Court File No. 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 INTERVENERS CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION AND THE FCJ REFUGEE CENTRE

February 28, 2022

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PART I – OVERVIEW

1. The Charter Committee on Poverty Issues, the Canadian Health Coalition and the FCJ Refugee Centre (the "CCPI Coalition") intervene in this motion to assist the Court in assessing whether it is plain and obvious that Ms. Nell Toussaint's challenge to Canada's decision not to give effect to the Views of the United Nations Human Rights Committee (the "Committee") in *Toussaint v Canada*[1] (the "Views") has no reasonable prospect of success.

2. In its Views on Ms. Toussaint's communication submitted under the *Optional Protocol* to the *International Covenant on Civil and Political Rights* ("*ICCPR*"), the Committee found that her rights to life and non-discrimination under articles 6 and 26 of the *ICCPR* were violated when she was denied access to essential health care because of her irregular immigration status.[2] Pursuant to Canada's obligation to provide an effective remedy, under article 2 (3) (a) of the *ICCPR*, the Views directed Canada to provide Ms. Toussaint with adequate compensation and "to take all steps necessary to prevent similar violations in the future, including reviewing [Canada's] national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."[3]

3. On February 1, 2019 Canada informed the Committee that it "regrets that it is unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views."[4] Ms. Toussaint is

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[1] *Toussaint v. Canada*, Communication No. 2348/2014, CCPR/C/123/D/2348/2014 (2018) [*Views*].
[2] *Views* at para 12. International Covenant on Civil and Political Rights [ICCPR] and Optional Protocol to the International Covenant on Civil and Political Rights [Optional Protocol], UN General Assembly resolution 2200A (XXI) (16 December 1966).
[3] *Views* at para 13.
[4] Permanent Mission of Canada to the UN, Response of the Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 (Feb 1, 2019) at para 34.

challenging this decision as, *inter alia*, contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and as an unreasonable exercise of a prerogative power.[5]

4. In these submissions, the CCPI Coalition will argue that the *Charter* and other issues raised in the Statement of Claim are distinct from those considered in Ms. Toussaint's previous challenge before the Federal Courts and must be considered in light of the Committee's Views. In addition, the CCPI Coalition will submit that the Defendant has not only mischaracterized the nature of the *Charter* claim in the present case but has also misstated the current state of *Charter* law relating to access to essential health care, which is far from settled. The CCPI Coalition will outline how sections 7 and 15 of the *Charter*, interpreted in light of the Committee's Views and based on Supreme Court of Canada jurisprudence, should be interpreted to prevent irregular migrants from being denied access to essential health care necessary for life.

5. The CCPI Coalition will further argue that, while the Committee's Views are not binding, Canada's decision not to implement those Views is subject to review by this Court for compliance with good faith and reasonableness in the exercise of prerogative powers.

6. The *Charter* issues raised in the motion to strike Ms. Toussaint's claim have immense implications, not only for irregular migrants, but also for the constitutional rights of many of the most disadvantaged individuals and groups in Canadian society.

PART II – FACTS

7. The CCPI Coalition accepts the facts as pleaded in the Statement of Claim as true.

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[5] Statement of Claim at paras 1(g) and (h).

PART III – ISSUES

8. The primary issue to be addressed in this case is whether it is plain and obvious that the Plaintiff's *Charter* challenge to Canada's decision not to give effect to the Committee's Views has no chance of success. A secondary issue is whether, in the alternative, Canada's decision may be found to be an unreasonable exercise of a prerogative power.

PART IV – LAW AND ANALYSIS

9. As outlined below, the Plaintiff's challenge to Canada's decision not to implement the Committee's Views raises distinctive issues of *Charter* compliance, particularly in relation to relevant section 7 principles of fundamental justice and the *pacta sunt servanda* principle of good faith interpretation and performance of treaties. The Committee's Views are relevant and may be persuasive with respect to the scope of protections afforded by sections 7 and 15 of the *Charter*. As argued below, the issues at stake in this challenge are novel and far from settled.

10. As the Supreme Court affirmed in *Canada (Attorney General) v PHS Community Services Society* ("*Insite*"), all exercises of government discretion must conform to the *Charter*.[6] While the federal executive's prerogative powers may provide discretion respecting whether to implement the Committee's Views, such discretion is not absolute.[7]

(i) The Proper Characterization of the Claim

11. Central to the Defendant's rejection of the Committee's Views, and to its arguments in support of the motion to strike, is the characterization of Ms. Toussaint's *Charter* claim as a

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[6] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*Insite*] at para 117; *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at para 50.

