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
(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Defendant
(Responding Party)

FACTUM OF THE MOVING PARTY, PLAINTIFF
(Returnable on September 9, 2024)

Dated: **August 27, 2024**

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Plaintiff
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FACTUM OF THE MOVING PARTY, PLAINTIFF

PART I - OVERVIEW

1. The Plaintiff seeks orders: (a) exempting this action from Rule 24.1 Mandatory Mediation or alternatively postponing mandatory mediation until after the completion of documentary production and examinations for discovery; and (b) that the Plaintiff and her lawyers be exempted from Rule 30.1.01(3) Deemed Undertaking in order to permit them to disclose evidence, and information obtained from such evidence, produced by the Defendant during the discovery process to third parties (whether they are given leave to intervene in this action or not) to assist the Plaintiff.

PART II - THE FACTS

2. The issues in this action involve complex matters of public interest or importance which would benefit from adjudication in order to establish an authority which will be persuasive, if not binding, on other cases.

Affidavit of Margot Young, affirmed August 17, 2024 ("Young Affidavit"), Motion Record of the Plaintiff ("MRP"), Tab 2

3. The full adjudication of the issues raised in this case is important to address longstanding concerns about access to justice for marginalized groups, such as racialized women with irregular immigration status and facing serious health issues.

Young Affidavit, MRP at para 11, Tab 2, pp 15-16

4. Restricting the resolution of rights claims to narrow individualized consideration can allow government to evade accountability under the *Charter*. Courts must, where legitimate and possible, seize the opportunity to consider fully, in a rich adversarial context, the merits and details of rights claims. This is especially true for individuals living in poverty, who are female, racialized, disabled, and/or of irregular immigration status.

Young Affidavit, MRP at para 13, Tab 2, pp 16-17

5. This case presents issues of clear and significant public interest that extend beyond their immediate applicability to the claimant before the court in this case.

Young Affidavit, MRP at para 21, Tab 2, p 22

6. The late Nell Toussaint (and after her death, her family), as well as human rights experts and civil society organizations, have already attempted to resolve the dispute with the Defendant over Canada's refusal to accept and implement the Views of the United Nations Human Rights Committee. From the filing of her complaint to the UN Human Rights Committee in 2014 until the present, the late Nell Toussaint and after her death her

mother Ann Toussaint, civil society organizations, health care advocates and human rights experts have utilized mechanisms at UN human rights bodies to try to convince the government of Canada to address the human rights violations alleged in Nell Toussaint's case, all without resolution: the rights of persons similarly situated to the late Nell Toussaint to receive essential health care still are not recognized by Canada. These processes, which have engaged the highest levels of the federal government, included a) periodic review of Canada by the UN Human Rights Committee in 2015 and review by the UN Committee on Economic, Social and Cultural Rights in 2016, b) the Universal Periodic Review procedure at the UN Human Rights Council in 2023-2024, and c) follow-up procedures by the UN Human Rights Committee on the Implementation of Views since the release of the Committee's Views in 2018 up to the present time. Canada replied to the UN Human Rights Committee on April 6, 2022 that "it would not be taking any further measures to give effect to the Committee's views", and Canada has maintained that position to date.

Affidavit of Bruce Porter, affirmed August 18, 2024 ("Porter Affidavit"), MRP, Tab 3; Porter Affidavit, MRP, Tab 3, Exhibit "C": Canada's Reply to the UN Human Rights Committee, p 109

7. On January 9, 2023, Nell Toussaint passed away. Her mother, Ann Toussaint, is now carrying the action on behalf of her deceased daughter's estate.

PART III - THE LAW

A. This Action Should Be Exempted From Rule 24.1 Mandatory Mediation

8. Rule 24.1.01 provides for mandatory mediation in certain actions, to "reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."

***Rules of Civil Procedure*, Rule 24.1.01**

9. An order exempting an action from mandatory mediation is discretionary. Among the criteria used to assess whether a mandatory mediation exemption order should be granted are:

a. whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases;
b. whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost and delay, they ought not to be required to repeat the effort; and
c. whether the exemption for any other reason would be consistent with the stated objectives of reducing cost and delay in litigation and facilitating early and fair resolution.

***Rules of Civil Procedure,* Rule 24.1.05; *G.O. v C.D.H.*, 2000 CanLII 22691 (ON SC) ("G.O.") at para 13; aff'd in *Scott v George Weston Ltd*, 2004 CanLII 11880 (ON SC) at para 8 and *Dunning v Colliers Macaulay Nicolls*, 2023 ONSC 7115 at para 2**

10. This Court has recently drawn attention to the "real, human impact" and costs of delays in legal proceedings.

***Bocchini v. Attorney General of Canada*, 2024 ONSC 4181, at para 8**

11. In the interests of reducing cost and delay, the Plaintiff ought not to be required to repeat or continue efforts to engage in forms of dispute resolution.

