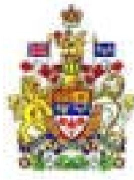
Federal Court of Appeal  Cour d'appel fédérale

Date: 20110627

Docket: A-362-10

Citation: 2011 FCA 213

CORAM: **BLAIS C.J.**
NADON J.A.
STRATAS J.A.

BETWEEN:

NELL TOUSSAINT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

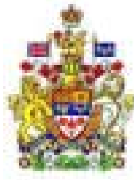
Heard at Ottawa, Ontario, on November 24, 2010.

Judgment delivered at Ottawa, Ontario, on June 27, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS C.J.
NADON J.A.

Federal Court of Appeal



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<u>REASONS FOR JUDGMENT</u>

<u>STRATAS J.A.</u>

[1] The applicant is a citizen of Grenada. In 1999, she entered Canada as a visitor. She never left. She has stayed in Canada, contrary to Canada's immigration laws.

[2] For her first seven years in Canada, the appellant worked and earned enough to sustain herself. However, in 2006, her health began to deteriorate. She could no longer work.

[3] Since 2006, the appellant has received some medical care without having to pay for it, but much more medical care is required. Her medical condition has become most serious.

[4] In September 2008, still in Canada contrary to Canada's immigration laws, the appellant took steps to try to regularize her status in Canada. She applied to Citizenship and Immigration Canada for permanent residence status. A few months later, she applied to Citizenship and Immigration Canada for a temporary residence permit so she could become eligible for health coverage under the Ontario Health Insurance Program. In both applications, she asked for a waiver of the fees. The waivers were refused, the fees remained unpaid, and so the applications were never considered.

[5] In May 2009, the appellant applied to Citizenship and Immigration Canada for medical coverage under its Interim Federal Health Program. As we shall see, this Program is actually embodied in one of Canada's immigration laws, Order in Council OIC 1957-11/848. Under this Order in Council, Citizenship and Immigration Canada covers the cost of emergency medical care for indigent persons that it has legally admitted to Canada.

[6] A Director with Citizenship and Immigration Canada found that the appellant was ineligible to receive medical coverage and rejected her application.

[7] The appellant brought an application for judicial review to the Federal Court, submitting that she was eligible for medical coverage. In the alternative, she submitted that her exclusion from medical coverage infringed her rights under sections 7 and 15 of the Charter. She requested the Federal Court to “read” the Order in Council as including her – in effect, to make this law compliant with sections 7 and 15 of the Charter by extending its terms to provide her with medical coverage.

[8] If the Federal Court accepted the appellant’s request, the curiosity of some might be piqued: even though the appellant has disregarded Canada’s immigration laws for the better part of a decade, she would be able to take one of Canada’s immigration laws (the Order in Council), get a court to include her by extending the scope of that law, and then benefit from that extension while remaining in Canada contrary to Canada’s immigration laws.

[9] But the Federal Court (*per* Justice Zinn) did not accept the appellant’s request to extend the scope of the Order in Council. It rejected her submissions and dismissed the application for judicial review: 2010 FC 810 (main decision) and 2010 FC 926 (decision on motion for reconsideration).

[10] The appellant appeals to this Court, making submissions substantially similar to those that were made in the Federal Court.

[11] I also reject the appellant’s submissions and would dismiss the appeal.

A. The Order in Council

[12] Order in Council OIC 1957-11/848, passed on June 20, 1957, provides as follows:

> The Board recommends that Order in Council P.C. 4/3263 of June 6, 1952, be revoked, and 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:
>
> (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 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 National Health and Welfare.

B. The Director's decision

[13] The decision-maker on the appellant's application to Citizenship and Immigration Canada for medical coverage was the Director, Program Management and Control, Health Management Branch.

[14] As mentioned above, the Director denied the appellant medical coverage. The Director's decision is as follows:

> Health care services are provided by the Provinces and Territories. As such, access or denial to health care rests with those Provincial and Territorial authorities, in this case the Province of Ontario.
>
> The Interim Federal Health Program is an interim measure to provide emergency and essential health care coverage to eligible individuals who do not qualify for private or public health coverage and who demonstrate financial need. IFHP services aim to serve individuals in the following four groups of recipients:
>
> - Refugee claimants;
> - Resettled Refugees;
> - Persons detained under the Immigration and Refugee Protection Act (IRPA); and,
> - Victims of Trafficking in Persons (VTIPs).
>
> As you have not provided any information to demonstrate that your client falls into any of the above-mentioned categories, I regret to inform you that your request for IFHP coverage cannot be approved.
>
> Please be advised that your client has no active immigration application with Citizenship and Immigration Canada (CIC).

C. The standard of review applicable to the Director's decision

[15] As mentioned above, the appellant applied to the Federal Court for judicial review of the Director's decision.

[16] The Federal Court did not explicitly select a standard of review for its consideration of the Director's decision. However, it did find, in effect on a correctness standard, that the appellant did not qualify for medical coverage.

[17] The first step in determining the standard of review is to appreciate the nature of the decision in issue. As mentioned at the outset, the Interim Federal Health Program mentioned by the Director is embodied in an Order in Council (P.C. 157-11/848) and the decision-maker is a delegate of the Minister of Citizenship and Immigration Canada. In effect, we are reviewing the legal interpretation and application of an Order in Council by a delegate of the Minister.

