File Number: _____

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Respondent

Applicant's Memorandum of Argument

Part I – Statement of Facts

Overview of the public importance of the issues

1. Does Canada refuse medical treatment for poor, illegal migrants who are dangerously ill? The Federal Court of Appeal has said it does. The legal issues include the proper impact of the *Canadian Charter* and Canada's international law obligations on the interpretation of a healthcare program designed for persons in contact with immigration authorities and, alternatively, constitutional questions respecting access to healthcare necessary for the protection of a person's life and security arising under sections 7 and 15 of the *Charter* – questions that are of particular general interest following this Court's judgment in *Chaoulli*[1].

2. Specifically, the case involves the right of indigent, undocumented migrants[2] in contact with the Minister of Citizen and Immigration (the "Minister") with a view to regularizing their status, and in urgent need of medical care and hospitalization, to be referred for medical treatment under Canada's Interim Federal Health ("IFH") program.

3. The authority for the IFH program is a long-standing Order-in-Council made in 1957 (the "OIC")[3] and the issue is how the OIC is to be interpreted. If it is properly interpreted as intending to exclude migrants from coverage under the IFH program when their status is undocumented even if their health and life is known by the immigration authorities to be at serious risk and it is evident they have no means to pay for healthcare, can that OIC, as so interpreted, be said to accord with the principles of fundamental justice within the meaning of section 7 of the *Charter*? Can it be held to be congruent with the requirements of section 15(1) of the *Charter*?

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

[2] Foreign nationals who have remained in or entered Canada without a visa in contravention of the *Immigration and Refugee Protection Act*, S.C. 2011, c. 27 *("IRPA")* and referred to by the courts below as "illegal migrants".

[3] Order-in-Council 1957-11/848, application for leave, pp. 122

4. Referring to section 7 of the *Charter*, the Federal Court of Appeal holds that Canadian governments can refuse dangerously ill migrants access to medical treatment for the purpose of discouraging "defiance of our immigration laws" and not be in violation of any of the principles of fundamental justice.[4]

5. The Federal Court's finding regarding the degree of the applicant's vulnerability – a finding that the Federal Court of Appeal did not challenge – is remarkable. It reads as follows:

> The evidence before the Court establishes both that the applicant has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, the record before the Court establishes that the applicant's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences. ….[5]

6. This case is also about providing direction to government officials engaged in discretionary decision-making in relation to undocumented migrants. Specifically, it raises the question of whether such officials fail to discharge their authority reasonably, fairly, and in the public interest if they decline to exercise their discretion to grant coverage under the IFH program to poor foreign nationals whose need for medical care is clear, solely on the basis that they are undocumented migrants. Is such exercise of discretion compatible with the Canadian values reflected in Canada's ratification of international human rights treaties and inherent in the principles of the *Charter*.

7. This case is not about claiming a right to remain in Canada in order to receive health care[6], nor is it about an unqualified right to healthcare. It is about whether

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[4] Federal Court of Appeal's reasons, para. 76, application for leave, p. 80

[5] Federal Court's reasons, para. 91, application for leave, pp. 43 and 44 and Federal Court of Appeal's reasons, paras. 65 and 66, application for leave, p. 77

[6] The Federal Court, at paragraph 90 of its reasons for judgment, stated that:

> Ms. Toussaint is in Canada without status. She may not be able to obtain the medical care

one of the most vulnerable and disadvantaged groups in society can be denied access to healthcare of last resort when they are unable to pay for their own care, and when that care is necessary to the protection of their life and security. The values and principles at stake in this issue include the sanctity of human life and are of immense public importance. The issue speaks not only to Canadian domestic values and principles but also directly engages matters of significant current interest internationally; matters that have been given a high priority in the work of the Office of the United Nations High Commissioner for Human Rights ("OHCHR") and other United Nations entities and are closely linked to human rights instruments ratified by Canada.[7] The OHCHR has indicated that it has carefully reviewed the decision of the Federal Court of Appeal in this case in light of Canada's obligations under international human rights law and that if the Court grants leave to appeal in this case, it will consider seeking leave from the Court to intervene in order to provide assistance with the international legal dimensions of the issues raised.[8]

8. The issues at stake in this case affect the safety and security of large numbers of people resident in Canada.[9]

The Order-in-Council

9. Prior versions of the OIC provided payment of medical expenses only for those who had been legally admitted to Canada as immigrants and lacked the financial resources to pay such expenses themselves.[10] The current version was amended in 1957 to authorize payment of such expenses also on behalf of:

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she needs if deported from Canada. Nonetheless, there are no current barriers that prevent Canada from instigating removal proceedings against the applicant. For reasons that are not before the Court, such proceedings have not been instigated and the applicant remains in Canada.

