Court File Number: T-1301-09

FEDERAL COURT

BETWEEN:

NELL TOUSSAINT

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF HEALTH

Respondent

MEMORANDUM OF ARGUMENT

OVERVIEW

The Federal Government is authorized to cover the medical expenses for anyone subject to immigration jurisdiction who cannot pay those expenses on their own. The Applicant is subject to immigration jurisdiction. She is destitute and has developed a number of serious medical conditions, at least partly because she has not had adequate access to health services.

The Applicant applied for health coverage under the Interim Federal Health (IFH) Program but was refused because she did not fall into any of the categories of persons that the program aims to serve. However, the order-in-council authorizing the IFH Program does not limit payment to such categories of persons. The Applicant argues on this application that this decision violates both sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The Applicant further argues that the decision resulted from a wrongful interpretation of the enabling authority for Federal health coverage for immigrants and represented an unlawful fettering of discretion.

PRELIMINARY ISSUE - THE PROPER PROCEEDING

The Applicant has challenged the determination that she does not qualify for the IFH Program in two separate proceedings. As further outlined below, it would appear that the IFH Program is authorized by a 1957 Order in Council. As the *Immigration and Refugee Protection Act* ("IRPA") makes no mention of health coverage, the Applicant takes the

position that the review of the decision excluding her from health coverage is not subject to s.72(1) of the IRPA. As a result, the Applicant makes a direct Application for Judicial Review in the within Application. Out of an abundance of caution in determining the proper proceeding, and to preserve her right of judicial review, however, the Applicant has also submitted an Application for Leave in Court File No. Imm-3761-09.

PART I - STATEMENT OF FACTS

1. The Applicant is a foreign national who has resided in Canada for over 9 years. She has made application for permanent residence based on humanitarian and compassionate grounds and is identified by a FOSS number in CIC's tracking system. The Applicant has developed a number of serious medical conditions. She is poor and lacks the financial resources to pay for the medical care she needs and has no public or private health coverage. Her health is at risk with possible life-threatening consequences because of an inability to pay.

2. The Applicant is 40 years old, a woman of colour and a national of Grenada. In Grenada she had been working for a Canadian company which was shut down following a hurricane. She came to Canada from Grenada on December 11, 1999 as a visitor. When she came she found opportunities to work and support herself. She has continuously resided in Canada ever since her arrival here.[1]

3. On September 12, 2008 the Applicant made an application for permanent residency from within Canada based on humanitarian and compassionate considerations. She could not pay the $550 application fee and she requested that the Minister of Citizenship and Immigration waive the fee. The Minister rejected her request. This decision is a separate subject of judicial review, and is presently under reserve in Court File No. IMM-326-09.[2]

---

1 Toussaint affidavit, paragraphs 2 and 3

2 Toussaint affidavit, paragraphs 7 and 12

4. When the Applicant came to Canada she did not have any immediate health care needs. She did not see a physician in Canada during her first three years here, and when she first saw a doctor she paid for it and she paid for subsequent appointments out of money she was earning whenever she was able to.[3]

5. The Applicant supported herself by working at a variety of jobs including factory work, baby sitting, and cleaning between 1999 and 2006. On occasion her employer deducted amounts for federal and provincial taxes, Canada Pension Plan, and Employment Insurance. She has been recognized as a resident of Canada by Canada Revenue Agency.[4]

6. In 2006 the Applicant developed an abscess on her right side which required drainage and she was left with chronic pain and difficulty walking. This forced her to largely discontinue working. From 2008 on she had no fixed income. She did receive occasional money by collecting aluminums and other returnable cans from the garbage and on occasion by helping friends and others with light housekeeping.[5]

7. In June 2008 the Applicant went to Women's College Hospital in pain after being referred there for an operation for the removal of her uterine fibroids. She was unable to see the surgeon because she did not have health coverage and was unable to pay for her health care. Afterwards she went to several different community health centres seeking help to arrange an operation but was turned down. Eventually, through the help of a caseworker she was accepted at York Community Services who arranged for her to have the operation at Humber River Regional Hospital in November 2008. Humber River Regional Hospital has indicated the Applicant owes $9,385 for her stay there.[6]

8. Later in November 2008, the Applicant presented to St. Michael's Hospital emergency room with uncontrolled hypertension. During a ten-day stay at that hospital she was

---

3 Toussaint affidavit, paragraph 4

4 Toussaint affidavit, paragraphs 5 and 6

5 Toussaint affidavit, paragraph 5

6 Toussaint affidavit, paragraphs 8 to 10

found to have nephrotic syndrome, a disorder in which the kidneys are damaged. A renal biopsy is required to definitively establish the cause of the nephritic syndrome. The nephrologist following the Applicant for her kidney problems decided not to undertake a renal biopsy, in large part due to the Applicant's inability to pay should complications arise or should medication be needed depending on the results of the renal biopsy.[7]