[18] The Supreme Court has told us that the standard of review will "usually" or "normally" be reasonableness where "a tribunal" is interpreting its "own statute" or "statutes closely connected to its function, with which it will have particular familiarity": 2008 SCC 9 at paragraph 54, [2008] 1 S.C.R. 190; *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1 at paragraph 34, 327 D.L.R. (4th) 513; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paragraph 26, 328 D.L.R. (4th) 1.

[19] I am inclined to find that the Director is subject to this "normal" or "usual" position of deference to his decision-making. But there exists considerable uncertainty on this, arising from *Dunsmuir* itself, previous case law, and the unusual circumstances of this case:

(a) We are dealing with a Ministerial delegate, not a "tribunal" in any formal sense. In *Dunsmuir* the Supreme Court used the word "tribunal" on this point. In my view, although it is not perfectly clear, in *Dunsmuir* the Supreme Court did not intend to restrict this position of deference to interpretations by formal tribunals. Throughout its discussion of the standard of review, the Supreme Court used the terms

"tribunal," "decision maker," "exercises of public authority," "administrative bodies," "adjudicative tribunal," "adjudicative bodies," "administrative tribunal," and "administrative actors": *Dunsmuir*, *supra* at paragraphs 28-29, 31, 33, 41, 47-50, 52, 54-56, and 59. It seems to have used the terms interchangeably and, collectively, they are wide enough to embrace a Ministerial delegate such as the Director.

(b) In a relatively recent decision, albeit before *Dunsmuir*, the Supreme Court did not defer to the interpretation of a Ministerial delegate who was interpreting a statute closely related to his function: *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, (a visa officer making an assessment under subparagraph 19(1)(*a*)(ii) of the *Immigration Act*, R.S.C. 1985, c. I-2); see also *Canada (Minister of Citizenship and Immigration) v. Patel*, 2011 FCA 187 and cases cited at paragraph 27 of *Patel*. This is certainly consistent with how we today approach decisions involving some other Ministerial delegates. For example, in the income tax context, income tax assessors – Ministerial delegates – are very familiar with the *Income Tax Act*. One might think that the normal administrative law standard of review analysis would apply to appeals of these administrators, with deference to their legal interpretations being the result: see, *e.g.*, *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 and *Dunsmuir*, *supra* at paragraph 54. But it does not. The Tax Court of Canada, sitting in appeal on

income tax assessments, and this Court do not defer at all to the statutory interpretations of the Minister's delegate.

(c) The Supreme Court spoke in *Dunsmuir* of deference to interpretations of certain types of "statutes." Did it mean to restrict this principle to "statutes"? There would appear to be no principled basis to do so. Deference probably also applies to interpretations of other types of laws, such as the Order in Council in this case.

(d) The Director's title seems to suggest that he administers programs such as this, and so he could be considered to be interpreting what *Dunsmuir* described as a law "closely connected with [his] function," warranting our deference. But there is no evidence in the record on this one way or the other, nor would one expect there to be such evidence given the narrow nature of a record on judicial review.

(e) The position of deference for administrative interpretations of statutes is said in *Dunsmuir* to apply only "usually" or "normally." Does this qualification refer to the situations mentioned in *Dunsmuir* where the correctness standard applies? Perhaps not, as these situations largely do not involve issues of statutory interpretation. Does this qualification refer to some as yet unidentified situations? We simply do not know.

(f) In this particular case, as we shall see, the Director did not engage in any actual interpretation of the Order in Council. Rather, he simply interpreted and applied an administrative policy made under that Order in Council. Does this mean that the Director's decision is subject to correctness review? I am not so sure. There are statements in *Dunsmuir* that suggest that the Director's failure to interpret the Order in Council may not matter. In two places in *Dunsmuir*, the Supreme Court suggests that in assessing the substance of decision-making under the reasonableness standard we are to examine the outcome reached by the decision-maker and not necessarily the plausibility of the reasons actually given. At paragraph 47, we are directed to ask ourselves "whether the decision falls within a range of possible, acceptable *outcomes* which are defensible in respect of the facts and law" and at paragraph 48 we are told that an administrative decision can be supported on the basis of reasons that "*could [have] be[en] offered*" [emphasis added].

(g) I am not alone in my doubts on this issue. Recently, this Court discussed *Dunsmuir* and the standard of review that should apply to the Governor in Council's interpretation of a statute. It found the law in this area to be unclear: *Global Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 at paragraph 35.

[20] Fortunately, on the facts of this case, I need not decide whether the standard of review is correctness or the deferential standard of reasonableness. Regardless of the standard of review, the

Director's decision passes muster: as the Director found, the appellant was not entitled to receive medical coverage in this case.

D. The Federal Court's conclusions concerning the decision of the Director

[21] The Federal Court found that the Director fettered his discretion by following a departmental guideline instead of interpreting the actual wording of the Order in Council. In its view, the Director was entitled to read and consider the departmental guideline but should have interpreted the actual wording of the Order in Council, the law that governed his discretion.

