Court File No. CV-20-00649404-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

COMPENDIUM OF THE PROPOSED COALITION OF INTERVENORS

(ON A MOTION SEEKING LEAVE TO INTERVENE)

CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, THE FCJ REFUGEE CENTRE AND THE MADHU VERMA MIGRANT JUSTICE CENTRE

Sept 3, 2024

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1. Rules of Civil Procedure, RRO 1990, Reg 194

Rule 1.04(1)

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Proportionality

(1.1) In app
lying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O.

1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

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2. Decision of Justice Belobaba (January 14, 2022)

Toussaint v Canada (Attorney General) (January 14, 2022), Ontario CV-20-649404 (ONSC) (Unreported decision on Intervention Motions, Justice Belobaba)

at p 1

3. I am satisfied that each of the four proposed interveners can usefully assist the court with the nuanced constitutional and international human rights issues that arise here — especially on the motion to strike where the legal focus is on the "no chance of success"/"doomed to fail" question. I refer in particular to the points set out in the CCPI Factum at paras. 45-70 ….

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4. Order of Justice Belobaba (January 14, 2022)

Toussaint v Canada (Attorney General) (January 14, 2022), Ontario CV-20-00649404-000 (ONSC) (Order on Intervention Motions, Justice Belobaba)

at para 4

4. THIS COURT FURTHER ORDERS that the Interveners shall not be entitled to receive and shall not be liable for costs against any party or intervener in the motion to strike.

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5. Case Conference Brief, Defendant

Ann Toussaint (Appointed Representative of the Estate of Nell Toussaint) v Attorney General of Canada (May 21, 2024), Ontario CV-20-00649404-0000 (ONSC) (Case Conference Brief, Defendant)

at paras 1, 3 - 4

> 1. The proposed interveners seek to participate in the discovery process. There is a Rule for that: Rule 13.01, intervention as a party.
> …
> 3. The proposed interveners suggest they may want to intervene as friends of the court. There is a Rule for that: Rule 13.02, which says that friends of the court provide "assistance to the court by way of argument." 2 1 Rule 13.01 2 Rule 13.02
>
> 4. The Court cannot twist the Rules into shapes they cannot bear and make unprecedented exceptions to important Rules governing discovery when there is a Rule which will suit the proposed intervener's purpose.

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6. *Trempe v Reybroek*, 2002 CanLII 49410 (ONSC)

At para 21.

> Rule 13.01 contains a built-in safeguard in the form of judicial discretion. The right to intervene is not automatic upon meeting one of the three tests set out in the sub-clauses of the rule. Rather, there is an overriding discretion set out in rule 13.01(2) based on whether the intervention would "delay or prejudice the determination of the rights of the parties to the proceeding". Further, the intervention may be granted on such terms as the court considers just. That might extend to granting full rights to participate on the same basis as any party, but might also be more restrictive. For example, the intervening party might be restricted to argument only with no right to file evidence. The broad judicial discretion afforded by this sub-rule prevents the addition of a party if this would cause an injustice to the existing parties.

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7. Affidavit of Ann Toussaint

The Estate of Nell Toussaint v Canada (Attorney General) (June 9, 2023), Ontario CV-20-00649404-0000 (ONSC) (Affidavit of Ann Toussaint, Motion record, Plaintiff)

at paras 17 and 18 on p 12

> 17. I am applying to be appointed as the representative of my daughter Nell's estate for the purposes of this action to pursue her claims herein, as she did, in the public interest to ensure that Canada protects the rights to life and equality of those who find themselves in the

circumstances my daughter faced when she sought and was denied access to essential health care.

