

**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

STATEMENT OF DEFENCE

A. FACTS ALLEGED IN THE FRESH AS AMENDED STATEMENT OF CLAIM

1. Except where expressly admitted herein, the Defendant denies the allegations made in the Fresh as Amended Statement of Claim (the “Statement of Claim”) and puts the Plaintiff to the strict proof thereof.
2. The Defendant admits the allegations contained in paragraphs 4, 5, 6, 12, 13, 15, 16, 18, 19, 21, 25 and 26 of the Statement of Claim.
3. With respect to paragraph 2, the Defendant admits that the late Nell Toussaint (“Ms. Toussaint”) was a woman of colour who is a national of Grenada, and that she lived in Canada since 1999. The Defendant denies that any irreversible negative health issues suffered by Ms. Toussaint are a result of the Defendant failing or refusing to provide essential health care benefits. The Defendant has no knowledge of the balance of the allegations in that paragraph.

4. With respect to paragraph 2a, the Defendant admits that Ms. Toussaint died on January 9, 2023. The Defendant has no knowledge of Ms. Toussaint's medical condition between November 2022 and January 2023. The Defendant denies the balance of the allegations in that paragraph. The Defendant specifically denies that it caused or contributed to Ms. Toussaint's death, and puts the Plaintiff to the strict proof thereof.

5. With respect to paragraph 2b, the Defendant admits that on October 6, 2023 Ms. Toussaint's mother Ann Toussaint was appointed as the representative of Ms. Toussaint's estate for the purposes of this action. The Defendant has no knowledge of the sources of funding for this action. The Defendant denies the balance of the allegations in that paragraph.

6. With respect to paragraph 3, the Attorney General of Canada defends this action on behalf of the Crown in Right of Canada.

7. With respect to paragraph 7, the Defendant admits that Ms. Toussaint lawfully entered Canada on December 11, 1999 as a visitor from Grenada and that she worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. The Defendant has no knowledge of the balance of the allegations in that paragraph.

8. With respect to paragraph 10, the Defendant admits that on September 12, 2008, Ms. Toussaint made an application for permanent resident status on humanitarian and compassionate ("H&C") grounds to Citizenship and Immigration Canada ("CIC"), including a request that CIC waive the application fee. The Defendant admits that, at the time of the application, CIC took the position

that it did not have discretion to waive the fee, and that the Federal Court of Appeal ultimately ruled that the Minister had that discretion. The Defendant otherwise has no knowledge of the allegations contained in paragraph 10.

9. With respect to paragraph 11, the Defendant denies that Ms. Toussaint qualified for provincial social assistance. In or around 2009, the Ontario Works program granted benefits to Ms. Toussaint on the mistaken assumption that she had an active application for permanent residence in progress. Ms. Toussaint's application for permanent residence had been refused on January 12, 2009. The Defendant has no knowledge of the balance of the allegations in paragraph 11.

10. With respect to paragraph 14, the Defendant denies that Ms. Toussaint's evidence before the Federal Court proved that her life was at risk. The Defendant otherwise admits the allegations in paragraph 14.

11. With respect to paragraph 17, the Defendant denies that the Federal Court of Appeal found that international human rights law was not relevant in Ms. Toussaint's case. The Defendant otherwise admits the allegations in paragraph 17.

12. With respect to paragraph 20, the Defendant denies that the Federal Court and the Federal Court of Appeal found that Ms. Toussaint's rights to life and security of the person were violated. The Federal Court and the Court of Appeal both concluded that Ms. Toussaint's rights under section 7 of the *Charter* were not violated.

13. With respect to paragraph 22, the Defendant admits that the United Nations Human Rights Committee ("UNHRC") is an independent body established

under the First Optional Protocol to the International Covenant on Civil and Political Rights (“ICCPR”), and that the UNHRC is recognized as an authority on the interpretation of rights in the ICCPR. The Defendant denies that the UNHRC is a binding authority on the scope and effect of the ICCPR in Canadian law. The Defendant otherwise admits the allegations in paragraph 22.

14. With respect to paragraph 23 and 24, the Defendant admits that Canada acceded to the international treaties referred to, and that Ms. Toussaint has correctly summarized the terms of the documents. The Defendant denies that they have the legal effect ascribed to them by Ms. Toussaint.

15. With respect to paragraphs 27-29 and 32, the Defendant admits that the Plaintiff has correctly summarized the views of the UNHRC. The Defendant denies that the UNHRC “determined” these issues, or that the UNHRC’s views have the legal effect ascribed to them by Ms. Toussaint.

16. With respect to paragraph 31, the Defendant denies that government officials did not reply to Ms. Toussaint’s request for compensation. The Defendant otherwise admits the allegations in paragraph 31.

17. With respect to paragraph 33, the Defendant denies that Canada’s response to the Committee’s views “mistakenly” re-argued the Defendant’s case. The Defendant otherwise admits the allegations in paragraph 33.

18. With respect to paragraphs 34-49, the Defendant denies that the Plaintiff’s summary of the legal basis for the claim is correct, or complete.