[7] See Jennifer A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2016) 54:4 *Alta. L. Rev.* 997.

demand for "an optimum level of health care"[8] or "a right to receive free health care anywhere in the world, regardless of one's lack of status."[9] Ms. Toussaint has never claimed "a right to free health care."[10] As Justice Zinn summarized Ms. Toussaint's previous challenge: "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."[11]

12. Similarly, when Canada argued before the Committee that Ms. Toussaint's communication was inadmissible, because the *ICCPR* does not guarantee a right to health or "an optimal level of health insurance,"[12] the Committee responded that "the author has explained that she does not claim a violation of the right to health but of her right to life, arguing that the State party failed to fulfil its positive obligation to protect her right to life which, in her particular circumstances, required provision of emergency and essential health care."[13]

13. The CCPI Coalition submits that governments and courts should avoid mischaracterizing *Charter* claims by members of disadvantaged groups, especially as they relate to the social programs upon which they rely.[14] These are not claims to "freestanding" socio-economic rights, disconnected from the actual language of the *Charter*. Rather, disadvantaged *Charter* claimants are seeking equal protection and benefit of the *Charter*'s life, liberty, security of the person and equality

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[8] *Views* at para 10.9.
[9] Factum of the Defendant at para 41.
[10] Factum of the Defendant at para 43.
[11] *Toussaint v. Canada (Attorney General)*, 2010 FC 810 ["Federal Court Decision"] at para 75.
[12] *Views* at para 6.5.
[13] *Views* at para 10.9.
[14] Bruce Porter & Martha Jackman, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014).

guarantees. Treating them otherwise risks denying access to justice under the *Charter*.[15]

14. The Committee's Views in Ms. Toussaint's case reflect a growing international appreciation of the importance, particularly for disadvantaged groups, of recognizing the interdependence and indivisibility of rights.[16] The fact that Ms. Toussaint's life and equality rights are supported by rights guaranteed in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, to which Canada is a party,[17] should strengthen her claim, instead of serving as the basis for denying her cause of action.[18] As the Supreme Court affirmed, with reference to the *ICESCR* in *Slaight Communications Inc. v Davidson*, "[t]he content of Canada's international human rights obligations is … an important indicia [*sic*] of the meaning of the 'full benefit of the *Charter*'s protection'."[19]

15. Mischaracterizing Ms. Toussaint's claim as about "free health care" reflects the discriminatory prejudices facing migrants. Justice Zinn cited Ms. Toussaint's affidavit describing "negative attitudes about immigrants seeking healthcare in Canada."[20] She worried that people "may think that I set out to 'take advantage' of Canada's healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society

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[15] Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 NJCL 85.
[16] Paul Taylor, *A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020); Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 Forum Constitutional Forum 97 at 99; Sarah Joseph, "Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36" (2019) 19 Human Rights Law Review 347; UN Human Rights Committee, General Comment 36: article 6, right to life (3 September 2019) CCPR/C/GC/36 at para 26.
[17] *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 2(2) and article 12.
[18] Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the *Canadian Charter*" in Helena Alviar García, Karl Klare & Lucy A Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) at 215.
[19] *Slaight Communications Inc. v Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 at 1056.
[20] Federal Court Decision at para 13.

but who has become ill and needs healthcare to save my life."[21]

(ii) Positive Obligations Under Section 7

16. The Defendant argues that there is no prospect that a domestic court, even if guided by the Committee's Views about Canada's obligations under the *ICCPR*, could find that section 7 of the *Charter* might impose a positive obligation on the government to ensure access to state-funded health care for irregular migrants. The Defendant relies on the oft-cited statement of the former Chief Justice and Justice Major in *Chaoulli v. Quebec (Attorney General)* ("*Chaoulli*") that "[t]he *Charter* does not confer a freestanding constitutional right to health care."[22] However, as Justice Zinn pointed out in Ms. Toussaint's previous *Charter* challenge, "[w]hat the respondent [Attorney General of Canada] fails to note is that [the Chief Justice and Justice Major] went on to state: 'However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*'."[23]

17. Neither the majority nor the minority judgments in *Chaoulli* addressed the question at issue in this case, that is, whether the right to life under section 7 guarantees irregular migrants' access to publicly funded health care that is reasonably available and accessible, in order to prevent a foreseeable risk to life, consistent with articles 6 and 26 of the *ICCPR*.

