Court File No.: A-362-10
(Federal Court No.: T-1301-09)

FEDERAL COURT OF APPEAL

BETWEEN:

NELL TOUSSAINT

Appellant
(Applicant in the Federal Court)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent in the Federal Court)

RESPONDENT'S MEMORANDUM OF FACT AND LAW

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RESPONDENT'S MEMORANDUM OF FACT AND LAW

OVERVIEW:

1. The Appellant is a 41 year old, female, divorced citizen of Grenada who entered Canada more than 10 years ago as a visitor for 6 months. She arrived in 1999 and has never left Canada. She has lived illegally in Canada for more than 10 years since the expiry of her visitor status. She now requires healthcare, to which she is not entitled due to her illegal status.

2. The Respondent submits that the Appellant's legal argument may be accurately reduced to the following proposition: "I am living in

Canada, I require healthcare, I cannot afford healthcare, and therefore I am entitled to access free healthcare in Canada."

3. In reply, the Respondent states that no country, including Canada, has the infinite resources required to provide free healthcare to everyone able to enter the country and set up residence here without authorization. Further, Canada has the right to choose to make her healthcare benefits available primarily to those persons having legal status in this country. The Appellant has had more than 10 years within which to choose to seek and obtain legal status in Canada. Instead, she decided to live and work in Canada illegally. She now claims that Canadian and international law gives her the right to access Canadian healthcare. The Appellant is highly selective, in terms of which of Canada's laws she chooses to ignore and which laws she chooses to invoke.

4. The Appellant asks this Court to accept that she is unfairly and unjustifiably being denied healthcare in Canada, because she lacks legal status in Canada. The reality is she is not entitled to healthcare in Canada because the law does not provide it to persons without lawful status in Canada. The Appellant has no right to characterize the consequences of her own choices, as alleged violations of of sections 7 and 15 of the *Charter* or international law.

PART I – STATEMENT OF FACTS

(a) Facts concerning the Appellant:

5. The Appellant chose to remain living in Canada illegally for more than 10 years since her visitor's status expired in early 2000. She has worked here without legal authorization to do so in the past, but is currently unemployed and collecting social assistance from the province of Ontario, because it believes in error, that she "is in the process of applying for permanent residence from within Canada." The Appellant has filed evidence describing herself, and the many tens of thousands of others like her, living in Canada illegally in clear violation of Canada's immigration laws, euphemistically as "immigrants without status." The Appellant is not an immigrant to Canada.

Affidavit of the Appellant and
Affidavit of Ilene Hyman, sworn August 25, 2009,
Appeal Book, pages 108 – 122, 294 – 305

6. Only when the Appellant's health problems recently required medical attention, did the Appellant take any steps to attempt to legalize her illegal status in this country, in order to gain access to the Canadian healthcare system. She filed an application in 2008 seeking permission under s.25(1) of *the Immigration and Refugee Protection Act* ("*IRPA*"), to be exempted from the normal requirement to apply for an immigrant visa from abroad, seeking to be granted landing as an immigrant from within Canada, on "Humanitarian and Compassionate" ("H&C") grounds.

Affidavit of the Appellant, Appeal Book, pages 110, 125 – 126

7. However, she chose not to pay the required $550 application fee, asking to be relieved of that legal obligation, claiming she lacked the funds. When the Department of Citizenship and Immigration ("CIC") refused to process her "H&C" application without payment of the required fee, she challenged that decision in Federal Court.

8. In addition to the s. 25 *IRPA* H&C application, the Appellant also sought to make an application seeking a Temporary Resident Permit ("TRP"), but again did not pay the associated processing fee. Her TRP application was returned as incomplete for that reason.

Court File No.: IMM-326-09

9. Madam Justice Snider held that neither sections 7 or 15 of the *Charter* required CIC to process the Appellant's "H&C" application without the payment of the required application fee. Justice Snider reasoned:

> "To access the extraordinary benefits of s.25(1), the foreign national must meet certain administrative requirements to make his or her "request", including: filing a written application; providing certain documents and information; and paying the fees set by the *IRP Regulations*."
>
> **Nell Toussaint v. M.C.I. et al., 2009 FC 873, at para. [26] (Toussaint #1)**
> **(on appeal to the Federal Court of Appeal in Court File No. A-408-09)**

10. Having been unsuccessful in gaining access to the Canadian healthcare system on "H&C" grounds, in 2009 the Appellant sought payment for her medical expenses pursuant to CIC's "Interim Federal Health Program" ("IFHP"). This program grants short-term and temporary essential medical benefits to certain limited and specifically-defined groups of persons in Canada on humanitarian grounds, the majority of whom are *legally in Canada*. The IFHP was never designed by the federal government nor intended to provide the significant benefits of the Canadian healthcare system, to people living in Canada illegally; or to utilize the Appellant's preferred phraseology, "immigrants without status." The Appellant was therefore advised by CIC, that she did not qualify for interim medical coverage under the IFHP.