19. The Defendant denies the allegations contained in paragraphs 20, 30, and 34 of the Statement of Claim.

20. The Defendant has no knowledge of the allegations contained in paragraphs 8 and 9 of the Statement of Claim.

21. The Plaintiff claims that the Defendant wrongfully prevented Ms. Toussaint from receiving state funded health care benefits, to the extent necessary to prevent a reasonably foreseeable risk of loss of life, or to prevent irreversible negative health consequences. For ease of reference, the benefits claimed by Ms. Toussaint are referred to hereinafter as “Essential Health Care Benefits”.

B. BACKGROUND

Ms. Toussaint

22. Ms. Toussaint was a national of Grenada.

23. Ms. Toussaint suffered from diabetes before she arrived in Canada. In Grenada, she took medication for this condition. She paid for this medication from her salary.

24. In 1986, before she arrived in Canada, Ms. Toussaint developed fibroids, which were a source of chronic pain.

25. On December 11, 1999, Ms. Toussaint entered Canada as a visitor.

26. Ms. Toussaint’s status as a visitor expired on or about June 11, 2000. She did not take any steps to renew her status.

27. Ms. Toussaint remained in Canada without status, and worked in Canada without authorization for over twelve years.

28. In the period from 1999 to 2008, when Ms. Toussaint needed to see a doctor, she paid for the visits herself.

29. In or about 2005, Ms. Toussaint contacted a person who she understood to be an immigration lawyer, to obtain a work permit. Ms. Toussaint did not obtain a work permit at this time. Ms. Toussaint continued to work without authorization.

30. In or around December 2007, Ms. Toussaint contacted the Canada Revenue Agency and asked for a determination of her residency status. On December 19, 2007, the CRA advised Ms. Toussaint that they considered her to be a resident of Canada, for the purposes of the *Income Tax Act*, as of December 11, 1999. Ms. Toussaint subsequently received GST and provincial tax credits for the years 1999 to 2006.

31. In 2006, Ms. Toussaint developed chronic fatigue, and an abscess on her right side that left her with chronic pain and difficulty walking.

32. At some point before June 2008, the particulars of which are known to Ms. Toussaint, Ms. Toussaint was referred to Women's College Hospital for an operation to remove uterine fibroids. Ms. Toussaint went to Women's College Hospital in June, 2008, and was told that she would have to pay privately for the operation if she was not covered by the Ontario Health Insurance Plan ("OHIP"). Ms. Toussaint had the procedure performed in November 2008 at Humber River Regional Hospital. She was billed for her care and was unable to pay the bill.

33. In March 2009, Ms. Toussaint was admitted to St. Michael's Hospital and treated for a pulmonary embolism.

34. As of August, 2009, the cost of Ms. Toussaint's medication was covered through the Ontario Drug Benefits program.

Ms. Toussaint applies for landing and a fee waiver

35. In September 2008, Ms. Toussaint made an attempt to legalize her status in Canada. She applied to be granted permanent residence from within Canada, on H&C grounds.

36. Ms. Toussaint asked to be relieved of the legal obligation to pay the required \$550.00 application fee, claiming she lacked the funds. By letter dated January 12, 2009, the application was denied, on the basis that the decision maker lacked the discretion to waive the fee.

37. Ms. Toussaint sought judicial review of the refusal before the Federal Court. On September 4, 2009, the Court dismissed the application for judicial review.

38. Ms. Toussaint appealed to the Federal Court of Appeal. On April 4, 2011, the Court of Appeal allowed the appeal, and directed CIC to assess Ms. Toussaint's request to waive the processing fee. The Court found that, as a matter of statutory interpretation, the legislation that allows CIC to grant applications for permanent residence on H&C grounds necessarily includes the discretion to waive the fees for applications.

39. The Federal Court of Appeal rejected Ms. Toussaint's argument that the *Charter* required CIC to process her application without payment of the required fee. The Court found that section 7 of the *Charter* was not engaged by CIC's decision not to consider the request for a fee waiver, and that the decision did not constitute discrimination contrary to subsection 15(1) of the *Charter*.

40. Ms. Toussaint sought leave to appeal to the Supreme Court of Canada on the *Charter* issues. On November 3, 2011, the Supreme Court of Canada dismissed the application for leave.

Application for OHIP denied

41. At some point in 2009, the particulars of which are known to Ms. Toussaint, Ms. Toussaint applied for OHIP coverage. Ms. Toussaint was denied coverage because she did not have legal status in Canada.

42. On October 7, 2010, Ms. Toussaint filed an Application under the Ontario *Human Rights Code* alleging that the denial of OHIP coverage constituted discrimination in services on the basis of citizenship and place of origin.

43. In her application, Ms. Toussaint argued that the Ontario *Human Rights Code*, if interpreted in a manner consistent with international law principles, entitled her to relief. On April 19, 2011, the Ontario Human Rights Tribunal dismissed Ms. Toussaint's application.

44. Ms. Toussaint did not seek judicial review or an appeal of the decision of the Ontario Human Rights Tribunal.

45. Ms. Toussaint did not seek any other form of relief or judicial review with respect to the denial of OHIP coverage.

Application for Interim Federal Health Program coverage denied

46. On May 6, 2009, Ms. Toussaint applied for coverage under the Interim Federal Health Program (the "IFHP").

47. On July 10, 2009, Ms. Toussaint was denied coverage under the IFHP because she did not come within any of the classes designated in the policy.