18. The Defendant also relies on Justice Lederer's assertion, in *Tanudjaja v. Canada (Attorney General)* ("*Tanudjaja*"), that "there can be no cause of action where, as here, the application is based on the premise that there is a positive right to the protections provided by s.

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[21] Federal Court Decision at para 13.
[22] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para 104.
[23] *Chaoulli* at para 104.

7 of the *Charter*."[24] This finding was, however, inconsistent with the Supreme Court's ruling in *Gosselin v Québec (Attorney General)*, and it was not upheld on appeal.[25] The majority of the Ontario Court of Appeal dismissed the *Charter* application in *Tanudjaja* on other grounds, concluding it was unnecessary to decide "the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*."[26] In her dissenting judgment, Justice Feldman found Justice Lederer "erred in stating that the s. 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled."[27] As noted recently by the four dissenting justices in *Toronto (City) v. Ontario (Attorney General)*, the Supreme Court has adopted "a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.[28]

19. As the B.C. Superior Court noted in *Cambie Surgeries v British Columbia (Attorney General)*, scholars and authorities "have criticized *Tanudjaja* and other section 7 authorities, including *Chaoulli*, because they did not acknowledge the rights to life, liberty and security of the person as providing positive rights to housing and healthcare."[29] The Court concluded in *Cambie Surgeries* that "the scope of the rights under s. 7 may be considered unsettled."[30]

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[24] Factum of the Defendant at para 62, fn 41, citing *Tanudjaja v AG (Canada)*, 2013 ONSC 5410 at paras 32, 37-40.
[25] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at paras 82-83.
[26] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 at para 37.
[27] *Ibid* at para 52.
[28] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paras 152 - 155
[29] *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310 at para 2052. Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 Journal of Law and Social Policy 46-67.
[30] *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310 at para 2052.

(iii) The Principles of Fundamental Justice in the Present Case

20. The Supreme Court found in the *Insite* case that a discretionary decision by the federal Minister of Health not to provide an exemption from the *Controlled Drugs and Substances Act* threatened the lives and health of injection drug users, thereby engaging their section 7 rights.[31] The Court found that the Minister's exercise of discretion was not in accordance with principles of fundamental justice because it was arbitrary, contrary to the purpose of protecting public health and safety, and grossly disproportionate, given lives were at stake.[32] The CCPI Coalition submits that a similar analysis must be applied to the discretionary decision in this case.

21. The CCPI Coalition agrees with the Plaintiff that, in light of the Supreme Court's decisions in *Bedford v. Canada (Attorney General)* and *Insite*, the Federal Court of Appeal's finding that Ms. Toussaint's own actions were the operative cause of any risk to her life, is doctrinally unsustainable.[33] Accordingly, the critical question here is whether the Federal Courts' finding with respect to section 7 principles of fundamental justice is *res judicata*.[34] The CCPI Coalition submits that the answer is no. The question before the Court in this case − whether the decision not to implement the Committee's Views accords with principles of fundamental justice − requires a different analysis than the one applied in Ms. Toussaint's previous claim.

22. When Ms. Toussaint's previous claim was considered, there was no jurisprudence from the Committee on whether the *ICCPR* required States Parties, such as Canada, to ensure irregular migrants have access to health care essential for life, pursuant to articles 6 and 26 of the

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[31] *Insite* at paras 91-94.
[32] *Insite* at paras 127-133.
[33] Statement of Claim at para 26. *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras 79-92. *Insite* at paras 97-106.
[34] Factum of the Defendant at para 62.

ICCPR.[35] Ms. Toussaint is now challenging Canada's decision to reject the Committee's Views and the government's refusal to implement the Committee's recommendations relating to undocumented migrants' access to health care – this in deliberate defiance of Canada's *ICCPR* obligations as determined by the Committee.

23. The central issue in this case is not, as the Defendant claims, whether "a right to free healthcare regardless of status" is a principle of fundamental justice.[36] The key question is 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 – norms that do constitute principles of fundamental justice as defined by the Supreme Court.