Application for leave, p. 43

[7] Affidavit of Nathalie Des Rosiers sworn September 23, 2011 and exhibit A thereto, application for leave, pp. 179 to 182

[8] *Ibid*.

[9] Affidavit of Denise Gastaldo sworn September 22, 2011, application for leave, pp. 164 to 169

[10] Federal Court's reasons, para. 36, application for leave, pp. 20 and 21

> (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 . . .

10. The amendment had been recommended in a report dated March 29, 1957 to the Treasury Board from the Minister of National Health and Welfare, concurred in by the Minister of Citizenship and Immigration. The following passage from the report expresses the humanitarian rationale for the amendment, namely: not to delay or postpone the provision of urgently needed medical care or hospital treatment.

> THAT on occasion persons are referred for medical and hospital treatment during the time they are thought to be under the jurisdiction of the Immigration authorities but before it is possible to satisfactorily determine their status as immigrants as defined in the *Immigration Act*, and because of the urgent nature of the disabling condition, treatment cannot be prudently postponed until their exact status has been completely established;
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> THAT in other instances persons other than immigrants as defined who are temporarily under the jurisdiction of the Immigration authorities become urgently in need of medical care or hospital treatment, and at the time it is not humanely possible to defer medical action until the determination of who, if any third party, is financially responsible for the cost of such action;
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> THAT it is considered to be in the public interest and necessary for the maintenance of good public relations between the two Federal Departments concerned and the large number of individuals, societies and other agencies who work closely in association with these Departments during the ordinary course of Immigration operations, that the existing authority which is restrictive by reason of the term "immigrant" and also by reason of the conditions of "time" which are applied, be changed to permit the Department of National Health and Welfare to render the necessary medical assistance in these instances;
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> THAT both Departments undertake to administer this authority in such a way as to confine its use to those occasions only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility;[11]

[11] Minister of National Health and Welfare's report to Treasury Board dated March 29, 1957, application for leave, pp. 123 and 124

11. The OIC does not expressly exclude from coverage persons who are in Canada without a visa.

The Applicant's Request for Coverage and its Refusal

12. The applicant applied to the Director of the IFH program for medical coverage on May 6, 2009. Prior to that time, various hospitals had denied the applicant medical services on several occasions because she could not pay for them, thus exposing her to serious health risks.[12] The Director rejected the applicant's request on the basis that she did not come within four categories of persons specified by the Minister as eligible to receive coverage, namely: refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection* Act, and victims of trafficking in persons.[13]

Reasons for Judgment of the Federal Court

13. The Federal Court held that the Director had fettered his discretion in limiting eligibility to the four categories of persons, stating that "the decision-maker relied on the list of categories in the guidelines as if they were an exhaustive list of the persons eligible for IFHP coverage and as if they were the binding legal authority on the decision-maker."[14]

14. The Court went on to hold that the words in paragraph (b) of the OIC authorizing payment of medical costs on behalf of "a person who at any time is subject to Immigration jurisdiction" include "persons whose status is being processed by the Immigration authorities".[15] The applicant had submitted a

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[12] Federal Court's reasons, paras. 7 to 9, and 91, application for leave pp. 9 and 10 and 43 and 44; Federal Court of Appeal's reasons, para. 66, application for leave, p. 77

[13] Para. 19 of the Federal Court's reasons sets out the relevant portions of the Director's decision. Application for leave, p. 14

[14] Federal Court's reasons, para. 58, application for leave, pp. 30 and 31

[15] Federal Court's reasons, para. 49, application for leave, p. 26. It is clear from paragraph 50 of the reasons of the Federal Court that the Court interpreted the words "a person who at any time is subject to Immigration jurisdiction" in the phrase "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" disjunctively so that

humanitarian and compassionate ("H & C") application for permanent residence although she could not pay the required processing fee, having instead sought a fee exemption, and her application had been returned without processing.[16] The Federal Court, following the earlier judgment of Snider, J. of the Federal Court in a different proceeding who had ruled that there was no provision under the *IRPA* which allowed for a fee exemption[17], found that the applicant had not filed an H & C application because she had not paid the fee. Accordingly, the Federal Court held that the applicant was not "under the jurisdiction of Immigration authorities"[18] and concluded that:

> . . . given the applicant's lack of a permanent residence application, the applicant did not and would not qualify for IFHP coverage under Order-in-Council P.C. 157-11/848 if properly interpreted.[19]

15. The Federal Court also considered the other wording in paragraph (b) of the OIC:

> "a person . . . for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer".