Affidavit of Craig Shankar, affirmed January 11, 2010, Exhibit "A", Appeal Book, pages 462 – 475, 60 – 61

11. The Appellant challenged CIC's decision finding her ineligible for IFHP medical benefits. Justice Zinn dismissed her judicial review application, determining: (i) the IFHP was designed to provide temporary medical benefits to specific deserving groups of persons, not including persons living illegally in Canada, and (ii) neither sections 7 and 15 of the *Charter* nor international law, granted the Appellant the right to access healthcare in Canada.

Judgment and Reasons of Justice Zinn, dated August 6, 2010, Appeal Book, pages 12 – 52

12. Justice Zinn concluded that CIC's decision was not one to which the leave and "serious question of general importance" certification provisions of the *IRPA* applied. The Appellant commenced an appeal as of right to this Honourable Court pursuant to s. 27(1)(a) of the *Federal Courts Act.*

(b) Facts concerning CIC's Interim Federal Health Program (IFHP):

13. As early as 1949, the federal government of Canada recognized the humanitarian need to provide some short-term, essential medical services to those newly-arrived immigrants legally granted admission to Canada, who required immediate medical attention after their arrival, but lacked the resources to pay for those essential medical services. Order-in-Council number P.C. 41/3888 authorized the federal government to expend a total of $1,500 in a fiscal year for this purpose.

Affidavit of Craig Shankar, at para. 7 and Exhibit "B" and Affidavits of Tom Heinze, sworn September 23, 2009 and March 3, 2010, Appeal Book, pages 464, 323 – 330, 319 – 321, 526 – 527

14. In 1952, another Order-in-Council, P.C. 4/3263, authorized the federal government (through appropriations voted by Parliament) to permit the Immigration Branch "...to pay hospitalization, medical care, dental care, and expenses incidental thereto, for immigrants, after being admitted at a port of entry... in cases where the immigrants lack the financial resources to pay those expenses for themselves."

Affidavit of Craig Shankar, at para. 8 and Exhibit "B", Appeal Book, pages 465, 323 – 330

15. In 1957, the 1952 OIC was revoked and replaced by a new one, P.C. 1957-11/848, which remains to this day, the legal authority for CIC's IFHP. This 1957 OIC provided that the Department of National Health and Welfare was:

> "... 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 maintenance 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 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."
>
> **Affidavit of Craig Shankar, at para. 9 and Exhibit "C", Appeal Book, pages 465, 332**

16. From 1957 to 1993, the Department of Health administered the delivery of temporary medical services to newly-arrived immigrants, naming its Program "Non-Insured Health Services." However, in 1993, a "Memorandum of Understanding" was signed between Health and Welfare and the Canada Employment and Immigration Commission (CEIC), now CIC, to transfer the entire "Immigration Medical Assessment function" from Health to Immigration, effective April 1, 1993. This transfer of responsibility for the management of Canada's "Immigration Medical Services" from Health to

Immigration, included the transfer of the "Non-Insured Health Services Program", which includes the IFHP:

> "Non-Insured Health Services: CEIC is responsible and accountable for the Non-Insured Health Services, including the medical assessment of indigent persons applying for landed immigrant status from within Canada and the reimbursement to health care practitioners and institutions for **the medical treatment of indigent persons, either landed immigrants or refugee claimants in Canada**, in circumstances where these persons are not covered by provincial health insurance plans or other provisions." [emphasis added]
>
> **Affidavit of Craig Shankar, at para. 10 and Exhibit "D" at p. 2, Appeal Book, pages 466, 334 – 347**

17. Two Orders-in-Council (JUS-93-219-01) and (JUS-93-220-01) were enacted shortly after the Memorandum of Understanding was signed, confirming in law the transfer of the responsibility for "the inspection and medical care of immigrants" from the Minister of Health, to the Minister of Employment and Immigration, effective June 1, 1993. CIC has had sole and continuous responsibility for the IFHP since that time.

