Court file no A-362-10

FEDERAL COURT OF APPEAL

BETWEEN:

Nell Toussaint

Appellant

and

Attorney General of Canada

Respondent

Appellant's Memorandum of Fact and Law

1. This is an appeal from the August 6, 2010 Order of the Honourable Justice Zinn, dismissing the application for judicial review of the appellant.

Overview

2. The appellant, Nell Toussaint, toiled for years in Canadian jobs that few Canadians would be willing to take. Various tax and other payroll deductions were taken from her pay cheques. She came to Canada and stayed to work. She did not come seeking healthcare. Then she became seriously ill and was informed by Canadian authorities that her illness and her inability to obtain healthcare for her illness were essentially her problem. This case is about whether such treatment complies with federal law relating to healthcare for non-citizens and, more profoundly, whether it complies with fundamental values of Canadian society, as set out and safeguarded in sections 7 and 15 of our *Canadian Charter of Rights and Freedoms* (*Charter*).

Preliminary Matter: The New Evidence

3. The respondent seeks to adduce new evidence in this appeal that was not before the learned applications judge. The evidence is not new. The respondent could have obtained the evidence at any point earlier in the proceedings, but chose not to do so. The evidence is of marginal value and is, by no stretch of the imagination, "practically conclusive" of any issue under consideration, which is required for the introduction of

new evidence on appeal.[1] The evidence would serve to cloud, rather than clarify the issues, particularly given the fact that the appellant has had no opportunity to conduct cross-examinations in relation to the new evidence, nor rebut it through her own evidence. In the circumstances, the new evidence should not be considered.

Part I: Facts

4. The appellant came to Canada more than 10 years ago on December 11, 1999 as a visitor from Grenada. At the time she required no visa. She has remained in Canada ever since.[2] In 2005 she paid a significant amount of her work savings to try to regularize her status but was victimized by an unscrupulous immigration consultant and could not afford to proceed with her application.[3] In the past four years, as described below, the appellant became disabled with multiple serious health conditions and became unable to work. Being impecunious, in September 2008 she submitted a humanitarian and compassionate ("H & C") application for permanent residence through her current immigration consultant and requested that the fee be waived. That issue is currently before this court.[4] The appellant has done all that she can to regularize her status. She is now forty-one years old, divorced after suffering physical abuse,[5] and lives in poverty.[6]

5. From 1999 until 2006, the appellant worked in Canada and was able to support herself, including paying for minor medical care when needed.[7] Sometimes she was paid a net amount for her work after the employer deducted amounts for federal and provincial taxes, Canada Pension Plan, and Employment Insurance. Canada Revenue

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[1] *Canada* v. *G.E. Electric Capital Canada Inc.*, 2010 FCA 290 paragraph 3
[2] Reasons for judgment of Zinn, J., paragraph 5, Appeal Book, page 14
[3] Affidavit of Nell Toussaint sworn January 3, 2010, paragraphs 4 to 6, Appeal Book, pages 446 and 447
[4] Reasons for judgment of Zinn, J., paragraph 14, Appeal Book, page 17. On January 12, 2009 the Minister advised the appellant that her H & C application would not be considered without the fee. See Appeal Book, page 137. On January 26, 2009 the appellant commenced an application for leave and judicial review of that decision in Federal Court file no. IMM-326-09. On March 5, 2009 Zinn, J granted her leave in that file. On September 4, 2009 Snider, J dismissed the appellant's application for judicial review in IMM-326-09. The appeal of Snider, J.'s decision, under file no. A-408-09, is scheduled to be heard by this Honourable Court on January 19, 2011.
[5] Affidavit of Nell Toussaint sworn August 23, 2009, paragraph 2, Appeal Book, page 108
[6] Reasons for judgment of Zinn, J., paragraph 5, Appeal Book, page 14
[7] Reasons for judgment of Zinn, J., paragraph 6, Appeal Book, page 14

Agency has recognized her as a resident of Canada.[8] The appellant precisely fits the profile of the typical undocumented migrant who migrates when healthy to work and only later becomes ill, as described in the expert evidence of Dr. Manuel Carballo, Professor of Clinical Public Health at Columbia University in New York and Executive Director of the International Centre for Migration, Health and Development in Geneva.[9]

6. The appellant's health began to deteriorate in 2006. She developed an abscess and chronic fatigue that left her unable to work.[10] Since that time she has experienced deterioration in her health, probably related to her Type 2 Diabetes. Zinn J. describes several of the typical incidents in which the appellant experienced serious risks to her health or life because of her inability to pay for or access healthcare coverage.[11]

7. One such incident occurred in February 2009, when the appellant developed increasing pain in her right leg. A doctor at a community health centre sent her to the emergency department at St. Michael's Hospital in Toronto with a suspicion of deep venous thrombosis. The appellant was asked to return the following day for an ultrasound. When she returned, she was denied the ultrasound on the basis that she could not afford to pay. She left the hospital and shortly thereafter developed chest pain. Two days later the appellant returned to the emergency room with her counsel. An investigation was finally performed that found a pulmonary embolism, an extremely serious, life threatening condition.

8. Dr. Gordon Guyatt, a specialist in internal medicine and a Professor of Medicine and of Clinical Epidemiology & Biostatistics at McMaster University, gave affidavit expert evidence detailing the appellant's medical situation::

> The appellant has severe medical problems that markedly impair her quality of life, are likely to decrease her longevity,

[8] Affidavit of Nell Toussaint sworn August 23, 2009, paragraph 6, Appeal Book, page 110
[9] Affidavit of Manuel Carballo sworn February 2, 2010, paragraphs 8 to 17, Appeal Book, pages 497 to 503
[10] Reasons for judgment of Zinn, J., paragraph 6, Appeal Book, page 14
[11] Reasons for judgment of Zinn, J., paragraph 8, Appeal Book, page 14

> and could be life-threatening over the short term. She requires intensive medical management by highly skilled professionals, including medical subspecialists. Negotiating pro bono care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous. Delays resulting from lack of coverage and an inability to pay for the healthcare that she needs and the risk that she will not have access to necessary services creates serious risk to her health and may have life threatening consequences.[12]