9. At the end of February 2009 the Applicant developed increasing pain in her right leg. The family doctor who was then seeing her at York Community Services sent her to the St. Michael's Hospital emergency department. She was asked to return the next day for an ultrasound. When she did so, the hospital personnel refused to carry out the ultrasound because she did not have OHIP (Ontario Health Insurance Plan) public health coverage and could not pay for the procedure. Shortly afterwards that same day the Applicant developed chest pain on her left side. She subsequently learned that the pain was caused by a life-threatening pulmonary embolism.[8] Two days later, on March 2, 2009, the Applicant was rushed to the St. Michael's Hospital emergency department because she was dangerously ill and at imminent risk of her life. She was admitted and kept in hospital until March 12, 2009. Pulmonary embolism can result in sudden death. The hospital's refusal to carry out an ultrasound could have proved fatal. This highlights the precariousness of the Applicant's access to health care.[9] Other serious health problems experienced by the Applicant are set out in the affidavit of Dr. Guyatt.[10]

10. On April 1, 2009 the Applicant was approved to receive social assistance from the Ontario Works program, having confirmed to them that she was in the process of applying for permanent residence from within Canada, based on humanitarian and compassionate grounds. While the Applicant has been self-supporting throughout much of her time in Canada, her lack of access to essential health services has, at least in part, resulted in her being unable to work at the time being. However,

---

7 Toussaint affidavit, paragraph 11; Guyatt affidavit, exhibit A,

8 Toussaint affidavit, paragraph 13

9 Toussaint affidavit, paragraph 14; Guyatt affidavit, exhibit A

10 Guyatt affidavit, exhibit A

Ontario Works only pays for certain medication and it does not pay for any medical services.[11]

11. The Applicant applied for coverage under the Interim Federal Health (IFH) Program on May 6, 2009, pointing out, among other things, that she has serious medical problems and lacks the funds to pay for necessary medical care. She was denied coverage by letter dated July 10, 2009. That is the decision which is the subject of this application.[12]

12. Without health coverage the Applicant is constantly anxious whether she will get treatment or not, or whether delays in obtaining it will jeopardize her health or her life. This frequently causes her to be unable to sleep and makes her exhausted, and she often is depressed.[13] Every time the Applicant has an appointment she becomes anxious about whether when she arrives she will be turned away because she cannot afford to pay. The uncertainty causes her anxiety and stress, and makes her feel even worse and exacerbates her chronic pain. The Applicant has a very reasonable anxiety that any health care that she receives in the future may result in additional bills that she will be unable to pay.[14]

13. Since being denied benefits under the IFH Program the Applicant continues to experience serious risks to her health or life by her inability to pay for, and lack of access to coverage for, her healthcare.

14. Due to a family history of large bowel cancer and the fact that she is at high risk because of her recent pulmonary embolus, on July 16, 2009 a gastroenterologist recommended that the Applicant undergo a gastrocolonoscopy. This has not taken place because of her lack of health coverage.[15]

---

11 Toussaint affidavit, paragraphs 16 and 17, Hwang affidavit, exhibit B

12 Toussaint affidavit, paragraphs 21 and 22

13 Toussaint affidavit, paragraph 24

14 Toussaint affidavit, paragraph 25, Hwang affidavit, exhibit B

15 Toussaint affidavit, paragraphs 28 and 29

15. On August 20, 2009 the Applicant went to St. Michael's Hospital emergency department on the referral of the nephrologist with a note indicating he was concerned that she may have another pulmonary embolism. She was admitted to the hospital in the early morning of Friday, August 21, 2009. The nephrologist visited her on August 21, 2009 in the afternoon. During his visit he asked her how she will be paying for the attendance and the stay in the hospital. She said that she didn't know.[16]

16. The Applicant has severe medical problems that markedly impair her quality of life, are likely to decrease her longevity, and could be life-threatening over the short term. Delays and outright exclusion from medical treatment create a serious risk to her health and may have life threatening consequences.[17]

PART II - ISSUES

17. The Applicant raises the following issues:

A. The decision denying her coverage under the Interim Federal Health Program violated s.7 of the *Canadian Charter of Rights and Freedoms* and is not saved under s.1 of the *Charter*.

B. The decision denying her coverage under the Interim Federal Health Program violated s.15 of the *Canadian Charter of Rights and Freedoms* and is not saved under s.1 of the *Charter*.

C. The decision denying her coverage under the Interim Federal Health Program violated principles of international law, including international conventions to which Canada is signatory.

D. The Minister, in denying the Applicant coverage under the IFH Program, erred on administrative law principles and unlawfully fettered his discretion.

PART III SUBMISSIONS

Standard of Review

16 Toussaint affidavit, paragraph 37

17 Guyatt affidavit, exhibit A; Hwang affidavit, exhibit B

18. The Applicant alleges that the Minister's decision denying the Applicant Interim Health coverage is wrong at law in that it violates the *Charter*, violates Canada's international obligations and does not comply with the IFH enabling authority. To this extent, it is clear that the appropriate standard of review is that of correctness. Even on the more deferential reasonableness standard, however, the Applicant submits that the decision under review lacks justification, transparency and intelligibility and, as such, should be quashed.[18]

A. The Exclusion of the Applicant from the IFH Program violates s.7 of the *Charter*

19. In order to succeed under s. 7, a claimant must show (a) that there has been a deprivation of life, liberty or security of the person, or some combination thereof, and (b) that this deprivation is not in accordance with the principles of fundamental justice.

