery," in Alan Harding, ed., *Law-Making and Law-Makers in British History* 79 at 84 (Royal Historical Society, 1980).

32. What is known in our common law today as the law of contracts is essentially the principle of *pacta sunt servanda*, bestowed with independent force by the common law.

33. As such, application of the *pacta sunt servanda* principle in this case may not even need to proceed by way of recognizing a *Nevsun*-style adoption-of-customary-law claim. The common law already has a mechanism that embodies the *pacta sunt servanda* principle, and directly provides a remedy for breaches of promises made with the intention to be legally bound. The customary international law rule of *pacta sunt servanda* could conceivably fit within this pre-existing common-law framework, or something similar. That is, the existing common-law principles that underpin the law of contracts could also be found to imply a cause of action for a breach of obligations undertaken in a treaty. After all, a treaty is nothing more than a contract governed by international law, and the common law can, under choice-of-law principles, uphold promises made under a different system of law. In fact, the common law has an established history of upholding binding promises governed by international law.

34. Historically there was an entire field of international law called the *lex mercatoria* or law merchant, which common law courts applied "in civil transactions and questions of property between the subjects of different states."[23]

35. As "a branch of the law of nations,"[24] the law merchant was integrated into the common law by virtue of the doctrine of adoption. In fact, some of the earliest decisions on the

[23] William Blackstone, *Commentaries on the Laws of England, First Edition* (Oxford: Clarendon Press, 1765-1769), Book IV, Chapter 5, at 67. In Book I, Chapter 7 at p. 264, Blackstone further explains that:

> For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant, or lex mercatoria, which all nations agree in and take notice of.

[24] *Ibid*. See also *Mogadara* v. *Holt*, (1691) 1 Show. 317 at 318 ("it is no more than the law of merchants, and that is *jus gentium*"); Francis M. Burdick, "What is the Law Merchant?" (1902), 2 *Columbia Law*

doctrine of adoption concerned the law merchant. For example, the 1761 decision in *Edie v. East India Company* involved a bill of exchange drawn upon the East India Company. Because it was a foreign bill of exchange, the Court did not apply the domestic laws applicable to inland bills of exchange. Rather, being a foreign bill, the governing law was the law merchant, which the Court stated formed part of the common law.[25]

36. Today, the law merchant has largely been supplanted by modern commercial codes (although it still applies in residual circumstances under certain statutes).[26] Nevertheless, it demonstrates that the common law is capable of applying rules of international law to promises or agreements that are subject to international law.

37. More recently, the Court of Appeal in England has confirmed that the governing law of an agreement to arbitrate may be international law for the purposes of English choice-of-law rules.[27]

38. Further, Ontario courts have long affirmed that another kind of treaty – aboriginal treaties – may give rise to promissory obligations that, although not contracts *per se*, "may give rise to an action in the nature of breach of contract."[28] In a similar way, international treaties rest on promissory obligations that 'may give rise to an action in the nature of breach of contract.'

Review 470 at 477-78, 480; *The Neptune*, (1834) 3 Hagg. 129 at 139-40; William Searle Holdsworth, "A History of English Law" vol. 1 (London: 1903, Methuen Press), p. 336; *Luke* v. *Lyde*, (1759) 2 Burr 882 at 887; *Holt Cargo Systems Inc.* v. *ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 at para. 25.

[25] (1761) 2 Burr. 1217.

[26] See e.g. *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 57(1); *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 72; *Bills of Exchange Act*, R.S.C. 1985, c. B-4, s. 9.

[27] *Ecuador* v. *Occidental Exploration and Production Company*, [2005] EWCA Civ 1116 at para. 33.

[28] *Restoule* v. *Canada (Attorney General)*, 2020 ONSC 3932 at 135, aff'd 2021 ONCA 779 (leave to appeal to SCC pending). Notably, the passage cited here relies on authority predating the entry into force of section 35(1) of the *Constitution Act, 1982*, suggesting that the existence of this cause of action is not dependent on that provision. For the similarities between treaties and contracts generally, see also *Beattie* v. *Canada*, 2004 FC 674, at para. 26.