9. Dr. Stephen Hwang, a specialist in internal medicine at St. Michael's Hospital and a professor in the Faculty of Medicine at the University of Toronto, also gave affidavit expert evidence detailing the appellant's medical condition. He commented on the likely medical outcome for the appellant, should she be unable to obtain adequate healthcare:

> The appellant would be at extremely high risk of suffering severe health consequences if she does not receive health care in a timely fashion. As noted above, she has already suffered from serious and to some degree irreversible health consequences due to lack of access to appropriate care, which resulted in inadequately treated, uncontrolled diabetes and hypertension. As documented in her medical records, her inability to afford medications in the past has also contributed to the poor control of her diabetes and hypertension. If she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).[13]

10. The appellant provided an affidavit in which she addressed the impact her healthcare situation has caused her:

> I never know whether I will be able to get treatment or tests I need in a timely fashion. I cannot predict when doctors or service providers will agree to provide services without pay and when they will not. This makes me feel that I lack control over my health.

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[12] Reasons for judgment of Zinn, J., paragraph 11, Appeal Book, page 16
[13] Reasons for judgment of Zinn, J., paragraph 12, Appeal Book, page 16

> I am extremely grateful for the services that I have been provided by doctors and service providers, despite the fact that I am unable to pay for them. On the other hand, I find it humiliating and degrading to have to negotiate with doctors and other healthcare service providers to receive healthcare, out of charity. It makes me feel that I am not considered of the same worth or value as other patients.
>
> 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.
>
> When people are hostile toward me or do not want to allow me to have access to the healthcare I require, I feel that my life and health are devalued because of my immigration status and my disability. This leaves me depressed and anxious about my vulnerable situation and I have to work hard to maintain my dignity and self-esteem.[14]

11. In March 2009, the appellant made an application for a Temporary Resident Permit to the Minister of Citizenship and Immigration. The appellant again requested a waiver of the required fee because of her poverty. This request was denied by a letter from Citizenship and Immigration Canada dated April 19, 2009. The letter referenced a Field Operations Support System (FOSS) number 6157-8132 for the appellant, thus indicating that Citizenship and Immigration Canada had placed her name and date of birth in its database at least as early as that time.[15]

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[14] Reasons for judgment of Zinn, J., paragraph 13, Appeal Book, page 17

[15] Reasons for judgment of Zinn, J., paragraph 15, Appeal Book, page 18; letter from Citizenship and Immigration Canada to Macdonald Scott dated April 19, 2009, Appeal Book, page 148; letter from Marie-Louise Wcislo, Department of Justice Canada to Andrew C. Dekany dated August 10, 2009, Appeal Book, page 149

12. In April 2009, the appellant was informed that she qualified for social assistance under the Ontario Works program because she was in the process of applying for permanent residence from within Canada based on H & C grounds.[16] Subsequently she was deemed eligible for social assistance from the Ontario Disability Support Program (ODSP).[17]

13. In June 2009, the appellant inquired about coverage under the Ontario Health Insurance Plan (OHIP) but was told that she was not eligible.[18] The appellant also applied to the Interim Federal Health Program (IFHP) for coverage by letter dated May 6, 2009 enclosing supporting documentation. The letter was received and marked with the appellant's aforesaid FOSS number 6157-8132 on May 8, 2009.[19]

14. Among the supporting documentation provided to the IFHP was a letter dated March 4, 2009 from Dr. Sally Sharpe stating that the appellant "is currently dangerously ill, very much complicated by the fact that she has been refused care because she could not pay bills" and as a result had been "at imminent risk of her life".[20]

15. The appellant's application for IFHP coverage was refused on July 10, 2009, on the basis she did not fit into any of the 4 categories of persons eligible for IFHP coverage set out in the Departmental guidelines of Citizenship and Immigration Canada (CIC). It is from this decision and the judicial review thereof that this appeal arises.

Part II: Issues

16. Did the learned applications judge err in concluding that the appellant is not a person who is "subject to immigration jurisdiction" and therefore is not eligible for

[16] Reasons for judgment of Zinn, J., paragraph 16, Appeal Book, page 18
[17] Affidavit of Nell Toussaint sworn January 3, 2010, paragraph 7, Appeal Book, page 447
[18] Reasons for judgment of Zinn, J., paragraph 17, Appeal Book, page 18
[19] Letter dated May 6, 2009 from Mr. Macdonald Scott to Ms Samir Samah, Director, Interim Federal Health Plan, Appeal Book, page 62
[20] Letter dated March 4, 2009 from Dr. Sally Sharpe, Appeal Book, page 79

IFHP coverage, pursuant to its enabling authority Order-in-Council P.C. 157-11/848 (the 1957 Order-in-Council)?

17. Did the learned applications judge err in concluding that the violation of the appellant's right to life and security of the person through the exclusion of IFHP coverage is in accordance with principles of fundamental justice under section 7 of the *Charter.*

18. Did the learned applications judge err in concluding that the appellant's exclusion from IFHP coverage did not violate her right to equality under section 15 of the *Charter* on an analogous ground of citizenship or citizenship status and on the enumerated ground of disability?

Part III: Submissions

A. The learned applications judge erred in concluding that the appellant is not a person who is "subject to Immigration jurisdiction", and therefore not eligible for IFHP coverage

19. It is respectfully submitted that the applications judge interpreted the word "subject to Immigration jurisdiction" too narrowly, in effect as requiring the appellant to be a person who is ¨the subject of an immigration proceeding."[21] While immigration authorities have not instigated removal proceedings against the appellant, it is clear that they have the authority to do so. The applications judge found the appellant to be a potential deportee. No one other than immigration authorities could exercise jurisdiction to deport her. As such, it is submitted that at all material times the appellant was "subject to immigration jurisdiction" both *de facto,* as her existence and whereabouts were known to CIC and *de jure*, as the learned applications judge found that "there are no current barriers that prevent Canada from instigating removal proceedings against the [appellant]".[22]

[21] Reasons for judgment of Zinn, J., paragraphs 43 and 44, Appeal Book, page 29
[22] Reasons for judgment of Zinn, J., paragraph 90, Appeal Book, page 48

20. The plain and ordinary meaning of the word "jurisdiction" is legal authority, capacity, power or right to act. The Oxford Online dictionary defines "jurisdiction" as "the territory or sphere of activity over which the legal authority of a court or other institution extends".[23]

21. At the time the Order-in-Council was made, Canadian courts used the word "jurisdiction" in immigration matters in the above sense, that is, as having the legal authority to act.[24] There existed, and still exists, a distinction between "jurisdiction", which is the authority to act, and the "exercise of jurisdiction", which is actually acting pursuant to the authority.[25] The 1957 Order-in-Council does not state "subject to the exercise of Immigration jurisdiction" but rather "subject to Immigration jurisdiction."