1. The Right to Life, Liberty and Security of the Person Under s. 7 of the *Charter*

20. Section 7 protects interests fundamentally related to human life, liberty, personal security, physical and psychological integrity, dignity and autonomy. These interests are protected because they are "intrinsically concerned with the well-being of the living person ... based upon respect for the intrinsic value of human life and on the inherent dignity of every human being."[19] Section 7 is implicated "when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity".[20]

21. As Justice Wilson noted almost twenty years ago: "government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members."[21] The Supreme Court has recognized that health care "touch[es] the core of what it means to be an autonomous human being

---

18 *Dunsmuir v. New Brunswick*, 2008 SCC 8

19 *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519 at 585, per Sopinka J.

20 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177.

21 *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 544.

blessed with dignity and independence in 'matters that can properly be characterized as fundamentally or inherently personal'[22] The Supreme Court has consistently emphasized the importance of health and health care decision-making to life, liberty and security of the person.[23]

22. In two seminal cases, the Supreme Court of Canada has considered the application of section 7 to the issue of access to healthcare. In *Morgentaler*,[24] the Court considered the application of section 7 to the issue of access to therapeutic abortions. And more recently, in *Chaoulli*,[25] the Court considered the issue of whether unreasonable wait times in the public healthcare system and the denial of access to alternative care through private health insurance to those affected by delays violated the rights to life and personal inviolability under the *Quebec Charter of Human Rights* as well as section 7 of the *Canadian Charter*.

23. Justice Deschamps, writing for the majority in *Chaoulli* restricted her findings to the rights to life and personal inviolability under the Quebec Charter. However, she recognized that the "the right to life and liberty protected by the *Quebec Charter* is the same as the right protected by the *Canadian Charter*." She further noted that: "Canadian jurisprudence shows support for interpreting the right to security of the person generously in relation to delays."[26]

24. Writing for three of the four justices in the majority in *Chaoulli*, Chief Justice McLachlin and Justice Major assessed the application of section 7 of the *Canadian Charter* to the evidence of delays in accessing medical care. She wrote that "the jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the *Charter*."

---

22 *R. v. Clay*, 2003 SCC 75 at para. 31

23 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras 83, 217.

24 *R. v. Morgentaler*, [1988] 1 S.C.R. 30

25 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791.

26 *Chaoulli*, supra, at para. 43.

> In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. … In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails.

25. The impugned decision in the present case is analogous to the legislative schemes considered by the Supreme Court of Canada in *Morgentaler* and *Chaoulli.* The Applicant is unable to obtain health insurance through the public healthcare system. The decision to exclude her from coverage under the IFH Program effectively denies her access to alternative healthcare.

26. As in *Morgentaler* and *Chaoulli*, the delays have increased the Applicant's risk of life threatening illness, in this case including pulmonary embolism. They have had serious consequences for her longer term health and have caused her to suffer severe pain for prolonged periods of time She has experienced serious anxiety and psychological suffering as a result of the constant uncertainty regarding whether she will be able to secure necessary healthcare in a timely fashion.[27]

27. Unlike the patients considered in *Chaoulli,* who had financial resources to purchase private healthcare insurance, the Applicant in the present case lives in poverty and is unable to pay for either private health care or for private health insurance. The remedy sought by more affluent Applicants in *Chaoulli* would be entirely ineffective in vindicating the present Applicant's rights under s. 7.

---

27 Toussaint affidavit, para. 24, Hwang affidavit

28. The rights of those who cannot afford to pay for private healthcare insurance were not considered in *Chaoulli*. Chief Justice McLachlin noted that in that case, the applicants were not asking the government to spend more money on healthcare, stating in *obiter*, that: "The *Charter* does not confer a freestanding constitutional right to health care." She goes on, however, to describe the constitutional issue before the Court in that case: " …where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."

29. The issue in the present case is on all fours with the issue in *Chaoulli*. The Applicant does not seek any new benefit but only access to an existing one. She does not claim a freestanding right to publicly financed healthcare – only inclusion in an existing program which covers the cost of healthcare for those who are otherwise unable to pay for it.

30. The section 7 analysis in *Chaoulli* should **not** be interpreted as affirming that governments have obligations to protect the rights for the more affluent to access to healthcare but not the rights of those living in poverty. The Chief Justice has emphasized elsewhere that poverty-related barriers to the equal enjoyment of *Charter* rights must receive full consideration so that the poor are not treated as "constitutional castaways."[28] In *Chaoulli* she criticized the existing regime for restricting access to private healthcare to the very rich:

> The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.[29]

---

[28] *R. v. Prosper*, [1994] 3 S.C.R. 236 at para. 102.

29 *Chaoulli*, supra, at para. 106.

31. The fact that the remedy required by the Applicant in the present case relates to the conferring of a benefit rather than a legislative restriction or 'interference' does not remove her circumstances from the proper scope of section 7. As noted in *Singh v. Canada*: "the right to security of the person means not only protection of one's physical integrity, but the provision of necessaries for its support."[30]

32. The Supreme Court of Canada has found in relation to the protection of familial relationships in child custody proceedings that the right to security of the person may place obligations on governments to provide benefits to those whose poverty would otherwise deny them access to protections that are necessary to section 7.[31] While the Supreme Court has excluded corporate economic rights from the scope of section 7, it has distinguished these from rights "included in various international covenants", which may be "fundamental to human life or survival."