> **Affidavit of Craig Shankar, at paras. 11 and 12 and Exhibit "E", Appeal Book, pages 466–467, 349–350**

18. Over the subsequent years, under CIC's responsibility and management, the IFHP has expanded somewhat to extend short-term, temporary medical benefits to additional discrete groups of individuals whom the federal government determined to be both deserving on humanitarian grounds and in financial need. For example, when in 1995 the government of Ontario stopped covering the cost of providing temporary medical benefits for

refugee claimants under OHIP, CIC's IFHP expanded to ensure that refugee claimants legally in Canada awaiting disposition of their refugee claims, received any essential medical services they required.

Affidavit of Craig Shankar, at para. 13 and Exhibits "F" and "G", Appeal Book, pages 467, 352 – 353

19. By 1996, a CIC Operations Memorandum reflected the fact that the focus of CIC's IFHP had shifted from looking after the medical needs of new indigent landed immigrants, to meeting the medical needs of refugee claimants, Convention refugees and others in significant humanitarian need:

> "The purpose of the **Interim Federal Health Program** is... to pay for in Canada health care for certain migrants who are unable to pay for expenses related to urgent and essential services... Now, this applies almost exclusively to refugee claimants and government assisted refugees...The program has been put in place for humanitarian reasons to allow refugee claimants or Convention refugees and others under immigration control to receive essential health care. It is not meant to replace Provincial health plans and does not provide the same extent of coverage allowed to permanent residents."

Affidavit of Craig Shankar, at para. 14 and Exhibit "H", Appeal Book, pages 468, 374 – 374

20. CIC's IFHP was subsequently extended slightly again, to cover applicants for CIC's new "Pre-Removal Risk Assessment" ("PRRA") and persons detained by the newly-created CBSA, as well as Victims of Human Trafficking, as recognized by a new CIC policy.

Affidavit of Craig Shankar, at para. 15 and Exhibits "I" and "K", Appeal Book, pages 468, 376 – 380

21. Claims to and payments made under the IFHP are practically administered by a private benefit administration company, which co-publishes a "Handbook for Health Care Providers in Canada" with CIC, explaining who qualifies for various medical benefits, which benefits are covered in which amounts, and how and where doctors, dentists, optometrists, pharmacists, and other health-care providers, are to submit their bills for payment by the federal government. The Handbook makes clear that it is CIC, and CIC alone, who determines if any particular person is entitled to IFHP medical benefits or not.

Affidavit of Craig Shankar, at para. 16 and Exhibit "J", pp. 1–2, 5–6, 16, Appeal Book, pages 469, 382 – 424

PART II – POINTS IN ISSUE

22. The Respondent states that Justice Zinn was correct in law in concluding that:

(a) Order-in-Council P.C. 1957-11/848 does not apply to the Appellant and she is therefore ineligible for IFHP medical benefits;

(b) CIC's decision finding the Appellant ineligible for IFHP benefits, was not contrary to the principles of international law;

(c) CIC's decision finding the Appellant ineligible for IFHP benefits, did not violate the Appellant's s. 15 *Charter* rights; and

(d) CIC's decision finding the Appellant ineligible for IFHP benefits, did not violate the Appellant's s. 7 *Charter* rights.

23. The Respondent disagrees with Justice Zinn's finding that CIC's decision not to grant IFHP benefits engaged the Appellant's s. 7 *Charter* rights.

PART III – SUBMISSIONS

A. Test for Appellate Review:

24. The test for appellate review of the decision under appeal is whether the Applications Judge chose the appropriate standard of review and properly applied it. Both of these issues are to be determined by the appellate court on a standard of correctness.

25. The Applications Judge properly determined that the correctness standard applied to the issues raised in the judicial review application and he correctly applied that standard. There is no basis to interfere with the Applications Judge's decision.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226; 2003 SCC 19, at paras. 33, 43–44;
Housen v. Nikolaisen, [2002] 2 S.C.R. 235; 2002 SCC 33, at paras.1–37;
Mugesera v. Canada (M.C.I.), [2005] 2 S.C.R. 100; 2005 SCC 40, at para. 35;
Canada (M.P.S.E.P.) v. Cha, 2006 FCA 126; 267 D.L.R. (4th) 324; [2007] 1 F.C.R. 409, at para.16

B. Appellant does not qualify for IFHP medical benefits under Order-in-Council P.C. 1957-11/848:

26. The Respondent states that Justice Zinn was correct in concluding that:

> "[51] Properly interpreted, Order-in-Council P.C. 157-11/848 does not apply to the applicant and she is not eligible for IFHP coverage. The applicant is not an "immigrant" in the sense that she is applying for permanent residence in Canada. The applicant is not temporarily under the jurisdiction of Immigration authorities. Nor does the applicant fall into one of the narrow, well-defined categories for which Immigration authorities feel responsible."
>
> **Reasons, Appeal Book, pages 12 – 52, at para. 51 (page 33)**

27. Justice Zinn below carefully reviewed the history behind and the actual wording of the 1957 Order-in-Council, which remains the sole authority for CIC's expenditure of Canadian taxpayer dollars to fund the IFHP. He concluded that while the CIC decision-maker fettered his discretion by relying unduly on CIC policy instead of the actual wording of the 1957 OIC, such error was immaterial because the Appellant did not qualify under the terms of the 1957 OIC itself, properly interpreted.