39. Thus, there is little difference conceptually between enforcing promissory obligations owed by the federal government to an individual in the context of a conventional private contract, or enforcing promissory obligations owed to an individual under a treaty. There may be differences in form, but both are fundamentally the same thing – promises made with an intention to be legally bound and subject to the principle *pacta sunt servanda*.

40. Alternatively, under purely domestic law, the defendant's entry into the Covenant and the Optional Protocol can be construed as a unilateral contract. Specifically, by entering into these two international agreements, the defendant has:

    - committed to upholding the right to life and the right to non-discrimination under international law (Article 6 and 26 of the Covenant respectively);
    - committed to ensuring an effective remedy for any violation of these rights, and in particular to ensure that such a remedy be determined by any "competent authority provided for by the legal system of the State," including judicial authorities (Article 2(3) of the Covenant); and
    - issued an invitation to individuals to submit any claims respecting alleged violations of rights protected under the Covenant to the Committee and to follow the procedure set out in the Optional Protocol.

41. Taken together, these elements can reasonably be construed to constitute terms of a unilateral offer, whereby the defendant promises that if an individual follows the procedure set out in the Optional Protocol, then if there has been a violation of the rights protected in the Covenant by the defendant, the defendant will ensure a remedy for such violation, including a right to have such remedy determined judicially.

42. The plaintiff's act of filing a communication with the Committee and following the prescribed procedure constitutes acceptance of the offer. The existence of a violation of a right protected in the Covenant becomes the condition precedent that triggers performance of the offeror's promissory obligation, which is to ensure a remedy that can be judicially determined. Under this theory, the disputed question that falls for judicial determination here is whether the condition precedent of the unilateral contract has been fulfilled, i.e. whether a Covenant-protected right has been violated.

43. As this Court has stated, the question in determining whether a unilateral contract has been formed is "whether a reasonable person in the plaintiff's position would be entitled to assume that upon satisfying the conditions, he was entitled to payment."[29] Here, it is not plain and obvious that a reasonable person would not assume that upon following the procedure set out in the Optional Protocol, they would be entitled to a remedy if a violation of a Covenant-protected right had occurred. After all it is a well-established principle of law that "where there is a right, there must be a remedy for its violation."[30] That the defendant led the plaintiff to believe it would pay her reparations if the Committee determined her rights had been violated is not "incapable of proof" as the defendant asserts (para. 36).[31]

44. Thus, there are at least three plausible legal theories under which the defendant's commitments under the ICCPR can be framed as binding promissory obligations enforceable under Canadian law:

    (1) Through the customary international law rule of *pacta sunt servanda* incorporated into the common law;

[29] *Ayerswood Development Corp.* v. *Hydro One Networks Inc.*, 2004 CanLII 45463 (ON SC), at para. 8.
[30] *Nevsun*, *supra*, at para. 120.
[31] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, at paras. 45-53.

(2) Through the common law's power to enforce promissory obligations found in instruments that are different from but nevertheless similar in principle to contracts, such as in the "breach of treaty" action recognized in cases such as *Restoule;* and

(3) As a unilateral contract under Canadian common law.

45. Ultimately however, all these theories are merely different expressions of a single underlying principle – the fundamental principle of both domestic and international law of *pacta sunt servanda* – promises are to be kept – and the law should provide a remedy if they are not.

International Treaties in Domestic Law

46. There are two legal objections that have historically been raised to the application of the terms of an international treaty by domestic courts. Both are neatly summarized in the "classic statement"[32] of Lord Oliver in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (*International Tin Council* case)

> …as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.[33] [Emphasis added]

47. Thus, the first legal objection to the enforcement of an international treaty in domestic law is that a treaty does not form part of domestic law unless implemented by legislation.

[32] *Miller* v. *Secretary of State for Exiting the European Union*, [2017] UKSC 5, at para. 244.
[33] *JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry*, [1990] 2 AC 418, at 500.

The second is that treaties being agreements between sovereign states are *res inter alios acta* as far as individuals are concerned, and besides that the conduct of foreign relations is a non-justiciable prerogative power. As explained below, neither legal barrier has application here.