22. It is submitted that interpreting paragraph (b) of the 1957 Order-in-Council in the above manner does not make paragraph (a) of the Order-in-Council redundant as held by the applications judge.[26] Paragraph (a), which refers to "an immigrant, after being admitted at a port of entry and prior to his arrival at destination . . .", applies to immigrants who have been admitted for landing.[27] It is submitted that paragraph (b), which refers to "a person who at any time is subject to immigration jurisdiction," applies to other foreign nationals who are in Canada.

23. It is further submitted that the intent of the amendment contained in the 1957 Order-in-Council was to extend the authorization to provide payment for medical expenses from only those who had been admitted for landing, which was what had been authorized in the prior 1952 Order-in-Council, to include those seeking to be landed but who have not yet been admitted for landing and to those foreign nationals not seeking landing but who are otherwise in Canada.

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[23] Oxford Dictionaries. April 2010 "jurisdiction". Oxford University Press http://oxforddictionaries.com/view/entry/m_en_gb0435250
[24] *Narine-Singh* v. *Attorney General (Canada)*, [1955] S.C.R. 395, at 396
[25] *The Queen* v. *Leong Ba Chai*, [1954] S.C.R. 10, at 14
[26] Reasons for judgment of Zinn, J., paragraph 41, Appeal Book, page 28
[27] *The Queen* v. *Leong Ba Chai*, *supra*, at 11 illustrates this interpretation

24. The aforesaid interpretation is supported by the first and second recitals excerpted in the reasons of the applications judge from the March 29, 1957 report to Treasury Board of the Minister of National Health and Welfare, which report recommended the making of the amendment contained in the 1957 Order-in-Council, and indeed its actual terms.[28] Those recitals read:

> 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 who 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;

25. With respect, it is submitted that the learned applications judge erred in his view that the first recital was mostly directed at persons who could not communicate their wishes regarding permanent residence at the border due to illness, speech impairment or language inability, and would not include persons who have made an application for permanent residence or who have indicated their intent to do so.[29] Rather, it is submitted that the recital is far broader and refers to foreign nationals who seek landing as permanent residents in Canada, and as such "are thought to be under the jurisdiction of the Immigration authorities" but for whom it has not yet been "possible to satisfactorily determine their status," that is, to make a determination as to whether they will be landed or not. Such, for example, was the situation of the appellants in *Narine-Singh* v. *Attorney General (Canada), supra* (although they were not seeking payment of health care expenses), who were an "Asian" husband and wife from Trinidad seeking

[28] Reasons for judgment of Zinn, J., paragraph 44, Appeal Book, page 29
[29] Reasons for judgment of Zinn, J., paragraphs 46 to 48, Appeal Book, pages 30 and 31

landing in Canada and who were challenging through the courts the denial of their eligibility because they belonged to a certain "ethnic group," East Indian. Pending the outcome of the Supreme Court of Canada's decision in their case it was not "possible to satisfactorily determine their status as immigrants," that is, to determine whether they could be landed or not.

26. Similarly, on July 10, 2009 when the Minister's representative advised the appellant she was not eligible for IFHP coverage, it was not possible to satisfactorily determine the appellant's status in Canada as the issue of the Minister's statutory duty to consider her H & C application without a fee, and the appellant's corresponding substantive right to such a consideration, was, with leave, still before the court.

27. Moreover, even if the appellant were unsuccessful in accessing the Minister under section 25(1) of the *IRPA*, or if she did access the Minister but it was found she did not have sufficient humanitarian and compassionate considerations, it is submitted that the appellant falls within the circumstances contained in the second recital above and is a person who is subject to Immigration jurisdiction as a potential deportee for the reasons set out earlier. Presumably it is on such basis that the Minister provides IFHP coverage to refused refugee claimants who are awaiting removal.[30]

28. The above interpretation would result in the appellant being eligible for IFHP coverage. It is a plausible alternative to the interpretation of the learned applications judge that the appellant is not eligible for IFHP coverage, the result of which is that she is exposed to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences depriving her of her right to life, liberty and security of the person under section 7 of the *Charter* and possibly violating her rights under section 15(1) of the *Charter*. It is respectfully submitted that where, as here, there are two possible interpretations of a statutory provision, one of which embodies *Charter* values and the other does not, that which embodies the *Charter* values should be adopted.[31]

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[30] CIC's IR 3 Operations Manual, paragraph 4.6(B)(4), Appeal Book, page 379
[31] *Hills* v. *AG*, [1988] 1 S.C.R. 513, at para. 93, *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 36

Moreover any exercise of discretion under the Order-in-Council must be exercised in accordance with the principles of the *Charter* and with the values of international human rights law ratified by Canada, and given the humane purpose of the Order-in-Council, in an equitable and humane manner having regard to the appellant's disability and poverty.[32] The spirit of the Order-in-Council is not being respected if medical coverage is not made available to a person in the appellant's situation.

B. The learned applications judge erred in concluding that the exclusion of IFHP coverage does not violate section 7 of the *Charter*

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

30. In the decision under appeal, the learned applications judge concluded that while the exclusion of the appellant from IFHP coverage deprived her of her right to life, liberty and security of the person, such deprivation was in accordance with the principles of fundamental justice. It is in this latter finding regarding the principles of fundamental justice that the appellant respectfully submits that the learned applications judge erred.