18. I have a personal understanding of the ways in which the denial of access to essential health care affected my daughter Nell and how it deprived her of her inherent dignity. I am confident that, if I am appointed as the legal representative of her estate for the purposes of this action, my legal team of Ms Jackman, Mr. Yap and Mr. Dekany will ensure that all necessary evidence is adduced to provide an evidentiary foundation for the court to consider my late daughter's claims. They have been in touch with human rights and health care organizations that intervened in the above-mentioned motion brought by the defendant to dismiss Nell's action and who put forward arguments to advance the interests of irregular migrants and other disadvantaged groups. …. Subsequently, on May 29, 2023 counsel for a coalition of three organizations who had been granted intervener status before Justice Perell, namely the Charter Committee on Poverty Issues, the Canadian Health Coalition and the FCJ Refugee Centre wrote by email to Mr. Dekany and counsel for the defendant stating that these organizations collectively intended to seek leave to intervene in this action in the public interest. …

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8. Fresh as Amended Statement of Claim

Toussaint (Estate of) v Canada (Attorney General) (October 6, 2023), Ontario CV-20-00649404-0000 (ONSC) Fresh as Amended Statement of Claim

at para 1(g) pp 3-4

1. (g) A declaration that the defendant's decision not to give effect to the said Views of the United Nations Human Rights Committee infringed sections 7 and 15(1) of the Canadian *Charter of Rights and Freedoms*, interpreted in light of the Human Rights Committee's Views, and an order under section 24(1) of the *Canadian Charter of Rights and Freedoms* requiring the defendant to give effect to the Views of the Human Rights Committee in a manner that complies with the *Canadian Charter of Rights and Freedoms*;

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9. Statement of Defense, Attorney General of Canada

Ann Toussaint (Appointed representative of the Estate of Nell Toussaint) v Canada (Attorney General) (November 20, 2023), Ontario CV-20-00649404-0000 (ONSC) (Statement of Defence, Attorney General Canada) at paras 101, 106–108 118, 120, 131-134, 141, 150, 120

at para 101

> 101 … There is no international consensus on the notion that either the right to life or the right to non-discrimination include a right to state funded Essential Health Care Benefits for persons in Ms. Toussaint's position. In 2017, Canada also expressly disagreed with the UNHRC's interpretation of the right to life as encompassing certain socio-economic entitlements in its comments on the Committee's draft General Comment No. 36 on the Right to Life. Other - 22 - countries, including Australia, the United Kingdom and United States, have expressed similar concerns.

at paras 106-108

> 106. Ms. Toussaint's exclusion from health care coverage under the IFHP, and the Defendant's response to the views of the UNHRC do not constitute a breach of Ms. Toussaint's rights under section 7 of the *Charter*.
>
> 107. The allegations in the Statement of Claim do not engage Ms. Toussaint's right to life, liberty, or security of the person under section 7 of the *Charter*. In the alternative, any deprivation of Ms. Toussaint's right to life, liberty, or security of the person was in accordance with the principles of fundamental justice.

at para 118

> 118. …. The UNHRC's non-binding view that Ms. Toussaint's exclusion from IFHP coverage violated her rights under articles 6 and 26 of the ICCPR bears no impact on the *Charter* analysis.

at para 120

> 120. The Defendant denies that the Plaintiff is entitled to seek relief on behalf of all irregular migrants, as alleged in paragraph 1(e) of the Statement of Claim, or at all.

at paras 131-134

> 131. Canada has committed to engaging with the Committee in good faith, which includes giving serious consideration to the Committee's views. Canada is not obliged to implement the UNHRC's recommendations . In the case of Ms. Toussaint's communication, Canada did seriously consider the UNHRC's views and recommendations, but ultimately disagreed with the UNHRC for the reasons set out in detail in Canada's response to the views.
>
> 132. Canada agreed to ratify an international covenant and protocol that was not binding unless expressly incorporated into domestic law. Canada chose not to incorporate these instruments part of its domestic law. Canada's decisions about which international instruments are incorporated into domestic law are not amenable to the judicial process in this action. Domestic courts do not have the jurisdiction to review these matters.