48. With respect to the first objection, Lord Oliver's comments in *International Tin Council* on the domestic law status of treaties are echoed in the words of Stratas J.A. of the Federal Court of Appeal in *Entertainment Software Assoc. v. Society Composers*, in a passage cited by the defendant:

> Let us not forget why domestic law prevails. In the territory of Canada, the Constitution of Canada is supreme. Under that Constitution, elected representatives in the federal Parliament and the provincial legislatures have the exclusive right to make laws. Under our Constitution, the power to make laws is not vested in anyone else and certainly not the unelected functionaries abroad who draft and settle upon international instruments. Unless legislative power has been properly delegated to the executive, even it does not have the power to make laws.[34] [citations omitted]

49. This is merely a corollary of the division of powers in our constitutional system which assigns law-making powers exclusively to the legislative branch. As Lord Oliver notes, the prerogative powers exercised by the executive do not encompass the power to legislate. As such, it stands to reason that no act of the executive rooted in its prerogative powers – such as the making of a treaty – can be imbued with force of law.

50. However, this well-settled rule does not defeat the plaintiff's argument here, because her argument does not rest on the Covenant becoming part of domestic law. Rather, her argument rests on the capacity of the Crown to undertake binding promissory obligations

[34] *Entertainment Software Assoc.* v. *Society Composers*, 2020 FCA 100, at para. 79. With respect, it is worth noting that Stratas JA's dictum overstates the separation of powers doctrine in Canada and other commonwealth countries. His finding here is inconsistent with judicially-imposed constraints on administrative decision-making, such as the common law duty of procedural fairness, and is in tension with the long-standing presumption of conformity under which domestic legislation will be construed whenever possible to conform to relevant international law.

under the customary international (and domestic) law principle of *pacta sunt servanda*. Crown promissory obligations, whether international or domestic, do not need to be crystallized in legislation before being binding on the Crown, because the principle of *pacta sunt servanda* transforms them into legally binding obligations.

51. The second objection noted by Lord Oliver in *International Tin Council* is that treaties, as agreements between states, create obligations between states only. Moreover, interstate relations and the conduct of foreign affairs are matters of "high policy" and not amenable to judicial process.

52. This is similar to the requirement of privity in domestic contract law such that generally only parties to an exchange of promises may sue to enforce them.

53. However, under international law, it has been recognized since at least the early 20th century that international treaties may in certain circumstances create rights for individuals that are meant to be legally enforceable by them in national courts. In the *Jurisdiction of the Courts of Danzig* case, the Permanent Court of International Justice (PCIJ) acknowledged that although individuals do not generally have rights under a treaty, the parties to an international treaty have the capacity to create rights for individuals if it is their intention to do so. In a widely-cited passage, the PCIJ stated:

> But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the parties of some definite rules creating individual rights and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the [treaty].[35]

[35] *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3) at para. 37.

54. More recently, in the *LaGrand* case, the International Court of Justice affirmed that article 36(1)(b) of the Vienna Convention on Consular Relations "creates individual rights."[36]

55. In England the Court of Appeal recognized in *Ecuador* v. *Occidental Exploration and Production Company* ("*Occidental Exploration*") that a bilateral investment treaty (BIT) between the US and Ecuador creates individual rights under international law. There, Ecuador attempted to argue that "the rights and duties in issue in the arbitration should be seen as state rights – …in other words…the rights which the United States of America would have in international law against Ecuador." Mance L.J. (as he then was) applied the intention-oriented analysis adopted by the PCIJ in the *Jurisdiction of the Courts of Danzig* case, and concluded that:

> The Treaty involves, on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which national courts should, in an internationalist spirit and *because* it has been agreed between States at an international level, aspire to give effect.[37] [Emphasis in original]

56. Applying a similar intention-oriented analysis here, an examination of the terms of the Covenant and Optional Protocol evinces similarly clear aims. It is plainly evident that the signatories have made every effort to ensure that these rights are exercisable by individuals. For example, article 2(3) of the Covenant reads:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority

