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

(Interveners: The Charter Committee on Poverty Issues, the Canadian Health Coalition, the FCJ Refugee Centre and the Madhu Verma Migrant Justice Centre (the "CCPI Coalition"), Amnesty International Canada and the International Network for Economic, Social and Cultural Rights ("Amnesty International/ESCR-Net"), Canadian Civil Liberties Association ("CCLA") and Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Legal Clinic of Ontario and the Chinese Southeast Asian Legal Clinic (the "Colour of Poverty"))

CCPI COALITION'S CASE CONFERENCE BRIEF

(Case Conference: May 13, 2026)

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CASE CONFERENCE MEMORANDUM OF THE CCPI COALITION

1. Canada's brief raises three procedural issues, but the central issue for the CCPI Coalition is Canada's proposed sequencing of this action. Canada states that it intends to bring a summary judgment motion before discoveries, arguing that: (i) the *Charter* claims are barred by issue estoppel; (ii) any customary international law claim is not viable; and (iii) "the Minister's decision not to adhere to the views of the ICCPR was reasonable."[1] The Coalition submits that this proposed motion should not delay the expeditious determination of the systemic *Charter* issues for which the Coalition was granted intervener status in this case. Eight years after the UN Human Rights Committee released its Views, irregular migrants in Canada are still being denied life saving health care.[1]

2. The Court granted the Coalition leave to intervene to provide the perspective and expertise on irregular migrants who are denied access to essential health care because of Canada's refusal to implement the Human Rights Committee's Views.[2] The Court identified the issues to be addressed by the Coalition as including whether s. 7 imposes a positive obligation to ensure access to essential health care where denial may result in loss of life; whether domestic courts may review Canada's refusal to implement the Views for *Charter* compliance; whether the refusal to implement the Views accords with principles of fundamental justice; and whether immigration status should be recognized as an analogous ground under s. 15 – questions with "immense implications not only for irregular migrants requiring access to essential health care for the protection of their lives, but also for the constitutional rights of many of the most disadvantaged individuals and groups in Canadian society, whose perspective the CCPI Coalition

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[1] *Toussaint v Canada CCPR/C/123/D/2348/2014* (30 August, 2018); *Toussaint v. Canada (Attorney General),* 2022 ONSC 4747 at paras 22–25.

[2] *Toussaint v. Attorney General of Canada*, 2025 ONSC 2007 paras 103–104.

represents."[3] The Coalition's role is distinct because it addresses "whether Canada's ongoing failure to implement the Views of the Committee violates the *Charter* rights which it says are essential to protect migrant lives," rather than the compensation claim for past injury.[4]

3. In the Coalition's submission, the proper case-management response is not to permit Canada to delay discovery and judicial determination of the systemic *Charter* issues in this case while it pursues a threshold summary judgment motion on an incomplete record. The proper response, in our submission, is to bifurcate the proceeding so that the Court first determines the systemic *Charter* and declaratory issues regarding whether Canada's refusal to implement the Views is *Charter* compliant, leaving the assessment of individualized medical causation, survivability, and damages for a subsequent phase if necessary.

4. This approach is supported by the Rules. Rule 1.04 requires the Rules to be liberally construed to secure "the just, most expeditious and least expensive determination of every civil proceeding on its merits." Rule 6.1.01 was amended in 2024, following "the courts' recognition of a crisis in the civil justice system and an increased backlog of cases" to authorize the Court to order a separate hearing on one or more issues.[5] It directs the Court to consider whether a separate hearing will dispose of issues, shorten or simplify the rest of the proceeding, save costs, and whether the issues are clearly severable without undue repetition or risk of inconsistent findings.[6] Recent Ontario jurisprudence confirms that the amended rule is a practical tool for achieving Rule 1.04's objectives, while remaining discretionary and context-specific.[7] The

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[3] Ibid at para 101.
[4] Ibid at para 103
[5] *Wheelans v. Kuss*, 2024 ONSC 6728, at para. 22; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 1.04(1), 6.1.01.
[6] Ibid.
[7] *Wheelans v. Kuss*, 2024 ONSC 6728, at para. 22; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 1.04(1), 6.1.01.

proper Rule 1.04 case-management response is therefore not to permit Canada to postpone discovery and judicial determination of the systemic *Charter* issues while it pursues a threshold summary judgment motion on an incomplete record.