However, in interpreting these words the Court itself seems to have engaged in fettering. The Court did not ask if the Director had considered the applicant's particular circumstances to determine whether humane interests caused him to "feel" obligated to accept responsibility on behalf of the Department to authorize payment for her treatment. Rather, the Court interpreted this provision to mean that the Department of Citizenship and Immigration, i.e. the Minister, first had to specify categories of persons for whom Immigration officers could feel responsible and the decision-maker's role was to determine if the applicant fell

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they are not modified by the words "who has been referred for examination and/or treatment by an authorized Immigration officer". Application for leave, p. 27

[16] Federal Court's reasons, para. 38, application for leave, p. 22

[17] Federal Court's reasons, paras. 14 and 39, application for leave, pp.12 and 13 and 22, referring to the judgment of Snider, J. in *Toussaint* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 873.

[18] Federal Court's reasons, para. 51, application for leave, p. 28

[19] Federal Court's reasons, para. 62, application for leave, p. 32

into any of such categories.[20] This is the very approach which the Federal Court had found to be fettering on the part of the Director.

16. The Federal Court then considered the final words of paragraph (b): "… and who has been referred for examination and/or treatment by an authorized Immigration officer", finding that, literally, the applicant had not been "referred". However, since the Director believed he could not approve the applicant's request for coverage because she did not fall within the four pre-determined categories, logically he could not "refer" her anywhere. It is only in cases where an Immigration officer "feels responsible" for the person and thus obligated to provide coverage that the officer would indicate what treatment or examination is to be covered, and in that sense "refer" the person. The OIC could not have intended to authorize an officer who "feels responsible" not to "refer". Moreover, the Court did not reference the evidence that, in current practice, according to the Minister's own operations manual, no particular "referral" to a health care provider takes place when eligibility for IFH program coverage is recognized. Rather, in most cases a form is issued which confers IFH eligibility, usually for twelve months.[21]

17. The Federal Court also rejected the applicant's arguments that her exclusion from coverage under the IFH program violated section 15(1) of the *Charter* as discrimination on the basis of her disability and on the basis of what the Court termed "her lack of Canadian citizenship".[22] However, the Court did state that:

> The applicant was excluded from coverage because of her illegal status in Canada. Only if 'immigration status' is an analogous ground could the

[20] Federal Court's reasons, para. 50, application for leave, p. 27
[21] Sections 4.3 to 4.6 of Operations Manual IR 3 Medical (revised December 1999), being exhibit "I" to the affidavit of Tom Heinze sworn September 23, 2009, application for leave, pp. 127 to 129
[22] The applicant had sought to argue discrimination not on the basis of lack of Canadian citizenship but rather discrimination on the basis of citizenship or immigration status. She brought a motion for reconsideration to clarify this before the Federal Court after the release of its judgment, but the motion was dismissed and the matter left for the Federal Court of Appeal, which did in fact pronounce on the issue, ruling that "immigration status" is not an analogous ground of discrimination. Reasons for Order and Order of the Federal Court dated September 16, 2010, application for leave, pp. 48 to 53

> applicant's exclusion from IFHP coverage be said to violate s. 15(1) of the *Charter*.
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> . . . . .
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> The Supreme Court's decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 leaves open the possibility that "immigration status" may be considered an analogous ground in the future. In *Corbiere*, at para. 60, the Court recognized that in analyzing whether a characteristic is an analogous ground "[i]t is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked." It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground.[23]

18. As to the applicant's argument that her right to life and security of the person under section 7 of the *Charter* had been violated, the Federal Court, noting that:

> . . . there can be no debate that non-citizens in Canada, including illegal immigrants, are entitled to the protections of s. 7 of the *Charter*. Such a broad conception of s. 7 is consistent with the notion that all human beings, regardless of their immigration status, are entitled to dignity and the protection of their fundamental right to life, liberty and security of the person[24]

agreed with the applicant and found, as referred to above[25], that the evidence in the record did establish that a deprivation of the applicant's right to life and security of the person had occurred, and further found that this was caused by her exclusion from the IFH program.[26]

19. On the issue of whether that deprivation was consistent with the principles of fundamental justice, and in particular whether it was arbitrary, the Federal Court ruled that it was not arbitrary because the applicant's situation did not "fall within the purpose of the IFHP", stating that:

> At its core, the purpose of the IFHP is to provide temporary healthcare to legal migrants.[27]

