

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

- and -

CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ
REFUGEE CENTRE, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL
NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE COLOUR OF
POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE,
THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND
SOUTHEAST ASIAN LEGAL CLINIC AND CANADIAN CIVIL LIBERTIES
ASSOCIATION

Interveners

**FACTUM OF THE INTERVENERS
AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING) AND
ESCR-NET – INTERNATIONAL
NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

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PART I - OVERVIEW

1. Amnesty Canada and ESCR - International Network for Economic, Social and Cultural Rights intervene in this motion to strike to aid the Court's consideration of international human rights law and its impact on Canada's domestic laws.
2. Ms. Toussaint's statement of claim follows the United Nations Human Rights Committee's conclusion that Canada violated the *International Covenant on Civil and Political Rights* (the "ICCPR") because Ms. Toussaint was denied access to essential health care, putting her life at risk given the seriousness of her health problems. Canada advised that it would not comply with the Committee's decision because it does not agree with its reasoning.¹ Among other things, Ms. Toussaint asks this Court to determine whether Canada's decision to not implement the Committee's decision is consistent with the *Charter*.²
3. Canada seeks to strike Ms. Toussaint's claim at a preliminary stage because it says that the scope of its obligations to protect life under the *Charter* and the ICCPR are settled. In Canada's view, the provision of health care falls exclusively within economic and social rights and, therefore, does not exist within the right to life. This position is at odds with Canada's obligations under the *Charter* and the ICCPR. Both the ICCPR and the broader international human rights law landscape affirm the indivisibility, interdependence and interrelatedness of human rights. Because domestic law, including the *Charter*, is presumed to conform to Canada's international law obligations, the court should not accept Canada's constrained interpretation of its legal obligations, particularly at this preliminary stage.

¹ Response of the Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 Submitted by Ms. Nell Toussaint at para. 7, Tab 45 [Canada's Response].

² Statement of Claim, Motion Record of the Attorney General of Canada ("AGMR") at para. 1(g).

4. Canada also says that the systemic remedy sought by the plaintiff – namely, that Canada take steps to prevent similar, future violations of the ICCPR – has no prospect of success because international law obligations cannot “amend domestic legislation or policy.”³ This position runs contrary to the right to an “effective remedy” for those who have had their rights violated.⁴ The right to an effective remedy includes the duty of non-repetition, which requires states to prevent the recurrence of a human rights violation. Similar systemic relief is available under the *Charter*. The plaintiff’s request for systemic relief sits comfortably within both domestic and international law principles. It is not doomed to fail.

PART II - SUMMARY OF FACTS

5. Amnesty Canada and ESCR-Net assume that the facts pled by Ms. Toussaint are true.⁵

6. The claim at issue arises out of, among other things, Ms. Toussaint’s December 2013 communication to the United Nations Human Rights Committee (the “**Committee**”) under the *Optional Protocol to the International Covenant on Civil and Political Rights* (the “**Optional Protocol**”). In ratifying the ICCPR and the Optional Protocol in 1976, Canada has recognized the “competence of the Committee to receive and consider communications from individuals...who claim to be victims of a violation by that State Party...”⁶

7. In her communication, Ms. Toussaint claimed that her exclusion from Canada’s Interim Federal Health Program violated the right to life and right to non-discrimination recognized in

³ Defendant's Factum at paras. 66-67, AGMR at p. 56.

⁴ [International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS, Can. TS 1976 No. 47 \(entered into force 23 March 1976\)](#) at 2.3(a) [“ICCPR”]; Paul Taylor, *A commentary on the International Covenant on Civil and Political Rights*: (Cambridge: Cambridge University Press, 2020) at p. 169, Tab 46.

⁵ [Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42](#) at para. 17, Tab 1.

⁶ [Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 2200A XXI \(entered into force 23 March 1976\)](#) at 1 [Optional Protocol]; [ICCPR](#) at 40-41.

articles 6 and 26 of the ICCPR.⁷ Amnesty Canada (with the support of Amnesty's International Secretariat) and ESCR-Net each offered legal opinions to the Committee to aid in its consideration of Ms. Toussaint's case.