12. In a recent case, Master Robinson exercised judicial discretion in granting an order to exempt an action from mandatory mediation. While he identified that "mediations serve the important function of distilling and narrowing issues for determination", he assessed that the nearly 1.5-year-long "heavily contested" litigation which had endured numerous opposed motions was "unlikely to settle" or to result in any material narrowing of issues.

***Allen v Kumar*, 2021 ONSC 5529 at paras 10-12**

13. So too this action is unlikely to settle at mandatory mediation given the years of highly contested litigation from the time that the underlying dispute started in 2009 and now almost four years since this action was commenced, including over two years from August 17, 2022 when the Honourable Justice Perell dismissed the Defendant's motion to strike characterizing it as a "land, sea, submarine, and celestial attack" against the Plaintiff's statement of claim.

***Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747 at para 11**

14. Justice Handrigan at the Supreme Court of Newfoundland and Labrador expressed his longstanding concern that "resolving legal disputes by alternative mechanisms to litigation will stymie the growth of the corpus of legal precedent that sustains and nurtures the common law". He recognized the Honourable Justice Kiteley's research in the *G.O.* case, i.e. that relevant to whether an exemption order should be granted under Rule 24.1.05 is the consideration of whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases. He assessed the possibility that, where the issues raised by the pleadings are unique and of great public interest or importance, and where a judicial ruling would establish precedential authority for subsequent cases, mediation may present a threat to the development of the common law.

***Juanita Drodge et al v Jeffrey Martin et al*, 2005 NLTD 73 at paras 19-22**

15. This Court has recognized that "where compelling the parties to engage in mediation will only delay the fair resolution of the litigation, unnecessarily increasing

costs to all parties", exempting an action from mandatory mediation is consistent with the stated objectives of Rule 24.1.

***Dunning v Colliers Macaulay Nicolls*, 2023 ONSC 7115 at para 7**

16. While Ontario courts recognize that the exemption from mandatory mediation is granted "sparingly", the Plaintiff's position is that this case meets the requisite criteria for such an order.

***Allen v Kumar*, 2021 ONSC 5529 at para 10**

17. The Court's granting of an exemption to mandatory mediation for this action would be consistent with the stated objectives of reducing cost and delay in litigation and facilitating early and fair resolution.

***G.O.* at para 13**

Alternatively, An Extension of Time for Conducting a Mediation Should be Granted

18. Given the complexity of the issues in this action, mediation will be more likely to succeed if the parties are first allowed to obtain evidence under Rule 30 (Discovery of Documents), Rule 31 (Examination for Discovery), and, if utilized, Rule 35 (Examination for Discovery by Written Questions).

19. Without full disclosure and examinations, the Plaintiff will be at a critical disadvantage in attempting to resolve key issues in this matter through mediation.

20. This Court has also recognized the benefit to parties in having an "exchange of information" prior to proceeding with mediation and has granted a deferral of mediation until after arbitration is complete in "the interest of achieving a fairer, timelier and less costly resolution" to a dispute.

***Scott v George Weston Ltd*, 2004 CanLII 11880 (ON SC) at para 11**

21. The complexity and novelty of this matter would warrant a thoughtful review by the Plaintiff of materials and testimony obtained through discovery, prior to engaging in mediation.

B. The Deemed Undertaking Rule Should Not Apply to this Action

22. The Plaintiff submits that the deemed undertaking rule ought not to apply to prevent the Plaintiff from disclosing evidence or information obtained from the Defendant in the discovery process in this action to third parties (e.g., prospective interveners, experts, consultants, civil society organizations, other jurists) who may assist the Plaintiff, whether they are granted leave to intervene in this action or not.

23. Rule 30.1.01(3) of the *Rules of Civil Procedure* states:

> Deemed Undertaking
> (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

24. Rule 30.1.01(8) provides as follows:

> (8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

25. The purpose of the deemed undertaking rule is to protect the privacy interest of the party who is compelled by the Rule to produce the document. As the Ontario Court of Appeal describes,

> The Rule provides that protection by prohibiting the party who obtained the information through compelled disclosure from using that information outside of

the litigation, except where certain exceptions apply or the court makes an order permitting its use.

> ***Kitchenham v AXA Insurance Canada*, 2008 ONCA 877 ("*Kitchenham*") at para 10**

26. The Court in *Kitchenham* went on to explain:

> Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.
>
> ***Kitchenham* at para 57**

27. The intent of the deemed undertaking rule is to prohibit the use of documents for purposes unrelated or extraneous to the litigation in which the documents were produced.

28. Although the disclosure of the Defendant's documents, and information obtained from such documents, by the Plaintiff and her lawyers in consulting others arguably would not be unrelated or extraneous to the litigation, they do not wish to run any risk of being accused of having breached the deemed undertaking by doing so.

29. Further, there is no reason to impose an extra burden of expense and delay on the Plaintiff of having to obtain the same documents it obtains in the discovery process by a separate access request under the *Access to Information Act*, in which case such evidence would not be subject to the deemed undertaking.