[36] *LaGrand Case (Germany* vs. *United States of America)*, (2001) 40 ILM 1069 at para. 42.
[37] *Ecuador* v. *Occidental Exploration and Production Company*, [2005] EWCA Civ 1116, at para. 32.

provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

57. Records from the original deliberations over the wording of article 2(3)(b) suggest that the main purpose of article 2(3)(b) was "to lay the foundation for a judicial action for remedy, before either a judicial body or a quasijudicial public agency."[38]

58. The Optional Protocol provides further evidence that the parties thereto intended to make rights actionable by individuals. It explicitly corrects the omission in the Covenant of a mechanism allowing individuals to submit complaints, and thus evinces a clear intention to make the rights enshrined in the Covenant legally enforceable by individuals directly.

59. The postwar rise of international human rights law has further accelerated the development of individual rights under international law. As the Supreme Court noted in *Nevsun*, "The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain."[39] The Court noted that these norms of international human rights law "were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed."[40]

[38] See para. 26 of the December 10, 1963 (A/5655) report of the Third Committee of the United Nations considering the wording of the draft ICCPR. In the November 11, 1963 1259th Meeting of the Third Committee the Israeli member affirmed, without any apparent objection from other members, that the main purpose of article 2(3)(b) was "to lay the foundation for a judicial action for remedy, before either a judicial body or a quasijudicial public agency."

[39] *Nevsun*, *supra*, at para. 107.

[40] *Ibid.* at para. 1.

60. The Supreme Court in *Nevsun* further noted that international human rights law is to be conceived of as a "contract with the state," that is "certainly enforceable against the state."[41]

61. The guidance in *Nevsun* that Canada's international human rights commitments ought to be viewed as legally meaningful rather than merely symbolic echoes growing calls from judges in England to the same effect.

62. In *In re McKerr*, Lord Steyn wrote:

> The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future.[42]

63. Similarly, in *R (SG)* v. *Secretary of State for Work and Pensions*, Lord Kerr wrote:

> Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim. If the government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard.[43]

64. These comments echo a growing trend around the common law world to rethink the legal status of international human rights treaties in domestic common law.[44]

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[41] *Ibid.* at para. 110.
[42] *In re McKerr*, [2004] UKHL 12 at para. 52. Also see *Lewis* v. *Attorney General of Jamaica*, [2000] UKPC 35, at para. 85 where the Privy Council raised the possibility that the requirement for a treaty to be "incorporated" may not apply to "international treaties dealing with human rights".
[43] *R (SG)* v *Secretary of State for Work and Pensions*, [2015] UKSC 16, at para. 256.
[44] See e.g. *Rono* v *Rono*, (2005) AHRLR 107 (Kenya Court of Appeal) ("However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation."), also citing a passage from the High Court of Zambia decision in *Longwe* v. *Intercontinental Hotels* reasoning that "...ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there

65. Academic commentators in Canada have similarly argued that there is room in the common law for Canada's commitments to individual rights in international treaties to be legally enforceable. For instance, de Mestral and Fox-Decent argue that "the status of such treaties should be equivalent to common law obligations that only explicit legislation or the constitution can supersede and restrict."[45] Similarly, Claydon envisions "An action against the Crown for a declaration of entitlement to protection [of an international human right], or in tort for failing to provide it (or both together)."[46]

66. The common thread unifying many of these passages from writers spanning many different times and places is that quite simply, a promise made with the intention to be legally bound ought to be kept. It is not plain and obvious that a principle of customary international law so fundamental and universal as *pacta sunt servanda* cannot find expression in the common law.

67. Not only would this follow logically from the principles set forth in cases like *Hape* and *Nevsun*, it would also represent a suitably sensible and incremental development in the common law. Simply holding the federal executive to its international obligations would not give rise to concerns regarding bypassing democratic processes, any more than it would in the context of the federal executive entering a conventional private contract. Further, adopting the intentional approach applied in cases like *Jurisdiction of the Courts of Danzig* and *Occidental Exploration* would restrict the scope to individuals genuinely intended to be holders of rights, and not incidental beneficiaries of a treaty that is

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is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convention in my resolution of the dispute.""