31. The learned applications judge unequivocally concluded that the exclusion of the appellant from coverage under the IFHP program constitutes "government action" to which the *Charter* generally applies.[33] As the applications judge further noted, "a broad conception of section 7 is consistent with the notion that all human beings, regardless of their immigration status, are entitled to dignity and the protection of their

[32] Sossin, Lorne, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law", 66 Sask. L. R. 129 (2003), at pages 156 to 159, citing *Baker* v. *Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817

[33] Reasons for judgment of Zinn, J., paragraph 87, Appeal Book, pages 46 and 47 citing *Singh* v. *Canada (MEI)* 1 S.C.R. 177 at 202

fundamental right to life, liberty and security of the person."[34] The appellant submits that these findings, rooted as they were in the jurisprudence, are correct.

32. The appellant similarly submits that the applications judge's findings with respect to the deprivation of the appellant's right to life, liberty and security of the person, despite the medical care she has received from time to time, represented the only reasonable interpretation of the evidence that was before him. Indeed, Justice Zinn's findings in this regard are cogent:

> 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.
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> . . . . . .
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> In my view, the applicant has established a deprivation of her right to life, liberty and security of the person that was caused by her exclusion from the IFHP.[35]

33. Where the appellant submits that the applications judge erred, however, was in his cursory assessment of the principles of fundamental justice. In essence, the applications judge concluded, in the absence of any evidence in support of the point, that the appellant's exclusion from IFHP coverage was in accordance with fundamental justice because to find otherwise would make Canada a "health-care safe-haven" for all who require health care services.

34. In the appellant's respectful submission, her exclusion from IFHP coverage was arbitrary, was based on vague and ambiguous legal authority, was based on a discriminatory premise and was in contravention of Canada's obligations under binding international human rights law. Further, there is consensus that the rule or principle at

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[34] *Ibid*.
[35] Reasons for judgment of Zinn, J., paragraph 91, Appeal Book, page 49

stake is "fundamental to the way in which the legal system ought fairly to operate".[36] Governments ought never to deny access to healthcare necessary to life as a means of discouraging unwanted or illegal activity, including to those who have entered or remained in a country without legal or documented status. This principle is fundamental to judicial and legislative practice in Canada and internationally and is a core principle of international human rights law binding on Canada.

a) Arbitrariness

35. It is a well-recognized principle of fundamental justice that laws should not be arbitrary. The state is not entitled to arbitrarily limit rights to life, liberty and security of the person.[37] Put in its simplest terms then, the deprivation experienced by the appellant in this case should not be inconsistent with or unrelated to the objectives of the IFH Program.

36. A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]." To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the IFH Program is meant to reflect.[38]

37. First, as argued above, the appellant contends that on a proper reading of the 1957 Order-in-Council, she is entitled to coverage under the IFHP. To this extent, then, her exclusion is based on an erroneous and arbitrary interpretation.

38. Alternatively, if the learned applications judge properly interpreted the provision, the Order-in-Council itself represents an arbitrary measure. As noted above, the applications judge concluded that while the Order-in-Council had infringed the appellant's right to life and security of the person, it was justified because to find

[36] *R.* v. *D.B.*, [2008] 2 S.C.R. 3, 2008 SCC 25 at paragraph 46.
[37] *Chaoulli*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Malmo-Levine*, 2003 SCC 74, at paragraph 135; *Rodriguez*, [1993] 3 S.C.R. 519 at paragraph 203.
[38] *Rodriguez*, at paragraph 203.

otherwise would open the 'floodgates' to other foreign nationals seeking healthcare coverage.

39. With respect, to the extent that there is a state concern or societal interest in denying healthcare to those in Canada who are morbidly ill and are without status for the explicit purpose of preventing others outside Canada from seeking healthcare, it *cannot* be found in the 1957 Order-in-Council. Policy makers may have attributed such concerns and interests to it over the years, but such attribution is the very definition of arbitrary, given that it has no actual connection to the enabling authority.

40. Furthermore, such floodgates reasoning is inappropriate at the section 7 stage of the analysis. In *Rodriguez*, McLachlin J. (as she then was) noted (albeit in a dissenting decision) that the floodgates argument has:

> no place in the s. 7 analysis that must be undertaken on this appeal. When one is considering whether a law breaches the principles of fundamental justice under s. 7 by reason of arbitrariness, the focus is on whether a legislative scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. The principles of fundamental justice require that each person, considered individually, be treated fairly by the law. The fear that abuse may arise if an individual is permitted that which she is wrongly denied plays no part at this initial stage.[39]

41. Justice Zinn did not have before him mythical masses of individuals seeking healthcare, but rather one individual who has lived and worked in Canada for many years, and who has become disabled and very ill in our midst.

42. Beyond being irrelevant to the section 7 analysis, the learned justice's findings regarding a perceived burden to the healthcare system are also unsupported by the record. Indeed, the expert evidence before the learned applications judge was to the opposite effect. Providing healthcare to the undocumented is not uncommon, it has not led to abuse and it has not overly taxed state healthcare mechanisms. As noted in the affidavit of Dr. Manuel Carballo:

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[39] *Ibid*, at paragraph 207, see also *R. v. Swain*, [1991] 1 S.C.R. 933 at 977, *Suresh*, [2000] 2 F.C. 592 at paragraph 105.

> Those who would argue against the equal provision of essential health care to undocumented migrants do so without due reference to the evidence. Undocumented migrants are a small proportion of all migrants and will always be a very much smaller proportion of national populations.
>
> To deny this vulnerable group access to health care is both contrary to the principles of universal access and human rights and short-sighted in terms of public health and sustained socio-economic development. This is being increasingly recognized and the number of countries committed to providing health care to undocumented migrants is growing. They are doing so not only out of a spirit of humanitarianism, but also on the basis of the evidence that undocumented migrants do not abuse health care services, do not arrive looking for health care, and are eager to work and "fit in". Further, they recognize that prevention, early diagnosis and treatment of illness in this vulnerable population *will provide savings in the longer term*, both in terms of relieving suffering and stress and reducing healthcare costs associated with longer term health problems in a population without which many local economies would quickly flounder.[40]

43. As in this case, the government in *Chaoulli* asserted that granting the relief sought by the appellants would undermine the public healthcare system. In rejecting this argument and finding that Quebec's ban on private insurance was an arbitrary measure, the court pointed to the practice of other OECD countries: "the evidence on the experience of other western democracies refutes the government's theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care."[41]