IFHP history and development

48. The IFHP originated and evolved from a series of Orders-in-Council ("OIC"). As early as 1949, Canada recognized that in some circumstances, there might be a desire, for humanitarian reasons, to provide some short-term, essential medical services to those legal immigrants who required immediate medical attention after their arrival, but who lacked the resources to pay for those services. The 1949 OIC authorized the Federal government to expend \$1,500 in a fiscal year for this purpose.

49. In 1952, another OIC (1952 OIC) authorized the Minister of Manpower and Immigration to pay for hospitalization, medical and dental care, together with incidental expenses, for immigrants after they were admitted at a port of entry. The authorization was for cases where immigrants were unable to afford those expenses themselves.

50. In 1957, the 1952 OIC was revoked and replaced by a new OIC (1957 OIC), which provided that the Department of National Health and Welfare was authorized to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:

- (a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and
- (b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been

referred for examination and/or treatment by an authorized Immigration officer,

- (c) in cases where the immigrant or such person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare.

51. The 1957 OIC served as the regulatory authority for the IFHP from 1957 to 2012.

52. In 1993, responsibility for administering the IFHP, including responsibility for making decisions as to eligibility and making payments under the policy, was transferred from the Department of National Health and Welfare to the Department of Citizenship and Immigration Canada, now known as the Department of Immigration, Refugees and Citizenship Canada ("IRCC"). Under CIC and then IRCC's management, the IFHP had expanded to extend short-term, publicly funded temporary medical benefits to additional discrete groups of individuals whose circumstances demonstrate both a need for humanitarian consideration and financial need.

53. By 1996, the focus of the IFHP had shifted from looking after the medical needs of indigent newly landed immigrants, to meeting the medical needs of refugee claimants, Convention refugees and others in significant humanitarian need, as determined by the Minister.

54. The IFHP was never intended to cover the medical costs of every person without immigration status in Canada who is not eligible for provincial health insurance. The IFHP does not provide the same extent of coverage as provincial health insurance.

55. IFHP benefits are not co-extensive with what Ms. Toussaint describes as Essential Health Care Benefits. If Ms. Toussaint had been given access to IFHP benefits, she would not necessarily have received the level of health care benefits claimed in the Statement of Claim.

56. Funding of the IFHP is made by way of an *ex gratia* payment by the Crown. An *ex gratia* payment is a benevolent payment made by the Crown when there is no statutory or regulatory vehicle to make such a payment. The payment is made in the public interest, where the Crown has no obligation of any kind or has no legal liability, or where the claimant has no right of payment or is not entitled to relief in any form. By making IFHP payments, Canada does not acknowledge any obligation beyond the stated limits of the IFHP policy. The extent of IFHP coverage can be modified at any time.

57. When Ms. Toussaint applied for IFHP coverage, the policy included the following classes of eligible claimants:

- (a) refugee claimants;
- (b) government-assisted refugees;
- (c) privately sponsored refugees
- (d) protected persons in Canada’;
- (e) refused refugee claimants whose negative decisions were under judicial review or appeal or who were awaiting removal from Canada;
- (f) members of the “Deferred Removal Orders Class”;
- (g) persons detained by the Canada Border Services Agency;
- (h) applicants for Pre-Removal Risk Assessments (PRRAs);
- (i) victims of human trafficking.

58. Ms. Toussaint never fell into the classes of eligible IFHP claimants.

Challenge to IFHP refusal in Federal Court

59. On August 10, 2009, Ms. Toussaint brought an application for judicial review in the Federal Court of the decision that she was ineligible for IFHP medical benefits. Ms. Toussaint argued that the decision violated her right to life liberty and security of the person under section 7 of the *Charter*, and her right to equality under section 15 of the *Charter*. Ms. Toussaint further argued that international law, including sections 6 and 26 of the ICCPR, gave her the right to access IFHP benefits.

60. The Federal Court dismissed the judicial review application. The Court determined that the IFHP was designed to provide temporary medical benefits to specific groups of persons as defined in the policy, but did not include persons living illegally in Canada. The Court determined that neither section 7 nor 15 of the *Charter* nor international law principles granted Ms. Toussaint the right to IFHP benefits.

61. The Federal Court determined that CIC had fettered its discretion by following the departmental policy manual to determine Ms. Toussaint's eligibility for IFHP benefits, rather than considering the terms of the OIC itself.

62. The Federal Court determined that the error was immaterial. The Court found that Ms. Toussaint would not have qualified under the policy in any event. The objective behind the policy was to provide temporary, emergency assistance to specified categories of foreign nationals or those who found themselves under the jurisdiction of the immigration authorities. The policy was not

meant to provide ongoing medical coverage to everyone who enters Canada and remains without status.

63. The Federal Court found that the decision to deny Ms. Toussaint IFHP benefits had not engaged her section 15 *Charter* interests, nor did it violate her section 7 rights, as it was in accordance with the principles of fundamental justice.