8. On July 24, 2018, the Committee released its decision (called the "Views") in response to Ms. Toussaint's communication. The Committee concluded that: (1) Canada had violated the right to life guarantee in article 6 because irregular migrants like Ms. Toussaint do not have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life; and (2) Canada's efforts to protect the right to life drew an impermissible distinction between regular and irregular migrants in violation of article 26.⁸

9. The Committee's Rules of Procedure provide that, after the Committee provides its Views, it may "follow-up" with the relevant state party "for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's Views."⁹ Canada's response to the Committee's follow-up did not explain the measures Canada had taken to respond. Instead, Canada expressed "regret" that it could not "agree with the Committee's reasoning in this case" and that it would "not be taking any further measures to give effect" to the Committee's Views.¹⁰

10. Ms. Toussaint's statement of claim seeks, among other things, remedies under Canadian domestic law aimed at addressing the violations of the ICCPR outlined in the Committee's Views. In particular, Ms. Toussaint seeks declarations that Canada's failure to give effect to the

⁷ Defendant's Factum at para. 20, AGMR at pp. 39-40.

⁸ Defendant's Factum at paras. 25-26, AGMR at pp. 4243; [Toussaint v. Canada, Communication No. 2348/2014, U.N. Doc. CCPR/C/123/D/2348/2014 \(2014\)](#) at para. 12, Tab 2 [*Toussaint HR Committee*].

⁹ [Human Rights Committee, Rules of procedure of the Human Rights Committee, CCPR/C/3/Rev.12](#) at Rule 106.

¹⁰ Canada's Response at paras. 7, 34.

Committee's Views infringed sections 7 and 15 of the *Charter*. Ms. Toussaint also seeks an order under s. 24(1) of the *Charter* requiring Canada to give effect to the Committee's Views.¹¹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

11. Amnesty International Canada and ESCR-Net's submissions focus on two issues.
12. ***Interpretation and application of the ICCPR.*** Canada's interpretation of its obligations under the ICCPR, expressed in its response to the Committee's Views and its position on this motion, is incorrect. It ignores the well-accepted doctrine of indivisibility, interdependence and interrelatedness of human rights. Because Canada's domestic laws, including the *Charter*, are presumed to conform with its international legal obligations under ratified treaties, there is a reasonable prospect that Canada's failure to abide by its international obligations and implement the Committee's Views constitutes a violation of sections 7 and 15 of the *Charter*.
13. ***Access to effective remedies.*** Ms. Toussaint seeks systemic relief, namely that Canada take steps to prevent future, similar violations of the ICCPR by ensuring that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life. Systemic relief is essential to vindicate the ICCPR's guarantee of an "effective remedy" and to adhere to the duty of non-repetition, which ensures that remedies include measures to prevent the human rights violation from recurring.¹² These systemic remedies are both within the *Charter*'s ambit and vital to ensuring that Canada can abide by its international law obligations to provide an effective remedy for ICCPR violations.

¹¹ Statement of Claim at paras. 1(f)-1(h), AGMR at pp. 12-13.

¹² [ICCPR](#) at art. 2.3(a); [International Commission of Jurists, "The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide" \(2018\)](#) at p. 137, Tab 47.

Interpretation and Application of the ICCPR

14. Canada declined to implement the Committee's Views based on an erroneous interpretation of its international law obligations. Because the *Charter* seeks to conform with Canada's international law obligations, Canada's failure to implement the Views, and conform to its international law obligations, discloses a viable *Charter* claim that should not be struck.

15. *Canada's interpretation of the ICCPR is incorrect.* The Committee decided that Canada had violated the right to life guarantee enshrined in article 6 of the ICCPR (and the right to non-discrimination in article 26) because irregular migrants like Ms. Toussaint do not have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

16. Canada has refused to implement the Committee's Views because it disagrees with the Committee's interpretation of the scope and content of article 6. Canada says that the right to life in article 6 does not include economic and social rights, such as access to health care, and that, in any event, Ms. Toussaint had adequate access to health care services.¹³ Canada now seeks to strike Ms. Toussaint's claim on the basis that its interpretation of its legal obligations is plainly and obviously correct.¹⁴

17. In rejecting that the right to life engages non-discriminatory access to essential health care, Canada's legal interpretation of the ICCPR employs a narrow, formalistic interpretation of the right to life as separate and distinct from all other rights, contrary to interpretations by the Committee and other international bodies, regional human rights courts, and several domestic

¹³ Canada's Response at paras. 15-24.