[22] However, the Federal Court held that this was immaterial: if the Director had regard to the Order in Council, he would have had to rule that the appellant was not entitled to receive coverage. Therefore, the Director's decision could stand.

[23] For the purposes of this appeal, the Federal Court's bottom-line conclusion was that the appellant was ineligible under the Order in Council to receive medical coverage.

E. Assessment of the Federal Court's decision that the appellant was ineligible to receive medical coverage under the Order in Council

(1) Introduction and overview

[24] In my view, the Federal Court's bottom line conclusion is correct: the appellant was ineligible to receive medical coverage under the Order in Council.

[25] In reaching its conclusion, the Federal Court relied upon the plain meaning of the words in the Order in Council. It examined the history behind the Order in Council in order to see if there was some special significance behind some of the wording used in it.

[26] The Federal Court also placed particular emphasis upon a rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957: see the Federal Court's reasons at paragraph 44. I agree with the Federal Court's view that the Minister's rationale was an important clue as to the intended scope of the Order in Council. It was right to place particular emphasis on it.

[27] The Minister's rationale was as follows:

> 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.
>
> 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;
>
> THAT it is considered to be in the public interest and necessary for the maintenance of good public relations between the two Federal Departments concerned and the large number of individuals, societies and other agencies who work closely in association with these Departments during the ordinary course of Immigration operations, that the existing authority which is restrictive by reason of the term "immigrant" and also by reason of the conditions of "time" which are applied, be changed to permit the Department of National Health and Welfare to render the necessary medical assistance in these instances;

> THAT both Departments undertake to administer this authority in such a way as to confine its use to those occasions only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility;…

[28] The Federal Court's overall conclusion was as follows (at paragraph 51):

> Properly interpreted, Order-in-Council P.C. 157-11/848 does not apply to the applicant and she is not eligible for [Program] coverage. The applicant is not an "immigrant" in the sense that she is applying for permanent residence in Canada. The applicant is not temporarily under the jurisdiction of immigration authorities. Nor does the applicant fall into one of the narrow, well-defined categories for which immigration authorities feel responsible.

[29] I agree with the general thrust of the conclusion in this passage. But I wish to amplify and clarify it somewhat. This is needed because parties might interpret this passage in future cases to ascribe to the Order in Council a scope of medical coverage greater than is warranted by its terms.

[30] As is seen from the text of the Order in Council quoted above at paragraph 12, the Order in Council contains two paragraphs, (a) and (b). Each of these sets out certain eligibility criteria. In addition to satisfying the eligibility criteria in paragraphs (a) or (b), a claimant must also "[lack] the financial resources to pay [the medical] expenses."

(2) Paragraph (a) of the Order in Council

[31] Paragraph (a) of the Order in Council provides as follows:

> (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…

[32] The Order in Council does not define "immigrant." However, the term "immigrant" was defined in *The Immigration Act*, S.C. 1952, c. 42, subsection 2(*i*) as "a person who seeks admission to Canada for permanent residence."

[33] Definitions of terms in statutes apply to terms contained in orders made under them: *Interpretation Act,* R.S.C. 1952, c. 158, section 38. It is not clear from the Order in Council whether it was made under the *Immigration Act*. But, in my view, the definition of "immigrant" in the *Immigration Act* sheds light on the meaning of that term in the Order in Council given that its subject-matter is related to immigration. I also note that the Minister of Health and Welfare, when offering a rationale for the Order in Council and in discussing its intended scope of coverage, referred to "immigrants as defined," which must be taken to be "immigrants" as defined under the *Immigration Act* as it stood at that time: see paragraph 27, above.

[34] In my view, only those who seek admission to Canada for permanent residence on or before entry to Canada fall under paragraph (a). Paragraph (a) uses the term "immigrant," meaning "a

person who seeks admission to Canada for permanent residence," and the express wording of paragraph (a) shows that person seeking permanent residence must satisfy one of two conditions:

(i) The person seeking admission to Canada for permanent residence was "admitted at a port of entry" but has not "[arrived] at destination," *i.e.*, is in transit between entry and destination, or

(ii) The person seeking admission to Canada for permanent residence is receiving "care and maintenance pending placement in employment." A fair reading of the Order in Council is that the "care and maintenance" is at the direction of the immigration authorities who met the person upon entry to Canada. In my view, this is a fair reading in light of the history of the Order in Council, reviewed by the Federal Court at paragraphs 30-37, which shows that this medical coverage program was always focused on those entering Canada for the first time, not on those who had already arrived in Canada.

[35] The appellant does not qualify under either of these conditions. She was not admitted into Canada as an applicant for permanent residence. She was not in transit between entry and destination. The immigration authorities did not direct her "care and maintenance pending placement in employment." The appellant was simply a visitor who decided to remain in Canada, contrary to Canada's immigration law.

(3) Paragraph (b) of the Order in Council

[36] Paragraph (b) of the Order in Council provides as follows:

> (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…

[37] Paragraph (b) refers to "a person," not an "immigrant," the term used in paragraph (a). As a result, paragraph (b) covers more than those seeking permanent residence in Canada.

[38] One requirement that must be met under paragraph (b) is that the person is "subject to Immigration jurisdiction" or is a person "for whom the Immigration authorities feel responsible."