64. In June 2011, the Federal Court of Appeal dismissed an appeal from the Federal Court's order. The Court found that while Ms. Toussaint had demonstrated a serious risk to her life and security of the person, the IFHP was not the operative cause of the risk. The Court found that Ms. Toussaint's own conduct, in choosing to live without status in Canada for almost a decade, was the reason she was not able to access more extensive public healthcare coverage.

65. The Federal Court of Appeal ruled that Ms. Toussaint's section 7 *Charter* claim failed because it was her own conduct, rather than the federal government's, which endangered her life and health. The Court noted that, even if it were to conclude that the government's conduct was the operative cause of any harm to Ms. Toussaint, the section 7 *Charter* claim would fail, because there is no principle of fundamental justice requiring Canada to provide Essential Health Care Benefits. The Court held that the principles of fundamental justice do not require the government to provide access to publicly funded healthcare to all those within Canada's border.

66. The Federal Court of Appeal also dismissed Ms. Toussaint's section 15 *Charter* claim. The Court found that Ms. Toussaint's immigration status as a

person not legally present in Canada was not an analogous ground of discrimination. Following established caselaw, the Court found that immigration status is not an immutable characteristic. The Court further found that lack of immigration status in Canada is a characteristic that the government has a valid and justified expectation that people will change.

67. The Federal Court of Appeal found that any distinction drawn by the IFHP was not discriminatory, as it did not promote or perpetuate stereotyping or prejudice against persons who are living in Canada without immigration status. The government was under no obligation to create a particular benefit, or to extend that benefit to persons living illegally in Canada. The Court also found that the 1957 OIC was not the operative cause of any disadvantage Ms. Toussaint may have experienced.

68. On June 27, 2011, Ms. Toussaint sought leave to appeal to the Supreme Court of Canada. On April 5, 2012, the Supreme Court dismissed the application.

69. On January 30, 2013, Ms. Toussaint was approved in principle for permanent residence based on spousal sponsorship. On April 30, 2013, Ms. Toussaint became eligible for and began receiving health care under OHIP.

Complaint to the UNHRC

70. In December 2013, Ms. Toussaint submitted a communication to the UNHRC under the Optional Protocol to the ICCPR. Ms. Toussaint claimed that as a result of her exclusion from the IFHP she was a victim of violations of, among others, the right to life and the right to non-discrimination recognized in articles 6 and 26 of the ICCPR.

71. In her observations to the UNHRC, Ms. Toussaint stated, among other things, that

(a) Canadian courts would have had a broad discretion to award appropriate and just remedies, including compensation, if the Federal Court or the Federal Court of Appeal had upheld her allegations;

(b) since the Federal Court of Appeal found that the *Charter* had not been breached in her case, she had no prospect of success of monetary compensation.

72. On August 14, 2014, Canada submitted its observations to the UNHRC regarding the admissibility of Ms. Toussaint's communication. Canada submitted, among other things, that:

(a) the administration and provisions of health care services is the responsibility of the government of each province or territory, and that Ms. Toussaint should have requested remedies from the Province of Ontario, or challenged the constitutionality of the Ontario health insurance scheme;

(b) that Ms. Toussaint had failed to seek monetary compensation before domestic courts when she challenged the constitutionality of the IFHP.

73. On April 2, 2015 and March 30, 2016, Canada submitted observations on the merits of the communication. Canada submitted, among other things, that:

(a) there had been no violation of Article 6 of the ICCPR: Ms. Toussaint had in fact received numerous health services, and the fact the state did not provide all health services immediately and free of charge did not amount to a violation of her right to life. Article 6 does not impose positive obligations to provide state-funded health insurance for all medical needs of undocumented migrants. Moreover, the reason that Ms. Toussaint may not have received an optimal level of state-funded health services was due to her own delay in regularizing her immigration status;

(b) there had been no violation of Article 26 of the ICCPR: differential treatment, based on legality of residence does not come within the scope of the right to non-discrimination protected by Article 26. In the

alternative, the differential treatment in question was reasonable and objective and in pursuit of a legitimate aim.

74. On August 7, 2018, the UNHRC released its views, in which it expressed the view that Canada had violated Ms. Toussaint's rights under articles 6 and 26 of the ICCPR.

75. On August 30, 2018, Ms. Toussaint, through her counsel, wrote to the Prime Minister requesting a remedy, including monetary compensation.

76. On February 1, 2019, Canada submitted its formal reply to the UNHRC. Canada stated that it disagreed with the views of the UNHRC in respect of the facts and law in the communication. Specifically, Canada disagreed with the broad scope that the Committee gave to article 6 of the ICCPR, noting that the right to life cannot extend to impose a positive obligation on States to provide state-funded medical insurance to foreign nationals without legal status present in the territory of the State. Canada also expressly disagreed that legality of residence in a country comes within the scope of "other status" under article 26 and that differential treatment of Ms. Toussaint was not based on reasonable and objective criteria. Canada stated that it would not be taking further measures to give effect to the UNHRC's views, or to compensate Ms. Toussaint.