[45] Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008), 53 McGill L.J. 573 at 636.

[46] John Claydon, "Application of International Human Rights Law by Canadian Courts, The" (1981) 30 Buff L Rev 727 at 736.

fundamentally just an agreement between states. Treaty obligations that are more properly characterized as belonging to the realm of inter-state relations (i.e., relations with rights and duties obtaining strictly between sovereign states) would still be subject to the common law rule that limits courts' powers to intervene on matters of foreign affairs, which may well render the subject matter non-justiciable.[47] The result would be a rule of very limited scope that applies only to the federal executive, predominantly in the context of treaties pertaining to fundamental human rights, in which the federal executive has undertaken a highly formal obligation after extensive deliberation and with the full intention to be legally bound. Nothing in this approach prevents Parliament from restricting or derogating from the executive's obligations in this limited domain. The approach proposed by the plaintiff does not infringe the principle of parliamentary sovereignty because Parliament retains full legal authority to override the obligations undertaken by the executive.

2) *Right to Life and Right to Non-Discrimination*

68. Apart from the right to life as a binding treaty commitment under the Covenant according to the customary international law rule of *pacta sunt servanda*, the plaintiff also relies on the right to life as a principle of customary international law in and of itself.

69. The right to life has been described as the supreme right of the human being, respect for which the enjoyment of all other rights depends. Its importance is reflected in its incorporation into every key international human rights instrument. It is a core right that has attained the status of customary international law.[48]

[47] *Black v. Chrétien et al.* (2001), 54 O.R. (3d) 215 (C.A.) at paras. 42-60.
[48] See the 2011 decision of the Inter-American Commission in *Jessica Lenahan (Gonzales) v. the United States*, REPORT No. 80/11 CASE 12.626, at para. 112.

70. Similarly, the right to non-discrimination is also a principle of customary international law and has been said to be a peremptory norm (*jus cogens*).[49]

71. The defendant does not appear to contest the assertion that the right to life and the right to non-discrimination are part of customary international law. However, the defendant does contend that the right to life under customary international law does not encompass the right that is claimed here. The defendant characterizes this as "a right to receive free health care anywhere in the world, regardless of one's lack of status." The plaintiff takes issue with this characterization – first, the word "free" implies that it is not paid for, where in fact it is financed by taxpayers such as the plaintiff. Second, the plaintiff limits her claim to "essential health care benefits" as defined in para. 1(a) of her claim, in similar terms to those used by the Federal Court, and by the Committee where it found there had been a violation of plaintiff's right to life and stated:

> ". . . as a minimum, States parties have the obligation to provide access *to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.*" [emphasis added][50]

[49] Trindade, *supra*, writes that "the fundamental principle of equality and non-discrimination has entered into the domain of the *jus cogens*," citing *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States*, Inter-American Court of Human Rights, Series A, No. 18, p. 113, paras. 4–5, cited in the 2019 Draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the UN International Law Commission on first reading. (An earlier 2018 draft appears to have been cited by the Supreme Court of Canada in its decision in *Nevsun* at para. 77.)

[50] *Supra*, para. 11.3. This language is similar to that used by the Federal Court which found that the plaintiff was deprived of her rights to life and security of the person because she was excluded from "timely and appropriate" health care under IFHP coverage "that exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences." *Toussaint* v. *Canada (Attorney General)*, 2010 FC 810, para. 91. The Federal Court specifically rejected the defendant's characterization of the rights as being a free right to health care when it stated at para. 75: "The present case is concerned with a scheme (the IFHP) that the government has put in place to provide health care to certain individuals; it is not concerned with whether non-citizens, or citizens for that matter, have a freestanding right to healthcare."

The Committee went on to note, using language similar to that of the Federal Court, that where the exclusion of the plaintiff from the IFHP could result in her loss of life *or irreversible, negative consequences for her health*, in such circumstances distinguishing between irregular migrants and those with legal status for the purpose of admission to the IFHP violated the right to non-discrimination.[51] [emphasis added] Other jurisdictions have similarly characterised the nature of the right to life in the context of health care for irregular migrants within their territory.[52]

72. A dispute over the content of a customary international law rule, in the absence of a binding judicial precedent, can only be resolved by reference to state practice and *opinio juris*. This can only be established through evidence, which is not permitted on this motion.[53] However, the opinion of the Committee, an international panel of experts, that the Covenant does indeed cover the rights that are claimed here, together with the fact that virtually every state in the world is a party to the Covenant, provides a sufficient

[51] *Ibid*., para. 11.8.