¹⁴ AGC Factum at paras. 47-49, 54-56.

courts.¹⁵ The practical reality is that access to essential health care is required to fully protect the right to life, security of the person, and non-discrimination. The Committee properly recognized that, to be an effective guarantee, the right to life requires state parties to provide access to existing health care services that are reasonably available and accessible when lack of access to health care would expose a person to a reasonably foreseeable threat or life-threatening situation that can result in loss of life.¹⁶

18. In its response to the Committee, Canada also alleged that the Committee conflated the right to life in the ICCPR with the right to health under the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”).¹⁷ This argument invokes the “implied exclusion” or *expressio unius* rule of statutory interpretation: because health care is expressly mentioned in the ICESCR, it is excluded under the umbrella of “life” in the ICCPR. Under international law, the implied exclusion rule is “non-obligatory” and must be used “with utmost caution” because “any automatic or mechanical application is likely to produce distorted interpretations.”¹⁸ Canadian courts have also cautioned against mechanically applying of the rule to interpret the Constitution (both in federalism¹⁹ and *Charter* cases²⁰), human rights legislation,²¹ and ordinary statutes.²²

¹⁵ Iain Byrne, “Enforcing the Right to Health: Innovative Lessons from Domestic Courts” in Mary Robinson and Andrew Clapham (eds), *Realizing the Right to Health* (Zurich: Rüffer & Rub, 2012) at p. 536, Tab 48; [UNHRC, General Comment No. 36 \(2018\) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 \(entered into force 30 October 2018\)](#) at paras. 3, 26 and 61, Tab 49.

¹⁶ [Toussaint HR Committee](#) at para. 11.3, Tab 2; [General Comment No. 36](#) at paras. 26 and 61, Tab 49.

¹⁷ Canada’s Response at paras. 17-18, Tab 45.

¹⁸ Alexandre Senegacnik, “Expressio Unius (Est) Exclusio Alterius” in Max Planck Encyclopedias of International Law (Oxford University Press: February 2018), Tab 50.

¹⁹ [Jones v. A.G. of New Brunswick \(1974\)](#), [1975] 2 SCR 182 at paras. 195-196, Tab 3.

²⁰ [Thomson Newspapers Ltd. v. Canada \(Director of Investigation and Research, Restrictive Trade Practices Commission\) \(1990\)](#), [1990] 1 SCR 425 at paras. 469-470 (per Wilson J., dissenting but not on this point), Tab 4; [R. v. S. \(R.J.\) \(1995\)](#), [1995] 1 SCR 451 at p. 520, Tab 5 (per Lamer C.J., concurring). See also: [Gérald Beaudoin, “Introduction” \(1992\) 24:1 Ottawa LR 7](#) at p. 9, Tab 51.

²¹ [Phipps v. Toronto Police Services rd, 2009 HRTO 1604](#) at paras. 33-34, Tab 6.

²² [R. v. Fercan Developments Inc., 2016 ONCA 269](#) at paras. 61-62, Tab 7.

19. In contrast, the Committee's decision is rooted in the broad, international consensus on the interdependence, interrelatedness, and indivisibility of human rights, as recognized in a wide range of international instruments.²³ These instruments emphasize that human rights must be interpreted contextually and not based on categorical distinctions of government obligations.²⁴ Canadian international law scholarship also supports interpreting the provisions of the ICCPR and the ICESCR as interdependent and overlapping.²⁵

20. The interdependence, indivisibility and interrelatedness of the right to life and non-discriminatory access to essential health care is also recognized in the jurisprudence of regional human rights bodies. For example, the Inter-American Court of Human Rights has held that "restrictive approaches" to the right to life are "inadmissible"²⁶ and that the right to life should be "directly and immediately linked to human health care."²⁷ Consistent with this interpretation, the Court has found that "the fundamental right to life includes, not only the right of every human being not to be deprived of [their] life arbitrarily, but also the right that [they] will not be prevented from having access to the conditions that guarantee a dignified existence."²⁸ This

²³ [Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 \(25 June 1993\)](#) at para. 5; [Human Rights Council, UNGA, 60th Sess., Res. 60/251, UN Doc. A/RES/60/251 \(15 March 2006\)](#) at Preamble, Tab 53; [HRC, Institution-building of the United Nations Human Rights Council, Res 5/1, UN Doc. A/HRC/RES/5/1 \(18 June 2007\)](#) at Preamble, Tab 54; [UNGA, World Summit Outcome, 60th Sess., Res. 60/1, UN Doc. A/RES/60/1 \(24 October 2005\)](#) at para. 13, Tab 55. See also: [UNGA, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 61st Sess., Res. 61/106, UN Doc. A/RES/61/106 \(24 January 2007\)](#), Tab 56; [Optional Protocol](#).

²⁴ Bruce Porter, "Interdependence of Human Rights" in Jackie Dugard, Bruce Porter, Daniela Ikawa & Lilian Chenwi, eds., (Cheltenham, UK: Edward Elgar Publishing, 2020) at p. 303, Tab 57.