77. On June 6, 2019, Ms. Toussaint filed a motion in the Supreme Court of Canada. Ms. Toussaint asked the Supreme Court to reconsider its 2012 decision, in which it dismissed Ms. Toussaint's application for leave to appeal the Federal Court of Appeal's 2011 decision in her case.

78. In the motion for reconsideration, Ms. Toussaint argued (among other things) that:

- (a) The UNHRC's views were new jurisprudence which conflicted with the Federal Court of Appeal's decision;
- (b) That as a result of the UNHRC's views, Ms. Toussaint's case raised an issue of public importance;
- (c) That Ms. Toussaint had shown "exceedingly rare circumstances in the case that warrant consideration by the Court", pursuant to Rule 73 of the *Rules of the Supreme Court of Canada*, SOR/2002-156;
- (d) That Ms. Toussaint was entitled to *Charter* damages.

79. On June 9, 2020, the Supreme Court of Canada dismissed Ms. Toussaint's motion for reconsideration.

Canadian legislation governing public health care funding

80. The *Canada Health Act* (the "CHA") provides for funding of public provincial health care plans. Provincial programs must provide coverage to residents of a province. "Resident" is defined as "a person lawfully entitled to be or to remain in Canada who makes his home and is ordinarily present in the province, but does not include a tourist, a transient or a visitor to the province".

81. The Ontario Health Insurance Plan ("OHIP") is a public health care plan available to residents of Ontario. A person cannot be recognized as a resident for the purposes of OHIP coverage unless the person has a specific eligible status.

82. Provincial health care plans include limits to the extent of health care funding provided, and waiting periods for eligibility.

Ms. Toussaint's access to medical care and coverage

83. Ms. Toussaint was able to access health care from various sources while she was without status. Ms. Toussaint accessed healthcare from Community

Health Clinics (“CHCs”). Primary health care is available to persons without OHIP through CHCs. CHCs are non-profit organizations funded by the province to provide primary and integrated health care for individuals, families and communities, that for a variety of reasons may have difficulty accessing health care. CHCs offer a broad range of comprehensive primary health care and health promotion programs to individuals and families including those without OHIP coverage. In 2008, Ms. Toussaint was receiving primary care, free of charge, at the York Community Services Health centre.

84. Ms. Toussaint also accessed healthcare from hospitals and from other medical practitioners in Canada. In some instances, Ms. Toussaint obtained those services free of charge, while being billed for others.

85. Ms. Toussaint was provided with emergency care at various hospitals in Ontario. The Ontario *Public Hospitals Act* requires hospitals to accept a person as an in-patient if the person has been admitted by a physician and the person requires the level or type of care for which the hospital is approved.

86. As of August 2009, the cost of Ms. Toussaint’s medication was covered through the Ontario Drug Benefits program.

C. MS. TOUSSAINT’S CLAIM

Res judicata and abuse of process

87. This proceeding is an attempt to re-litigate issues that have been finally determined in previous proceedings, and is an abuse of process.

88. The claim that the Plaintiff is entitled to relief under the *Charter* is *res judicata*. In her original application for judicial review in 2009, Ms. Toussaint argued

that the denial of benefits under the IFHP was contrary to the *Charter*. She relied on the principles of international law and Canada's international obligations. In 2010, the Federal Court determined that the denial of public health care benefits to Ms. Toussaint did not violate her right to life under section 7 of the *Charter*, or her right to equality under section 15 of the *Charter*. In 2011, the Federal Court of Appeal dismissed Ms. Toussaint's appeal. In 2012, the Supreme Court of Canada dismissed Ms. Toussaint's application for leave to appeal.

89. In 2019, following the release of the UNHRC's views, Ms. Toussaint sought to have the Supreme Court of Canada reconsider its earlier decision dismissing her application for leave, arising out of the original denial of IFHP benefits. Ms. Toussaint argued that the UNHRC's views constituted a reason to reconsider the matter. The Supreme Court dismissed the motion.

90. Canadian courts decided in 2012 the facts of Ms. Toussaint's case, when examined in the light of Canada's international obligations, do not give rise to a *Charter* breach.

91. The release of the UNHRC's views in 2018 did not change the law of Canada.

92. The Supreme Court of Canada did not consider the UNHRC's views to be a sufficient reason to re-open Ms. Toussaint's *Charter* challenge.

93. Ms. Toussaint's attempt to raise issues and seek remedies that could have been raised in previous proceedings is an abuse of process.

94. Ms. Toussaint's claim for damages under the *Charter* and at common law could have been raised, either before the Federal Court or this Court, at the

time that Ms. Toussaint challenged the decision to deny her benefits under the IFHP.

Collateral attack on administrative decisions

95. In paragraphs 1(a) and 20 of the Statement of Claim, it is clear that the Plaintiff is seeking to reverse the initial decision to deny Ms. Toussaint benefits under the IFHP, over 10 years after the fact. The Plaintiff also seeks to set aside Ministerial decisions denying relief to Ms. Toussaint.