> **Reasons of Justice Zinn, Appeal Book, pages 12 – 52, at paras. 29 – 62 (pages 23 – 27)**

28. Justice Zinn held that the earlier Order-in-Council clearly provided medical benefits to only selected persons legally admitted to Canada as immigrants, but

> "...the issue that requires the Court's determination, is whether that continued to be the case when, on June 20, 1957, Order-in-Council P.C. 1957-11/848 was passed."
>
> **Reasons, Appeal Book, pages 12 – 52, at paras. 32 – 36 (pages 24 – 26)**

29. In deciding that the Appellant did not fall under part (a) of the 1957 OIC, Justice Zinn noted that "immigrant" was a defined term in law in 1957 and meant "a person who seeks admission to Canada for permanent residence." He noted that the Appellant was only admitted into Canada *as a visitor* and has never subsequently sought admission to Canada as a permanent resident (her 2008 "purported" H&C application not qualifying as a request for admission, since the required fee was not paid):

> "There is no evidence that the applicant has ever submitted an application with the required fee and ...cannot be said to have sought admission to Canada for permanent residence."
>
> **Reasons, Appeal Book, pages 12 – 52 , at paras. 36 – 39 (pages 25 – 27)**

30. In deciding that the Appellant also did not fall under part (b) of the 1957 OIC, Justice Zinn relied upon both the principle of statutory interpretation which avoids superfluous words and a surplusage of language and upon a letter from the two relevant Ministers of the Crown, explaining their recommendation for the wording of the 1957 OIC.

> **Reasons, Appeal Book, pages 12 – 52, at paras. 40 – 51 (pages 28 – 33)**

31. The Respondent submits that part (b) of the 1957 OIC contains two elements, both of which must be met for a person to fall within its meaning. Firstly, the person must be "subject to Immigration jurisdiction" or be a person "for whom the Immigration authorities feel responsible." The Respondent states that the Appellant, as a long-term illegal resident of Canada has intentionally avoided being under "Immigration jurisdiction", as she has actively sought to avoid compliance with or application of Canada's immigration laws. Similarly, Immigration authorities certainly do not "feel responsible" for the well-being of persons like the Appellant, who have remained in Canada through evasion of Canadian immigration laws.

Shankar Affidavit, Appeal Book, pages 464-467, at paras. 8 – 15

32. Secondly, for the Appellant to properly fall under part (b) of the 1957 OIC, she would have to be a person "who has been referred for examination and/or treatment by an authorized immigration officer." Since the Appellant has not been so referred, she also fails to meet the second half of the definition in part (b) of the 1957 OIC. Both portions of the definition must be met for it to apply, since the word "and" is utilized; not the word "or".

33. It is therefore submitted that the proper interpretation of the applicable 1957 OIC makes clear that persons in the Appellant's situation were not and are not entitled to interim medical benefits under the IFHP.

C. Denial of IFHP benefits to the Appellant, is not contrary to international law:

34. Justice Zinn correctly noted that while Canada has acceded to and ratified international treaties and conventions which speak about rights to health and medical care, such agreements are not part of Canadian law unless and until they have been implemented by domestic statutes.

> **Baker v. Canada (M.C.I.), [1999] 2 S.C.R. 817, at para. 69**
> **Suresh v. Canada (M.C.I.), 2002 SCC 1, at para. 60**
> **DeGuzman v. Canada (M.C.I.), 2005 FCA 436, at para. 63 (leave to appeal to the SCC dismissed December 20 2005, SCC No. 31333)**

35. Further, such international agreements speak in general and abstract terms and do not and cannot dictate to individual signatory nation states, the exact content of the right nor the required manner of delivery of the subject matter of the right. Thus, while international agreements might recognize "an international right to health", that does not equate, in either international or domestic law, to an unlimited right to all available health services by everyone in Canada, at government expense.

> **Auton v. B.C. (Attorney General), 2004 SCC 78, at para. 35**

36. Indeed, Canada has clearly and intentionally chosen to enact domestic legislation which grants access to her public healthcare system on a strictly defined and much more limited basis, specifically to those present in Canada who meet the defined eligibility criteria set out in her domestic laws. Where a nation's domestic law is incompatible with international law,

domestic statutes prevail over international law, for the purposes of Canadian law.