[52] For example, in para. 95 of its decision in T-254 of 2021 the Colombian Constitutional Court described the fundamental right to life with dignity in the context of health care for an irregular migrant "under the understanding that the preservation of life implies not only freeing the human being from the very fact of dying, that is, of simply preserving his biological functions, but also *protecting him from any circumstance that makes his conditions of existence unbearable and undesirable and prevents him from adequately deploying the faculties with which he has been endowed to develop in society in a dignified manner*."[emphasis added] [transl.] Similarly, in the context of a disability pension for an irregular migrant the Supreme Court of Argentina in the 2007 decision in *Reyes Aguilar* at p. 15, para. 8 quoted from the 1999 decision of the Inter-American Court of Human Rights in *Caso de los "Ninos de la Calle"*, para. 144: "In essence, the fundamental right to life includes not only the right of every human being not to be arbitrarily deprived of life, but also the right not to be prevented from having access to the *conditions that guarantee a dignified existence.* The States have the obligation to guarantee the creation of the conditions required so that violations of this basic right do not occur." [emphasis added] [transl.]

[53] The defendant argues at para. 42 of its factum that Canada's disagreement with the Committee's decision shows a lack of "*opinion (sic) juris*", presumably meaning to refer to a lack of "general practice". However, the majority in *Nevsun* makes clear that "general practice" is "not necessarily universal practice." (para. 77). The minority agreed on this point, citing Professor Currie and explaining that "A state practice need not, however, be perfectly widespread or consistent at all times. And for good reason: if that were true, the moment one state departs from either requirement, the custom would cease to exist." (para. 162).

prima facie basis to infer that it is not plain and obvious that the rights claimed here have not attained sufficiently widespread acceptance to attain customary status.

73. The defendant also argues that any customary international law rule that does recognize the plaintiff's right to essential health care benefits in this case conflicts with existing legislation. Certainly, as customary international law has the status of domestic common law, this necessarily means that like all domestic common law it can be displaced by legislation. The defendant cites the *Canada Health Act*, Ontario's *Health Insurance Act*, and the IFHP as legislation that would bar the application of any adopted customary international law rule in this case.

74. However, none of these pose a conflict with any right to essential health care benefits the plaintiff has under customary international law. Neither the *Canada Health Act* nor Ontario's *Health Insurance Act* prohibit the provision of health care to individuals who fall outside the terms of coverage set out in those statutes – otherwise the IFHP could not exist. As for the IFHP itself, it was created by an Order-in-Council and thus does not qualify as legislation for these purposes. As noted by Lord Oliver and others cited above, an exercise of prerogative powers cannot constitute legislation. Moreover, the IFHP also does not contain a general prohibition on the provision of essential health care benefits to individuals such as the plaintiff.

C. The Charter Claims Are Not an Abuse of Process nor barred by the Principle of Issue Estoppel

75. It is well established in *Charter* jurisprudence that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[54]

[54] *Quebec (Attorney General)* v. *9147-0732 Québec Inc.*, 2020 SCC 32, at para. 31.

76. The case for this presumption is particularly strong where the ICCPR is concerned. The drafting process of the *Charter* was profoundly influenced by the ICCPR, so the two are inextricably linked.[55]

77. Therefore, a finding from a credible adjudicative body with jurisdiction that rights protected under the ICCPR have been violated is a determination that is highly relevant in interpreting the *Charter*.[56] The Supreme Court has repeatedly held that *Charter* protection should not be below the level of protection found in an international human rights instrument that Canada has ratified.[57] The Committee's finding constitutes sufficient new circumstances to warrant allowing this action to proceed.