96. This action is an impermissible collateral attack on a decision of a federal tribunal.

No right to damages under the ICCPR nor under customary international law

97. Canada has ratified the International Covenant on Civil and Political Rights as well as its Optional Protocol establishing the individual communications mechanism. The ICCPR is not directly enforceable in Canadian law. The UNHRC's views are non-binding in international law and are not enforceable in domestic law. In adhering to the Optional Protocol, Canada did not agree to be bound by the views of the UNHRC.

98. States Parties to the ICCPR and its Optional Protocol, when the treaties were being negotiated, turned their minds to the question of whether they should agree to be bound by the Committee's views. They decided as a matter of policy that they should not, leaving each party state, on a case-by-case basis, free to accept or reject the UNHRC's final views. While States Parties to the Optional Protocol commit to engaging in good faith with the Committee, which includes

giving serious consideration to the Committee's views, it remains open to Canada to disagree with the Committee's views and to choose not to give effect to them.

99. The Plaintiff has no cause of action in damages arising from the Committee's views, nor to a declaration that Ms. Toussaint's rights under the ICCPR have been breached. Customary international law does not give rise to a cause of action for a domestic remedy in damages in Ms. Toussaint's case.

100. The Plaintiff claims that the "right to life" and the "right to be free from discrimination", as protected by the ICCPR, are also rules of customary international law. The Defendant admits that certain aspects of these rights have become part of customary international law. However, the Statement of Claim is not simply asserting a "right to life" or a "right to non-discrimination" at large. The claim is that those general principles include a right to state-funded Essential Health Care Benefits in situations where persons not legally present in Canada face serious risks to their health and life. There is no international consensus or consistent state practice that supports the conclusion that such a right is a principle of customary international law.

101. The UNHRC's non-binding views on this issue are not indicative of a customary international norm. 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

countries, including Australia, the United Kingdom and United States, have expressed similar concerns.

102. The Defendant denies that the rights claimed by Ms. Toussaint are principles of customary international law. In any event, customary international law principles can only become part of Canadian common law if there is no express Canadian legislation to the contrary. In this case, the legislation which governs public health insurance in Canada and Ontario runs counter to Ms. Toussaint's claim. Canadian public health insurance legislation expressly limits public health care coverage to residents. Canadian legislation which expressly limits public health insurance coverage to residents has been found to comply with sections 7 and 15 of the *Charter*.

No right to damages under the *Charter*

103. Foreign nationals without status have no right to enter or remain in Canada, nor do they have a *Charter* protected right to access healthcare services funded by the federal government. The Federal Court of Appeal has already concluded that Ms. Toussaint's rights under sections 7 and 15 of the *Charter* were not violated by exclusion from the IFHP.

104. Where a UN Committee expresses the view that Canada has violated its obligations under an international human rights treaty, this does not automatically translate into a breach of similar *Charter* rights giving rise to a right to damages.

105. The UNHRC is not a court or a tribunal. It plays an important role in monitoring states parties' compliance with their obligations under the ICCPR, and

issues only non-binding recommendations. The views that the UNHRC issued in 2018 in Ms. Toussaint's case did not change the law or impact the scope of the *Charter* rights claimed by Ms. Toussaint.

a) No breach of Section 7

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.

b) No breach of Section 15

108. The claim does not engage the protection of section 15 of the *Charter*. Section 15 does not impose a positive obligation on the part of the Government of Canada to provide state funded Essential Health Care Benefits.

109. Ms. Toussaint was not, at any relevant time, denied equal protection as compared to others on the basis of an enumerated or analogous ground. In particular The IFHP has not denied Ms. Toussaint a benefit on the basis of any enumerated or analogous ground protected by section 15.

110. Failure to include persons who remain in Canada without status from IFHP benefits does not reinforce, perpetuate or exacerbate any disadvantage. Any distinction at issue is not discriminatory.

c) Any breach saved by Section 1

111. Alternatively, if any of Ms. Toussaint's *Charter* rights were violated, which the Defendant denies, the Defendant says that any infringement was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter*.

d) No right to damages under section 24(1) of the Charter

112. If a breach of any of Ms. Toussaint's *Charter* rights is found, then a remedy pursuant to subsection 24(1) of the *Charter*, including an award of monetary damages to the Plaintiff is not appropriate or just. Such an award would not serve the objectives of subsection 24(1), and would be inappropriate based on countervailing factors. Further, the *Charter* damages the Plaintiff seeks are duplicative of the other damage awards she seeks.

113. The Defendant denies that the UNHRC's 2018 views had any effect on the law or policy in effect in 2009, when Ms. Toussaint applied for IFHP coverage. Even if the UNHRC's views somehow called some part of the policy into question (which is denied), no cause of action for damages can arise from the enforcement of duly enacted laws and policy unless the state conduct under the law or policy was "clearly wrong, in bad faith or an abuse of power". The Defendant denies that in denying IFHP benefits to Ms. Toussaint in 2009, it acted in a manner that was "clearly wrong, in bad faith or an abuse of power". The Defendant denies that, in any of its interactions with Ms. Toussaint, it acted in a manner that was "clearly wrong, in bad faith or an abuse of power".