[39] At paragraph 46-50 of its reasons, the Federal Court interpreted these phrases in light of their plain wording and the rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957, excerpts of which are reproduced at paragraph 27, above. The Federal Court held (at paragraph 49) that those "subject to Immigration jurisdiction" are:

> …those persons who are passing through a port of entry and thus subject to the jurisdiction of the Immigration authorities, those persons whose status is being processed by the Immigration authorities, and those persons under detention and in the custody of the Immigration authorities. Persons temporarily under the jurisdiction of the Immigration authorities would also include refugee claimants…

I agree with this conclusion and the reasons the Federal Court offered in support of it (at paragraphs 46-50).

[40] However, by way of clarification, “those persons whose status is being processed by the Immigration authorities” must mean a person who sought that status before or upon entry to Canada. The Program could not have been intended to pay the medical expenses of those who arrive as visitors but remain illegally in Canada and who, after the better part of a decade of living illegally in Canada, suddenly choose to try to regularize their immigration status. Coverage for those persons would be against the whole tenor of the Order in Council, the history of the Order in Council, and the Minister’s stated rationale.

[41] Paragraph (b) contains another requirement, expressed in the phrase “and who has been referred for examination and/or treatment by an authorized Immigration officer.” Does that phrase apply only to those who “[have] been referred for examination and/or treatment by an authorized Immigration officer”? Or does it apply both to those who “[have] been referred for examination and/or treatment by an authorized Immigration officer” and to those who are “subject to Immigration jurisdiction”?

[42] In my view, the latter must be the correct interpretation: all those qualified under paragraph (b) must have been “referred for examination and/or treatment by an authorized Immigration officer.”

[43] This interpretation is supported by the rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957: see paragraph 27, above.

[44] Finally, it must be remembered that in 1957, when the Order in Council was passed, Canada did not have a government-administered medicare scheme. Canadians were obligated to pay for their own health care or arrange for insurance coverage. Given that historical context, it does not make sense that all those "subject to Immigration jurisdiction" would have emergency medical coverage courtesy of the state, even if not specifically "referred for examination and/or treatment by an authorized Immigration officer". I would add that there is no evidence before the Court to suggest that paragraph (b) was ever interpreted in that way.

[45] Given this interpretation, the appellant does not qualify under paragraph (b). Upon entry to Canada, she did not claim a status other than visitor and the Immigration authorities were not processing any other status. She was not in the custody of the Immigration authorities, nor was she a refugee claimant. At no time was she "referred for examination and/or treatment by an authorized Immigration officer." At no time did the "Immigration authorities feel responsible" for her. The appellant was just a visitor who decided to remain in Canada, contrary to Canada's immigration law.

[46] For the foregoing reasons, I find that the appellant was ineligible to receive medical coverage under the Order in Council. Therefore, the Director was correct in deciding to deny the appellant medical coverage and the Federal Court was correct in upholding the Director's decision.

F. Are the appellant's rights under sections 7 and 15 of the Charter infringed?

(1) A preliminary observation

[47] The appellant raised the constitutional issues for the first time in her application for judicial review in the Federal Court and filed her evidence on those issues in that Court. Before the Director, she did not raise the constitutional issues or offer evidence on those issues.

[48] Sometimes this is a fatal flaw that prevents the reviewing court from considering the constitutional issue on judicial review: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 at paragraphs 38-40, [2005] 1 S.C.R. 257.

[49] In this case, however, the objection would not lie if the Director did not have the jurisdiction to decide the constitutional issues: *Okwuobi*, *supra*, at paragraphs 28-34 and 38; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504. In that circumstance, the Federal Court would be the first place where the constitutional issues could be determined.

[50] The point was not argued before us and, given my ultimate disposition of the constitutional issues, I need not decide whether the objection lies in this case.

(2) The standard of review

[51] What is the standard of review of the Federal Court's decision on the constitutional issues? Since the Director did not consider the constitutional issues, we must look to the law concerning appellate standards of review, not administrative law standards of review.

[52] The normal rule on appeals is that on pure questions of law or questions of mixed fact and law where the law predominates or is "extricable", the standard of review is correctness. On questions of fact, or questions of mixed fact and law that are primarily factual in nature, the standard of review is palpable and overriding error. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (A.G.)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

[53] On occasion, the Supreme Court has stated that the appellate standard of review on decisions in constitutional cases is correctness and has used language to suggest that there can be no deference on any question, factual or legal, in a constitutional case: see, *e.g.*, *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at paragraph 36, [2003] 3 S.C.R. 3 ("[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin").

[54] I do not take these statements to mean that in a constitutional case an appellate court can readily interfere with factual findings and exercises of discretion that are heavily suffused with facts. There are many Supreme Court decisions that confirm that deference on such matters is still warranted: see, *e.g.*, *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761 at paragraph 34,

2008 SCC 23; *R. v. Buhay*, [2003] 1 S.C.R. 631 at paragraphs 44-45, 2003 SCC 30; *R. v. Stillman*, [1997] 1 S.C.R. 607 at paragraph 68; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at paragraphs 188-189.