33. In *Gosselin v. Québec (Attorney General)*, a majority of the Court again held that in future cases section 7 may be found to include "a positive obligation to sustain life, liberty or security of the person,"[32] while Justice Arbour found that positive rights "intimately intertwined with considerations related to one's basic health (and hence security of the person) – and ... one's survival (and hence "life") ... can readily be accommodated under the s. 7 right..."[33]

34. As Lorne Sossin has noted:

> By establishing the connection between deprivations of the basic necessaries of life and fundamental rights, *Chaoulli* may well be the first step through the doors left open in *Irwin Toy* and *Gosselin* ... If state obligations to those in need are not foreclosed under the Constitution ... then it is hard to imagine more compelling settings

---

30 Singh v. Canada [1985] 1 S.C.R. 177 at 206-07, citing Law Reform Commission of Canada, Medical Treatment and the Criminal Law – Working Paper No. 26 (Ottawa: Supply and Services Canada, 1980) at 6.

31 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46

32 *Gosselin v. Québec (Attorney General)*, 2002 SCC 204 at paras 82-83, McLachlin C.J.; at para. 414, LeBel, J.

33 Ibid. at para. 311, Arbour J.

> for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support.[34]

35. The right to access healthcare is now widely recognized and applied by courts around the world as a component of the right to life and security of the person which places positive obligations on governments. The Indian Supreme Court has held that: "The right to health for workers is an integral facet of meaningful right to life..."[35] In its well known 2002 decision in *Minister of Health and Others* v. *Treatment Action Campaign and Others*, the South African Constitutional Court required the provision of antiretroviral drugs to HIV-positive pregnant women throughout the country as a requirement of the right to health.[36] In *Cruz Bermudez et al* v. *Ministerio de Sanidad y Asistencia Social*, the Supreme Court of Venezuela held that the right to life and the right to health are closely linked, and on that basis ordered the provision of antiretrovirals and other medications, as well as the design and funding of programs necessary for affected patients' treatment and assistance.[37]

2. The Decision to Deny Healthcare Coverage Violates of Principles of Fundamental Justice

36. The principles of fundamental justice are those "about which there is significant societal consensus" that they are "fundamental to the way in which the legal system ought fairly to operate". Decisions that are "arbitrary or irrational" violate fundamental justice.[38] The societal consensus in Canada that human life must be respected is central to fundamental justice.[39] The principles of fundamental justice have both a substantive and a procedural component.[40] As Justice LaForest explains in *Godbout* v. *Longueuil*:

---

34 Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto:University of Toronto Press, 2005) 161 at 178.

35 *Consumer Education and Research Centre and Others v. Union of India and Others*, (1995) AIR Indian Supreme Court 922 at paras 24-30 (Date of Decision: 27 January 1995); see also *Paschim Banga Khet Mazdoor Samity and Others v. State of West Bengal and Another* (1996), AIR Indian Supreme Court 2426.

362002, (5) South African Law Reports 721 (CC) (Date of Decision : 5 July 2002).

37Decision No. 916 of the Administrative Law Court of the Supreme Court of Justice of Venezuela, Case No. 15.789 (Date of Decision: 15 July 1999).

38 *R. v Malmo-Levine; R. v. Caine*, 2003 SCC 74 at paras 115, 135.

39 *Rodriguez*, supra at 608.

[40]*R . v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 63.

> ... if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in term of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally. [41]

37. A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]."[42] In *Chaoulli*, the Chief Justice and Justice Major described the principle in the following terms:

> The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.[43]

38. The interest at stake in the present case - access to life sustaining health care - places the highest possible onus on the government to establish a clear connection in theory and in fact between the exclusion of certain classes of immigrants and the purpose of the IFH Program. The exclusion of the Applicant and others in her circumstances from the IFH Program, however, bears no rational connection to the purpose of providing persons subject to immigration jurisdiction, otherwise without access to healthcare, with financial assistance with the costs of healthcare.

39. Moreover, no consideration appears to have been given of alternative means of obtaining necessary healthcare. There is no transparency, predictability, rationality or accountability to the decision to disqualify the Applicant from access to healthcare. The Applicant was not given any reasons for her disqualification from the benefit which she could address or respond to in a meaningful way. She was

---

41 *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844 at para. 74.

42 *Rodriguez*, at pp. 594-95.

43 *Chaoulli*, supra, per Mclachlin, CJ., at para. 131.

simply told that she was ineligible because she did not belong to one of a list of groups who are provided the benefit.

40. The impugned decision was therefore contrary to principles of fundamental justice in a procedural as well as a substantive sense, as described by Dickson, C.J. in *Morgentaler*, relying on vague or unknown criteria with no opportunity for reasoned response.[44] As Martha Jackman has written:

> when governments or other publicly funded health care providers make policy or regulatory decisions affecting the allocation of health care resources and services, they should ensure that those whose fundamental interests are at risk are adequately involved. As in the individualized treatment setting, in order for regulatory decisions that adversely affect health related interests to be characterized as fundamentally just within the meaning of section 7, decision-making must become more inclusive and accountable.[45]

41. The decision in this case is analogous to the case of *Collin* v. *Lussier* in which the Federal Court found that the decision-making process in relation to a denial of access to treatment did not conform with the principles of fundamental justice. [46]

42. Further, as will be developed below, the exclusion of the group to which the Applicant belongs is contrary to basic tenets of our legal system: it is discriminatory, contrary to section 15 and to international human rights law, and hence not in accordance with principles of fundamental justice.