133. In any event, the Defendant denies that the UNHRC's views are a correct interpretation of Canada's obligations under the ICCPR.

134. The Defendant denies that the Plaintiff is entitled to relief in the nature of judicial review with respect to the Minister's response to the UNHRC's views. The Defendant further denies that the government's decision on whether and how to implement treaty body views is a justiciable issue. The government's decision on whether and how to implement treaty body views is a matter that falls purely within the executive's policy-making responsibility

at para 150

150. In the alternative, assuming that the Plaintiff has established any of the causes of action pleaded give rise to any right to damages or any other remedy against the Defendant, the Defendant pleads that any cause of action raised or relief requested is personal to Ms. Toussaint, and does not survive the death of Ms. Toussaint.

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10. *M. v. H.* 1994 7324 (ONSC) CanLII

at pp 9-11

There is a difference between rules 13.01 and 13.02 in terms of the basis upon which the court will exercise its discretion and allow intervention.

Rule 13.01 provides for the intervention of a non-party who essentially has an interest in the subject-matter of the proceeding or its outcome. The non-party becomes a party and may well become involved in the fact-finding process.

Under rule 13.02 a person may apply to participate as a friend of the court for the purpose of rendering assistance in argument, without becoming a party. The intervenor cannot adduce evidence but is confined to making argument on the parties' record before the court.

Rule 13 as a whole, and particularly rule 13.01, has been interpreted narrowly in conventional, non-*Charter*, litigation. I think this has been for two main reasons.

One is practical in nature. Proceedings run the risk of becoming onerous and unwieldy by the admission of parties or of additional non-party participants in the process.

These obvious practical consequences could present difficulties for the court in its attempt to address the issues in the case clearly and fairly. They also can unnecessarily delay the proceedings and otherwise cause prejudice to the parties to the original

litigation by requiring them to deal with more material, new facts, different perspectives on issues, additional counsel, and greater costs.

The second reason, in my opinion, that the discretion to add parties has been exercised cautiously has to do with the very basis upon which the common law is built. It is built upon an incremental system of developing the law. An issue is determined between parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable. If the courts had previously interpreted or were to interpret Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then, as Ms. Eberts so aptly put it, there would be no principled way of excluding the second or the 500th case. The common law system would implode upon itself.

On the other hand, it is clear that this cautioned approach to intervention has been relaxed somewhat in constitutional cases. In Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164, 2 C.R.R. (2d) 327 (C.A.), intervention was sought in a pending appeal from a judgment that held an Act of the Ontario legislature to be unconstitutional. It is significant that the motion in that case was to intervene as an added party under rule 13.01 or as a friend of the court under rule 13.02.

The Chief Justice concluded that intervention as a friend of the court was appropriate.

In his consideration of Rule 13, the Chief Justice made some instructive observations as to how the discretion of the court should be exercised in motions of this nature. In constitutional cases, the judgment affects not only the immediate parties but others as well. Accordingly, a relaxation of the rules governing the disposition of intervention applications is warranted. The matters to be considered in the exercise of the court's discretion on intervention motions are:
(1) the nature of the case; (2) the issues that arise; and (3) the likelihood of the applicant being able to make a useful contribution to the proceeding without causing injustice to the immediate parties.

With all due respect to the detailed analyses contained in other decisions concerning proposed intervenors, I agree with this decision of the Chief Justice. Regardless of whether the proposed intervention is sought under rule 13.01 or rule 13.02, the court's focus should be on determining whether the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original action.

11. *Bedford v Canada (Attorney General)*, 2009 ONCA 669 (CanLII)

at para 2

> [2] The relevant jurisprudence provides considerable guidance to a court hearing such a motion. Where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: see Ontario (Attorney General) v. Dieleman (1993), 1993 CanLII 5478 (ON SC), 16 O.R. (3d) 32, [1993] O.J. No. 2587 (Gen. Div.). Most importantly, the overarching principle is that laid down by Dubin C.J.O. in Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada (1990), 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164, [1990] O.J. No. 1378 (C.A.), at p. 167 O.R.:
>
> > Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

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12. *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 (CanLII)

at para 33.