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[23] Federal Court's reasons, para. 81 and para. 82, footnote 3, application for leave, pp. 39 and 40
[24] Federal Court's reasons, para. 87, application for leave, pp. 41 and 42
[25] *Supra*, para. 5, application for leave, p. 99
[26] Federal Court's reasons, para. 91, application for leave, pp. 43 and 44
[27] Federal Court's reasons, para. 93, application for leave, p. 43. The Court recognized that some illegal immigrants who are victims of human trafficking receive IFH program coverage but distinguished those persons as being "often unwittingly illegal immigrants." The Court in this part of

20. The Federal Court also decided that the deprivation of the applicant's rights to life and security of the person under section 7 of the *Charter* was not fundamentally unjust:

> I see nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safehaven for all who require heath care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.

21. The Court did not refer to the unchallenged and uncontroverted evidence from a prominent international expert in migration and health, Manuel Carballo, that undocumented migrants are predominantly young and healthy, migrate in search of work, and are unlikely to take healthcare options into account when deciding to move.[28] Moreover, after reviewing evidence from a number of countries which provide healthcare to undocumented migrants, Dr. Carballo concluded that ensuring access to adequate health care to this group is "sound and rational healthcare policy, resulting in significant public health benefits and economic savings over the longer term."[29] There was no evidence at all to support the Court's finding that Canada would become a "health-care safehaven".

22. In determining that it is in accordance with the principles of fundamental justice to deny coverage under the IFH program to illegal immigrants, the Federal Court did not take into account Canada's obligations under international human rights

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its reasons made no mention of "persons under detention and in the custody of the Immigration authorities", who usually are without immigration status or "illegal", and who it had found earlier in its reasons at para. 49 (application for leave pp. 26 and 27) are eligible for IFHP coverage because they are under the jurisdiction of Immigration authorities. The Court did not consider in its reasons whether once released from detention such persons are still "subject to Immigration jurisdiction" and eligible for coverage even though "illegal", and if not eligible whether it is arbitrary for illegal immigrants to be eligible for coverage under the IFH program while in Immigration detention and custody but not after being released nor, presumably, before being detained.

[28] Paragraph 11, Affidavit of Manuel Carballo sworn on February 2, 2010, application for leave, p. 147

[29] Paragraph 24, Affidavit of Manuel Carballo sworn on February 2, 2010, application for leave, p. 153

law. It examined those obligations, but merely observed that Canada has not implemented them in its domestic legislation.[30]

Reasons for Judgment of the Federal Court of Appeal

23. Following oral argument but before release of the judgment of the Federal Court of Appeal in the case at bar, a differently constituted panel of the Federal Court of Appeal partially reversed the judgment of Snider, J.[31] and ordered the Minister to consider the applicant's request for a waiver of the fees payable in respect of her H & C application under subsection 25(1) of the *Immigration and Refugee Protection Act*.[32] It therefore appeared that the Immigration authorities were now obliged - *by court order* - to exercise their jurisdiction with respect to the applicant. It seemed at that point that the applicant had become "subject to Immigration jurisdiction" as the Federal Court had interpreted that term, even if she hadn't been before.

24. However, the Federal Court of Appeal forestalled that outcome by overruling the Federal Court's interpretation of the words "subject to Immigration jurisdiction" in paragraph (b) of the OIC.[33]

25. It did this in two ways. Firstly, without considering in context the intended meaning of the word "referred"[34], the Court of Appeal concluded that the applicant did not qualify under paragraph (b) because, while she may have been

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[30] Federal Court's reasons, para. 70, application for leave, p. 36

[31] *Toussaint* v. *Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146. The panel of the Federal Court of Appeal on the appeal from the judgment of Snider, J. held that the Minister had discretion to waive the fee on humanitarian and compassionate grounds and ordered the Minister to consider the applicant's fee waiver request, but also held that there was no entitlement to a fee waiver on constitutional grounds. An application for leave to appeal the constitutional ruling in that judgment has been filed with this Court as file no. 34336.

[32] The Federal Court of Appeal's judgment in that case is at pp. 162 and 163 of the application for leave.