B. The Exclusion of the Applicant from IFH Coverage violates s.15 of the *Charter*

---

[44] *Morgentaler*, *supra*, at pp 63 – 73.

[45] Martha Jackman, The Implications of Section 7 of the Charter for Health Care Spending in Canada Discussion Paper No. 31 (Saskatoon: Commission on the Future of Health Care in Canada, 2002)

[46] Collin v. Lussier. 1983. [1983] 1 F.C. 218 (Federal Court of Canada)

43. The applicant alleges that the denial of healthcare coverage under the IFH Program violates her right to the equal benefit of the law without discrimination on the grounds of disability and citizenship.

44. In *R.* v. *Kapp*, the Supreme Court of Canada eschewed the formalism of some recent applications of the approach to equality claims laid out in the *Law* decision. The Court noted that the application of the *Law* test had been criticized for having narrowed equality analysis to "an artificial comparator analysis focused on treating likes alike."[47] The Court called for a recommitment to the ideal of substantive equality as it was affirmed in *Andrews*:

> Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. [48]

45. The Court endorsed a return to the two-part test for determining discrimination under section 15, as first articulated in *Andrews v. Law Society of British Columbia*:

> (1) Does the law create a distinction based on an enumerated or analogous ground? And
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

1. The Exclusion from the IFH Program Discriminates on the Ground of Disability

i) Creates a Distinction based on Disability

46. The Applicant in this case suffers from serious health complications related to diabetes. She is mobility impaired and has become unable to work because of her disabilities. [49] Her disability has forced her into extreme poverty and more recently,

---

[47] *R. v. Kapp*, 2008 SCC 41 at para 22 [hereinafter, *Kapp*].
[48] *Ibid.*, at para 15.
[49] Diabetes was accepted as a disability for the purposes of s.15 by the Federal Court of Appeal in *Bahlsen v. Canada (Minister of Transport)*141 D.L.R. (4th) 712, and in *Hines v. Nova Scotia (Registrar of Motor Vehicles)* 73 D.L.R. (4th) 491.

to rely on social assistance. She describes in her affidavit her experience of vulnerability and negative stereotypes associated with being an immigrant with a disability. Those she encounters in the healthcare system and with whom she may have to negotiate for pro bono treatment in public waiting rooms "may think that I have set out to "take advantage" of Canada's healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society but who has become ill and needs healthcare to save my life."[50]

47. The Applicant notes that when people do not want her to receive coverage for the healthcare necessary for her life and security, her life and health are devalued because of her immigration status and her disability. This makes it more difficult to maintain her dignity and self-esteem.[51]

48. Considering both the functional limitations of the claimant and, most importantly, how those limitations have been treated by the government and by society at large, it is clear that the Applicant's health conditions constitute a disability for the purposes of section 15. [52]

49. In *Law v. Canada* the Court set out a two part inquiry to determine if a distinction has been made on the basis of a ground of discrimination. "Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?"[53]

(2d) 139
[50] Affidavit of Nell Toussaint, supra, at para. 35.
[51] Ibid, para. 36.
[52] Ibid, paras 31 – 40.
[53] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 39,

50. While the exclusion of particular classes of immigrants from healthcare coverage does not draw a formal distinction on the basis of disability, it nevertheless gives rise to a distinction on the ground of disability under the second aspect of the analysis. It fails to accommodate the unique needs and circumstances associated with disability.

51. A foreign national without a disability would not be likely to experience as severely the adverse consequences of exclusion from the IFH Program as has the Applicant. Indeed, prior to the development of complications related to diabetes that resulted in loss of employment, the Applicant did not have serious healthcare needs. She did not see a physician for the first three years of her residency in Canada. While employed, she was initially able to pay for her appointments with a physician. It was after she developed more serious health complications related to her disability that her healthcare needs increased, along with her poverty, and she experienced the more adverse consequences of her exclusion from the IFH Program.

52. Moreover, the Applicant's unique circumstances or needs related to her disability were not taken into account in any individualized assessment of her application for coverage under the IFH Program. She was denied coverage on the sole basis that she did not belong to a list of groups of immigration categories provided with coverage. This type of decision, in light of its severe consequences for the dignity and security of the applicant, falls squarely within the category of suspect decision-making in relation to disability. It manifestly fails to consider or address the adverse effect of a policy that is facially neutral in relation to disability but which, without thorough individualized consideration and accommodation of unique circumstances, may have life threatening consequences.

53. The fact that not all immigrants with disabilities are denied coverage under the IFH Program does not prevent a finding of a distinction based on the ground of disability. As noted in *Nova Scotia (Workers' Compensation Board) v. Martin*, the Supreme Court "has long recognized that differential treatment can occur on the basis of an

enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated."[54]

ii) The Distinction is Discriminatory on the Basis of Disability

54. In the second aspect of the section 15 analysis, it must be determined if the distinction constitutes discrimination by perpetuating disadvantage and stereotyping. The analysis of whether a distinction is discriminatory must address "the broader context of a distinction in a substantive equality analysis."[55]

55. In the case of disability discrimination, the perpetuation of stereotyping and disadvantage is usually linked to the discriminatory effect of a failure to accommodate unique needs and circumstances. It is not necessary to establish that persons with disabilities who are excluded from the IFH Program are subject to different or more egregious stereotypes in comparison to those with disabilities who are included in the Program.