²⁵ Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 Forum Constitutionnel 97 at p. 99, Tab 58.

²⁶ [Case of the "Street Children" \(Villagran-Morales et al.\) v. Guatemala, Merits, Inter-Am. Ct. H.R. \(Nov. 19, 1999\)](#) at para. 144, Tab 8.

²⁷ [Case of Albán Cornejo et. al. v. Ecuador, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. \(ser. C\) No. 171 \(Nov. 22, 2007\)](#) at para. 117, Tab 9. See also: [Ximenes Lopes v. Brazil, Merits, Reparations and Costs, Inter-Am. Ct. H.R. \(ser. C\) No. 149 \(3 July 2006\)](#) at para. 124, Tab 10.

²⁸ [Case of the "Street Children"](#) at para. 144, Tab 8; This is similar to paragraph 26 of [General Comment No. 6](#), Tab 61.

obligation includes providing vulnerable groups with proper health care as a special protective measure fundamental to the right to life.²⁹ Both the European Court of Human Rights and the African Commission on Human and Peoples' Rights have also determined that the right to health and the right to life are interrelated and interdependent.³⁰

21. Domestic courts around the world have similarly recognized the interdependence between the right to life and right to health.³¹ For example, the Supreme Federal Tribunal of Brazil has ruled that [translation]: “the right to health – apart from being established as a fundamental right in the service of all persons – represents a constitutional consequence indissociable from the right to life.”³²

²⁹ [Case of the "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. \(ser. C\) No. 63 \(2 September 2004\)](#) at para. 176, 11.

³⁰ [Nitecki v. Poland](#) (First Section Decision as to Admissibility), Application No. 65653/01 Eur. Ct. H.R. (21 March 2002), Tab 12. See also: [Powell v. the United Kingdom, Decision No. 45305/99 Eur. Ct. H.R. \(4 May 2000\)](#), Tab 13; [Case of Cyprus v. Turkey](#) (Judgment), Application no. 25781/94, ECHR 2001-IV Eur. Ct. H.R. 219 (10 May 2001), Tab 14; [Mehmet Senturk and Bekir Senturk v. Turkey](#) (Judgment), Application No. 13423/09, 60 EHRR 4 (9 April 2013) at para. 88, Tab 15; [Purohit and Moore v. The Gambia, Communication No. 241/2001, African Commission on Human and Peoples' Rights \(29 May 2003\)](#) at para. 80, Tab 16.

³¹ For example, **Argentina**: [Reynoso, Nida Noemí c/INSSJP/amparo, May 16, 2006 \(Supreme Court of Argentina\)](#), Tab 17; [Campodonico de Beviacqua, Ana Carina v. Ministerio de 'Salud y Banco de Drogas Neoplasicas, ' October 24, 2000 \(Supreme Court of Argentina\)](#), Tab 18; **Bangladesh**: [Rabia Bhuiyan v. Ministry of Local Government, Rural Development, 59 DLR \(AD\) 176 \(2007\)](#), Tab 19; [Dr. Mohiuddin Farooque v. Bangladesh, 48 DLR 438 \(1996\)](#), Tab 20; **Brazil**: [Viera v. Porto Alegre, RE 271286 AgR/RS \(2000\)](#), Tab 21 [Viera]; **Colombia**: [Sala Segunda de Revisión, Sentencia T-760 \(2008\), Judgment T-760/08 \(2008\)](#), Tab 22; **Ecuador**: [Mendoza & Ors v. Ministry of Public Health, Resolution No. 0749-2003-RA \(2004\) \(Constitutional Court of Ecuador\)](#), Tab 23; **El Salvador**: [Mr. Jorge Odir Miranda Cortez v. la Directora del instituto Salvadoreño del Seguro Social, File No. 348-99 \(2001\) \(Constitutional Court of El Salvador\)](#), Tab 24; **India**: [Laxmi Mandal v. Deen Dayal Harinagar Hospital and Others, WP\(C\) 8853/2008, Judgment of 4 June 2010, High Court of Delhi](#) at paras. 20-21, Tab 25; [Francis Coralie Mullin v. The Administrator, Union, 1981 AIR 746 \(1981\)](#) at para. 6, Tab 25; **Mexico**: [Case "Special Care Unit 13" \(Pabellón 13\) regarding patients with HIV-AIDS brought against the National Institute of Respiratory Diseases \(INER\) and other authorities \(AR 378/2014\)](#), Tab 27; **United Kingdom**: [Burke, R. \(on the application of\) v. General Medical Council and Ors., \[2005\] EWCA Civ. 1003](#) at paras. 39, 53, Tab 28; **Venezuela**: [Cruz del Valle Bermúdez y otros v. MSAS s/amparo, Expediente N° 15.789, Sentencia N° 196 \(1999\) \(Supreme Court of Venezuela\)](#), Tab 29. See also: Byrne, “Enforcing the Right to Health: Innovative Lessons from Domestic Courts” at 536, Tab 48; Malcolm Langford, “Social Rights Jurisprudence: Emerging Trends in International and Comparative Law” (Cambridge: Cambridge University Press, 2008), Tab 59.