> **R. v. Hape, 2007 SCC 26, at para. 53**
> **Schreiber v. Canada (A-G), [2002] 3 S.C.R. 269, at para. 50**
> **Bouzari v. Islamic Republic of Iran (2004), 71 O.R. (3d) 675 (C.A.), at para. 66 (leave to appeal to S.C.C.) dismissed, [2004] S.C.C.A. No. 410**

D. Denial of IFHP benefits to the Appellant, is not a violation of her s.15 *Charter* rights:

37. The Appellant asks this Court to accept that people like herself, who have chosen to live and work illegally in Canada, should nevertheless, by virtue of section 15 of the *Charter*, have free and unlimited full access to Canada's healthcare system when they require it, because it is convenient and in many cases preferable to the healthcare available to them in their own country. However, that is not the Appellant's decision to make. As stated by Justice Linden of this Honourable Court:

> "The appellants are, in essence, seeking to expand the law ... so as to create a new human right to a minimum level of health care... the law in Canada has not extended that far.... a freestanding right to health care for all of the people of the world who happen to be ... in Canada would not likely be contemplated by the Supreme Court."
>
> **Covarrubias v. Canada (M.C.I.), 2006 FCA 365, at para. 36**

38. The Respondent states that at present, the Supreme Court of Canada's test to evaluate if a s.15 *Charter* equality right has been denied has two parts and that the Appellant fails to meet both prongs of the two-part test to establish a s. 15 violation:

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143
Law v. Canada (M.E.I.), [1999] 1 S.C.R. 497
R v. Kapp, 2008 SCC 41

(i) No distinction in law on an analogous ground:

39. The Respondent asserts that Justice Zinn was correct in finding that the Appellant did not allege discrimination on the basis of her immigration status. The Respondent asserts that immigration status is not an analogous ground under s. 15.

Toussaint v. Canada (M.C.I.), 2010 FC 926

40. The Appellant alleges her s.15 equality rights have been violated on the "analogous ground" of her immigration status: living in Canada illegally, as an "immigrant without status." The Respondent states this identified ground fails to meet the test for an "analogous ground" under s. 15 *Charter* jurisprudence.

41. In Corbiere, the Supreme Court of Canada identified the criteria by which one identifies an analogous ground of distinction created by law:

> "... It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of **a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.** This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on **characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.** To put it another way, s. 15 targets the denial of equal treatment on **grounds that are actually immutable, like race, or constructively immutable, like religion.** ..." [emphasis added]
>
> **Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at para. 13**

42. For a ground to be "analogous" within the meaning of s.15 of the *Charter*, it must be actually immutable or unchangeable, or only changeable at an unacceptable cost to a person's identity. It is a characteristic that the government has no legitimate interest in expecting a person to change, in order to receive equal treatment and benefit under law.

43. The Respondent states that the characteristic of "being illegally resident in a country with no legal status", is completely the opposite. It is a characteristic that can be changed, at no unacceptable personal cost to one's identity. The government has a real, valid and justified interest in expecting residents of Canada to have a legal status in this country, if they wish equal treatment under and equal benefits from Canada's laws.

44. Since the characteristic identified and relied upon by the Appellant is the very antithesis of what the Supreme Court has identified as an "analogous ground", the Appellant has utterly failed to meet the first prong of the two-part test to establish a s.15 *Charter* violation.

45. The Ontario Court of Appeal so found in Irshad, where persons living in Ontario alleged that their s. 15 rights were violated because they were denied OHIP benefits because, due to their lack of legal immigration status, they failed to meet Ontario's definition of "ordinarily resident in Ontario." The Court accurately noted the reality that a person's immigration status can and does change: "A person's status as a non-permanent resident for the purposes of OHIP eligibility is not immutable...the immigration status of persons with physical disabilities changes." Since immigration status was changeable, no s. 15 violation was made out.

Irshad et al. v. H.M.Q in Right of Ontario et al., 2001 CanLII 24155 (ON C.A.) at paras. 133 – 136

46. Indeed, this Honourable Court in its 2006 decision in Forrest, subsequently concluded that:

> " It is far from obvious that the lack of immigration status ... is an analogous ground under section 15 because his lack of immigration status, not unlike that of other foreigners who have no immigration status in Canada but who may seek and obtain one, is not immutable."

