Court File No.: IMM-3761-09

FEDERAL COURT

BETWEEN:

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – THE FACTS

(a) facts concerning the Applicant:

1. The Applicant is a 40 year old, female, single citizen of Grenada, with parents and a brother living in her country of citizenship. The Applicant states she entered Canada almost 10 years ago and was granted permission to visit Canada for 6 months (no visas were required of visiting citizens of Grenada). She arrived in Montreal in December of 1999 and never left Canada.

Affidavit of the Applicant, sworn August 23, 2009

2. The Applicant has chosen to remain living in Canada illegally for almost 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 she told the Social Services Division in Toronto, she was "...in the process of applying for permanent residence from within Canada." The Applicant has filed evidence describing herself, and the many thousands of others like her living in Canada illegally in clear violation of Canada's immigration laws, euphemistically as "immigrants without status." The Applicant is not an immigrant to Canada.

Affidavit of the Applicant, *supra*.
Affidavit of Ilene Hyman, sworn August 25, 2009

3. Only when the Applicant's health problems recently required serious medical attention, did the Applicant take any steps to attempt to legalize her illegal status in this country, in order to facilitate her access to the Canadian healthcare system. She filed an application in September of 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, instead seeking to be granted landing from within Canada, on "Humanitarian and Compassionate" ("H&C") grounds.

Affidavit of the Applicant, *supra*.

4. However, she chose *not* to pay the required $550 application fee, asking to be relieved of that legal obligation, claiming she lacked the resources to pay the fee. When the Department of Citizenship and Immigration ("CIC") refused, in January of 2009, to process her "H&C" application without the required fee, she successfully accessed the resources required to challenge that decision in Federal Court.

See: Court File No.: IMM-326-09

5. Madam Justice Snider held that neither sections 7 or 15 of the Charter, nor the rule of law, nor the common law constitutional right of access to the Courts, required CIC to process the Applicant's "H&C" application, without the payment by her of the required application fee; holding:

> "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]**

6. Thus the Applicant has been unsuccessful (to date) in gaining full access to the Canadian healthcare system as a legal immigrant to Canada on "H&C" grounds. So in May of 2009, the Applicant tried another strategy: she claimed the right to medical benefits under CIC's "Interim Federal Health Program" ("IFHP"); a program granting short-term and temporary essential medical benefits to certain limited and specifically-defined groups of persons on humanitarian grounds, who are **legally in Canada**.

This Program was never designed by the federal government nor intended to provide the significant benefits of the Canadian healthcare system, to people in Canada illegally; or to utilize the Applicant's preferred phraseology, "immigrants without status." The Applicant was therefore told by CIC she did not qualify for medical coverage under the Interim Federal Health Program (by CIC's letter dated July 10, 2009) because she was not a member of any of the groups selected by the federal government of Canada, to receive the temporary medical benefits available under the Program.

Affidavit of the Applicant, ***supra.***
Affidavit of Tom Heinze, sworn September 23, 2009, Exhibit "A"

7. Although the Applicant has no legal status in Canada, has the ongoing option of returning to her own country of citizenship to obtain healthcare there, and has no legal right to access free healthcare in Canada, she has nevertheless been successful in securing a family doctor, payment for many of her medications, a number of surgeries and hospital stays and the services of various specialists in the medical profession in Canada.

Affidavit of the Applicant, ***supra.***

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

8. 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 permission to come to Canada, who required immediate medical attention after their arrival, but

lacked the ability and 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 Tom Heinze, *supra*., Exhibit "B", at p. 5

9. 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." (bold typeface added).

Affidavit of Tom Heinze, *supra*., Exhibit "B", at p. 5

10. In 1957, the 1952 OIC was revoked and replaced by a new one, P.C. 157-11/848, which 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." (bold typeface added)
>
> **Affidavit of Tom Heinze, *supra.*, Exhibit "C"**

11. From 1957 to 1993, the Department of Health paid the costs of temporary medical services for newly-arrived immigrants who could not do so; naming its Program "Non-Insured Health Services." However, in 1993, a "Memorandum of Understanding" was signed between the Department of National Health and Welfare and the Canada Employment and Immigration Commission (now CIC), to transfer the entire "Immigration Medical Assessment function" from Health to Immigration, effective April 1, 1993. This transfer included the "Non-Insured Health Services Program":

> "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. (See Part E – Administrative and Transitional Arrangements concerning the management of resources in the context of the program.) (bold typeface added)
>
> **Affidavit of Tom Heinze, *supra.*, Exhibit "D" at pp. 2 – 3**

12. 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 continuous responsibility for the Interim Federal Health Program since that time.

Affidavit of Tom Heinze, *supra.*, Exhibit "E"

13. Over the subsequent years, under CIC's responsibility and management, the Interim Federal Health Program has expanded to extend short-term, temporary medical benefits to additional discrete groups of individuals whom the federal government thought both deserving and in need. For example, when the government of Ontario stopped covering the cost of providing temporary medical benefits for refugee claimants under OHIP effective April 1, 1995, CIC's Interim Federal Health Program expanded, to ensure that refugee claimants legally in Canada awaiting disposition of their refugee claims, received any essential medical services they required.