> [33] The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).

at para 36.

> [36] In *Downtown Eastside*, this Court recognized that access to justice is symbiotically linked to public interest standing: the judicial discretion to grant or deny standing plays a gatekeeping role that has a direct impact on access (para. 51). Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights.

at paras 66-67

> [66] First, a directly affected *plaintiff* is not vital to establish a "concrete and well-developed factual setting". Public interest litigants can establish such a setting by calling affected (or otherwise knowledgeable) non-plaintiff *witnesses* (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 14-16, 22 and 110; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 15 and 54; *Downtown Eastside*, at para. 74). As long as such a setting exists, a directly affected co-plaintiff or a suitable proxy is not required for a public interest litigant to be granted standing. If a directly affected co-plaintiff is not required, then would-be public interest litigants should not have to justify — or compensate for — the absence of one.
>
> [67] Second, the AGBC's proposed requirements would thwart many of the traditional purposes underlying standing law. A strict requirement for a directly affected co-plaintiff would pose obstacles to access to justice and would undermine the principle of legality. Constitutional litigation is already fraught with formidable obstacles for litigants. These proposed requirements would also raise unnecessary procedural hurdles that would needlessly deplete judicial resources. Given these concerns, the Court was correct in *Downtown Eastside* to retain the presence of directly affected litigants as a *factor* — rather than a separate legal and evidentiary hurdle — in the discretionary balancing, to be weighed on a case-by-case basis. I would not disturb that conclusion here.

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13. *Grant v. Winnipeg Regional Health Authority et al*., 2015 MBCA 44 (CanLII)

at para 92

> [92] The plaintiff has raised a substantial constitutional issue in the *Charter* claim (*Downtown Eastside Sex Workers* at para. 42). I reject the idea that it is a foregone conclusion that the *Charter* should be read to not allow for any litigation where the breach of the *Charter* allegedly contributed to a death. I also do not agree that societal concerns arising from a breach of the *Charter* in relation to one individual should never be corrected when the affected party dies. It is unnecessary to illustrate the perverse and deleterious effects such a bright line rule would create by real life examples, as unlawful deadly acts of state actors are well known in our history. All that need be said, is that in a society based on the rule of law, the principle of legality requires that "there must be a practical and effective [way] to challenge the legality of state action" (*Downtown Eastside Sex Workers* at para. 31; and see Tom Bingham, *The Rule of Law* (London, England: Penguin Books Ltd., 2010) at 8).

14. *Selkirk et. al. v. Trillium Gift of Life Network et. al.*, 2021 ONSC 2355 (CanLII)

at paras 64-68.