24. As Justice Lamer noted in *Re BC Motor Vehicle Act*, Canada's international obligations are an important source of section 7 principles of fundamental justice. [37] In their recent judgment in *Quebec (Attorney General) v 9147-0732 Québec inc.* (*9147-0732 Québec inc.*), Justices Brown and Rowe reiterated the "presumption of conformity" between the *Charter* and "similar provisions in international human rights documents which Canada has ratified"[38] and the "considerable relevance" of how adjudicative bodies have interpreted those documents.[39]

25. With particular reference to the relationship between Canada's international human rights commitments and principles of fundamental justice, the Supreme Court explained in *Suresh v. Canada (Minister of Citizenship and Immigration)* that "our concern is not with Canada's

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[35] Justice Zinn referred to relevant jurisprudence on the right to health and found that it was "contested." See Federal Court Decision, at paras 63-70.
[36] Factum of the Defendant at paras 60-62.
[37] *Re B.C. Motor Vehicle Act*, 1985 CanLII 81(SCC), [1985] 2 SCR 486 at paras 57-60.
[38] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras 30-34.
[39] *Ibid*, at para 30 citing *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para 58.

international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself."[40]

26. Similarly, in *Kazemi Estate v. Islamic Republic of Iran*, Justice LeBel observed that recognizing all of Canada's international human rights commitments as principles of fundamental justice within the meaning of section 7 would be inconsistent with Canada's dualist system. Justice LeBel accepted, however, that *jus cogens* or peremptory norms of international law can generally be equated with principles of fundamental justice because they function as "basic tenets" of the legal system that are fundamental to our societal notion of justice.[41]

27. As the Preamble of the *Vienna Convention on the Law of Treaties* affirms, the principles of good faith and *pacta sunt servanda* are "universally recognized" as fundamental rules of international law.[42] States must, pursuant to articles 26 and 31 of the *Vienna Convention*, interpret and perform all of their international treaty obligations "in good faith" in accordance with the principle of *pacta sunt servanda*.[43] In the words of Professor John Currie: "the *pacta sunt servanda* principle … is so well established and so essential to the whole architecture of the international legal order that it could be considered a pre-eminent example of a rule of *jus cogens*, or a customary rule from which no derogation is permissible."[44] Consistent with the

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[40] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 60.
[41] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at paras 150-151.
[42] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 [*Vienna Convention*], Preamble.
[43] *Vienna Convention*, Articles 26, 31. The *pacta sunt servanda* principle requires that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith": *Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para 59.
[44] John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008), Chapter 4: Law of Treaties at 154. See also Mark W. Janis, "Nature of Jus Cogens" (1988) 3 Conn J Int'l L 359 at 362-63; Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017), Chapter 4.

Supreme Court's reasoning in *Re B.C. Motor Vehicle Act*,[45] *Kazemi*,[46] and *9147-0732 Québec inc.*,[47] this universal legal norm qualifies as a section 7 principle of fundamental justice.

(iv) The Obligation to Give Effect to the Committee's Views in Good Faith

28. In *Gabčíkovo-Nagymaros Project (Hungary–Slovakia) (Merits)*, the International Court of Justice explained that the principle of *pacta sunt servanda* in article 26 of the *Vienna Convention* combines two elements of equal importance: the binding nature of treaties [under international law] and the obligation to perform obligations in good faith. The Court held: "The principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized."[48]

29. Whether Canada's refusal to give effect to the systemic remedy required in the Committee's Views is in accordance with section 7 principles of fundamental justice must be considered in relation to Canada's obligation to apply the Views reasonably, in a manner that realizes the purpose of the *Optional Protocol* to the *ICCPR*. Further, following the Supreme Court's approach in *Insite*, this Court must consider whether the risk to the lives of irregular migrants resulting from the federal executive's exercise of discretion in this case is grossly disproportionate to any purported benefit of the decision not to give effect to the Views.