Forrest v. Canada (A-G), 2006 FCA 400, at para. 16

47. The Appellant also suggests the 1957 Order-in-Council discriminates against her on the basis of disability. However, persons with disabilities are not excluded from receiving IFHP benefits – persons with disabilities who fall within the enumerated classes of the 1957 OIC receive IFHP benefits. Secondly, discrimination only arises, when disability is considered when it is not a relevant factor, or is not considered when it is a relevant factor. Because disability is not a relevant factor to eligibility for IFHP benefits, it need not be considered. Finally, the disability equality guarantee is not designed to ameliorate all adverse impacts, but to ensure that the disability is not given undue consideration and is considered when it is relevant to the inquiry. Having a disability does not entitle the Appellant to receive publicly funded healthcare services under CIC's IFHP.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at para. 58
Granovsksy v. Canada (M.E.I.), [2000] 1 S.C.R. 703, at para. 33

(ii) No disadvantageous perpetuation of prejudice or stereotyping:

48. The Appellant also fails to meet the second prong of the test to establish a s. 15 *Charter* violation because she has failed to demonstrate that her lack of legal status in Canada "has the effect of perpetuating or promoting the view that she is less capable or worthy of recognition or value as a human being." What she has shown, is that due to her lack of legal status, she is not entitled to the same medical benefits that those with legal status in Canada

enjoy; but that is far from demonstrating the affront to essential human dignity, prejudice or stereotyping, that is required to establish a s. 15 *Charter* violation.

See: Law, *supra*, at para. 63 and
Forrest, *supra*, at para. 19

E. Denial of IFHP benefits to the Appellant, is not a violation of her s. 7 *Charter* rights:

49. Jurisprudence from the Supreme Court of Canada holds that in order to succeed in demonstrating a violation of her s.7 *Charter* rights, this Appellant must satisfy a two-part test, by showing:

(a) a deprivation of her right to life, liberty and security of the person; and

(b) that the deprivation is not in accordance with a principle of fundamental justice.

Gosselin v. Quebec (A-G), 2002 SCC 84, at para. 205
Chaoulli v. Quebec (A-G), 2005 SCC 35, at paras. 29 & 109 (reasons of Deschamps J. and concurring McLaughlin C.J. respectively)

(i) no deprivation of the Appellant's life or security of the person:

50. With respect to the first part of the two-part test to establish a s.7 violation, the Respondent states that Justice Zinn erred in concluding that the Appellant had established a deprivation of her right to life, liberty and security of the person on the evidence before him.

Reasons, Appeal Book, pages 12 – 52, at paras. [91 – 92] (pages 48 – 49)

51. The Respondent states that in spite of her illegal status in Canada and hence her lack of free access to Canada's public healthcare system (outside of the free medical and emergency care she has received), the evidence amply demonstrates that the Appellant has been and remains under the active care of both a family doctor and a number of specialists, respective Heads of their Departments at St. Michael's Hospital in Toronto. She has had a number of surgeries when required, as well as numerous hospital admissions. Over the years, her health problems have been identified, diagnosed and evaluated by a number of specialized tests and procedures, and are being actively monitored and treated with a variety of appropriate medications. In spite of lacking any legal right to healthcare in Canada, the Appellant has in actual fact, received most, although not all, of the medical treatment she has required and requested.

Appeal Book, pages 163 – 164, 196 – 198, 200 – 207, and Supplementary Appeal Book, Vol. 6 – 12, 63 – 65, 68 – 75, 176 – 178 and Vol.'s 2, 3, 4 pages 248 – 846

52. This evidence, combined with the fact that Canada's public hospitals cannot deny emergency medical treatment to anyone, when to do so would endanger life, leads to the conclusion, in the Respondent's view, that the Appellant has not demonstrated that she has established any serious deprivation of her right to life or security of the person, within the meaning of s.7 of the *Charter*.

***Public Hospitals Act*, R.S.O. 1990, c. P.40**

(ii) Appellant's failure to identify a "principle of fundamental justice":

53. With respect to the second part of the two-part test to establish a s.7 *Charter* violation, the Respondent states Justice Zinn was correct in his conclusion that the principles of fundamental justice do not require that Canada provide healthcare to all persons in her territory, irrespective of their legal status, or lack of status, in this country. He reasoned:

> "... Ms. Toussaint is neither a legal migrant nor is she unwittingly an illegal migrant. Although she entered this country legally, she chose to remain here illegally; there is nothing stopping her from returning to her country of origin. She has chosen her illegal status and, moreover, she has chosen to maintain it. I fail to see how her situation can be said to fall within the purpose of the IFHP. ...
>
> I do not accept the applicant's submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. 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 safe-haven for all who require health care and health care services. There is nothing fundamentally unjust in refusing to create such a situation."
>
> **Reasons, Appeal Book, pages 12 – 52, at paras. 93 – 94 (pages 49 – 50)**