5. The recent decision in *Gajenthiran v Toronto Standard Condominium Corporation No 2261 et al*, 2026 ONSC 2477 supports a bifurcated and expeditious approach in the present proceeding.[8] In *Gajenthiran*, the Court emphasized that Rules 1.04, 29.09, and 6.1.01 should be applied to prevent litigants from suffering unnecessary delay because of collateral or derivative proceedings on liability and it confirmed that bifurcation is appropriate where core issues are sufficiently distinct from more complex or delayed secondary disputes. The Court held that courts cannot countenance permitting further unnecessary delay, where doing so would impede timely access to justice.[9] The Coalition submits that the same principles apply with even greater force where the unresolved issues concern ongoing *Charter* claims relating to life, equality, and access to essential health care.

6. The systemic *Charter* issues are clearly severable from the damages phase in the present case. The first, systemic phase would focus on Canada's continuing refusal to implement the Views, the ongoing exclusion of irregular migrants from essential life-preserving health care, the implications of the Human Rights Committee's interpretation of the *ICCPR* for ss. 7 and 15, and the appropriate declaratory/systemic remedy. The subsequent damages phase would address complex individualized medical evidence concerning Nell Toussaint's deterioration, premature death, causation, survivability, and quantum of damages.

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[8] *Gajenthiran v. Toronto Standard Condominium Corporation No. 2261 et al*, 2026 ONSC 2477
[9] Ibid at paras 91 – 94.

7. Canada's own brief confirms the severability of the present claim. Canada says the medical records are central to causation, health deterioration, death, and survival of claims.[8] Those issues may matter to damages. They are not necessary to decide whether Canada's ongoing refusal to implement the Views and to ensure access to essential health care for irregular migrants violate ss. 7 and 15. The systemic claim would rely on facts already found by the Federal Courts and accepted by the Committee, together with a modest updated record on the continuing effects of Canada's position.

8. Bifurcation would promote, rather than undermine, proportionality. It would avoid allowing the most urgent and systemic constitutional issues to be delayed by extensive litigation over decades of medical records and evidence of individualized damages. It would also allow the Court to determine whether Canada's ongoing position regarding the Views and its obligations to ensure access to essential health care of irregular migrants is constitutionally compliant before the parties incur the expense and delay of a full damages trial.

9. Canada's anticipated issue estoppel argument should not be allowed to delay judicial consideration of the critical systemic issue in this case. Perell J. has already rejected Canada's argument that the claim was plainly barred by res judicata, issue estoppel, abuse of process, or collateral attack. He recognized that the Committee's Views created a materially new legal context.[10]

10. Justice Perell found that the requirement of exhaustion of domestic remedies under the *Optional Protocol* to the *ICCPR* makes Canada's issue estoppel theory problematic. He noted that Ms. Toussaint "did not have access to the Human Rights Committee until after she first

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[10] *Toussaint v. Canada (Attorney General),* 2022 ONSC 4747 at para 125.

sought relief in the Federal Court" and that her present claim provides an opportunity to consider the Committee's View which was not available to the federal courts.[11] In considering whether Canada's refusal to implement the Views violates the *Charter*, the court will also have the benefit of the Supreme Court's consideration of immigration status or refugee claimant status as an analogous ground in the recent *Kanyinda* case.[11]

11. Canada's attempt to have these complex issues resolved in a summary judgment on issue estoppel would convert exhaustion into a trap: a claimant must exhaust domestic remedies before going to the Committee, but once the Committee issues Views, Canada says the earlier domestic proceedings bar any domestic consideration of the relevance of the Views to *Charter* interpretation or to Canada's refusal to implement them. That position is difficult to reconcile with *pacta sunt servanda* and good faith performance of treaty obligations which Justice Perell found to be a critical issue in assessing the role of customary international law this case.[12]

12. Although Justice Perell recognized that some of the legal issues in this case could be resolved by summary judgment, he held that "it would not be doing justice nor appropriate to decide the merits of Ms. Toussaint's case pursuant to Rule 21 and without additional evidence about the human rights plight of persons like Ms. Toussaint." This is precisely the evidence that the CCPI Coalition would propose to have considered in the first phase trial, that is, whether Canada must give good faith consideration to the Views so as to ensure the non-repetition of the violation of rights to life and non-discrimination called for by the Committee with respect to others in Ms. Toussant's situation.[12]

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[11] *Quebec (Attorney General) v. Kanyinda,* 2026 SCC 7 at paras 26 and 216 – 229. and Perell J at 172.
[12] Ibid at paras 28, paras 181–182.