44. In this case the uncontradicted evidence on the record regarding the provision of healthcare to the undocumented in other western democracies refutes both the respondent's contention and the applications judge's finding regarding the burdens that would arise from granting the relief sought by the appellant. More specifically, the Carballo affidavit demonstrates that the following countries provide healthcare services to the undocumented:

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[40] Affidavit of Manuel Carballo sworn February 2, 2010, paragraphs 45 and 46, Appeal Book, pages 512 and 513

[41] *Chaoulli*, *supra*, at paragraph 149

Italy	Switzerland
Spain	Portugal
Netherlands	Czech Republic
Belgium	Turkey
France	Sweden[42]

b) Vagueness

45. The doctrine of vagueness is founded on the rule of law, particularly on the principle of fair notice to those who may be affected by the law in question.[43] It is a well-established principle of fundamental justice that laws may not be too vague – they must have a clear and understandable interpretation so as to properly define the regulated subject matter.[44]

46. A law is unconstitutionally vague if it does not have sufficient clarity to provide for coherent legal debate. Determining whether a provision is overly vague involves consideration of its purpose, subject matter, nature, prior judicial interpretation, societal values, and related provisions.[45]

47. In this case, the statutory authority in question is an Order-in-Council issued over 50 years ago, before any system of national healthcare had been conceived and at a time when our government barred or severely limited "Asiatics" and "Coloured people" from immigrating.[46]

48. Since that time, the Order-in-Council has been interpreted by government policy makers in varying ways and under the auspices of different government departments. In looking at the history of these proceedings, the lack of intelligibility of the provision becomes apparent. First, as found by the learned applications judge, the original

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[42] Carballo affidavit, *supra*, paragraphs 24 to 42
[43] *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606
[44] *Ontario* v. *Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at paragraph 2
[45] *Ibid*, at paragraph 49
[46] Roddick, P. "Canadian Immigration Policy: The Hard Facts," 11 *International Journal* 122 (1955-1956)

decision maker who determined that the appellant was not eligible for IFHP coverage misapprehended the nature of the enabling Order-in-Council and fettered his discretion. That same decision-maker gave evidence as to the uneven application of the IFHP when he admitted that in certain undefined cases, IFHP coverage has been granted by CIC "to persons who do not squarely fall within the enumerated categories of qualified groups."[47]

49. Second, in the proceedings at the Federal Court, the Minister sought to quash this matter on the understanding that it had not properly been put to the court. The Minister argued that the IFH Program was properly understood to be administered under the *Immigration and Refugee Protection Act*, and was therefore subject to the judicial review procedures set out therein. The court below rejected this submission, but it is telling that the Minister himself appears to have misapprehended the enabling authority of the IFHP.

50. Third, it is not insignificant that the applications judge largely based his interpretation of the Order-in-Council not on the actual words of the Order, but rather on a letter from the Minister of National Health and Welfare who recommended the wording of the Order-in-Council.

51. Fourth, even accepting the importance of flexibility and breadth in legislative drafting and accepting that Parliament may rely on the courts to provide meaning to broad legislative enactments, the Order-in-Council is unacceptably ambiguous. It is precisely because of its lack of intelligibility and its inapplicability to contemporary immigration issues that the Department of Citizenship has, itself, recommended that it be updated with a new and more clearly drafted authority.[48]

52. In short, it cannot be said that the Order-in-Council provides individuals such as the appellant with anything resembling the kind of clarity required by the rule of law.

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[47] Affidavit of Craig Shankar sworn January 11, 2010, paragraph 28, Appeal Book, page 474
[48] Audit of the Control Framework for the IFHP dated April 21, 2004, Appeal Book, pages 173 and 174

c) Discriminatory Premise

53. As will be set out below, and contrary to the findings of the learned applications judge, the appellant's exclusion from IFHP coverage was discriminatory and infringed section 15 of the *Charter*. The exclusion is therefore contrary to basic tenets of our legal system and as such, is not in accordance with the principles of fundamental justice.

d) International Human Rights Treaties Ratified by Canada

54. The principles of fundamental justice in this case must also take into account Canada's obligations in the various sources of international human rights law by which Canada is bound.[49]

55. Under international human rights law, "the inherent right to life" guaranteed in Article 6 of the *International Covenant on Civil and Political Rights* (*ICCPR*) is "the supreme right from which no derogation is permitted." It cannot properly be understood in a restrictive manner. "It requires that States adopt positive measures." These may include, for example, measures to reduce infant mortality and to increase life expectancy.[50]

56. Following from the special nature of the inherent right to life, international human rights law prohibits states from depriving anyone of access to healthcare necessary to protect the right to life as a form of sanction or penalty for unethical or illegal activity. Even in cases of the most egregious violations of law, states have an

[49] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 23
[50] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 at paragraph 5.

obligation to ensure access to healthcare necessary to protect the right to life for those who are subject to sanction or detention for illegal acts.[51]

57. Closely associated with the right to life under international human rights law is the right to health, guaranteed under the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*)[52] and a number of other international human rights treaties ratified by Canada, including the *International Convention on the Elimination of All Forms of Racial Discrimination*.[53]

58. 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 palliative health services."[54] 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, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[55]

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[51] Standard Minimum Rules for the Treatment of Prisoners (1957); The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988): The Code of Conduct for Law Enforcement Officials (1978) and ; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

[52] 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.

[53] 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."[53] 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." (*International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28)

[54]General Comment No. 14, UN Doc. E/C.12/2000/4 (2000) at para. 34.

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

59. Similarly, the UN 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."[56]

60. In the appellant's submission, Zinn J.'s assessment of the principles of fundamental justice at stake in this case involve a number of serious inconsistencies with international human rights norms. First, Zinn, J. finds that there is a "principled reason" for limiting healthcare coverage for migrants without legal status to illegal immigrants who are victims of trafficking, on the basis that "Canada feels responsible for such illegal migrants because of the fact that they have been exploited by unscrupulous human traffickers." However, under international law, Canada has accepted that the state is responsible for ensuring the right to life of anyone in its jurisdiction or territory"[57] A limitation of state responsibility to ensure access to healthcare necessary for life to those for whom the state "feels" responsible is clearly inconsistent with principles of state responsibility under international human rights law.