30. According to its preamble, the complaints mechanism in the *Optional Protocol* was put in place to enable the Committee to further "the purposes of [the *ICCPR*] and the implementation

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[45] *Supra* note 37.
[46] *Supra* note 41.
[47] *Supra* note 38.
[48] *Gabčíkovo-Nagymaros Project (Hungary–Slovakia) (Merits)* [1997] ICJ Rep 7 at para 142.

of its provisions."[49] In acceding to the *Optional Protocol*, Canada acknowledged the competence and authority of the Committee and its Views.[50]

31. Citing the Ontario Court of Appeal's 2009 decision in *Ahani v. Canada (Minister of Citizenship and Immigration)*, the Defendant submits that, because the Committee is not a court or tribunal and its Views are not binding, "Canada is within its rights to disagree with the Committee's views, and to choose not to implement the Committee's recommendations."[51] The request for interim measures at issue in *Ahani* is not, however, equivalent to the Views issued by the Committee at the end of an adversarial, adjudicative process to determine whether *ICCPR* rights have been violated.

32. As Martin Scheinin points out, the Committee's Views are more than mere "recommendations"; they "come at the end of a "quasi-judicial adversarial procedure" before a body that is established for the purpose of interpreting the provisions of the Covenant."[52] It is incompatible with the nature of this procedure for one of the parties to "simply replace the Committee's position with its own interpretation."[53] Sarah Joseph explains that the Committee "is the pre-eminent interpreter of the *ICCPR* which is itself legally binding. The [Committee]'s decisions are therefore strong indicators of legal obligations, so rejection of those decisions is good evidence of a State's bad faith attitude towards its *ICCPR* obligations."[54]

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[49] *Optional Protocol*, Preamble.
[50] *Ibid*, article 1; *General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33 at para 13.
[51] Factum of the Defendant at para 70. Citing *Ahani v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 2 at paras 32-42.
[52] Martin Scheinin, "The Work of the Human Rights Committee" in Raija Hanski & Martin Scheinin, *Leading Cases of the Human Rights Committee*, 2nd ed (Turku: Abo Akademi University, 2007) at 23.
[53] *Ibid*.
[54] Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed (Oxford: Oxford, 2013) at 1.61; UN Human Rights Committee,

(v) Immigration Status as an Analogous Ground Under Section 15

33. The Federal Court did not make a finding with respect to whether immigration status is an analogous ground of discrimination under section 15 and it left open the possibility that immigration status may be considered such in the future.[55] As Justice Zinn opined: "It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground."[56]

34. By contrast, the Federal Court of Appeal rejected immigration status as an analogous ground, finding instead that it is "not immutable or changeable only at unacceptable cost to personal identity" and that immigration status is a characteristic that the government has a "legitimate interest in expecting [the person] to change."[57] The Federal Court of Appeal's analysis of immutability in this case has been strongly criticized. As Donald Galloway notes: "Stratas J.A.'s account of immigration status as mutable runs counter to common experience — it is notoriously difficult for the bulk of the world's population to change its immigration status. It also runs counter to the more lax analysis of immutability found in *Andrews*, where status as a non-citizen is identified as an analogous ground."[58]

General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June 2009, CCPR/C/GC/33 at para 13.

[55] Federal Court Decision, Note 3.

[56] *Ibid*.

[57] *Toussaint v. Canada (Attorney General),* 2011 FCA 213 ["Federal Court of Appeal Decision"] at para 99.

[58] Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dalhousie Law Journal 17; See also Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) Alta L Rev 649**.** On the issue of immutability see Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (Mar 2018) 38:1 National Journal of Constitutional Law 35-88.

35. In its Views, the Committee held that a distinction based on irregular immigration status, which could result in the loss of life, was "not based on a reasonable and objective criterion" and could violate the right to non-discrimination under article 26 of the *ICCPR*.[59] *Charter* interpretation, including the recognition of new analogous grounds under section 15, needs to respond to evolving international human rights norms and emerging challenges such as the international migration crisis. There is no reason to assume that immigration status would not be recognized as an analogous ground in this case.

(vi) Whether Canada's Decision not to Implement the UN Committee's Views Constitutes an Unreasonable Exercise of a Prerogative Power

36. The CCPI Coalition takes the position that Canada's decision not to give effect to the Committee's Views should be reviewed for *Charter* compliance, as described above, rather than on administrative law standards. However, there remains considerable uncertainty in the current jurisprudence as to when courts should apply a full *Charter* analysis, as was done in the *Insite* case, and when they should instead review executive's discretionary decision by relying on an administrative law reasonableness standard, informed by the *Charter* and Canada's international human rights obligations.[60] The CCPI Coalition therefore submits that the claim in paragraph 1(h) of the Plaintiff's Statement of Claim should not be struck.