78. The decision of the Federal Court of Appeal – which is not binding on this Court[58] – is now almost twelve years old, and the law on both sections 7 and 15 has changed substantially in that time. For instance, the law of causation in *Charter* claims has been clarified as has the jurisprudence on gross disproportionality as a principle of fundamental justice.[59] Courts have been urged to recognize equality and non-discrimination as a principle of fundamental justice under section 7 of the *Charter*.[60]

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[55] de Mestral and Fox-Decent, *supra*, at 624. See also Gaile McGregor, "The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court," (2002) 28-3 Manitoba L.J. 321 at 330.

[56] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3, paras. 59-60, in the context of determining principles of fundamental justice under section 7 of the *Charter*.

[57] *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, paragraph 137

[58] *Strickland* v. *Canada*, 2015 SCC 37, at para. 53.

[59] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at paras. 97 and following, *Canada* v. *Bedford*, [2013] 3 SCR 1101, 2013 SCC 72, at paras. 76 and 123, and *Carter v. Canada (Attorney General)*, 2015 SCC 5

[60] See Flader, S. "Fundamental Rights For All: Toward Equality As A Principle Of Fundamental Justice Under Section 7 Of The *Charter*" (2020) 25 *Appeal* 43, 2020 CanLII Docs 1668. Support for the argument exists in the recognition by the Supreme Court of Canada in *Kazemi (Estate) v. Islamic Republic of Iran*, 2014 SCC 62, that peremptory norms of general international law (*jus cogens)* "can generally be equated with principles of fundamental justice" and the aforesaid opinion of the Inter-

79. In 2001, the Supreme Court in *United States v. Burns* held that extradition without assurances that the death penalty would not be imposed would violate the *Charter* in all but exceptional cases, effectively reversing its own precedent from just ten years earlier.[61]

80. Ultimately, the dilemma for claimants like the plaintiff is that the procedure under the Optional Protocol requires that claimants first exhaust all available domestic remedies. Thus, if the decision of the Committee is to have any legal significance at all domestically, while still leaving the last word to a Canadian judge to review, some element of multiple proceedings in domestic courts is necessary.

81. The Court has discretion not to apply issue estoppel and *res judicata*. Among the factors it must consider are whether the application of issue estoppel in a particular case "would work an injustice".[62]

D. The Action is Not Statute Barred

82. A limitation period does not begin to run until, among other things, the person with the claim knew that "a proceeding would be an appropriate means to seek to remedy it."[63]

83. The plaintiff's position is that she did not have this knowledge until she had clear and unequivocal confirmation from the defendant that it did not intend to honour the decision of the Committee. This came in the form of the Director General's response of September 15, 2020 (claim, para. 33).

84. However, even under the alternative theory advanced by the defendant under which the plaintiff could have filed the claim after the Committee released its July 24, 2018

American Court of Human Rights in the context of undocumented migrants that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*.

[61] *United States* v. *Burns*, 2001 SCC 7.

[62] *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, at paras. 67 and 80.

[63] *Limitations Act, 2002*, SO 2002, c 24, Sch B, s. 5(1)(a)(iv). *Presidential MSH Corporation* v. *Marr Foster & Co. LLP*, 2017 ONCA 325 at para. 28 and *Vu* v. *Attorney General of Canada*, 2020 ONSC 2447, at para. 49.

decision, the two-year limitation period would still not have expired when the plaintiff filed this action on October 14, 2020, due to the operation of O. Reg. 73/20 suspending limitation periods in Ontario courts during the COVID-19 pandemic.[64]

85. Further, with respect to claims based on *pacta sunt servanda* and promissory obligations, the actual injury did not occur until it became clear on September 15, 2020 that the defendant intended not to honour the decision of the Committee, in alleged breach of its article 2(3) commitment to ensure an effective remedy for breaches of the Covenant.