61. Zinn J. also distinguishes between a right to "health" and a right to "healthcare", suggesting that under international law a right to health does not necessarily place a positive obligation on a state to provide specific health services. However, the jurisprudence of United Nations human rights bodies and the provisions of the instruments themselves are unambiguous in this respect. Article 5(e)(iv) of the *ICERD* refers to the right to "medical care" and article 12 of the *ICESCR* refers to the obligations of states in relation to "the prevention, treatment and control of epidemic,

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Comment No. 30 of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

[56] 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

[57] See, for example, *ICCPR*, article 2(1).

endemic, occupational and other diseases" and "the creation of conditions which would assure to all medical service and medical attention in the event of sickness."

62. Finally, Zinn J. notes that subsequent to the earlier treaties that Canada has ratified, the U.N. adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.*[58] He suggests that "If the right to health is as wide in scope as the above United Nations supervisory organizations advocate there would be little need for further protection of migrant workers." However, the U.N. has adopted a number of human rights treaties addressing the rights of groups already protected from discrimination under the *ICERD*, the *ICCPR* and the *ICESCR*. The adoption of these subsequent treaties weighs in favor of recognizing the importance of protections guaranteed to these groups in earlier human rights treaties. It certainly does not suggest that previous protections should now be interpreted more narrowly.

C. Exclusion from IFHP Coverage Violates section 15 of the *Charter*

63. Under the two step framework for assessing section 15 claims described by the Supreme Court in *Kapp,*[59] the first stage of the inquiry is to ask whether the impugned policy creates a distinction and if so, whether the distinction is based on an enumerated or analogous ground. The second stage of the process is to ask whether the distinction creates disadvantage by perpetuating stereotype and prejudice.[60]

i) Distinctions Created by the Policy

64. The applicant argued in the court below that the impugned policy creates two distinctions that are contrary to section 15 – first on the analogous ground of "citizenship" or "citizenship status" and second on the enumerated ground of disability. She did not, however, argue that she was denied healthcare "on the basis of her lack of

[58] *18 December 1990, UN Doc. A/RES/45/158.*
[59] *R.* v. *Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 (*Kapp*).
[60] *Kapp*, *supra*, at paragraph 17.

Canadian citizenship" or "because of her disability" as her claim was mischaracterized by Zinn, J.

65. The first and primary distinction, on the ground of citizenship status, relates to *who* is disqualified from healthcare – i.e. certain classes of non-citizens based on their immigration or citizenship status. The policy creates a distinction between two categories of foreign nationals based on citizenship status or immigration status.

66. A secondary intersecting ground relates to *what* is being denied in this case – healthcare for needs related to a disability. The applicant has unique healthcare needs related to complications from diabetes that she has developed in recent years. She is differentially affected by the disqualification from healthcare because of her disability. On this secondary comparison, the policy creates a distinction between undocumented migrants with disabilities, who are adversely affected by the policy, and those without disabilities, who are similarly disqualified from coverage, but who do not have serious disabilities or related healthcare needs, therefore experiencing a differential effect.

67. The identification of the grounds of distinction to be considered under section 15 in this case has raised a question about the scope of the ground of 'citizenship status' or 'citizenship'. At issue is whether discrimination on the ground of 'citizenship' or 'citizenship status' encompasses distinctions drawn on the basis of "immigration status" (identifying undocumented migrants for differential treatment), or whether such distinctions ought to be considered in relation to a distinct analogous ground under the term "immigration status". Zinn, J. appears to have assumed that the analogous ground of "citizenship" would apply only to situations of explicit exclusion of all non-citizens. The applicant, on the other hand, drew on a broader application of the ground "citizenship" or "nationality" under international and domestic jurisprudence, to identify the analogous ground in question as 'citizenship' or 'citizenship status.'

68. In the appellant's submission, the precise term employed for the analogous ground in this case ought not to be determinative of the outcome of the section 15

analysis. The natural starting point of the analysis of the distinction in the section 15 analysis "is to consider the claimant's view." It is the claimant who generally sets "the parameters of the alleged differential treatment that he or she wishes to challenge."[61] However, "within the scope of the ground or grounds pleaded" the court may "refine the comparison presented by the claimant where warranted." It was open to Justice Zinn to refine the analogous ground of "citizenship status" identified by the applicant in order to consider the ground of "immigration status."

69. In this case, it is consistent with the claimant's characterization of the group characteristics through which she experiences discrimination either to identify the analogous ground at issue by the broader term of "citizenship" or "citizenship status", so as to subsume "immigration status" or in the alternative, to identify the analogous ground as "immigration status" as Zinn, J. suggests. In the appellant's view, the use of the broader term 'citizenship' is preferable to identifying an entirely new analogous ground targeting a sub-group of non-citizens. However, either approach is consistent with the evidence adduced and the grounds pleaded and either approach is open to this Court on appeal.[62]

ii) Discrimination on the Ground of Citizenship Status

70. With respect to the ground of citizenship status, the appellant argued in the court below that:

> The distinction on the ground of citizenship status in this case is a formal distinction, evident on the face of the decision. Ms. Toussaint was disqualified from any coverage for necessary medical care explicitly because her citizenship status as a foreign national seeking permanent residency on humanitarian and

[61] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 1999 CanLII 675 (S.C.C.), paragraph 58

[62] The appellant brought a motion for reconsideration before Justice Zinn, requesting reconsideration of what she considered to be inaccurate characterizations of her argument with regard to citizenship and immigration status. In dispensing with the motion, Zinn J. noted an undertaking from the respondent that it would not raise any objection or take any step that might prevent the applicant from making full submissions on her section 15 *Charter* argument on appeal: *Toussaint v AG Canada* 2010 FC 926, at paragraphs 3 and 4, Appeal Book, pages 54 and 55

> compassionate grounds did not place her in any of the listed classes of immigrants deemed eligible for the benefit.[63]