[55] In other words, the normal appellate standards of review discussed in *Housen* and *H.L.* apply in constitutional cases. However, as a practical matter, it is fair to say that correctness review probably happens more frequently in constitutional appeals because of the centrality of the legal issues in such appeals, and the fact that questions of constitutional law are often extricable from the questions of mixed fact and law that arise.

(3) Section 7 of the Charter

[56] In the Federal Court and in this Court, the appellant submits that her exclusion from medical coverage under the Order in Council infringes her section 7 rights to life and security of the person and her right not to be deprived thereof except in accordance with the principles of fundamental justice.

(a) Rights to life and security of the person

[57] The Federal Court found that the appellant's rights to life and security of the person under section 7 of the Charter were infringed (at paragraph 91):

> The evidence before the Court establishes both that the [appellant] 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…coverage [under the Order in Council] has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences…. 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 [Order in Council].

[58] This finding is open to challenge on two grounds. I would reject the first ground, but accept the second.

- I -

[59] First, the respondent disputes the Federal Court's factual finding that the appellant has been exposed to delays and risks. On the facts, the respondent submits that the appellant has been able to obtain hospital admissions and surgeries when required and has been under the active care of both a family doctor and a number of specialists. The respondent adds that in Ontario, where the appellant lives, hospitals cannot deny emergency medical treatment to anyone, when to do so would endanger life: *Public Hospitals Act*, R.S.O. 1990, c. P.40. As a result, the respondent submits that the appellant has not established a serious deprivation of her right to life or security of the person under section 7 of the Charter.

[60] The respondent's submissions gain force from legal proposition that the effects on the protected interests under section 7 must be more than trivial. They must be serious: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paragraph 123, [2005] 1 S.C.R. 791; *R. v.*

Morgentaler, [1988] 1 S.C.R. 30 at pages 56 and 173; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paragraph 60.

[61] Bearing in mind the standard of review, I am not prepared to interfere with the Federal Court's factual conclusion that the appellant was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person. The Federal Court had an evidentiary basis for its finding.

[62] At paragraphs 6 to 13, the Federal Court reviewed the appellant's medical condition while she has remained in Canada. Before 2006, she only required minor medical care. After 2006, however, her medical needs have substantially increased as her health has worsened. Her conditions include uterine fibroids, uncontrolled hypertension, nephrotic syndrome, poorly controlled diabetes, a pulmonary embolism, decreased mobility, shortness of breath, hyperlipidemia and anxiety.

[63] The Federal Court reviewed the appellant's access to health care services and medication (at paragraphs 6 to 9). Before 2006, the appellant was able to work. She earned enough income to pay for the minor medical care and medication that she required. After 2006, her medical needs surpassed her ability to pay but she was still able to obtain some treatment. There is some evidence that she had had access to medical assistance at a community health centre. In 2008 she underwent an operation at Humber River Regional Hospital for the removal of uterine fibroids. She was billed for that surgery, but was unable to pay the bill. Later in 2008, the appellant was admitted to St.

Michael's Hospital for ten days for uncontrolled hypertension. In 2009, she was admitted to St. Michael's Hospital for eight days during which a pulmonary embolism was found. She was unable to pay for the medication to treat that, but the hospital gave her a supply.

[64] Evidence was before the Federal Court suggesting that the appellant's access to health care services and medication was impaired. While eventually the appellant did have her uterine fibroids surgically removed at Humber River Regional Hospital in 2006, at first she was denied service at Woman's College Hospital due to her lack of insurance coverage and her inability to pay. In 2008, while at St. Michael's Hospital, a test aimed at determining the cause of her nephritic syndrome could not be performed owing to her inability to pay for treatment and for the medicine that might be necessary if complications arose.

[65] Also before the Federal Court was expert medical evidence. Overall, this evidence, accepted by the Federal Court, suggested that (at paragraph 91):

> [if the appellant] 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).

[66] Given this evidence, and bearing in mind the deferential standard of review that must be applied to the Federal Court's findings of fact, I would not give effect to the respondent's submission that the Federal Court erred in finding that the appellant was exposed to serious health risks.

- II -

[67] As mentioned above, based on this evidence, the Federal Court found that the Order in Council created a risk to the appellant. That is true in the sense that if the Order in Council were broader and provided her with all of the treatment and medication she needs, all risk would be averted. But that is not sufficient legally to demonstrate that the Order in Council has caused injury to the appellant's rights to life and security of the person.

[68] It is incumbent on the appellant to establish that the failure of the Order in Council to provide medical coverage to her is the operative cause of the injury to her rights to life and security of the person under section 7 of the Charter: *TrueHope Nutritional Support Limited v. Canada (A.G.)*, 2011 FCA 114 at paragraph 11.

[69] The provision of public health coverage and the regulation of access to it is primarily the responsibility of the provinces and the territories, with the federal government playing a role in funding, the setting of standards under the *Canada Health Act*, R.S.C. 1985, c C-6 and, occasionally, regulation in specific areas under its criminal law power: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457.

[70] If there is an operative cause of the appellant's difficulties, it is the fact that although she is getting some treatment under provincial law (see paragraph 59, above), that law does not go far enough to cover all of her medical needs.