> The rationale underlying the prohibition of disability-based discrimination is the imperative to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities in a vast range of social contexts. It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons.[56]

56. The application of and perpetuation of stereotypes in the case of disability may also be directly linked simply to a refusal to reasonably allocate resources to address disability related needs. In the *Eldridge* case, when governments argued that they were not required by section 15 of the *Charter* to allocate scarce healthcare resources to ensure effective communication between hearing impaired patients and healthcare providers, Justice LaForest, writing for a unanimous Court, vigorously

---

[54] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 S.C.R. 504,* at para.76

[55] *Ermineskin Indian Band and Nation v. Canada,* 2009 SCC 9. at para 194

[56] Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 S.C.R. 504 para. 89.

rejected the notion that governments should be entitled to provide benefits to the general population without ensuring that the disadvantaged have the resources to take full advantage of those benefits:

> In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. … This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; …. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons …[57].

57. The Supreme Court noted in *Eldridge* that adverse effects discrimination is especially relevant in the case of disability. "The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled."[58]

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. … This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the 'equal concern, respect and consideration' that s. 15(1) of the *Charter* demands. Instead they have been subjected to the paternalistic attitudes of pity and charity …"[59]

58. As first noted in *Andrews*, and affirmed in *Law*: "It will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances."[60]

59. The nature of the interest affected in the present case - access to life sustaining healthcare – also leads to a conclusion that the distinction constitutes discrimination

---

[57] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para. 71.
[58] Ibid, at para. 64.
[59] *Eldridge, supra* at para. 56

[60] *Law*, supra, at para. 70.

in the substantive sense. The Applicant notes in her affidavit that being denied access to healthcare that is potentially life-saving is experienced as a devaluation of her life and health. In *Eldridge*, the Court referred to the values underlying the healthcare system as the promotion of health and the prevention and treatment of illness and disease. The Court found that "There could be no personal characteristic less relevant to these values than an individual's physical disability." [61]

2. The Exclusion from the IFH Programs Discriminates Based on Citizenship

i) Policy Creates a Distinction on the Ground of Citizenship

60. The distinction on the ground of citizenship status in this case is a formal distinction, evident on the face of the decision. Ms. Toussaint was disqualified from any coverage for necessary medical care explicitly because her citizenship status as a foreign national seeking permanent residency on humanitarian and compassionate grounds did not place her in any of the listed classes of immigrants deemed eligible for the benefit.

61. The fact that the members of the comparator group who receive the benefit are also non-citizens does not negate the fact that the applied policy creates a distinction based on citizenship status. Just as in *Martin*, the distinction between two types of disabled workers was still a disability-based distinction, so in the present case, the disqualification of one group of non-citizens on the basis of the particular immigration status is still a decision based on citizenship.[62]

62. Non-citizens, particularly those who are undocumented or seeking humanitarian and compassionate consideration in the situation of the Applicant, are subject to negative stereotypes and stigmas such that any distinction which excludes sub-groups of non-citizens must be seen as "suspect."

---

[61] *Eldridge, supra*, at para. 59.
[62] *Nova Scotia v. Martin, supra* at para. 80.

> It is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated"…In my view, this dictum applies no matter what the nature of the impugned law."[63]

63. The particular group that is excluded by the impugned policy in the present case includes the most marginalized and disadvantaged of the class of non-citizens. Undocumented migrants have been recognized both within Canada and internationally as suffering from multiple disadvantages, usually including language, poverty, low education and lack of access to basic services.[64] Racialized women with disabilities experience intersecting and compound discrimination and disadvantage.

Ameliorative Purposes

64. The fact that the IFH program has an ameliorative purpose in relation to non-citizens does not relieve the government of an obligation not to exclude a disadvantaged sub-group of non-citizens. According to *Law*, "underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination." This has been applied in a wide range of cases analogous to the present one.

65. In *Schachter*,[65] the Supreme Court found that parental benefits previously available only to mothers must be extended to fathers so as not to be under-inclusive on the ground of sex. In *Dartmouth/Halifax County Regional Housing Authority v. Sparks*,[66] the Nova Scotia Court of Appeal found that security of tenure

---

[63] *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 45.
[64] Affidavit of Ilene Hyman.
[65] *Schachter v. Canada*, [1992] 2 S.C.R. 679
[66] [1993] 101 D.L.R. (4th) 224 (N.S.C.A.),

protections must be extended to public housing tenants so as to remove discrimination on grounds of sex, race, marital status and poverty. In *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health),* the Ontario Court of Appeal made an order pursuant to a human rights complaint, striking out an age restriction in the visual aids category of the Assistive Devices Program. The Court reasoned as follows:

> Special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within that program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate. …. Once it can be shown that an individual whom a special program is designed to assist is being discriminated against and that there is no rational connection between the prohibited ground of discrimination and the program, the provider of the program must remove the discrimination.[67]

66. As noted above in relation to the principles of fundamental justice, under section 7, there is no rational connection between the characteristics of the classes of non-citizens who are denied access to the IFH Program and the purposes of the Program. The exclusion from healthcare coverage on the ground of citizenship status must be found to be discriminatory within the meaning of section 15.