[33] Federal Court's reasons, paras. 29 to 51, application for leave, pp. 18 to 28. The Federal Court's interpretation had corresponded with the respondent's submission, namely that persons who are the subject of an immigration proceeding provided for in the *IRPA* are subject to Immigration jurisdiction. See the Federal Court's reasons, paras. 43 and 44, application for leave, p. 24

[34] See paragraph 16 above, application for leave, p. 104

now subject to Immigration jurisdiction, she had not been "referred."[35] Secondly, the Federal Court of Appeal redefined the meaning of the words "subject to Immigration jurisdiction" by holding that it was not enough, as the Federal Court had thought, that a person was "being processed by the Immigration authorities". To qualify as being "subject to Immigration jurisdiction" for purposes of paragraph (b), that person must, in the Federal Court of Appeal's view, also have "sought that status before or upon entry to Canada".[36]

26. The reasons the Court gives for reading these additional words of limitation into the paragraph are as follows and amount, with respect, to little more than an expression of a bias against illegal immigrants.

> The Program could not have been intended to pay the medical expenses of those who arrive as visitors but remain illegally in Canada and who, after the better part of a decade of living illegally in Canada, suddenly choose to try to regularize their immigration status. Coverage for those persons would be against the whole tenor of the Order in Council, the history of the Order in Council, and the Minister's stated rationale.[37]

Paragraph (b) in fact confers coverage on "a person who *at any time* is subject to Immigration jurisdiction" and in these reasons the Court has ignored the implications of the phrase "at any time".[38] Neither did the Court refer to the passage in the Minister's report to the Treasury Board recommending the addition of paragraph (b) to the OIC, in which the reason for doing so included the Minister's opinion that the authority in the prior order-in-council had been unduly "restrictive by reason of the term 'immigrant' *and also by reason of the conditions of 'time'*".[39] (emphasis added)

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[35] Federal Court of Appeal, para. 45, application for leave, p. 71
[36] Federal Court of Appeal, para. 40, application for leave, p. 70
[37] *Ibid*. The Federal Court clearly did not mean to impose such a limit, since if the applicant had paid the H & C fee the Federal Court was prepared to find her status was being processed so as to make her eligible for IFHP coverage, even though she had not sought permanent resident status when she entered Canada as a visitor.
[38] The entire phrase reads: "a person who at any time is subject to immigration jurisdiction".
[39] Minister of National Health and Welfare's report to Treasury Board dated March 29, 1957, application for leave, p. 123

27. In concluding that the applicant was not a person contemplated under paragraph (b) the Federal Court of Appeal stated:

> Upon entry to Canada, she did not claim a status other than visitor and the Immigration authorities were not processing any other status.[40]

28. As for the words "a person . . . for whom the Immigration authorities feel responsible" in paragraph (b) of the OIC, the Federal Court of Appeal simply stated, without more, "At no time did the 'Immigration authorities feel responsible' for her."[41] But, the applicant submits, in human terms, how could they not?

Section 7 of the *Charter*

29. The Federal Court of Appeal accepted the Federal Court's finding of fact:

> . . . that the [applicant] was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person.[42]

30. However, the Federal Court of Appeal set aside the Federal Court's finding that the cause of the deprivation of the applicant's security of the person was the applicant's exclusion from IFH program coverage.[43] It did so by finding the "operative cause of the [applicant's] difficulties" to be that she was not eligible to receive coverage under Ontario's *Health Insurance Act* because she was "a person in Canada contrary to Canadian immigration law"[44] and "most fundamentally" because she was the author of her own misfortune, *viz*:

> She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan.[45]

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[40] Federal Court of Appeal's reasons, para. 45, application for leave, p. 71
[41] *Ibid*
[42] Federal Court of Appeal's reasons, para. 61, application for leave, p. 76
[43] Federal Court's reasons, para. 91, application for leave, pp. 43 and 44
[44] Federal Court of Appeal's reasons, para. 71, application for leave, p. 79
[45] Federal Court of Appeal's reasons, para. 72, application for leave, p. 79. In suggesting that the applicant was ineligible for provincial health coverage because she had not obtained legal immigration status in Canada, and that the applicant should have attempted a constitutional challenge to Ontario's eligibility requirement, the Court did not analyze the federal-provincial interplay contemplated in section 1.4.5 of R.R.O. 1990, Regulation 552 enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6, that makes a person who has submitted an application for

31. The Federal Court of Appeal went on to adopt the words of the Federal Court that granting IFH program coverage to persons who "enter and remain in Canada illegally . . . would make Canada a health-care safe-haven for all who require health care and health care services".[46] It did so despite the absence of any evidence to support such a finding and notwithstanding the undisputed evidence of Dr. Carballo that "undocumented migrants do not abuse health care services, do not arrive looking for health care, and are eager to work and 'fit-in'."[47] Also, as stated before, the applicant is not arguing that she is entitled to stay in Canada in order to receive medical treatment.