[71] The appellant has attempted to obtain coverage under the Ontario Health Insurance Plan. Ontario refused coverage because, as a person in Canada contrary to Canadian immigration law, the appellant is not a "resident" of Ontario under R.R.O. 1990, Regulation 552, section 1.4, enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6. She did not judicially review Ontario's refusal, nor did she argue that Ontario's eligibility requirements violate her rights under sections 7 and 15 of the Charter. Nor did she challenge the *Public Hospitals Act*, *supra*, and argue that it is constitutionally underinclusive or over restrictive. The record reveals no attempt by the appellant to assert section 7 or 15 of the Charter against provincial legislation that limits her access to health care.

[72] Further, and most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan: see section 1.4 of Regulation 552, *supra*.

[73] In my view, the appellant has not met her burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person under section 7 of the Charter.

(b) The principles of fundamental justice

[74] Even if the appellant had discharged the burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person, she would still have to establish that the deprivation of her rights to life and security of the person was contrary to the principles of fundamental justice. Here as well, the appellant has fallen short.

[75] The appellant submits at paragraph 34 of her memorandum of fact and law that "[g]overnments 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." The appellant submits that "[t]his principle is fundamental to judicial and legislative practice in Canada."

[76] At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.

[77] The Charter does not confer a freestanding constitutional right to health care: *Chaoulli, supra* at paragraph 104 (*per* McLachlin C.J.C. and Major J.).

[78] The results reached in other recent cases confirm that the Charter does not confer a freestanding constitutional right to health care. In these recent cases, courts have denied claims under the Charter to obtain state funding or financial assistance for necessary treatments: *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *Ali v. Canada*, 2008 FCA 190; *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (C.A.); *Eliopoulos v. Ontario* (2006), 82 O.R. (3d) 321 (C.A.); *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, (2008), 91 O.R. (3d) 412 (C.A.).

[79] In words apposite to the case at Bar, Justice Linden of this Court wrote:

> The appellants are, in essence, seeking to expand the law…so as to create a new human right to a minimum level of health care…. [T]he law in Canada has not extended that far…[A] freestanding right to health care for all of the people of the world who happen to be…in Canada would not likely be contemplated by the Supreme Court.

(*Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 at paragraph 36, [2007] 3 F.C.R. 169).

[80] These judicial statements and holdings suggest that the principle proffered by the appellant cannot qualify as a principle of fundamental justice under section 7 of the Charter. It is not a "legal principle" that is "vital or fundamental to our societal notion of criminal justice," nor is there "a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate": *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at paragraphs 112-113, [2003] 3 S.C.R.

571; *R. v. D.B.*, 2008 SCC 25 at paragraph 46, [2008] 2 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraph 23, [2010] 1 S.C.R. 44.

[81] The appellant invokes other principles of fundamental justice under section 7. She submits that her exclusion from coverage by the Order in Council is arbitrary. She rightly submits that the Supreme Court has recognized that an arbitrary law – a law that "bears no relation to, or is inconsistent with, the objective that lies behind [it]" – will be contrary to the principles of fundamental justice: *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paragraph 103, [2009] 2 S.C.R. 181; *Chaoulli*, *supra* at paragraph 104 (*per* McLachlin C.J.C and Major J.), and *Malmo-Levine*, *supra* at paragraph 135.

[82] However, the Order in Council is not arbitrary. It is related to and consistent with the objective that lies behind it. As a general matter, as the analysis in paragraphs 31-46 above shows, the Order in Council is meant to provide temporary, emergency assistance to those who lawfully enter Canada and find themselves under the jurisdiction of the immigration authorities, or for whom the immigration authorities feel responsible. The Order in Council is not meant to provide ongoing medical coverage to all persons who have entered and who remain in Canada, lawfully or unlawfully.

[83] In this regard, I agree with the Federal Court and adopt its words (at paragraph 94):

> I do not accept the applicant's submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. I see nothing arbitrary in denying financial coverage for health care to persons who have chosen

> to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safe-haven for all who require health care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.

[84] The appellant also submits that the Order in Council offends the principles of fundamental justice because it is unacceptably vague in the sense that it is unintelligible and impossible to interpret. This is a very high standard to meet and, accordingly, successful claims on this basis are extremely rare: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

[85] The appellant falls well short of establishing that high standard. As is evident from paragraphs 31-46 above, the Order in Council can be interpreted and a clear meaning can be gleaned from it.

[86] Finally, the appellant submits that the principles of fundamental justice must also take into account Canada's obligations under various sources of international human rights law such as the right to life under article 6 of the International Covenant on Civil and Political Rights and rights to health under article 12 of the *International Covenant on Economic, Social and Cultural Rights* and article 5 of the *International Convention on the Elimination of All forms of Racial Discrimination*.

[87] On the basis of *Khadr*, *supra* at paragraph 23, I accept that, in appropriate cases, courts can be assisted by these sources when defining the precise content of certain principles of fundamental justice under section 7. But in this case we are not at the point of defining the content of a principle

of fundamental justice. We are not even at first base. The appellant has not offered a principle that meets the criteria set out in *Malmo-Levine*, *supra* and *D.B.*, *supra* for admission as a principle of fundamental justice under section 7 of the Charter.