3. The Exclusion of the Applicant from the IFHP is Not Saved by Section One

67. A Section One analysis must be guided by the values underlying the *Canadian Charter*, which have been identified as including social justice, enhanced participation in society and the provisions of international human rights instruments ratified by Canada.[68]

68. While governments are to be accorded some deference in relation to the allocation of healthcare resources, recent jurisprudence has placed clear limits on the level of

---

[67] Ontario (Human Rights Comm.) v. Ontario (Ministry of Health) (1994), 21 C.H.R.R. D/259 (Ont. C.A.) at para. 49

[68] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at p. 344; *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 64; *R.* v. *Oakes* (n. 75 above), p. 136; *Irwin Toy Ltd. v. Quebec (Attorney General),* (n. 25 above), pp. 1003-4; *Vriend v. Alberta* (n. 33 above), para. 64; *Eldridge v. British Columbia (Attorney General)* (n. 35 above), para. 73.

deference to be accorded in this area. Healthcare decision-making directly engages *Charter* protected interests and courts are required to protect those interests. Courts are further mandated by section one to require the government to show that its action is "motivated by a reasonable objective connected with the problem it has undertaken to remedy."[69]

69. In *M. v H.*, Justice Bastarache set out a number of factors to consider in determining the degree of deference to be accorded to decision-makers including: the nature of the interest involved; the vulnerability of the group affected; the complexity of the issue being determined; the source of the rule or decision; and the extent to which the provision is adopted as a result of "moral judgments in setting social policy."[70] In the present case the interest affected is fundamental to the protection of life; the group affected is one of the most vulnerable in society; the basis of the exclusion is not complex; and the source of the rule is not Parliament but an un-elected decision-maker. All of these factors weigh against according the Respondent deference in this case.

70. Under section one the demonstration of a reasonable limit involves consideration of five related questions:

i) Does the policy address concerns that are "pressing and substantial"?

As noted by the Supreme Court of Canada in N.A.P.E., "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities."[71] In the present case, there is no evidence of any fiscal emergency which would

---

[69] *Chaoulli*, supra, at para. 87.
70M. v H., [1999] 2 S.C.R. 3 at paras. 305-321, per Bastarache J.

[71] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 at para. 72

justify so extreme a measure as excluding an entire class of vulnerable immigrants from access to basic healthcare.

ii) Is the substance of the law "rationally connected to the objective"?

There is no rational connection between the excluded groups and any identified objective of the IFH Program.

iii) Does the law impair the right no more than is reasonably necessary?

There has been no consideration or accommodation of the Applicant's needs whatsoever in the decision to deny her coverage.

iv) Is there proportionality between the effects of the legislation and the objectives?

The effects of the exclusion from access to basic healthcare include threats to life and personal security. There is no proportionality between these effects and any objectives of the policy.

v) Do the adverse effects of the measure outweigh its "actual salutary effects?[72]

There are no salutary effects of denying the Applicant and others in her circumstance access to any coverage for healthcare.

C. The Exclusion of the Applicant from IFH Coverage violates Canada's International Legal Obligations.

[72] Ibid.

71. In *Slaight Communications v. Davidson*, referring to the *International Covenant on Economic, Social and Cultural Rights*, the Supreme Court of Canada endorsed the statement of Dickson C.J. in the *Alberta Reference* that these and other sources of international human rights law must be "relevant and persuasive sources for interpretation of the *Charter*'s provisions."[73]

72. In *Baker*, the Court declared that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."[74] Justice L'Heureux-Dubé further elaborated on this point in *Ewanchuk*, where she stated that "our *Charter* is the primary vehicle through which international human rights achieve a domestic effect." "In particular," she noted that ss. 7 and 15 "embody the notion of respect of human dignity and integrity."[75] Canada's international human rights obligations must therefore be a relevant source of interpretation of the application of the *Charter* in the present case.

73. The right to healthcare is protected in a wide range of human rights instruments ratified by Canada. Of particular relevance is Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),[76] which recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." In its *General Comment* on Article 12 of the *ICESCR*, the U.N. Committee on Economic, Social and Cultural Rights (CESCR) has clarified that state parties to the Covenant are under an obligation "to respect the right to health by refraining from denying or limiting equal access for all persons, including … asylum seekers and illegal immigrants, to preventive, curative and palliative health services."[77]

---

[73] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 57; *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 144.
74 *Baker*, *supra*, at para. 70.
75 *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73.
[76] *International Covenant on Economic, Social and Cultural Rights*, (1966) 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [*ICESCR*].
[77] *General Comment No. 14*, *supra* at para. 11

74. In a more recent General Comment, the CESCR has clarified obligations with respect to non-discrimination on the ground of "nationality" as follows:

> The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care**.** The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[78]

75. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) similarly prohibits discrimination based on "race, colour or national or ethnic origin" in health care and other social programs. The UN Committee overseeing compliance with CERD has stated that States have an obligation "to respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services." [79]

76. These unequivocal obligations on Canada under international human rights law should inform the interpretation and application of sections 7 and 15 of the *Canadian Charter*. The IFHP is a critical component of the implementation of Canada's international human rights obligations to respect the fundamental human rights of migrant workers and undocumented residents. To comply with international human rights, however, the Program must be extended to any person subject to immigration jurisdiction who lacks the means to pay for necessary healthcare.