54. Central and essential to every successful section 7 *Charter* claim, is the requirement that the claimant identify "a principle of fundamental justice" that is engaged on the evidence in the case:

> "...the real control over the scope and operation of section 7 is to be found in the requirement that the Applicant identify a violation of a principle of fundamental justice."
>
> **Chaoulli, *supra*, at para. 199 (Judgment of Binnie J.)**

55. "A principle of fundamental justice" must meet 3 criteria:

(a) it must be a legal principle;

(b) it must be vital and fundamental to our notion of justice or viewed by society as essential to the administration of justice; and

(c) it must be capable of precise identification and yield predictable results when applied.

R. v. Malmo-Levine, 2003 SCC 74, at paras. 112 & 113

56. The Respondent submits that the Appellant has failed to identify any "principle of fundamental justice" within the meaning of s.7 of the *Charter*, which meets the tripartite test above. The Appellant's "principle" appears to be: "persons with no legal status in Canada must be given access to healthcare in Canada, if they require it." To suggest this "principle" is essential to Canadian society's notion of justice is not credible or supportable.

57. The Appellant cites no jurisprudence that purports to recognize this as an existing or recognized legal principle in Canada. She quite understandably has been unable to provide any evidence that such a principle is vital, fundamental or essential to Canadian society's view of justice. Lastly, the Respondent notes, as did Justice Zinn, that "the predictable result" of recognizing such a "principle", would be a steady influx of illegal migration to Canada by those seeking healthcare.

58. Very recently, the Federal Court had occasion to consider a very similar s.7 *Charter* claim. In Toussaint, Justice Snider considered the Appellant's argument that her s.7 rights mean that Canada must consider her "H&C" application (seeking to obtain permanent residence and thus the right to Canadian healthcare) without payment of the required processing fee.

Toussaint v. M.C.I., 2009 FC 873

59. In considering whether Ms. Toussaint had identified any "principle of fundamental justice" as required under s.7, Justice Snider held that her alleged principle of being entitled to a "free" "H & C" assessment was not "a principle of fundamental justice" because: (a) there was no indication that such a principle was vital or fundamental to our societal notion of justice and (b) it was not capable of being precisely identified so as to provide a justiciable standard, nor did the alleged principle set out minimum requirements for the dispensation of justice. The Respondent submits that a similar conclusion that no such "principle of fundamental justice" exists, is warranted in this case.

Toussaint, *supra*, at paras. 34 – 51

60. As recently as 2005, our Supreme Court has noted that "...As we enter the 21st Century, health care is a constant concern" and "The demand for health care is constantly increasing" and "no one questions the need to preserve a sound public health system." However, the Supreme Court of Canada also confirmed that even Canadian citizens, do not have a

"...freestanding constitutional right to healthcare" under the *Charter*. If Canadians do not have a constitutional right to healthcare, it clearly follows that non-citizens residing illegally in Canada certainly do not.

Chaoulli, *supra*, at paras. 2, 14 and 104

61. The 1957 Order-in-Council does not infringe the principles of fundamental justice by being impermissibly vague. A law only offends the doctrine of vagueness when, considered in its full interpretative context, it so lacks in precision that it does not provide sufficient guidance for legal debate as to the scope of prohibited conduct or of an "area of risk". The vagueness doctrine does not even apply – it is ordinarily restricted to criminal law, as it concerns the required precision of criminal provisions. The Appellant's entitlement to IFHP benefits under the 1957 OIC does not concern any criminal law provision. Even if the OIC was subject to the vagueness doctrine, its meaning and scope can be easily discerned through the application of statutory interpretation principles, as done by Zinn J. This fact precludes the Appellant from arguing that the OIC is impermissibly vague.

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at 626 – 627 and 643
Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, at 1070–72

62. It is therefore submitted that the Appellant has failed to demonstrate any violation of her section 7 or 15 *Charter* rights.

F. CONCLUSION:

63. The Respondent submits that from 1949 until the present day, interim medical health benefits have been made available by the federal government for short periods of time, to certain defined newcomers to Canada who lacked resources to pay those expenses themselves and whom the federal government decided were deserving of these interim medical benefits on humanitarian grounds.

64. A careful reading of the Orders-in-Council shows that the beneficiaries of the IFHP, consistently throughout the entire 60 years of its existence, have almost exclusively been those legally admitted to Canada as new immigrants, and more recently, also those persons welcomed to Canada on the basis of their need for Canada's protection on refugee or humanitarian grounds.