Section 15(1) of the *Charter*

32. The Federal Court of Appeal rejected "immigration status" as an analogous ground of discrimination under section 15(1) of the *Charter*, stating that it is not immutable.[48] The Federal Court of Appeal did not refer to any evidence in that regard, nor to the Federal Court's finding as to the "difficulty of changing one's illegal migrant status"[49] which was supported by the expert evidence in the record concerning the vulnerabilities, barriers and disadvantage faced by persons without status.[50]

Part II – Statement of the Questions in Issue

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permanent residence in Canada eligible for provincial health care coverage under the Ontario Health Insurance Plan, "even if the application has not yet been approved, as long as Citizenship and Immigration Canada has confirmed that the person meets the eligibility requirements to apply for permanent residency in Canada, and the application has not yet been denied." Undocumented migrants in Canada can submit such an application under section 25 of the *IRPA*, even if they have no legal status. The applicant attempted to submit such an application over three years ago but has been delayed because of the Minister's failure to consider her request for a fee exemption. See the Federal Court of Appeal's judgment in *Toussaint* v. *Canada (Minister of Citizenship and Immigration*), *supra*, at footnote 31 above.

[46] Federal Court of Appeal's reasons, para. 83, application for leave, pp. 82 and 83

[47] Affidavit of Manuel Carballo, para. 46, application for leave, pp. 160 and 161

[48] Federal Court of Appeal's reasons, para. 99, application for leave, p. 87

[49] Federal Court's reasons, para. 82, footnote 3, application for leave, p. 40

[50] Affidavit of Ilene Hyman sworn August 25, 2009, especially paras. 7 to 13, application for leave, pp. 131 to 141

33. Does the OIC not require the Minister, or the Minister's delegate, to consider on a case by case basis poor foreign nationals who are in Canada for whatever reason, regardless of their immigration status, when they have been in touch with the immigration authorities with a view to regularizing their status and approach Immigration authorities for help to access medical care when their inability to access such care presents a serious risk to their health and life?

34. If not, does interpreting the OIC so as to exclude such persons from coverage under the IFH program fail to accord with the principles of fundamental justice within the meaning of section 7 or discriminate under section 15(1) of the *Charter*, or both?

Part III – Statement of Argument

35. The applicant came forward to Immigration authorities and requested permanent resident status on humanitarian and compassionate grounds, a procedure provided for in section 25(1) of the *Immigration and Refugee Protection Act*. She has been engaged in that process for over 3 years. She awaits the determination of that status. The government has not attempted to deport her. Having become dangerously ill and not being able to afford to pay for medical treatment, she asked for coverage under Canada's existing IFH program. For the following reasons it is submitted that Canadian law does not compel nor allow Immigration officials to ignore her request because she is in Canada illegally. Moreover, given the humane purpose of the OIC, it is submitted that Canadian law obliges Immigration officials to exercise their discretion under the OIC in an equitable and humane manner having regard to an applicant's disability and poverty, and in accordance with the principles of the *Charter* and the values of international human rights law ratified by Canada. The Order-in-Council could not have intended that in assessing whether they "feel" responsible for the individual whose medical condition has come to their attention, immigration authorities should be expected to – or required to – turn their faces against considerations of normal human compassion for persons found in need on their doorstep, as it

were.[51] It was surely to relieve immigration officials of having no humane recourse when faced with such persons that the 1957 Order-in-Council was enacted.

Interpretation of the OIC

36. Read literally in their ordinary and grammatical sense, the words, "a person who at any time is subject to Immigration jurisdiction", in paragraph (b) of the OIC would include, as the Federal Court held and as the respondent itself argued,[52] persons who are the subject of an immigration proceeding provided for in the Act, such as those whose status is being processed by the Immigration authorities.[53] Indeed, they would include a person who is subject to any form of Immigration control such as deportation.[54]

37. The OIC does not expressly exclude persons without status who are in Canada illegally; nor, it is submitted, can it be interpreted as intending to do so, particularly not given the evidence concerning the Governor in Council's intentions in the report of the Minister to the Treasury Board which proposed the current version of the OIC as referenced in paragraph 10 above.