[88] Therefore, I conclude that the appellant's rights under section 7 are not infringed.

(4) Section 15 of the Charter

(a) General principles

[89] When assessing the merits of a subsection 15(1) claim, we must apply a two-part test: (1) whether the law creates a distinction that is based on an enumerated or analogous ground and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping: *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paragraph 30; *R. v. Kapp*, 2008 SCC 41 at paragraph 17, [2008] 2 S.C.R. 483.

[90] The first step tells us that not all distinctions, in and of themselves, are contrary to s. 15(1) of the *Charter*: *Withler*, *supra* at paragraph 31; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paragraph 188, [2009] 1 S.C.R. 222. Subsection 15(1) only covers distinctions made on the basis of the grounds enumerated in subsection 15(1), or grounds analogous to them.

[91] The second step tells us that the focus under subsection 15(1) is not differential treatment, but rather discrimination. Therefore, in order to succeed, a section 15 claimant must show that the impact of the law is discriminatory: *Withler*, *supra* at paragraph 31; *Andrews*, *supra* at page 182; *Ermineskin Indian Band*, *supra* at paragraph 188; *Kapp*, *supra* at paragraph 28.

[92] Discrimination has been described as follows:

> …a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

(*Andrews*, *supra*, at pages 174-175.)

(b) Application of the principles to this case

[93] The appellant submits that her exclusion from the medical coverage afforded by the Order in Council infringed subsection 15(1) of the Charter because that exclusion was based on an enumerated and analogous ground, and was discriminatory.

[94] The Federal Court rejected the appellant's subsection 15(1) submission, primarily on the basis (at paragraphs 79-83) that the appellant had failed to establish that her exclusion from coverage under the Order in Council was based on an enumerated or analogous ground.

[95] I find no error in the Federal Court's rejection of the appellant's section 15 submissions. In my view, there are four main reasons why the appellant's section 15 submissions must fail.

- I -

[96] In my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation. On this point, I substantially agree with the Federal Court reasons.

[97] In this Court, the appellant suggests that the Order in Council creates a "primary distinction" enhanced by a "secondary intersecting ground."

[98] The primary distinction is said to be between foreign nationals possessing certain immigration status who are covered under the Order in Council, and other foreign nationals who possess another immigration status who are not covered. As we have seen, however, coverage is potentially available under paragraph (b) to all persons regardless of immigration status. For example, the appellant herself might have been covered by the Order in Council upon her arrival in Canada. Upon entry, she was legally admitted as a visitor. Had she been in desperate need of

emergency medical attention at that time and could not otherwise afford it, and if the immigration authorities felt obligated to assist, she would have been covered by the Order in Council.

[99] Further, I do not accept that "immigration status" qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in *Withler*, *supra* at paragraph 33. "Immigration status" is not a "[characteristic] that we cannot change." It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status" – in this case, presence in Canada illegally – is a characteristic that the government has a "legitimate interest in expecting [the person] to change." Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada. See also *Forrest v. Canada (A.G.)*, 2006 FCA 400 at paragraph 16; *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (C.A.) at paragraphs 133-136.

[100] The "secondary intersecting ground" is said by the appellant to be "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." Intersecting grounds can affect the quality of the alleged discrimination and influence the section 15 analysis: See, *e.g.*, Denise Reaume, "Of Pigeonholes and Principles: A reconsideration of discrimination law", (2002) 40 Osgoode Hall L.J. 113-144 at paragraphs 33-42 and Douglas Kropp, "Categorical Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject,"

(1997) 23 Queen's L.J. 201 at paragraph 8. As the appellant has failed to establish her primary distinction, immigration status, and since there are other obstacles to her section 15 claim, discussed below, I need not consider this further.

[101] Therefore, in my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation.

[102] Parenthetically, I would note that if the appellant had prevailed on this point, subsection 15(2) of the Charter might become live. If the immigrants, refugees and others who do receive medical care under the Order in Council constitute a disadvantaged group embraced by the enumerated or analogous grounds, and if the Order in Council is aimed at ameliorating or remedying that group's condition, the Order in Council would be a "law, program or activity" within the meaning of subsection 15(2). In such a case, the Order in Council would not be found to be discriminatory under subsection 15(1): *Kapp*, *supra* at paragraph 41; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950.

- II -

[103] The appellant has failed to establish that the Order in Council relies upon, perpetuates or promotes prejudice or stereotyping.

[104] The appellant has been denied coverage because she did not enter as an applicant for permanent residence, is not a person under immigration jurisdiction, and is not a person for whom the immigration authorities feel responsible. In imposing these eligibility criteria, the Order in Council does not suggest that the appellant and others like her are less capable or less worthy of recognition or value as human beings. The Order in Council does not single out, stigmatize or expose the appellant and others like her to prejudice and stereotyping, nor does it perpetuate any pre-existing prejudice and stereotyping. Indeed, the Order in Council, with its eligibility criteria, denies medical coverage to the vast majority of us, and not just the appellant and others like her. The Order in Council treats the appellant – a non-citizen who has remained in Canada contrary to Canadian immigration law – in the same way as all Canadian citizens, rich or poor, healthy or sick.

