

## Some Reflections on Nell Toussaint: July 14, 1969 – January 9, 2023

### The Person Behind the Historic Human Rights Case

Bruce Porter

Nell Toussaint passed away last week after suffering heart failure and falling into a coma late last year.

As the human rights movement mourns the passing of a very significant human rights claimant and advocate, I've been thinking about the person that I came to fondly know as we wound our way through legal processes that too often seem to erase the 'human' from human rights.

The most striking thing as I reflect on the decade long legal struggles is the contrast between the person I came to know and the person described by lawyers for the Canadian government and by some of the judges.

I remember Nell walking into the federal court room in Toronto in 2010, supporting herself with a cane and greeting us all with that incredible warm smile of hers. She proceeded to sit with such dignity and composure as the lawyers for Canada described her quest for justice in the most derogatory and discriminatory terms one could imagine. If you're interested in a what that looks like, you might take a look at Nell's affidavits and compare the person you see there with the person described in Canada's Memorandum of Argument.

[Affidavit of Nell Toussaint sworn January 26, 2009](#)

[Affidavit of Nell Toussaint sworn August 23, 2009](#)

[Supplementary Affidavit of Nell Toussaint sworn January 3, 2010](#)

[Canada's Memorandum of Argument](#)

Before every court and before the Human Rights Committee, Canada has described Nell as a manipulative and selfish law breaker only interested in securing benefits that she doesn't deserve or need, simply to advance her own selfish ends. For anyone who knew Nell or had bothered to read the evidence these descriptions were so hard to stomach! And it was shocking to see how easy it was for lawyers to convince some judges to simply affirm discriminatory stereotypes about irregular migrants. The Federal Court of Appeal, for example, found that what happened to Nell was in accordance with principles of fundamental justice because, if Canada were to provide health care to people like Nell when their lives are at risk, boatloads of irregular migrants would set sail for Canada's "health care safe haven"! The judges had before them uncontested evidence that it is entirely untrue that irregular migrants are likely to migrate in search of health care, but as with most discriminatory stereotypes, the evidence didn't seem to matter.

When I first met Nell, she had been working in Canada for almost a decade, as a valued employee working as a car parts assembler and a general labourer. It was after an employer suggested that she apply for permanent residency status so that she could be hired permanently that she began to investigate regularizing her residency status. Canada, of course, suggested that she did so just to try to get free health care!

I first met Nell after she had tried to apply for Humanitarian and Compassionate consideration of a permanent residency application but was unable to afford the significant fees. Though she was at risk of deportation, she agreed to join with several other claimants challenging Canada's refusal to consider fee waiver requests from those living in poverty and she continued to pursue a remedy in the public interest after receiving outside help in paying the fees for her own application.

Sadly, however, Nell became increasingly ill. Canada's refusal to allow her access to publicly funded health care, of course, led to the historic claim in [Toussaint v Canada](#). These were scary times when Nell's life was at serious risk because she lacked access to diagnostic and specialized care for serious complications of diabetes. She subsequently experienced very serious health effects linked to lack of adequate care during that time, including amputation, a stroke and blindness. Hospital emergency rooms were required by law not to turn her away, but Nell was always uncertain about how she would be treated and she would subsequently have to deal with debt collection agencies trying to get her to pay hospital bills she couldn't afford to pay. Here is how she described visiting emergency rooms:

I am aware that many doctors, receptionists and people in waiting rooms who hear me explain why I have no health coverage and ask for compassion based on my serious circumstances may have negative attitudes about immigrants seeking healthcare in Canada. I feel vulnerable to being treated as an outsider. I feel that administrators, receptionists, other patients and doctors who do not know the details of my circumstances may have negative ideas about people in my situation. They may think that I have set out to 'take advantage' of Canada's healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society but who has become ill and needs healthcare to save my life.

In the midst of all of these struggles Nell was willing to launch and continue with a Charter challenge that she knew would be more likely to benefit others more than herself. In doing so she subjected herself to the very negative publicity attached to irregular migrants or those in poverty using the court system, and she continued with her claim well after she herself had regularized her status and was receiving publicly funded health care.

In her personal life as well as in her human rights advocacy, Nell was always thoughtful of others. I remember how, in my first visit with her after her stroke, when speaking was incredibly difficult for her, it took me a minute to understand that she was making a significant effort to ask me how my “boys” were doing. She was always alert to everyone else’s needs in a room and unlike the person described by lawyers for Canada, she was grateful for the support she received from care givers, human rights and health care advocates, physicians and specialists willing to see her. She was particularly grateful to her lawyer Andrew Dekany, who stood by her and supported her throughout all of her struggles – legal and otherwise.

Of course, Nell’s interaction with the justice system, both in Canada and at the UN, has also included some really happy moments of vindication that made for the memories I will most cherish. The day the [decision of the UN Human Rights Committee](#) was released was amazing. I remember reading to Nell from emails and tweets from far away countries and telling her how her victory was reverberating around the world among others facing similar struggles. She loved to hear that.

And more recently, there was the [decision from Justice Perell](#) denying Canada’s attempt to have her claim dismissed. This was the first time in the long process that a judge in Canada has refused to accept the discriminatory characterizations of Nell’s human rights claims and instead called Canada out for the way in which they disparaged her with false stereotypes. I so enjoyed reading the following passage from Justice Perell’s decision to Nell:

It pains me to have to say that Canada’s argument that it is plain and obvious that Ms. Toussaint’s claim is doomed to fail does it no pride, because Canada pejoratively mischaracterizes Ms. Toussaint’s human rights claim and thus its rhetorical and largely conclusory argument misfires and is also unfair. ... In a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system, Canada mischaracterizes Ms. Toussaint’s Charter claim as a right to receive free health care anywhere in the world, regardless of one’s lack of status” or as a right to receive “an optimum level of health insurance and as a claim for a purely socio-economic right which is outside the guarantees of the Canadian Charter of Rights and Freedoms.

Below is a photo of Andrew Dekany, me and Nell in holding that decision just after it came out last summer. That will always be a great memory! We don’t get a lot of victories like that in Canadian courts!

Nell’s human rights claim will live on, of course, not just because of what has already been accomplished but because others are committed to seeing it through and to ensuring that Canada implements the Human Rights Committee’s decision. We won’t rest until Canada either agrees to treat people like Nell with dignity and as human beings equal in dignity and rights or is ordered to do so by the courts.

Of course, while others now have to carry it forward, the claim and all of what it accomplishes will always belong to the woman who walked into the courtroom in 2010 with such dignity and greeted us with that amazing smile. She won't be forgotten.



Me, Nell Toussaint and Andrew Dekany celebrating the decision in [Toussaint v. Canada \(Attorney General\) 2022 ONSC 4747](#)