³² [Viera](#), Tab 21.

22. The interdependence, indivisibility and interrelatedness of rights is not foreign to Canadian law: access to certain health care services (including abortions, physician-assisted suicide and private medical insurance) is embedded within the *Charter*'s section 7 rights.³³

23. Canada's response to the Committee's Views suggests that the states negotiating the ICCPR "clearly did not intend for economic and social rights...to be encompassed under the right to life."³⁴ This interpretive approach ignores the fact that, like the *Charter*, the ICCPR is a "living instrument."³⁵ The rules of *Charter* interpretation similarly reject a rigid adherence to expressed wishes of its drafters and negotiators.³⁶ The Committee's interpretation is not a sudden, unprecedented expansion of the ICCPR: since at least 1982, the Committee has interpreted the right to life to include "positive measures" that "increase life expectancy."³⁷ The Committee's 2018 authoritative statement on the consolidated evolution of the right to life reaffirms that "[t]he right to life is a right which should not be interpreted narrowly."³⁸ Indeed, Canada's response to the Committee appropriately acknowledged that protecting the right to life does impose positive obligations on states.³⁹

³³ [R. v. Morgentaler \(1988\), \[1988\] 1 SCR 30](#), Tab 30; [Carter v. Canada \(Attorney General\), 2015 SCC 5, \[2015\] 1 SCR 331](#), Tab 31; [Chaoulli v. Quebec \(Attorney General\), 2005 SCC 35, \[2005\] 1 SCR 791](#), Tab 32.

³⁴ Canada's Response at para. 18, Tab 45.

³⁵ UNHRC, *Judge v. Canada* (Views), 78th Sess., Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (13 August 2003), Tab 60.

³⁶ [Re B.C. Motor Vehicle Act \(1985\), \[1985\] 2 SCR 486](#) at para. 509, Tab 33.

³⁷ [UNHRC, CCPR General Comment No. 6: Article 6 \(Right to Life\), 60th Sess., UN Doc. HRI/GEN/1/Rev.1 \(entered into force 30 April 1982\)](#) at para. 5, Tab 61; Sarah Joseph, "Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36" (2019) 19:2 Human Rights Law Review 247 at p. 357, Tab 62; Taylor, *A commentary on the International Covenant on Civil and Political Rights* at p. 145, Tab 46.

³⁸ [General Comment No. 36](#) at para. 3, Tab 49.

³⁹ Canada's Response at para. 16, Tab 45.

24. Canada's failure to implement the Committee's Views is at odds with both the ICCPR and the broader international consensus on the indivisibility, interdependence, and interrelatedness of human rights. Striking Ms. Toussaint's claim now would effectively sanction an interpretation of Canada's domestic laws that ignores a widely accepted approach to interpreting its international human rights obligations. As set out in more detail below, that outcome would be inconsistent with the interpretive presumption that the *Charter* conforms with Canada's international law obligations.

25. ***The ICCPR's impact on Canada's domestic law.*** To grant Canada's motion, this Court must conclude not only that Canada's interpretation is the preferred or best reading of the *Charter*, but that it is plainly and obviously the only possible interpretation. Canada's position is that the right to life and the right to health operate in nearly watertight compartments.⁴⁰ It says that Canada's domestic law is settled in this regard.⁴¹ Given the interpretive presumption that the *Charter* conforms to Canada's international law obligations, it is not plain and obvious that Canada's interpretation of its obligations under the ICCPR is correct.

26. The *Charter* is "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."⁴² Canada acceded to the ICCPR and the Optional Protocol in 1976. This Court must therefore interpret sections 7 and 15 of the *Charter* in conformity with the guarantees set out in the ICCPR and the Optional Protocol, including the right to life in article 6 of the ICCPR.

