

***Litigating Access to Healthcare
for the Undocumented***

Toussaint v. Canada

By Angus Grant

The Interim Federal Health Program – Who's in and Who's Out?

- The IFH Program covers the basic healthcare costs for:
 - Refugee protection claimants;
 - Applicants for a pre-removal risk assessment (PRRA) upon application and during the in-Canada process;
 - A refugee protection claimant who has received a negative decision from the Immigration and Refugee Board (IRB) while still legally in Canada;
 - Protected persons;
 - All refugees and persons in similar circumstances selected abroad; and
 - Individuals detained by the Canada Border Services Agency.

IFH – What Level of Care do Recipients Receive?

- The IFH program is described as playing a transitional role only and is not designed to offer the same comprehensive medical coverage as provincial health insurance. The benefits are generally meant to be limited to:
 - essential health services for the treatment and prevention of serious medical/dental conditions (including immunizations and other vital preventative medical care);
 - essential prescription medications, and non prescription life saving medications;
 - contraception, prenatal and obstetrical care; and
 - the Immigration Medical Examination for individuals who are unable to pay for it.

IFH: Where does it come from?

- There is no mention of federal health coverage in the [Immigration and Refugee Protection Act](#) or any other legislation. Rather, authority for the program dates back to a 1957 Order in Council, which states in part:

The Board recommends that... the Department of National Health and Welfare be authorized to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:

...

(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 a 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.

Toussaint v. Canada

- Nell Toussaint has lived in Canada without lawful status for many years. She has worked, paid taxes and supported herself as well as she can. She now has significant healthcare needs.
- She has, to date, had to rely on community health clinics, and increasingly, on the willingness of doctors to assist her on a pro bono basis.
- She applied for, and was refused coverage under the IFH Program.

Toussaint v. Canada

- Nell has appealed her refusal for IFH coverage on the following grounds:
 - Her exclusion violates her right to life, liberty and security under section 7 of the [Canadian Charter of Rights and Freedoms](#);
 - Her exclusion is discriminatory, contrary to s.15 of the *Charter*;
 - Her exclusion violates principles of international law, including international conventions to which Canada is signatory;
 - Her exclusion violates the very terms of the Order in Council which authorizes the government to cover the healthcare expenses of anyone "subject to immigration jurisdiction."

Charter Section 7

- In *Stoffman*, the Supreme Court of Canada said:
- “Government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members”.
- Citing *Morgentaler* and *Chaoulli*, we say that the decision to exclude Nell from IFH has increased her risk of life threatening illness, and unequivocally interfered with her rights to life and security of the person.

Charter Section 15

- **With respect to s. 15 of the *Charter*, we argue that the denial of healthcare coverage under the IFH Program violates Nell's right to the equal benefit of the law without discrimination on the grounds of both disability and citizenship.**

International Law

- Canada is a signatory to the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)
- Article 12(1) of the ICESCR recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”
- General Comment on Article 12: Signatories must “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.”

International Law (cont'd)

- ICESCR and other international instruments represent unequivocal obligations on Canada under international human rights law.
- These obligations should also inform the interpretation and application of sections 7 and 15 of the Charter.

International Law – Expert Evidence

- Expert evidence has been provided on:
 - The profile of those who generally migrate as typically young, healthy and active
 - The lack of any empirical evidence on the healthcare tourism phenomenon
 - The policies of other countries on providing healthcare to the undocumented

Conclusions

- The hearing into the matter is scheduled for March 23, 2010
- Regardless of the court's findings, an appeal is all but assured
- The case has the potential to profoundly broaden the range of those eligible for health coverage under the IFH program.