71. While "immigration status" is widely recognized in international and domestic law as a prohibited form of discrimination, it is generally considered as a category of discrimination on the ground of 'citizenship' or 'nationality' rather than as a separate ground. As noted above, U.N. human rights bodies have found that prohibitions of discrimination against 'non-citizens' or 'non-nationals' must be interpreted broadly to prohibit discrimination against immigrants on the basis of legal status or documentation. In human rights legislation in Canada, discrimination on the grounds of "citizenship" has been held to prohibit exclusions of particular types of non-citizens such as refugees[64] or recent newcomers.[65] When 'citizenship" was added as a prohibited ground of discrimination to Ontario's *Human Rights Code*, legislators specifically exempted requirements of "Lawful admission to Canada for permanent residence" and "domicile in Canada with the intention to obtain Canadian citizenship" in particular circumstances, from what was evidently anticipated as a potentially broad application of the term "citizenship" so as to include immigration status.[66]

72. Courts in Canada considering the issue of discrimination on the basis of citizenship and/or immigration status under section 15 have similarly linked the two grounds. In *Lavoie*, the Supreme Court describes the disadvantage faced by non-citizens in very broad terms that are clearly applicable to the nature of the disadvantage of migrants lacking in legal status:

> It is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and

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[63] Appellant's Memorandum of Argument filed in Court file no. T-1301-09, paragraph 60
[64] *Kearney et al*, v. *Bramalea Ltd et al* (1998), 34 CHRR D/l/ (Ont. Bd. Inq.), upheld by the Divisional Court in *Shelter Corporation et al.* v. *Ontario Human Rights Commission et. al.* (2001), 143 OAC 54 (Div. Ct.);
[65] *Ahmed* v. *177061 Canada Ltd* (2002), 43 CHRR D/379 (Ont. Bd. Inq.).
[66] *Human Rights Code*, R.S.O. 1990, c. H.19, section 16 (2).

> respect violated"…In my view, this dictum applies no matter what the nature of the impugned law."[67]

73. In *R.* v. *Church of Scientology*[68] the Ontario Court of Appeal referred to the analogous ground of "immigration status" as applying to the exclusion of non-citizens from jury duty, appearing to use "immigration status" and "citizenship" interchangeably. In *Re Jaballah*,[69] the Federal Court held that providing procedural rights to permanent residents held under security certificates while denying those rights to foreign nationals, 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 that discrimination on the ground of "immigration status" cannot be permitted under section 15 as a consequence of the Supreme Court's finding in *Andrews* that "citizenship" constitutes an analogous ground.[70]

74. In general, grounds of discrimination under the *Charter* have been applied so as to prohibit not only discriminatory policies applying to the entire group, but also to sub-groups, defined by related characteristics. The appellant argued before Zinn J. that discrimination on the ground of her 'citizenship status' or 'immigration status' may similarly be subsumed under the broader ground of 'citizenship':

> The fact that the members of the comparator group who receive the benefit are also non-citizens does not negate the fact that the applied policy creates a distinction based on citizenship status. Just as in *Martin*[71], the distinction between two types of disabled workers was still a disability-based distinction, so in the present case, the disqualification of one group of non-citizens on the basis of a particular immigration status is still a decision based on citizenship.[72]

75. However, the alternative of considering discrimination on the basis of 'immigration status' as a separate ground, rather than as a type of discrimination covered by the ground

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[67] *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769 at paragraph 45.
[68] (1997), 33 O.R. (3d) 65 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 683 (S.C.C.), at 114.
[69] 2006 FC 115 (CanLII).
[70] *Ibid*, at paragraph 80.
[71] *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54 at paragraph 80.
[72] Appellant's Memorandum of Argument filed in Court file no. T-1301-09, paragraph 61

of citizenship was also open to the court. Though declining to apply the analysis to the present case Zinn J. observed that:

> 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.[73]

76. The appellant argued before Justice Zinn that undocumented migrants in her circumstances are subject to particularly negative stereotypes and stigmas. She argued that:

> The particular group that is excluded by the impugned policy in the present case includes the most marginalized and disadvantaged of the class of non- citizens. Undocumented migrants have been recognized both within Canada and internationally as suffering from multiple disadvantages, usually including language, poverty, low education and lack of access to basic services.[74]

77. Analogous ground protection, of course, does not mean that every distinction on the basis of immigration or citizenship status will be contrary to section 15 - only differential distinctions which are discriminatory in a substantive sense. In the present case, however, the denial of healthcare necessary to life and security clearly fails to recognize the equal worth and value of immigrants without legal status. Further, it is based on a negative and unfounded stereotype of the group as migrating to take advantage of free services. The unrebutted evidence is that such stereotypes are contrary to migration realities, which suggests that most migrants, like the appellant, migrate to take up low paid jobs and provide significant benefit to the economy. The policy thus exacerbates prejudice, stereotype and social exclusion of migrants without legal status in a manner that undermines the purposes of section 15 and constitutes discrimination.

78. With respect to the identification of the analogous ground to be applied, the appellant submits that it is preferable to maintain the congruence of section 15 analogous grounds with grounds of discrimination identified under international and domestic human

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[73] Reasons for Judgment of Zinn, J., paragraph 82 footnote 3, Appeal Book, page 45
[74] Appellant's Memorandum of Argument filed in Court file no. T-1301-09, paragraphs 62 and 63

rights law and jurisprudence. Seen in this light, this Honourable Court should apply the ground of "citizenship" to determine whether the impugned policy in this case constitutes discrimination on the analogous ground of "citizenship" or "citizenship status." In the alternative, it is submitted that this Court ought to recognize as a separate analogous ground the ground of "immigration status".

iii) Discrimination on the Intersecting Ground of Disability

79. Articulating ways in which discrimination may involve more than one enumerated or analogous ground "accords with the essential purposive and contextual nature of equality analysis under section 15(1) of the *Charter.*"[75] In the present case, while the appellant is challenging a denial of healthcare on the primary ground of citizenship or immigration status, it is also useful to articulate a second ground of discrimination, which accords with the way she experiences the effect of the impugned provision.