⁴⁰ Canada Response at paras. 17-18, Tab 45; AGC Factum at para. 52.

⁴¹ AGC Factum at paras. 47.

⁴² [Reference Re Public Service Employee Relations Act \(Alta.\) \(1987\)](#) at p. 349 (per Dickson CJ), Tab 34 [*Re PSERA*].

27. There are two rationales for the presumption of conformity. First, given that the *Charter* was enacted to implement Canada's international human rights obligations, including the ICCPR, those obligations "clearly form part of the historical context of a *Charter* right and illuminate the way it was framed."⁴³ Canada's executive branch has represented to the Committee that the *Charter* is the primary vehicle for the implementation of the ICCPR.⁴⁴ International human rights law "must" therefore be "relevant and persuasive" when assessing the scope of the deliberately general and open-ended language in the *Charter*.⁴⁵

28. Second, the presumption of conformity reflects a judicial interpretative policy that domestic courts will facilitate – not frustrate – the fulfilment of Canada's international legal obligations.⁴⁶ The Supreme Court of Canada has acknowledged that, in ratifying the ICCPR and the Optional Protocol, Canada "obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*."⁴⁷ A state party's compliance with the ICCPR is assessed on a unitary basis: legislative, executive and judicial action are all equally attributable to the state.⁴⁸ The judiciary employs the presumption of conformity to avoid putting Canada at odds with its international legal obligations, including the ICCPR.⁴⁹

⁴³ [Quebec \(Attorney General\) v. 9147-0732 Québec inc., 2020 SCC 32](#) at para. 9, Tab 35 [*Quebec*].

⁴⁴ [UNHRC, "Human Rights Committee discusses report of Canada" \(8 July 2015\)](#), Tab 63; [UNHRC, Consideration of reports submitted by States parties under article 40 of the Covenant: Sixth Periodic Report, CCPR/C/CAN/6 \(28 October 2013\)](#) at para. 8, Tab 64; Jutta Brunnee and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l L 3 at p. 24, Tab 65.

⁴⁵ [Re PSERA](#) at p. 349 (per Dickson CJ), Tab 34; [Quebec](#) at para. 9, Tab 35.

⁴⁶ [R. v. Hape, 2007 SCC 26](#) at paras. 53-56, Tab 36 [*Hape*].

⁴⁷ [Re PSERA](#) at p. 349 (per Dickson CJ), Tab 34; [Quebec](#) at paras. 31-33, Tab 35.

⁴⁸ [UNHRC, General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 80th Sess., CCPR/C/21/Rev.1/Add.13 \(26 May 2004\)](#) at para. 4, Tab 66.

⁴⁹ [Hape](#) at paras. 53-56, Tab 36.

29. Canada's obligations are rooted in the customary international law rule of *pacta sunt servanda* rule, which has been codified in article 26 of the *Vienna Convention on the Law of Treaties*, to which Canada acceded in 1970.⁵⁰ *Pacta sunt servanda* is crucial to the preservation of the rule of law between states: it ensures that state parties cannot simply disregard or redefine their international legal obligations as contained in treaties and interpreted by authoritative international treaty bodies like the Committee.⁵¹ The presumption of conformity reflects the judiciary's desire to ensure that (where possible) Canada meets its binding commitments to the ICCPR and the Optional Protocol, in accordance with *pacta sunt servanda*.⁵² In its Periodic Reports to the Committee, Canada's executive branch cites the presumption of conformity, along with many examples of *Charter* cases employing that presumption, as evidence that it is complying with its legal obligations under the ICCPR.⁵³

30. ***Prior domestic court rulings do not defeat the presumption of conformity.*** In support of its motion to strike, Canada also relies on the Federal Court of Appeal's conclusion that Canada did not violate the *Charter* when it failed to provide access to health care to Ms. Toussaint.⁵⁴ Accepting Canada's position that Ms. Toussaint's claim is doomed to fail because of the Federal

⁵⁰ [Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, p. 331 \(23 May 1969\)](#) at Preamble, art. 26 [*Vienna Convention*]; [General Comment No. 31](#) at para. 3, Tab 66.

⁵¹ [UNHRC, General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 94th Sess., CCPR/C/GC/33 \(25 June 2009\)](#) at para. 13, Tab 67. See also: [Canada v. Alta Energy Luxembourg S.A.R.L., 2021 SCC 49](#) at para. 59, Tab 37.

⁵² [Hape](#) at paras. 53-56, Tab 36.

