

**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

THE ATTORNEY GENERAL OF CANADA

Defendant

NOTICE OF MOTION

THE DEFENDANT will make a motion to the Court on the (insert date) or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- ☐ in writing under subrule 37.12.1(1) because it is (*insert one of* on consent, unopposed *or* made without notice);
- ☐ in writing as an opposed motion under subrule 37.12.1(4);
- ☒ in person;
- ☐ by telephone conference;
- ☐ by video conference;

at the following location:

Ontario Superior Court of Justice – Civil Courthouse
330 University Avenue, 7th Floor
Toronto, Ontario M5G 1R7

THE MOTION IS FOR:

- a) Summary judgment dismissing the Plaintiff's action against Canada in its entirety;
- b) In the alternative, summary judgment dismissing parts of the Plaintiff's action against Canada;
- c) In the alternative, if summary judgment is not granted, an Order directing that this action proceed to a mini-trial under Rule 20.04(2.2), together with any necessary directions governing the conduct of the mini-trial;
- d) An Order for costs of this motion and the Action payable to the Defendant on a partial indemnity basis; and
- e) Such further and other relief as counsel may advise and this Honourable Court may order.

THE GROUNDS FOR THE MOTION ARE:

Background

- 1) The Defendant established the Interim Federal Health Program (the "IFHP") in 1957. The IFHP provides limited health care benefits to certain foreign nationals or permanent residents who may not otherwise be eligible for health care coverage under federal or provincial law.
- 2) The Plaintiff is a national of Grenada who passed away at the age of 54 on January 9, 2023. The Plaintiff entered Canada as a visitor in 1999. When her visitor status expired, she nevertheless remained in Canada illegally for several years without regularizing her status.
- 3) The Plaintiff appears to have been in poor health upon arriving in Canada or her health declined shortly thereafter. Her conditions included diabetes. In 2006 her health began to further deteriorate. While she was otherwise able to access some health care benefits, she was denied health-care coverage under IFHP in 2009, as she did not fit into any of the four eligible categories.
- 4) The Plaintiff sought judicial review before the Federal Court of the 2009 decision denying her coverage under the IFHP. She argued that the decision was in breach of the *Charter*, and not consistent with Canada's international obligations. The Federal Court dismissed the application in August 2010.
- 5) The Plaintiff appealed to the Federal Court of Appeal. In dismissing the appeal, the Federal Court of Appeal found, among other things:
 - a) Ms. Toussaint's rights under s. 7 of the *Charter* were not infringed. Although Ms. Toussaint's inability to access health care did put life, liberty and security of the person at risk, her inability to access insurance under the IFHP was not the operative cause of that risk. In support of this finding, the FCA pointed to

two other causes of her risk to life and security of the person: (1) The fact that the Ontario Health Insurance Plan (“OHIP”) did not cover everything she needed (the provision of health care is primarily the role of the provinces and territories) and (2) Ms. Toussaint’s own conduct – continuing to remain in Canada illegally.

- b) Ms. Toussaint’s rights under s. 15(1) of the *Charter* were not infringed because the IFHP did not draw a distinction based on immigration status which, in any event, is not an analogous ground.
- 6) The Plaintiff’s application for leave to appeal to the Supreme Court of Canada was denied on April 5, 2012.
 - 7) In April 2013, the Plaintiff became eligible for health-care coverage under OHIP as a result of a successful application for permanent residence following a marriage to a Canadian.
 - 8) In December 2013 the Plaintiff submitted a communication to the United Nations Human Rights Committee (the “UNHRC”) under the International Covenant on Civil and Political Rights (the “ICCPR”). The Plaintiff claimed that her exclusion from the IFHP infringed on her right to life and her right to non-discrimination recognized in articles 6 and 26 of the ICCPR.
 - 9) On July 24, 2018, the UNHRC released its views that the Defendant had violated the Plaintiff’s rights to life and non-discrimination recognized in articles 6 and 26 of the ICCPR, and that Canada ought to provide the Plaintiff with a remedy.
 - 10) The Plaintiff wrote to Canadian officials and demanded a remedy following the UNHRC’s decision. The Defendant took the position that it had met its obligations under the ICCPR and refused to provide compensation to the Plaintiff at that time.