- III -

[105] In my view, the facts and the holding of the Supreme Court in *Auton*, *supra* are directly on point and confirm that the Order in Council does not infringe section 15 of the Charter. In *Auton*, the claimants sought an order that British Columbia's medicare program should be extended to cover a particular treatment for autism. The denial of coverage was said to be discriminatory under section 15 of the Charter. The Supreme Court refused to order British Columbia to extend its medicare program to cover the treatment.

[106] At paragraph 41, the Supreme Court held that "[i]t is not open to Parliament…to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment." I note that the Order in Council does not do this. The Supreme Court then added (at paragraph 41):

> On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect…does not give rise to s. 15(1) review. 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: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at para. 61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 55; *Hodge*, *supra*, at para. 16.

[107] On the issue whether the benefit was conferred in a discriminatory manner, the Supreme Court stated (at paragraph 42):

> Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

[108] The exclusion of the appellant from the coverage provided by the Order in Council does not undercut its overall purpose. On the other hand, the exclusion of the appellant from the coverage provided by the Order in Council is consistent with its purpose. The Order in Council is designed to provide emergency care to legal entrants into Canada who are under immigration jurisdiction or for

whom immigration authorities feel responsible. Extending these benefits to all foreign nationals in Canada, even those in Canada illegally, stretches the program well beyond its intended purpose. Excluding persons such as the appellant keeps the program within its purpose. In the words of *Auton* (at paragraph 43), the appellant's exclusion from the Order in Council "cannot, without more, be viewed as an adverse distinction based on an enumerated ground"; rather, "it is an anticipated feature" of the Order in Council.

[109] Since the Order in Council does not confer benefits in a discriminatory manner, the general rule expressed by the Supreme Court in paragraph 41 of *Auton* prevails. The government was "under no obligation to create a particular benefit" in the Order in Council and was left "free to target the social programs it [wished] to fund as a matter of public policy."

- IV -

[110] Finally, I query whether the Order in Council, said by the appellant to be discriminatory, is the operative cause of the disadvantage the appellant is encountering. The observations I made in paragraphs 67-73 also apply to the appellant's section 15 claim.

[111] Therefore, for all of the foregoing reasons, I conclude that the Order in Council does not infringe the appellant's rights under section 15 of the Charter.

G. Justification and remedy

[112] On the issue of justification under section 1 of the Charter – whether the Order in Council is a reasonable limit prescribed by law in a free and democratic society – the Federal Court held (at paragraph 94) that if the Order in Council were extended to prove medical coverage to persons illegally in Canada, such as the appellant, Canada would become a "health care safe haven." The Federal Court mentioned this in the context of the state's interest that forms part of the analysis of the principles of fundamental justice under section 7.

[113] In any analysis of justification under section 1 of the Charter in this case, the interests of the state in defending its immigration laws would deserve weight. If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada's immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could become a health care safe haven, its immigration laws undermined. Many, desperate to reach that safe haven, might fall into the grasp of human smugglers, embarking upon a voyage of destitution and danger, with some never making it to our shores. In the end, the Order in Council – originally envisaged as a humanitarian program to assist a limited class of persons falling within its terms – might have to be scrapped.

[114] In this case, it is not necessary to comment on justification under section 1 any further. Nor is it necessary to comment on what constitutional remedy might be awarded under subsection 24(1)

of the Charter. The appellant’s constitutional challenge fails for want of proof of rights breach. The Order in Council does not infringe sections 7 and 15 of the Charter.

H. Concluding comments

[115] Just before the release of these reasons, this Court released its judgment in *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146. It held that the Minister must consider the appellant’s request for a waiver of fees for her application for permanent residence in Canada.

[116] On the evidence in this record, and given the reasons set out in paragraphs 35 and 45, above, a decision by the Minister to waive the fees and accept the appellant’s application will not entitle her to medical coverage under the Order in Council. However, depending upon the terms of legislation in Ontario, she may be entitled to health coverage or assistance from Ontario, now or at some point in the future. That will be for others to decide.

I. Proposed disposition

[117] I would dismiss the appeal. In the circumstances, the Crown has asked that costs not be awarded against the appellant. Accordingly, I would not award costs.

"David Stratas"
J.A.

“I agree
Pierre Blais C.J.”
“I agree
M. Nadon J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-362-10

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE ZINN DATED AUGUST 6, 2010 NO. T-1301-09

STYLE OF CAUSE:	Nell Toussaint v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 24, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Blais C.J. and Nadon J.A.
DATED:	June 27, 2011

APPEARANCES:

Andrew Dekany Raj Anand Angus Grant	FOR THE APPELLANT
Marie-Louise Wcislo Martin Anderson	FOR THE RESPONDENT
Iris Fischer Lindsay Aagaard	FOR THE INTERVENER

SOLICITORS OF RECORD:

Andrew Dekany Barrister & Solicitor Toronto, Ontario	FOR THE APPELLANT
Weir Foulds LLP Toronto, Ontario	

Law Office of Catherine Bruce Toronto, Ontario	
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT
Blake, Cassels & Graydon LLP Toronto, Ontario	FOR THE INTERVENER