38. An interpretation which embodies *Charter* values ought to be preferred over one which does not.[55] To interpret the OIC so as to deny undocumented migrants who face serious health risks access to potentially life-saving treatment through the IFH program because they have contravened provisions of the *IRPA*, with all respect to the Federal Court of Appeal who in effect so held,[56] penalizes and

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[51] This was the issue that confronted the Good Samaritan in the biblical parable. Luke 10:25-37 New King James Version online at http://www.biblegateway.com/passage/?search=Luke+10&version=NKJV,
[52] Federal Court's reasons, para. 43, application for leave, p. 24
[53] Federal Court's reasons, para. 49, application for leave, pp. 26 and 27
[54] See para. 49 of the Federal Court's reasons as to refugee claimants who are subject to a removal order that is temporarily unenforceable, being persons subject to Immigration jurisdiction. *A fortiori* persons subject to an enforceable removal order would, literally, be subject to Immigration jurisdiction.
[55] *Hills* v. *Canada (Attorney General)*, [1988] 1 S.C.R. 513, 1988 CanLII 67, at para.93
[56] See paragraph 8 of the Federal Court of Appeal's reasons, application for leave, p. 57

treats them in an inhumane manner. Not only does such an interpretation run counter to the humane intentions expressed in the report of the Minister to the Treasury Board. It also runs contrary to the *Charter* values of respect for life and security of the person, equal protection and benefit of the law, and freedom from being subjected to cruel and unusual treatment.

39. In *Baker*[57] this Court stated that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. This case also calls for such a contextual approach. Granting leave would allow this Court to further clarify how the values and obligations expressed in the international instruments by which Canada is bound, as well as the *Charter* values, are to be taken into account in interpreting domestic law.

40. Canada has ratified two international covenants which reflect the important values of not denying or not limiting access to health services because persons are undocumented or illegal migrants, namely, the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*")[58] and the *International Convention on the elimination of all Forms of Racial Discrimination* ("*ICERD*").[59] In its *General Comment* on the right to health in 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

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[57] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 70

[58] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46[1] [ICESCR] Entered into force on January 3, 1976; acceded to by Canada on May 19, 1976. Article 12(1) of the *ICESCR* reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[59] *International Convention on the Elimination of All Form of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28. Article 5 of the *ICERD* guarantees the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of a number of specified rights, including "the right to public health, medical care, social security and social services."

palliative health services."[60] (emphasis added) In a more recent General Comment, the CESCR has clarified obligations with respect to non-discrimination more generally on the ground of "nationality", noting that "Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, migrant workers and victims of international trafficking, *regardless of legal status and documentation*."[61]

41. Similarly, the U.N. Committee overseeing compliance with the *ICERD*, in its 2004 General Recommendation XXX on *Discrimination Against Non-Citizens* has made it clear 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."[62] In 2007 that Committee expressed concern about the fact that undocumented migrants do not have ready access to healthcare in Canada and recommended that measures be taken to correct this.[63]

42. In the event that the Court did find the Federal Court of Appeal's interpretation of the OIC palatable, it would then have to address the constitutional issues under sections 7 and 15 of the *Charter*.

Section 7 of the *Charter*

43. As Professor Sossin wrote shortly after the release of this Court's judgment in *Chaoulli*:

> "In the wake of *Chaoulli*, it is entirely likely that the Court will soon be asked to rule on the question of a right to adequate health care in the public sector. Not only would such a right be consistent with s. 7, but also would bring *Charter* jurisprudence in line with s. 36 of the *Constitution Act, 1982*, and with Canada's commitment to international human rights instruments which

[60] General Comment No. 14, UN Doc. E/C, 12/2000/4 (2000) at para. 34
[61] General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the *ICESCR*) E/C. 12/GC/20 2 July 2009 at paragraph 30
[62] 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 paragraph 36
[63] Affidavit of Manuel Carballo sworn on February 2, 2010, para. 20, application for leave, p. 152

> recognize the right to adequate social services. If the Court declines to recognize such a right based on the positive/negative rights dichotomy, it will have traveled even further down the road of a two-tier Constitutional system.

He concluded that:

> 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* toward constitutional protections for those dependent on the state for their survival. If state obligations to those in need are not foreclosed under the Constitution, as these obiter remarks suggest they are not, then it is hard to imagine more compelling settings for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support.[64]

44. The IFH program is a form of healthcare in the public sector providing state support for the health care needs of indigent foreign nationals in Canada who do not have access to provincial health care coverage. It is a government "scheme to provide health care"[65] and must comply with the *Charter*.[66] When the right to life and security of the person of an individual living in Canada are seriously at risk, as in the case of the applicant, surely it is a principle of fundamental justice that a government cannot deny access to lifesaving healthcare to such person in order to coerce compliance (or "discourage defiance" as the Federal Court of Appeal put it) with certain legal requirements, specifically, the requirement for a foreign national living in Canada to have a visa. If the principle set out in *Singh*[67], that anyone physically within Canada is entitled to the protection of section 7 of the *Charter*, is recognized as a principle of fundamental justice and is to be respected, then, just as we do not – and it is submitted under section 7 of the *Charter* we could not – deny healthcare to Canadian citizens or landed immigrants in order to discourage unwanted or illegal activity, we do not do so for persons living in Canada without legal or documented status. In this regard, with respect, the

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[64] 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 pp, 173 and 178

[65] Federal Court's reasons, para. 75, application for leave, p. 38

[66] *Chaoulli, supra*, para. 104.