⁵³ [UNHRC, Consideration of reports submitted by state parties under Article 40 of the Covenant: Fourth Periodic Report, CCPR/C/103/Add.5 \(15 October 1997\)](#) at paras. 8-9, Tab 68; [ICCPR Sixth Report of Canada, Catalogue No. CH37-4/7/2013F-PDF \(2013\)](#) at paras. 15, 22-23, Tab 69 [Sixth Periodic Report]; [ICCPR Fifth Report of Canada, Catalogue No. CH37-4/7-2004E-PDF \(2004\)](#) at paras. 10, 34, 49, 51-52, 64, 72-73, 77-81, 87, 90, 95-97, 101, 105, 111-117, 118, 120-128, 135-137, 160-162, 166, 169-172, 174, 177-178 195, Tab 70. See also: [Selected Decisions of the Human Rights Committee under the Optional Protocol, 75th-84th Sess., Vol. 8, CCPR/C/OP/8 \(2007\)](#) at p. 416, Tab 71 (Canada's response cites the Supreme Court's decision in [United States v. Burns, 2001 SCC 7](#), Tab 38 as evidence that it is now "in substantial compliance" with the Committee's Views).

⁵⁴ AGC Factum at paras. 2, 57.

Court of Appeal's decision would undermine the persuasive authority of the Committee. Because domestic remedies must be exhausted before a communication to the Committee can be made,⁵⁵ Canada will *always* have a favourable domestic ruling to rely on to resist compliance with the Committee's Views. Automatically striking a plaintiff's claim on the strength of a prior domestic ruling would give Canada license to ignore its international legal obligations and the Committee, the "pre-eminent interpreter" of the rights enshrined in the ICCPR.⁵⁶

Effective Remedies

31. In addition to a compensatory remedy for Ms. Toussaint, the Committee also affirmed the importance of a systemic remedy: that Canada prevent future, similar violations of the ICCPR.⁵⁷ This type of remedy is consistent with Canada's international legal obligation to provide an "effective remedy" for ICCPR violations⁵⁸ and existing *Charter* principles and precedents, which permit expansions to under-inclusive benefits legislation to remedy *Charter* breaches.

32. ***The claim for systemic relief has a reasonable prospect of success.*** Like the right to an effective remedy in the ICCPR, section 24(1) of the *Charter* allows courts significant discretion to safeguard rights with "effective remedies"⁵⁹ that they consider "appropriate and just in the circumstances."⁶⁰ In its most recent Periodic Report to the Committee, Canada notes that its

⁵⁵ [Optional Protocol](#) at arts. 2, 5(2)(b).

⁵⁶ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed. (Oxford: Oxford University Press, 2013) at p. 22, Tab 72; [Optional Protocol](#) at art. 1; [Vienna Convention](#) at art. 26. See also: [Vienna Convention](#) at art. 27 (which prohibits state parties from invoking "the provisions of its internal law as justification for its failure to perform a treaty."); Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee*, 2nd ed. (Turku: Institute for Human Rights, Abo Akademi University, 2007) at p. 23, Tab 73.

⁵⁷ Defendant's Factum at para. 26, AGMR at pp. 42-43; [Toussaint HR Committee](#) at para. 13.

⁵⁸ [ICCPR](#) at art. 2.3(a).

⁵⁹ [Ontario \(Attorney General\) v. G, 2020 SCC 38](#) at paras. 94-95, Tab 39.

⁶⁰ [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, s 91\(24\)](#) at section 24(1).

Constitution “gives Canadian courts powerful remedial tools for the protection of *Charter* rights” as evidence of its compliance with the ICCPR.⁶¹ The plaintiff’s request for systemic relief sits comfortably within the ambit of these “powerful remedial tools.”

33. Systemic remedies are essential to the *Charter* and the rule of law. Section 52(1) of the *Constitution Act, 1982* provides that laws inconsistent with Canada’s Constitution are “of no force and effect.”⁶² *Charter* claimants can accordingly seek relief to vindicate not only their rights but also the rights of third parties.⁶³

34. At international law, this concept is reflected in the right to a non-repetition remedy. Non-repetition remedies are a core element of the right to an effective remedy. They guarantee that initial violations of international human rights law are accompanied by corrective systemic measures.⁶⁴ The Committee has noted that the purposes of the ICCPR “would be defeated” without the obligation “to take measures to prevent a recurrence of a violation of the Covenant.”⁶⁵ The *Charter*’s guarantees would be similarly defeated if it provided relief only for an individual claimant and otherwise allowed the underlying violation to persist. Canada’s

⁶¹ [Sixth Periodic Report](#) at para. 8, Tab 69.