80. With respect to the appellant's claim that disability is an intersecting ground of discrimination, Zinn, J. found that: "There is no doubt that the applicant is disabled with high medical needs; however, the applicant was not excluded from IFHP coverage because of her disability."[76]

81. However, the appellant alleged a very different type of distinction relevant to the section 15 inquiry, related not to the explicit basis of her disqualification, but to its *effect*. The benefit that is denied in this case is one which the appellant and others with disabilities disproportionately require for security, integration into society and even for the protection of life. Thus, even if persons with disabilities are not treated differently under the policy from able-bodied persons, the effect of denying access to healthcare still has a differential, adverse effect on persons with disabilities such as the appellant. As noted by the Supreme Court in *Eldridge*, "adverse effects" discrimination, rather than direct discrimination as Zinn, J. focused on, is especially relevant to the ground of disability. "The government will

[75] *Law*, *supra*, paragraph 93
[76] Reasons for judgment of Zinn, J., paragraph 80, Appeal Book, page 44

rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled."[77]

82. The comparator group with respect to the discrimination on the ground of disability in this case is able-bodied undocumented migrants who, like the appellant in her earlier working years prior to the onset of her disability, are disqualified from receiving healthcare because of their citizenship status, but who are not adversely affected by the exclusion in comparison to those with disabilities because they do not tend to have serious healthcare needs. As noted by the expert Manuel Carballo, migrants enter host countries when they are healthy and rarely use the healthcare system. However, they are vulnerable to developing disabilities in later years: "Poor housing, overcrowding, inadequate nutrition and unhealthy eating combined with sudden change to sedentary life can lead to poor health, including chronic diseases such as type 2 diabetes and cardiovascular problems."[78] Similarly, it was after the appellant developed more serious health complications related to her disability that her healthcare needs increased, along with her poverty, and she began to experience the more adverse consequences of her exclusion from IFHP coverage.

83. The needs related to the onset of her disability after a number of years in Canada were not taken into account in any individualized assessment of the appellant's application for coverage under the IFHP. The lack of individualized assessment exacerbated her experience of vulnerability and negative stereotypes associated with being an immigrant with a disability. Instead of being recognized as an individual, worthy of dignity and respect, she felt stereotyped as one who would "take advantage" of Canada's healthcare system."[79] This made it more difficult to maintain her dignity and self-esteem and furthered prejudice and stereotyping[80]

Section One of the *Charter*

[77] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 paragraph 64.
[78] Affidavit of Manual Carballo sworn February 2, 2010, paragraph 12. Appeal Book, page 500
[79] Affidavit of Nell Toussaint sworn August 23, 2009, paragraph 35, Appeal Book, page 121
[80] Affidavit of Nell Toussaint sworn August 23, 2009, paragraph 36, Appeal Book, page 122

84. The justification considered by Justice Zinn for the exclusion of immigrants without legal or documented status from the IFHP was that to provide them with the benefit would be to create a "healthcare safe haven" for anyone seeking free healthcare. This "justification" requires serious scrutiny and ought to be rejected. The Supreme Court has cautioned that courts "must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1."[81] In this case, the justification put forward draws on the assumption that migrants would come to Canada illegally in order to benefit from free healthcare, yet the expert Carballo has provided uncontested expert evidence that such an assumption is false. The "justification", simply affirms the negative stereotype of immigrants described by the appellant in her affidavit, without any evidence to substantiate it.[82]

85. In the present case, the respondent has provided no evidentiary basis or expert opinion as to the costs of providing the IFHP to undocumented migrants. The appellant's expert, Manuel Carballo has stated that ensuring access of undocumented migrants to healthcare, as other countries have done, saves on healthcare expenditure by ensuring access to preventative and timely care before health issues become more serious, avoids inappropriate reliance on emergency healthcare resources, and addresses critical public health concerns. This evidence is uncontested.

86. The appellant further submits that if in fact it is correct that providing healthcare to undocumented migrants may encourage people to enter Canada illegally in order to secure healthcare, this is certainly not the case with the appellant. The respondent has made no attempt to minimally impair her rights in addressing this concern. It would not be difficult, for example, to distinguish between those who have entered Canada for the purpose of securing healthcare and those in the appellant's situation, who have been living and working in Canada for many years.

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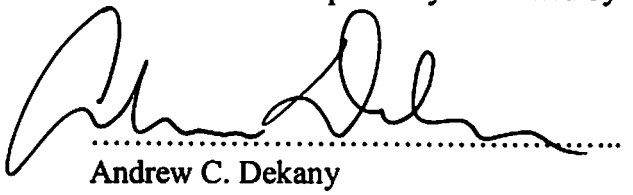
[81] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), 2002 SCC 68, [2002] 3 S.C.R. 519 at paragraph 18.
[82] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paragraphs 128 and 129.

Part IV: Order Sought

87. The appellant requests that this appeal be granted with submissions on costs to follow. She further requests an order quashing and setting aside the decision of Craig Shankar, dated July 10, 2009, on the basis that her exclusion from IFHP benefits was inconsistent with Order in Council No. 157-11/848 and was contrary to sections 7 and 15 of the *Charter*, and that this matter be remitted to a different decision-maker for a new determination in accordance with this Honourable Court's reasons for decision.

All of which is respectfully submitted by



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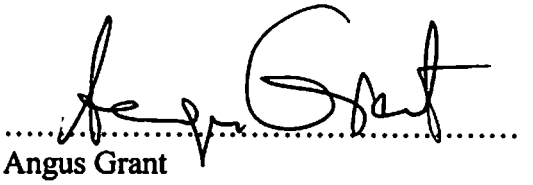

Angus Grant

of counsel for the appellant

Dated at Toronto, Ontario this 10th day of November, 2010

Part V: List of Authorities

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5. *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
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25. *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54
26. *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
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31. *Human Rights Code*, R.S.O. 1990, c. H.19, section 16 (2).

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33. UN Human Rights Committee (HRC), *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 at paragraph 5.
34. Standard Minimum Rules for the Treatment of Prisoners (1957),
35. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988),
36. Code of Conduct for Law Enforcement Officials (1978)
37. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982))
38. *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*ICESCR*

39. *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28)
40. General Comment No. 14, UN Doc. E/C.12/2000/4 (2000) at para. 34
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