[67] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 1985 CanLII 65, at para. 35

Federal Court of Appeal erred in its holding that government can deny access to healthcare "to discourage defiance of our immigration laws".[68]

Section 15 of the *Charter*

45. The Federal Court found that the applicant "was excluded from IFH program coverage because of her illegal status in Canada."[69] and, referring to this Court's judgment in *Corbiere*[70], pointed to the possibility that "immigration status" is an analogous ground because "illegal immigrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status".[71] The record contains ample evidence as to the disadvantage and vulnerability of undocumented migrants and the systemic barriers that they face.[72] Moreover, it is appropriate to describe immigration status as this Court in *Andrews* described citizenship status, that is to say that it is "at least temporarily, a characteristic of personhood not alterable by conscious action . . ."[73] There is no principled reason that citizenship status should be considered immutable, but immigration status not. And just as Bastarache, J. for the majority in *Lavoie* held "it is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage"[74] the point applies equally, if not more so, to undocumented migrants, a particularly disadvantaged class of non-citizens. In *Lavoie*, the nature and scope of the interest affected, namely employment, was found to merit constitutional protection. All the more so does the interest in the case at bar - namely, the protection of life and security of the person – merit such protection.

46. The distinction created by denying IFH program coverage to undocumented migrants but not to other migrants creates disadvantage by perpetuating stereotype

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[68] Federal Court of Appeal's reasons, para. 76, application for leave, p. 80
[69] Federal Court's reasons, para. 81, application for leave, pp. 39 and 40
[70] *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 60
[71] Federal Court's reasons, para. 82, footnote 3, application for leave, p. 40
[72] Affidavit of Ilene Hyman sworn August 25, 2009, paras. 7 to 13, application for leave, pp. 135 to 141
[73] *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143, at para. 67
[74] *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 45

and prejudice.[75] The denial of healthcare necessary for life and security clearly fails to recognize the equal worth and value of undocumented migrants. Further, it is based on a negative and unfounded stereotype of the group as migrating to take advantage of free services. The un-rebutted evidence is that such stereotypes are contrary to migration realities, which suggest that most migrants, like the applicant, migrate to take up low paid jobs and thus provide significant benefit to the economy. Denying undocumented migrants access to the IFH program exacerbates prejudice, stereotype and social exclusion of undocumented migrants in a manner that undermines the purposes of section 15 and constitutes discrimination.

47. In at least one case the Federal Court has recognized "immigration status" as an analogous ground of discrimination.[76] A ruling in the case at bar would provide needed guidance to lower courts on this issue.

Part IV – Submissions In Support Of Order Sought Concerning Costs

48. This application for leave to appeal is: a) brought by a disabled applicant who is completely reliant on social assistance and against whom a costs order would impose even greater hardship, and b) is public interest litigation going beyond the mere personal interests of the applicant. For these reasons the applicant requests that costs be awarded to her, in any event of the cause.

Part V – Order Or Orders Sought

49. That leave to appeal be granted with costs, in any event of the cause.

All of which is respectfully submitted.

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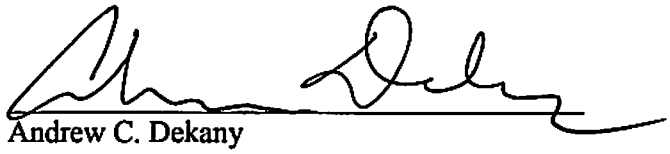
[75] *R.* v. *Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41, at para. 17

[76] In *Re Jaballah*, 2006 FC 115, the Federal Court held that providing procedural rights to permanent residents held under security certificates while denying those rights to foreign nations, constituted discrimination within the meaning of subsection 15(1). While the court appears to have considered "immigration status" as a separate ground of discrimination, it reasoned, at paragraph 80, that discrimination on the ground of "immigration status" cannot be permitted under section 15 as a consequence of this Court's finding in *Andrews* that "citizenship" constitutes an analogous ground.

Dated at Toronto, Ontario this 23rd day of September, 2011



Andrew C. Dekany
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PART VI - Table of Authorities

Paragraph no.

Legislative enactments

Case law

International Documents

Texts