86. The applicability of the *Limitations Act, 2002* should be left to be decided as a defence because it involves factual and legal issues regarding discoverability. So too should principles of *res judicata*, issue estoppel, abuse of process and collateral attack. No damages were or could have been claimed in the judicial review application before the Federal Courts. More, the possibility that a constitutional challenge may be raised to a limitation statute which would prevent the advancement of a claim for a personal *Charter* remedy was left open by the Ontario Court of Appeal in *Alexis* v. *Darnley*[65]. There is no principled reason that a similar constitutional challenge cannot be raised to a rule of common law.[66]

E. The Administrative Law Remedies Sought by the Plaintiff Are Within This Court's Jurisdiction

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[64] Limitation Periods, O. Reg. 73/20.

[65] *Alexis* v. *Darnley*, 2009 ONCA 847, at para. 22. This decision came after and referred to the Supreme Court of Canada's decision in *Ravndahl*, in which counsel conceded that *The Saskatchewan Limitation of Actions Act* did apply and no constitutional challenge was brought to that act.

[66] See the plaintiff's amended notice of constitutional question dated May 25, 2021 given in accordance with section 109(1) of the *Courts of Justice Act*, respecting the provisions of the *Crown Liability and Proceedings Act* which make the *Limitations Act, 2002* apply, and also respecting the common law rules of *res judicata*, issue estoppel, abuse of process and collateral attack, to the extent they would bar a claim against the defendant for a breach of sections 7 and 15(1) of the *Charter*.

87. This Court has jurisdiction over the administrative law remedies referred to in para. 1(h) of the amended amended statement of claim. The plaintiff seeks judicial review of the defendant's decision not to provide the plaintiff with compensation pursuant to the decision of the Committee. Because the Committee also stated that the defendant should take steps to amend its present policies and programs in order to comply with the violations of articles 6 and 26 that the Committee found, and the Minister's delegate rejected this recommendation as well, the plaintiff also seeks judicial review of that aspect of the decision.

88. In rejecting the decision of the Committee, the defendant relied largely on a different interpretation of its obligations under the Covenant. Notably, the defendant disagreed with the Committee's conclusion that the right to life under Article 6 includes an obligation to provide access to existing health services that are reasonably available and accessible, when lack of access to health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

89. The Committee's decision, though persuasive, is not binding, and the defendant claims to be entitled to adopt a different interpretation of the law and form its decision accordingly. If so, its decision must be based on a legal interpretation that is correct, and is judicially reviewable on this basis.

90. The defendant argues that this is within the exclusive jurisdiction of the Federal Court because "Judicial review of federal administrative decisions lies in the exclusive jurisdiction of the Federal Court." (defendant's factum, para. 72)

91. However, in *Black v. Chrétien* the Court of Appeal for Ontario ruled that the Federal Court's exclusive jurisdiction over federal administrative decisions extends only to

decisions made "'by or under an Act of Parliament' and 'by or under an order made pursuant to a prerogative of the Crown'."[67] However, "absent an order, the exercise of a prerogative power may be reviewable in the Superior Court."[68]

92. Here, there is neither Act of Parliament, nor order made pursuant to a Crown prerogative, that confers on the Minister or anyone else the power to decide whether or not to implement the recommendations of the Human Rights Committee. Neither is there an Act of Parliament or order made pursuant to a Crown prerogative that confers on the Minister or anyone else the power to amend the IFHP, if that is what honouring the Committee's decision would require.

93. Further, should the trial judge reject the plaintiff's argument characterizing the Covenant as creating a direct legal relationship between her and the defendant, and instead prefer a more classical characterization of the Covenant as creating obligations exclusively between states, then there would be a strong case that the decision to comply with an obligation under the Covenant would fall within the Crown prerogative over foreign affairs, a discretionary prerogative power not subject to any existing Act of Parliament or prerogative order here.[69] Therefore, like the decision in question in *Black v. Chrétien*, this must be a decision made in exercise of a prerogative power, and thus reviewable in the Superior Court.

All of which is respectfully submitted this 25th day of February, 2022

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[67] *Black v. Chrétien et al.* (2001), 54 O.R. (3d) 215 (C.A.) at para. 74.
[68] *Ibid.*, at para. 76.
[69] *Canada (Prime Minister)* v. *Khadr*, 2010 SCC 3, at paras. 33-38.

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ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced At
Toronto

Factum of the Plaintiff
for the Defendant's Motion
Returnable on June 13, 2022

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