30. As the Supreme Court of Canada has stated with respect to the comparable implied obligation of confidentiality under Quebec law,

> The rule of confidentiality will apply only to information obtained solely from that examination, however, and not to information that is otherwise accessible to the public. If the information is available to the public from other sources, a party should not be given the burden of applying to the court for leave before using it merely because it was also communicated at an examination on discovery. The obligation of confidentiality applies only to information that would have remained confidential if the examination on discovery had not taken place.
>
> ***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc*, 2001 SCC 51 at para 78**

31. There is no countervailing privacy interest that would justify maintaining the deemed undertaking rule to prevent the Plaintiff and her lawyers from disclosing to third parties the evidence obtained from the Defendant in the discovery process.

32. As a general principle, government information should be available to the public as recognized in section 2(2)(a) of the *Access to Information Act*, RSC 1985, c A-1 where it provides that Part 1 of the Act "extends the present laws of Canada to provide a right of access to information in records under the control of a government institution *in accordance with the principles that government information should be available to the public*" (emphasis added).

33. Consequently, no prejudice can result to the Defendant by the making of an order lifting the Plaintiff's deemed undertaking with respect to evidence and information disclosed by Canada in the discovery process because in general Canada has no privacy interest in that evidence and information.

34. More, the Defendant's concerns about the violation of their privacy interests are misplaced, as any valid claims for privilege it may assert are protected by the common law and statute.

35. For example, section 37(1) of the *Canada Evidence Act* provides:

> Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

36. As well, under section 38 of the *Canada Evidence Act*, Canada may object to disclosing information that, if it were disclosed to the public, could injure international relations or national defence or national security. Both of these sections provide for procedures whereby Canada can have any such objections determined by the courts.

37. The Defendant has acknowledged in its Case Conference Memorandum dated May 21, 2024 that third party organizations who may seek leave to intervene "are not restricted in any way from assisting the plaintiff outside of the litigation".

38. The Defendant's acknowledgment that the Plaintiff is entitled to obtain such assistance suggests that there is no real concern of prejudice to the Defendant if the deemed undertaking is lifted. In order for the Plaintiff realistically to obtain assistance from third parties the Plaintiff needs to be free to disclose to them the evidence, and information obtained therefrom, provided by the Defendant on discovery.

39. The public interest in preserving privacy in the efficient conduct of this action would not be defeated by lifting the deemed undertaking rule so that the disclosure of the Defendant's discovery evidence, and information obtained therefrom, to third parties who may assist the Plaintiff in this litigation is not restricted.

PART IV - ORDER REQUESTED

40. The Plaintiff accordingly requests an order exempting this action from mandatory mediation, lifting the deemed undertaking rule to allow the Plaintiff and her lawyers to

disclose the evidence, and information obtained from such evidence, produced by the Defendant during discoveries to third parties who may assist the Plaintiff, and for costs as provided in the copy of the draft order attached hereto as **Schedule "A".**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August 2024.

_____per:

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Court File No.: CV-20-00649404-0000

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THE HONOURABLE	)	DAY, THE
	)	
JUSTICE PAPAGEORGIOU	)	DAY OF , 2024

B E T W E E N:

(Court Seal)

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

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

DRAFT ORDER

THIS MOTION, made by the Plaintiff, for an exemption to mandatory mediation and for the lifting of the deemed undertaking rule, was heard on September 9, 2024 at 330 University Avenue, Toronto, ON M5G 1R8 and via videoconference.

ON READING the Motion Record and Factum of the Plaintiff, and on hearing the submissions for counsel for the Plaintiff, Defendant, and prospective interveners CCPI Coalition and Amnesty International Canada and ESCR-Net,

1. THIS COURT ORDERS that this action is exempted from mandatory mediation.

2. THIS COURT ORDERS that subrule 30.1.01(3) (Deemed Undertaking) deeming the parties and their lawyers to undertake not to use evidence obtained under Rule 30 (documentary discovery), Rule 31 (examination for discovery), and, if utilized, Rule 35 (examination for discovery by written questions) and information obtained from such evidence for any purposes other than those of this proceeding, does not apply to the Plaintiff and her lawyers producing such evidence or information to, or consulting with, third parties who may assist the Plaintiff.

3. THIS COURT ORDERS that the Defendant pay the Plaintiff costs fixed in the amount of $ within 30 days from the date of this order.

Court File No.: CV-20-00649404-0000

TOUSSAINT (ESTATE OF)
Plaintiff (Moving Party)

-and-

ATTORNEY GENERAL OF CANADA
Defendant (Responding Party)

ONTARIO
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Proceeding Commenced at Toronto

DRAFT ORDER

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Plaintiff (Moving Party)

-and-

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Proceeding Commenced at Toronto

FACTUM OF THE PLAINTIFF
(Returnable on September 9, 2024)

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