---

[78] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20 2 July 2009 at para. 30.; See also General Comment No. 30 of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

[79] UN Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 30 (2004): Discrimination Against Non-Citizens, A/59/18 (2004) 93 at para. 36

D. The Exclusion of the Applicant from IFH Coverage is an error of law and an unlawful fettering of discretion

77. The Applicant further argues that the Minister erred on administrative law principles in interpreting the authority providing for Interim Federal Health and fettered his discretion in concluding that the Applicant did not fit into a category of persons for whom health coverage is provided.

78. The authority on the part of the Federal Government to provide health coverage to those without immigration status is provided further to a 1957 Order in Council which, for ease of reference, states:

> The Board recommends that… the Department of National Health and Welfare be 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 maintenances 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,
>
> in cases where the immigrant or such a 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.[80]

79. The Applicant, as someone without status who has submitted various applications to Citizenship and Immigration Canada, is clearly someone who is "subject to immigration jurisdiction."

80. Since the 1957 Order in Council, the authority for providing Federal health coverage to immigrants has never been updated, nor amended. Neither the current

80 Order in Council P.C. 1957-11/848 dated June 20, 1957.

Immigration and Refugee Protection Act, nor Rules and Regulations promulgated thereunder make any mention of health coverage.

81. As mentioned above, Citizenship and Immigration Canada refused the Applicant's application for health coverage under the IFH program, as it found that Ms. Toussaint does not fall into any of the categories of individuals that the program "aims to serve." For ease of reference, the decision states in part: "As you have not provided any information to demonstrate that your client falls into any of the above-mentioned categories, I regret to inform you that your request for IFH coverage cannot be approved."[81] [emphasis added]

82. The Applicant respectfully submits that, in addition to the above *Charter* arguments, the decision maker in this matter misinterpreted the Federal authority to provide health care under the 1957 Order in Council and wrongfully fettered his discretion.

83. The 1957 Order in Council clearly grants the discretion to the Federal Government to pay the costs of the Applicant's medical expenses and hospitalization. She lacks the resources to pay for these expenses and she is subject to immigration jurisdiction. These are the only criteria required to come under the authorization set out in the Order.

84. Notwithstanding the language of the Order in Council, the clear and unambiguous wording of the decision indicates that the decision maker was under the impression that authorization to provide such funding was limited to the four groups of people set out therein. To this extent, the Applicant submits that the decision maker erred in his interpretation of the authorization to provide health care coverage.

85. There is no evidence in the refusal letter that the decision maker turned his mind to the *actual* eligibility of the Applicant for IFH benefits under the 1957 Order in Council. Rather, it would appear that the decision-maker mechanically applied the

---

81 Application Record, p. 2

Applicant's personal situation to a set of criteria that have no material connection to the actual wording of the Order in Council. The determination by the decision maker that the application for IFH coverage "cannot be approved" because the Applicant did not meet this imposed set of criteria is, therefore, the very definition of an improper fettering of discretion.[82]

86. As the Supreme Court noted in *Baker*, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.[83]

87. In this case, the Applicant has already argued that the Minister failed to exercise his discretion in accordance with the *Charter*. The Applicant has further argued that the Minister has failed to exercise his discretion in accordance with the fundamental values of Canadian society, as expressed in international treaties to which Canada is signatory. Furthermore, the Applicant respectfully submits, per *Baker*, that the Minister has failed to exercise his discretion in accordance with the boundaries of the enabling provision, but rather has arbitrarily narrowed those boundaries in a manner that excluded the Applicant from the IFH program.

88. As mentioned above, the Supreme Court recently noted in *Dunsmuir*, reasonableness in the administrative context is concerned mostly with the existence of justification, transparency and intelligibility. The Applicant respectfully submits that the Minister's decision in this manner does not meet any of these requirements.

89. It is not justified in that it appears to be based on an imposed set of criteria not connected to the enabling authority. It is not transparent in that the Minister provides no rationale as to why the categories of individuals enumerated in the

82 *Cheng v. Canada (Secretary of State)*, (1995), 25 Imm.L.R. (2d) 162 (F.C.T.D.) at 166.

83 *Baker*, supra, at para. 56, C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539.

decision receive IFH coverage, whereas the Applicant does not. Finally, the Minister's reasons are not intelligible in that there is no discernible basis for the decision to limit IFH coverage to a narrow subgroup of those authorized for coverage under the Order in Council.[84]

PART IV - ORDER SOUGHT

90. The Applicant respectfully requests an order quashing and setting aside the decision that she is ineligible for Interim Federal Health Benefits and further requests that her application be remitted for reconsideration, combined with a declaration that indigent foreign nationals living in Canada who are not eligible for provincial health care coverage must be provided with Interim Federal Health Benefits, under Order in Council No. 1957-11/848 even if they are not refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection Act*, or victims of trafficking in persons, by virtue of the proper construction and application of the relevant Order in Council, section 7 and 15 of the *Charter,* and by virtue of Canada's international law obligations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Andrew Dekany

Of Counsel for the Applicant

Angus Grant

Of Counsel for the Applicant

84 Dunsmuir v. New Brunswick, 2008 SCC 8, at para. 47.