37. In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court stated that "in some administrative decision-making contexts, international law will operate as an important constraint on an administrative decision maker."[61] The Court noted:

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[59] *Views* at para 11.8.
[60] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paras 34-37; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 57.
[61] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 114.

"Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power.[62]

38. The CCPI Coalition agrees with the Plaintiff's submissions regarding this Court's jurisdiction to review the exercise of the prerogative power in this case.[63] The prevailing uncertainty about whether a full *Charter* analysis or an administrative law analysis informed by the *Charter* will be adopted in a particular case and access to justice concerns identified in *Canada Attorney General v Telezone Inc.* strongly militate in favour of this Court considering both the *Charter* and administrative law claims in the present case.[64]

PART V – ORDER SOUGHT

39. CCPI, CHC and the FCJ Refugee Centre respectfully request an order:

a) permitting them to make joint oral submissions at the hearing of this motion not exceeding 15 minutes, or such other duration as the Court may order;

b) that costs shall not be awarded to or against them; and

c) granting such further orders as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2022.

for	*for*	*for*
Martha Jackman	Vanessa Gruben	Yin Yuan Chen

Lawyers for the Interveners, CCPI, CHC, FCJ Refugee Centre

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[62] *Ibid.*
[63] *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA) at paras 74-76.
[64] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at paras 18-19; Klinck, *supra* note 7.

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law	
1.	*Toussaint v Canada* CCPR/C/123/D/2348/2014 (30 August 2018)
2.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
3.	*Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441
4.	*Toussaint v Canada (Attorney General)*, 2010 FC 810
5.	*Toussaint v. Canada (Attorney General)*, 2011 FCA 213
6.	*Slaight Communications Inc. v Davidson*, 1989 CanLII 92 (SCC)
7.	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791
8.	*Tanudjaja v AG (Canada)* 2013 ONSC 5410
9.	*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA
10.	*Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429
11.	*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34
12.	*Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310
13.	*Canada (Attorney General) v. Bedford*, 2013 SCC 72
14.	*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC)
15.	*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32
16.	*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313
17.	*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1
18.	*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62
19.	*Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49
20.	*Gabčíkovo-Nagymaros Project (Hungary–Slovakia) (Merits)* [1997] ICJ Rep 7

21.	*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395
22.	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
23.	*Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA)
24.	*Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62
International Instruments	
25.	Government of Canada, Permanent Mission of Canada to the United Nations, Response of the Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 (Feb 1, 2019)
26.	International Covenant on Civil and Political Rights UN General Assembly resolution 2200A (XXI) (16 December 1966)
27.	Optional Protocol to the International Covenant on Civil and Political Rights UN General Assembly resolution 2200A (XXI) (16 December 1966)
28.	*International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976
29.	UN Human Rights Committee, General Comment 36: article 6, right to life (3 September 2019) CCPR/C/GC/36
30.	United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331
31.	UN Human Rights Committee, *General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33
Secondary Sources	
32.	Jennifer A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2016) 54:4 *Alta. L. Rev.* 997
33.	Bruce Porter & Martha Jackman, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014)
34.	Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 NJCL 85

35.	Paul Taylor, *A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020)
36.	Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 Forum Constitutional Forum 97
37.	Sarah Joseph, "Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36" (2019) 19 Human Rights Law Review" 347
38.	Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the *Canadian Charter*" in Helena Alviar García, Karl Klare & Lucy A Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) 215
39.	Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 Journal of Law and Social Policy 46
40.	John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) Chapter 4: Law of Treaties
41.	Mark W. Janis, "Nature of Jus Cogens" (1988) 3 Conn J Int'l L 359
42.	Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017) Chapter 4
43.	Martin Scheinin, "The Work of the Human Rights Committee" in Raija Hanski & Martin Scheinin, *Leading Cases of the Human Rights Committee*, 2nd ed (Turku: Abo Akademi University, 2007)
44.	Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed (Oxford: Oxford, 2013)
45.	Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dalhousie Law Journal 17
46.	Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) Alta L Rev 649
47.	Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (Mar 2018) 38:1 National Journal of Constitutional Law 35-88

SCHEDULE "B" – STATUTES CITED

***Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religions, sex, age or mental or physical disability.

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.