13. The Coalition is also deeply concerned by Canada's submission that this Court can simply decide whether the Minister's refusal to implement the Views was "reasonable". This characterization risks improperly reducing the Plaintiff's claim to one of administrative law review. The claim advanced in this case is a full *Charter* claim: whether Canada's ongoing refusal to ensure access to essential health care where denial may result in loss of life violates ss. 7 and 15, interpreted in light of Canada's *ICCPR* obligations and the Committee's Views.[13]

14. The claim raises the critical question of the scope of the rights themselves, not merely whether an individual administrative decision-maker gave adequate weight to *Charter* values. In *Canada (Prime Minister) v Khadr*, the Supreme Court confirmed that the executive's foreign affairs prerogative is subject to the *Charter* and that Canadian courts, while respecting the prerogative powers of the executive, may issue declaratory remedies with respect to *Charter* obligations. Canada's refusal to implement the Committee's Views cannot be insulated from full *Charter* review merely because it arises in the context of the executive's conduct of foreign affairs, treaty implementation, or ministerial policy.[14]

15. In *Hryniak v. Mauldin*, the Supreme Court held that summary judgment is appropriate only where it permits a "fair and just determination" and is proportionate, more expeditious, and less expensive.[15] A premature summary judgment motion here would likely do the opposite. It would require extensive argument on issue estoppel, international law, evidence, and justiciability before the systemic record is complete, while delaying the focused trial of the very issues for which the Coalition was granted standing to assist.

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[13] Fresh As Amended Statement of Claim (October 19, 2023) at para 1(g)
[14] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras 36 – 37 and 46.
[15] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 72 – 73.

16. We respectfully submit that rather than creating further delay by scheduling the Defendant's proposed summary judgment motion, the Court should instead canvass with the parties the advantages of bifurcating the hearing pursuant to Rule 6.1.01 in a manner that prioritizes the systemic *Charter* issues in this case. Given the public interest nature of the systemic claim, the Court should consider a no-cost order in relation to a motion under Rule 6.1.01.

17. This approach would entail:

(a) the expeditious completion of discovery with respect to Canada's decision not to implement the systemic remedy required in the Committee's Views;

(b) limited evidence on ongoing exclusion of irregular migrants from essential health care and on immigration status as an analogous ground under s. 15;

(c) a motion., with a no-cost order, to bifurcate the hearing under Rule 6.1.01;

(d) a first phase hearing on whether Canada's refusal to implement the systemic remedy required by the Committee's Views violates ss. 7 and 15 and systemic/declaratory relief;

(e) a second phase hearing, if necessary, on individualized damages, medical causation, survivability, and quantum of damages.

18. This approach respects the Plaintiff's systemic claim, the public importance of the issues, and the Rules' commitment to the just, most expeditious, and least expensive determination of proceedings on their merits. It also prevents Canada from using a proposed summary judgment motion to delay adjudication of urgent constitutional questions affecting life, equality, and access to essential health care for irregular migrants.

19. The CCPI Coalition therefore submits that the Court should decline to direct that Canada's proposed summary judgment motion proceed before discovery and the record is developed on the systemic issues in this case. Instead, we respectfully submit the Court should direct the parties to address bifurcation and a timetable for the prompt determination of the systemic *Charter* issues as we have proposed.

All of which is respectfully submitted

Martha Jackman
Counsel for the CCPI Coalition

SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence

1. Canada (Prime Minister) v. Khadr, 2010 SCC 3

2. Gajenthiran v. Toronto Standard Condominium Corporation No. 2261 et al, 2026 ONSC 2477

3. Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 SCR 87

4. Quebec (Attorney General) v. Kanyinda, 2026 SCC 7

5. Toussaint v. Attorney General of Canada, 2025 ONSC 2007

6. Toussaint v. Canada (Attorney General), 2022 ONSC 4747

7. Toussaint v Canada CCPR/C/123/D/2348/2014 (30 August, 2018

8. Wheelans v. Kuss, 2024 ONSC 6728

Legislation

9. Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Other Materials

10. Fresh as Amended Statement of Claim (October 19, 2023)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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.

RULE 6.1 SEPARATE HEARINGS

Separate Hearings

6.1.01 (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,

(a) on a party's motion, with or without the consent of the other parties; or

(b) at a conference under Rule 50, with the consent of the parties. O. Reg. 175/24, s. 1.

(2) In determining whether to order a separate hearing, the court shall consider,

(a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;

(b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;

(c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;

(d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and

(e) any other relevant matter. O. Reg. 175/24, s. 1.