No right to damages under domestic Ontario law

114. Ms. Toussaint has not cited any Ontario law which would entitle her

to state-funded Essential Health Care Benefits. Ontario law expressly excluded Ms. Toussaint from health care coverage when she arrived in Canada as a visitor, and when she remained without legal authorization. The applicable Ontario law complies with the *Charter*.

115. In any event, in 2009, Ms. Toussaint applied for OHIP coverage and was denied. Ms. Toussaint filed a complaint with the Ontario Human Rights Tribunal. She alleged that, based on international law principles, the Tribunal should find that she had suffered discrimination. The complaint was dismissed. Ms. Toussaint did not pursue any other appeal or application for judicial review.

116. The issue of whether Ontario law gives Ms. Toussaint a right to Essential Health Care Benefits is *res judicata*. Ms. Toussaint's attempt to re-litigate the issue is an abuse of process.

No right to a declaration that IFHP breaches the Charter

117. At all material times, the relevant IFHP policies in force complied with the *Charter*.

118. Both the Federal Court and Federal Court of Appeal have expressly found that the exclusion of irregular migrants from the IFHP does not infringe sections 7 and 15 of the Charter. 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.

119. In the alternative, if there was any violation of Ms. Toussaint's *Charter* rights as a result of the IFHP, which is expressly denied, it was

demonstrably justified in a free and democratic society and therefore saved by section 1 of the *Charter*.

No right to relief for person other than Ms. Toussaint

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.

121. The Ontario Court Rules for the joinder of claims do not create a cause of action or a right to relief in this action for persons other than the Plaintiff. The comments of the Judge who dismissed a motion to strike in this matter do not create a cause of action or a right to relief in this action for persons other than the Plaintiff.

No right to a declaration that the Minister violated Ms. Toussaint's *Charter* rights between 2012 and 2013

122. Ms. Toussaint did not apply for health coverage after the IFHP was amended in 2012, or at any time after the initial refusal of benefits. The Defendant denies that there has been any breach of Ms. Toussaint's *Charter* rights between 2012 and 2013, when Ms. Toussaint obtained status in Canada and thereby became eligible for health insurance under OHIP.

No right to an order directing re-interpretation or amendment of the IFHP

123. The IFHP in force in 2009 complied with the *Charter*.

124. In any event, that 2009 IFHP policy is no longer in effect, having been replaced in 2012, and again in 2016. Ms. Toussaint's request to strike or amend the 2009 IFHP policy is moot.

125. The IFHP in force in 2012, to the extent it excluded Ms. Toussaint from coverage, complied with the *Charter*. In any event, Ms. Toussaint did not apply for health coverage after the IFHP was amended in 2012. The Plaintiff has no standing to request relief with respect to the 2012 IFHP. In the alternative, the Plaintiff's request to strike or amend the 2012 IFHP is also moot.

126. The IFHP in effect since 2016 complies with the *Charter*. Further, Ms. Toussaint has never been subject to, nor made any claim for coverage under the 2016 IFHP. The Plaintiff has no standing to request relief with respect to the 2016 IFHP. In the alternative, the Plaintiff's request to strike or amend the 2016 IFHP is moot.

No right to a declaration under the ICCPR

127. Canada has ratified the ICCPR, and the treaty is binding on Canada in international law. The texts of the ICCPR have not been expressly incorporated into domestic law. The ICCPR is not directly enforceable in Canadian law.

128. The Plaintiff is not entitled to a declaration by a Canadian court that Ms. Toussaint's rights under an international treaty have been breached.

No right to a damages or declaration regarding the Minister's response to non-binding UNHRC views

129. The Statement of Claim seeks to treat the UNHRC's 2018 views as a new fact which would warrant relief in this Court, despite the previous findings of Canadian courts. The UNHRC's views did not change the law of Canada, and do not give rise to a right to damages in Canadian law.

130. The views of the UNHRC are not binding on the Defendant in international law, and are not enforceable in domestic law. The UNHRC is not a

court or a tribunal. It is open to the Defendant to disagree with the Committee's views.

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.

135. In the alternative, the Minister's response to the UNHRC's views was reasonable.

136. In the further alternative, if relief in the nature of judicial review is warranted, the Defendant denies that relief in the form of damages or a declaration is appropriate. If relief in the nature of judicial review is warranted (which is denied), the decision not to further implement the UNHRC's views should be remitted to the Minister for reconsideration.

No negligence

137. The Defendant denies that the Defendant, or any Crown servants, agents or employees for whom the Crown may be vicariously liable acted negligently, as alleged in paragraph 20 of the Statement of Claim, or at all.

138. The Defendant did not owe a private law duty of care to Ms. Toussaint. If the Defendant owed a *prima facie* duty of care to Ms. Toussaint, which is not admitted but denied, it is negated as a result of residual policy considerations.

139. In the alternative, if the Defendant owed a private law duty of care to Ms. Toussaint, the Defendant met the standard of care required in the circumstances.

140. The Defendant's reasonable, bona fide policy choices with respect to the administration of the IFHP, including its response to the UNHRC's views, are immune from liability in negligence.