65. CIC's policy decisions over the years, have determined who benefits from the IFHP, what benefits are given and when those temporary benefits end. The list of those eligible for these short-term temporary medical benefits, has always been based upon Canada's humanitarian tradition of giving essential medical help to those newly-arrived immigrants selected and approved by Canada, as well as refugee claimants and other vulnerable groups, who both need and deserve our help and protection.

66. While the Appellant asserts that people like herself, who have chosen to live and work illegally in Canada, should nevertheless also be beneficiaries of the IFHP, that is not her decision to make. As stated by the Supreme Court:

> "This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner."
>
> **Auton, *supra*, at para. 41**

67. The Supreme Court has also recognized that even the expansive and generous guarantees set out in the *Charter* and relied upon by the Appellant, are necessary imperfect and incomplete:

> "It seems to me that s.7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined."
>
> **R. v. Lyons, [1987] 2 S.C.R. 309, at para. 88**

68. Providing unlimited and free access to Canada's healthcare to all persons living in Canada, be they Canadian citizens and permanent residents or nationals of other countries choosing to reside in Canada illegally, may indeed be "the most favourable procedure imaginable", but it is not the procedure reasonably and legitimately chosen by the government of Canada.

69. In closing, the Respondent states that the situation in which this Appellant currently finds herself, as unfortunate and sympathetic as it may be, is one created entirely by her own choices and actions and not one which can be blamed on any shortcomings or failures of CIC or the federal government of Canada. The Supreme Court has confirmed that people must bear the consequences of the choices they make, even when they don't like the outcomes of their choices:

> "Subsequent dissatisfaction with the "way things turned out" or with the sentence received is not, in my view, a sufficient reason to move this Court to inquire into the reasons behind the election or plea of an offender, particularly where there is nothing to suggest that these were anything other than informed and voluntary acts."
>
> **Lyons, *supra*, at para. 107**

PART IV – ORDER SOUGHT

70. The Respondent states that this appeal should properly be dismissed without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 18th day of November, 2010.

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PART V – LIST OF AUTHORITIES

Nell Toussaint v. M.C.I. et al., 2009 FC 873
(on appeal to the Federal Court of Appeal in Court File No. A-408-09)

Dr. Q. v. College of Physicians and Surgeons of British Columbia,
[2003] 1 S.C.R. 226; 2003 SCC 19

Housen v. Nikolaisen, [2002] 2 S.C.R. 235; 2002 SCC 33

Mugesera v. Canada (M.C.I.), [2005] 2 S.C.R. 100; 2005 SCC 40

Canada (M.P.S.E.P.) v. Cha, 2006 FCA 126; 267 D.L.R. (4th) 324;
[2007] 1 F.C.R. 409

Baker v. Canada (M.C.I.), [1999] 2 S.C.R. 817

Suresh v. Canada (M.C.I.), 2002 SCC 1

DeGuzman v. Canada (M.C.I.), 2005 FCA 436

Auton v. B.C. (Attorney General), 2004 SCC 78

R. v. Hape, 2007 SCC 26

Schreiber v. Canada (A-G), [2002] 3 S.C.R. 269

Bouzari v. Islamic Republic of Iran (2004), 71 O.R. (3d) 675 (C.A.);
(leave to appeal to S.C.C.) dismissed, [2004] S.C.C.A. No. 410

Covarrubias v. Canada (M.C.I.), 2006 FCA 365

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Law v. Canada (M.E.I.), [1999] 1 S.C.R. 497

R v. Kapp, 2008 SCC 41

Toussaint v. Canada (M.C.I.), 2010 FC 926

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Irshad et al. v. H.M.Q in Right of Ontario et al., 2001 CanLII 24155 (ON C.A.)

Forrest v. Canada (Attorney General), 2006 FCA 400

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624

Granovsksy v. Canada (M.E.I.), [2000] 1 S.C.R. 703

Gosselin v. Québec (Attorney General), 2002 SCC 84

Chaoulli v. Quebec (Attorney General), 2005 SCC 35

R. v. Malmo-Levine, 2003 SCC 74

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606

Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031

R. v. Lyons, [1987] 2 S.C.R. 309

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25

Public Hospitals Act, R.S.O. 1990, c. P.40, ss. 20 and 21

Court File No.: A-362-10
(Federal Court No.: T-1301-09)

FEDERAL COURT OF APPEAL

BETWEEN:

NELL TOUSSAINT

Appellant
(Applicant in the Federal Court)

– and –

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent in the Federal Court)

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