Affidavit of Tom Heinze, *supra.*, Exhibit "G"

14. In 1998, a CIC Operations Memorandum repeated that the intent of CIC's Interim Federal Health Program was:

> "...to pay for in-Canada health care for certain migrants who are unable to pay for expenses related to urgent and essential services...The program has been put in place for humanitarian reasons to allow **refugee claimants, Convention refugees, humanitarian classes 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." (bold typeface added)

The groups entitled to CIC Interim Federal Health coverage again expanded to include members of "DROC", the Deferred Removal Orders Class (defined by Regulation) and individuals in Canada detained by CIC.

Affidavit of Tom Heinze, *supra.*, Exhibit "H"

15. CIC's Interim Federal Health Program was subsequently extended again, to cover applicants for CIC's new "Pre-Removal Risk Assessment" ("PRRA") and persons detained by the newly-created CBSA, as well as more recently, Victims of Human Trafficking, as recognized by CIC policy.

Affidavit of Tom Heinze, *supra.*, Exhibits "I" and "K"

16. Claims to and payments made under the Interim Federal Health Program are practically administered by a private benefit administration company, FAS Benefit Administrators Ltd., on behalf of CIC. FAS and CIC co-publish a "Handbook for Health Care Providers in Canada", explaining who in Canada 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 CIC determines if any particular person is entitled to Interim Federal Health Program benefits or not, and if found eligible, CIC issues them an "Eligibility Document", entitling them to short-term medical coverage.

Affidavit of Tom Heinze, *supra*., Exhibit "J", pp. 1–2, 5–6, 16

PART II – THE ISSUE

17. Was CIC correct in its decision that the Applicant is not entitled to benefits under the Interim Federal Health Program, because she is not a member of the specifically enumerated groups whom the federal government has decided, as a matter of policy, should benefit from this Program?

PART III – THE LAW AND ARGUMENT

(a) the Applicant's overall claim to healthcare in Canada:

18. The Respondent submits that this Applicant'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 free access to healthcare in Canada."

Applicant's Memorandum of Argument, (undated), at pp. 225 – 254 of the Applicant's Application Record

19. In reply, the Respondent states that no country, including Canada, has the infinite resources required to provide free healthcare to everyone able to enter and set up residence in that country. Further, Canada has the right to choose to make her healthcare benefits available only to those persons who have legal status in this country. This Applicant has had 10 years within which to choose to seek and obtain legal status in Canada. Instead, she decided to live and work in Canada illegally. But now, she claims that Canadian and international law gives her an entitlement to free access to Canadian healthcare. The Applicant is highly selective, in terms of which laws she chooses to ignore and which laws she chooses to invoke.

Applicant's Memorandum, ***supra.***

20. The Applicant asks this Court to believe that she is being denied healthcare in Canada, because she is a disadvantaged woman of colour with few economic resources. The reality is she is not entitled to healthcare in Canada because of the choices she had independently made since her arrival in this country; which country accepted her *only* as a short-term temporary visitor 10 years ago. The Applicant has no right to attempt to camouflage her own choices, as invidious societal or governmental discrimination against her, in alleged violation of sections 7 and 15 of our Charter.

Applicant's Memorandum, ***supra.***

21. 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 v. Quebec (Attorney General) 2005 SCC 35, at paras. 2, 14 and 104

22. Furthermore, our Supreme Court of Canada has also held that Canadian citizens who pay for and legitimately benefit from many healthcare services in Canada, are not, pursuant to section 15 of the Charter, entitled to government-funded healthcare services of their choice, or "...all medically required treatment". The Court confirmed that the Charter does not require governments to provide citizens with all medically required treatments:

> "...the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment...the benefit here claimed – funding for all medically required services – was not provided for by the law."

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

(b) the Applicant's specific claim to healthcare benefits under CIC's Interim Federal Health Program:

23. 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 benefits on humanitarian grounds. They are not permanent medical benefits, and only intended to "cover the gap", until the identified groups qualify for regular provincial or territorial healthcare coverage.

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

25. CIC's policy decisions over the years, have determined who benefits from the Program, 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, who both need and deserve our help and protection.

26. While the Applicant asserts that people like herself, who have chosen to live and work illegally in Canada, should nevertheless also be beneficiaries of the Interim Federal Health Program, that is not her decision to make. As stated by our 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**

27. Our Supreme Court has also recognized that even the expansive and generous guarantees set out in sections 7 and 15 of our Charter, and relied upon by the Applicant, 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**

28. 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.

29. In closing, the Respondent states that the situation in which this Applicant 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. Our 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

30. For all of the above reasons, the Respondent states that this leave application should be properly dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 25th day of September, 2009.

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