141. At all material times, Crown officials administered the IFHP and made decisions about Canada's response to the UNHRC's views in good faith,

based on their knowledge of relevant facts at the time decisions were made, and for purposes consistent with the relevant statutes and policy.

No bad faith

142. The Defendant denies that the Defendant, or any Crown servants, agents and employees for whom the Crown is liable, acted in bad faith, as alleged in paragraphs 20 and 34 of the Statement of Claim, or at all, and puts Ms. Toussaint to the strict proof thereof.

No damages

143. In response to Ms. Toussaint's claim as a whole, the Defendant denies that any action or inaction on the part of the Defendant or any crown servant caused or contributed to Ms. Toussaint's death, or caused or contributed to any harm to Ms. Toussaint.

144. The Defendant denies that Ms. Toussaint sustained any compensable loss, injury, or damages as alleged against the Defendant and as a result of the facts alleged in the Statement of Claim, and puts Ms. Toussaint to strict proof thereof.

145. In the alternative, if the Defendant sustained any loss, injury or damages as alleged, any such loss, injury or damage was not a reasonably foreseeable consequence of any act or omission on the part of the Defendant or anyone for whom the Defendant may be vicariously liable.

146. The Defendant states that the damages claimed are excessive, exaggerated, unforeseeable, and remote.

147. In the further alternative, if Ms. Toussaint sustained any injuries and damages as alleged in the Claim, then:

- (a) Such loss injury or damage was not caused or contributed to by any fault, negligence, breach of duty, or want of care on the part of the Defendant or of anyone for whom the Defendant may be vicariously liable;
- (b) Such loss injury or damage is attributable to pre-existing injuries or medical conditions of Ms. Toussaint, and further, no act or omission on the part of the Defendant or anyone for whom the defendant may be vicariously liable aggravated any pre-existing injury;
- (c) Such loss, injury or damage was caused by reason of other incidents, injuries or medical conditions occurring subsequent to and independently of the circumstances alleged in the Statement of Claim; and
- (d) Ms. Toussaint could have, by the exercise of due diligence, reduced the amount or extent of any loss, injury, or damage. Ms. Toussaint failed to mitigate her damages.

148. Furthermore, the Defendant pleads that if Ms. Toussaint sustained any damages, which is denied, Ms. Toussaint caused or contributed to these damages through her own conduct.

Any causes of action do not survive the death of Ms. Toussaint

149. The Defendant denies that any of the Plaintiff's allegations disclose any right to damages or any other remedy against the Defendant.

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.

Limitations, *res judicata* and estoppel apply to Original Plaintiff's claims

151. There is no basis in law for the Plaintiff's request for a declaration invalidating the statutory limitation periods applicable to this case. Likewise, there is no basis in law for a declaration invalidating common law doctrines of *res judicata*, issue estoppel, abuse of process or collateral attack. Common law restrictions on pursuing a claim for damages do not engage or breach section 7 of the *Charter*, and do not breach section 15 of the *Charter*.

Action is statute barred

152. The Plaintiff's claim, in whole or in part, is statute barred by operation of the two-year limitation of actions under the *Limitations Act, 2002*. The facts giving rise to Ms. Toussaint's cause of action, Ms. Toussaint's awareness of those facts, and Ms. Toussaint's ability to seek legal redress arising out of those facts date back to 2009.

153. Based on the facts known to her at the time, Ms. Toussaint's interpretation of her *Charter* rights, and her interpretation of Canada's international obligations, Ms. Toussaint could have commenced this action in 2009.

154. In the alternative, based on Ms. Toussaint's application to the UNHRC, in which she engaged with the federal government and argued that Canada's international obligations gave her a right to compensation in Canada arising out of the denial of IFHP benefits, Ms. Toussaint could have commenced this action in December 2013.

155. In the further alternative, even assuming that Ms. Toussaint's cause of action arose after the UNHRC released its views that Canada was in breach of its obligations under the ICCPR, Ms. Toussaint could have commenced this action

on July 24, 2018.

156. Ms. Toussaint's attempts to seek non-judicial remedies, by corresponding with various government officials and asserting a right to a remedy, do not serve to extend a statutory limitation period.

D. LEGAL BASIS

157. The Defendant pleads and relies upon:

- (a) The *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11;
- (b) The *Crown Liability and Proceedings Act*, RSC 1985, c C-50;
- (c) The *Public Authorities Protection Act*, R.S.O. 1990, c. P38,
- (d) The *Negligence Act*, R.S.O. 1990, c. N.1;
- (e) The *Trustee Act*, R.S.O. 1990, c. T.23;
- (f) The *Federal Courts Act*, R.S., 1985, c. F-7, s. 18;
- (g) The *Canada Health Act*, R.S.C. 1985, c C-6, ss. 2, 7- 5;
- (h) The *Health Insurance Act*, R.S.O. 1990, c H.6, s. 2, 3;
- (i) *Regulation 552*, General, R.R.O. 1990, Reg. 552, s. 1.4.
- (j) The *Limitations Act*, S.O. 2002, c. 24, Schedule B,

E. CONCLUSION

158. The Defendant pleads that the action should be dismissed, with costs.

Dated at Toronto, November 20, 2023.

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