> [64] In Ontario, the survival legislation is the *Trustee Act*, to which the respondents make reference. It does not provide a basis for Ms. Selkirk to advance a *Charter* claim on behalf of Mr. Selkirk's estate. However, I am satisfied that the criteria for public interest standing are made out here. Ms. Selkirk has raised a serious justiciable issue with respect to the constitutionality of the 2010 Criteria and its application to Mr. Selkirk. She has a genuine interest in it, and the proposed application is a reasonable way to bring these issues before the court.
>
> [65] I rely on the societal purposes of Ms. Selkirk's claim. Assuming, at this threshold stage of my analysis, that there is no other reason not to proceed to determine the claims that Mr. Selkirk's *Charter* rights were violated, and assuming the violation can be proven - the objective of vindication of the alleged breach of Mr. Selkirk's *Charter* rights serves society broadly. I agree with the court in *Green* that it would wrong if an applicant could have sought redress for a breach of his *Charter* right, if only it had not contributed to his death. It cannot be correct that a state actor who commits a *Charter* breach has accountability if the breach injures someone, but none if the breach results in the death of that person.
>
> [66] Nor do I find that the other avenues available at law – such as tort actions, which can be maintained by an estate under Ontario's survivorship legislation – are a sufficient avenue to provide a remedy for a breach of a *Charter* right alleged to result in death. To conclude otherwise would be to ignore the inherent value of the rights accorded by the *Charter*, and the inherent value of the vindication of those rights, even absent other remedies being sought. There is a public dimension to vindicating the *Charter* right to life where a state actor has, in violation of s. 7, contributed to, or caused, the death of someone. If s. 7 is to meaningfully protect the right to life, there must be some accountability for a *Charter* violation that causes death. Concluding that the right dies with the individual where the violation is implicated in the death does not accord with the purposes of the *Charter*.
>
> [67] Retrospective declaratory relief can thus be understood to be a publicly-oriented remedy. The fact that the declarations sought with respect to Mr. Selkirk's rights are best understood to be a remedy sought under s. 24(1) of the *Charter*, and not a s. 52 remedy does not, in my view, change the public impact of the remedy. Section 24(1) gives the court broad remedial discretion to craft an effective and responsive – an "appropriate and just" – remedy. Retroactive declaratory relief under s. 24(1) can meet the goal of vindication of *Charter* rights within the public dimension in the appropriate case.
>
> [68] I find that this is an appropriate case for Ms. Selkirk and Mr. Selkirk's estate to advance claims based on violations of Mr. Selkirk's *Charter* rights during his lifetime on the basis of public interest standing, having regard to the circumstances, where the

alleged *Charter* violations are said to have contributed to, or caused, his death. To deny this right would be to empty the right to life contained in s. 7 of all meaning.

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15. Affidavit of Bonnnie Morton

At para 35, Motion record p 24

35. As an organization committed to ensuring access to effective remedies through consistent interpretations of sections 7 and 15 of the *Charter*, and to calling Canada to account when it fails to live up to its international human rights obligations, CCPI has a significant interest in the outcome of this action.

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16. Affidavit of Diana Gallego

at para 8, Motion Record p 32

8. The FCJ Refugee Centre is a non-profit, grass-roots organization in Toronto and a registered charity. The Centre's membership and clients include irregular migrants. For more than 30 years, the Centre has served refugees and other migrant populations at risk due to their immigration status, and welcomes anyone asking for advice, counsel and support regarding their refugee or immigration claim process.

at para 15, Motion Record p 35

15. The Centre now operates, with the support of the Inner City Health Association, a fully equipped examination room which is open two days per week, with health care support provided to uninsured patient by a roster of five (5) physicians, and one Psychiatrist. The Centre now operates, with the support of the Inner-City Health Association, a fully equipped examination room which is open two days per week, with health care support provided to uninsured patients by a rooster of five (5) physicians and one Psychiatrist. From January to August 2023, the Centre's primary health clinic has scheduled a total of 527 appointments and 117 appointments were facilitated by the Psychiatrist. The Centre was able to welcome 120 new patients, including 24 children who were connected with a pediatrician in another clinic.

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17. Affidavit of Steven Staples

at para 29, Motion Record p 55

29. CHC has a direct interest in the court's determination in this case of whether the *Charter* is to be interpreted as providing the same level of protection of the right to life and non-discrimination in access to publicly funded health care as in privately funded health care, and in whether the protections accorded by these rights under the *Charter* provide the same level of protection as similar protections in the International Covenant on Civil and Political Rights

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18. Affidavit of Aditya Rao

at para 20

20. The Madhu Centre has a real and substantial interest in the outcome of this case, as can be seen from the organization's work and focus on the well-being of migrants in New Brunswick. The Madhu Centre is frequently called upon to allocate time and resources to assist migrants with problems related to the denial of access to publicly funded health care. The work of the organization would be significantly advanced if the systemic remedy required by the UN Human Rights Committee's Views, and sought by the Plaintiff, in this case is implemented.