⁶² [Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c. 11](#) at section 52(1).

⁶³ [R. v. Nur, 2015 SCC 15, \[2015\] 1 SCR 773](#) at para. 51, Tab 40, citing [R. v. Ferguson, 2008 SCC 6, \[2008\] 1 SCR 96](#) at para. 59, Tab 41.

⁶⁴ [General comment no. 31](#) at paras. 15, 17, Tab 66; [UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 60th Sess., Res. 60/147, UN Doc. A/RES/60/147 \(21 March 2006\)](#) at paras. 18, 23(h), Tab 74; [International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session, 56th Sess., Supp. No. 10, UN Doc. A/56/10 \(2001\)](#) at 30, Tab 75.

⁶⁵ [General Comment No. 31](#) at para. 17, Tab 66.

commitment to provide remedies under the ICCPR informs the scope and application of section 24(1) of the *Charter*.⁶⁶

35. Canada says that the plaintiff's pursuit of this systemic remedy is doomed to fail because international law obligations cannot "amend domestic legislation or policy."⁶⁷ But systemic remedies that correct *Charter*-infringing under-inclusiveness by requiring legislators to expand the scope and protection of legislation are well-established. For example, the Supreme Court has ordered for provincial human rights legislation to include "sexual orientation" as a protected ground and, in another case, has directed the government to provide state-funded sign language interpreters to ensure health care legislation is administered in a non-discriminatory manner.⁶⁸ Affirming and providing these types of systemic remedies is essential to, and consistent with, Canada's international law obligations to ensure an effective remedy under the ICCPR.

PART IV - ORDER REQUESTED

36. Amnesty Canada and ESCR-Net request an order:

- (a) permitting Amnesty Canada and ESCR-Net to make joint oral submissions at the hearing of this motion not exceeding 15 minutes, or such other duration as the Court may order;
- (b) that costs shall not be awarded to or against Amnesty Canada and ESCR-Net; and
- (c) granting such further orders as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2022

⁶⁶ [Henry v. British Columbia \(Attorney General\), 2015 SCC 24](#) at paras. 135-137, Tab 42.

⁶⁷ Defendant's Factum at paras. 66-67, AGMR at p. 56.

⁶⁸ [Vriend v. Alberta \(1998\), \[1998\] 1 SCR 493](#) at para. 179, Tab 43; [Eldridge v. British Columbia \(Attorney General\) \(1997\), \[1997\] 3 SCR 624](#) at paras. 95-96, Tab 44.



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SCHEDULE "A"

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4.	<i>Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)</i> (1990), [1990] 1 SCR 425	469-470
5.	<i>R. v. S. (R.J.)</i> (1995), [1995] 1 SCR 451	520
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7.	<i>R. v. Fercan Developments Inc.</i>, 2016 ONCA 269	61-62
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63.	UNHRC, "Human Rights Committee discusses report of Canada" (8 July 2015)	
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74.	<u>UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 60th Sess., Res. 60/147, UN Doc. A/RES/60/147 (21 March 2006)</u>	18, 23(h)
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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS, Can. TS 1976 No. 47 \(entered into force 23 March 1976\)](#)

Article 2. 3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity

Article 6. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Vol. 999,1-14668 Crime of Genocide.⁶⁹

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground

⁶⁹ This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. [Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 2200A XXI \(entered into force 23 March 1976\)](#)

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 5

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. [Human Rights Committee, Rules of procedure of the Human Rights Committee, CCPR/C/3/Rev.12](#)

Rule 106

1. The Committee shall designate a Special Rapporteur for follow-up on Views adopted under article 5 (4) of the Optional Protocol, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's Views.

2. The Special Rapporteur may make such contacts and take such action as appropriate for performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the Committee as may be necessary.

3. The Special Rapporteur shall regularly report to the Committee on follow-up activities.

4. The Committee shall include information on follow-up activities in its annual report.

4. [Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, p. 331 \(23 May 1969\)](#)

Preamble

The States Parties to the present Convention, Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

Article 26. "PACTA SUNT SERVANDA"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. INTERNAL LAW AND OBSERVANCE OF TREATIES

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

5. [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, s 91\(24\)](#)

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

6. [Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c. 11](#)

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

NELL TOUSSAINT v. ATTORNEY GENERAL OF CANADA
Plaintiff Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE INTERVENER AMNESTY
INTERNATIONAL CANADA AND
ESCR-NET – INTERNATIONAL
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