No genuine issue requiring a trial

- 11) A summary judgment is appropriate where there is “no genuine issue” requiring a hearing on the merits. This court is to consider whether the evidence available through summary judgment is sufficient to fairly resolve the dispute.
- 12) The Applicant has advanced three main causes of action in her Amended Amended Statement of Claim based on:
 - a) The *Charter*;
 - b) Customary international law; and
 - c) Domestic administrative law.
- 13) The Amended Amended Statement of Claim discloses no genuine issue requiring a trial:

- a) The *Charter* claims must fail because they are *res judicata* and subject to *issue estoppel*. Canadian courts have already decided, based on the same facts asserted in this claim, and considering Canada's international obligations, that the Plaintiff's exclusion from health care coverage under the IFHP did not breach of her rights under *Charter* ss. 7 and 15(1);
 - b) There is no basis for the Court to exercise its discretion not to apply *issue estoppel*. A non-binding decision of an international tribunal, interpreting Articles of the ICCPR, is not sufficient to justify departing from an authoritative decision of a Canadian appellate court on the specific *Charter* provisions at issue. Furthermore, there has been no change in the law subsequent to the Federal Court of Appeal's decision that renders it "clearly wrong";
 - c) Moreover, an estate cannot vindicate the ss. 7 or 15(1) *Charter* rights of a deceased individual.
 - d) There is no basis in law for the Plaintiff's claim that the common law rules of *res judicata*, issue estoppel, abuse of process and collateral attack are unconstitutional if they bar a claim against the Defendant;
 - e) It is settled law that Canadian legislation, which generally limits public health insurance coverage to legal residents, complies with the *Charter*;
 - f) It is settled law that a federally funded right to health care insurance coverage regardless of status is not a principle of fundamental justice;
 - g) The Plaintiff's attack on the constitutional validity of the requirements for discretionary coverage during the relevant period (2009-2013), which are no longer in effect, is moot and would serve no purpose;
 - h) There is no genuine issue requiring a trial in international law. The ICCPR decision does not found a cause of action. The non-binding views of a United Nations treaty body cannot form the basis for obtaining a civil remedy. Moreover, customary international law cannot form the basis, in and of itself, for an action in domestic courts, and even if it could, the Plaintiff has not identified a norm of customary international law that is actionable in domestic law and that has been breached; and
 - i) There is no genuine issue requiring a trial in administrative law. The Minister of Citizenship and Immigration's decision not to adhere to the UNHRC decision is not justiciable and, in the alternative, was reasonable.
- 14) These issues can be decided based on a documentary record and do not depend on significant credibility assessments or live evidence.
- 15) The Plaintiff has already received the Defendant's documentary disclosure, and she will have full recourse to all means available under the *Rules of Civil Procedure*, RRO 1990, Reg 194 ("*Rules*") to put her best foot forward on the motion for summary judgment.

- 16) A trial would not assist the Court to make any determinations beyond what is produced in the record on this motion.
- 17) There is no genuine issue requiring a trial, and summary judgment should be granted in favour of the Defendant, with costs payable by the Plaintiff to the Defendant for the motion and the proceedings.
- 18) In the alternative, a mini trial under Rule 20.04(2.2) would allow the motion judge to reach a fair and just resolution of the Rule 20 motion and is a proportionate course of action.
- 19) Rule 20 of the *Rules*.
- 20) The *Limitations Act*, 2002, S.O. 2002, c 24, Sch. B, ss. 4, 15.
- 21) The *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 18.
- 22) The *Canada Health Act*, R.S.C. 1985, c C-6, ss. 2, 7.
- 23) The *Health Insurance Act*, R.S.O. 1990, c H.6, s. 2, 3.
- 24) Regulation 552, *General*, R.R.O. 1990, Reg. 552, s. 1.4.
- 25) Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) Affidavit of Fabien Lengelle;
- b) The expert report of Dr. Christopher M. Milroy; and
- c) Such further and other materials as counsel may advise and this Honourable Court may permit.

(date)

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ONTARIO
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Proceeding Commenced at **TORONTO**

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