

Mr. Andrew Dekany
1724 Queen Street West
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Canada

June 3, 2016

Dear Mr. Dekany:

We have been asked to comment on whether it was reasonable for Ms. Nell Toussaint to seek a remedy against the federal government, rather than against a provincial government, for her lack of access to health care in Canada. This issue was raised in the March 30, 2016 *Supplementary Submission of the Government of Canada to The Human Rights Committee on the Admissibility and Merits of the Communication of Ms. Nell Toussaint: Communication No. 2348/2014*.

In Canada, constitutional jurisdiction over health care is shared between the federal and provincial governments.¹ Through the exercise of its spending power, the federal government contributes to the funding of provincial health insurance plans, and it relies on this financial incentive to secure provincial compliance with the program conditions of the *Canada Health Act* (“CHA”).² In addition, the federal government is responsible for the administration and delivery of health care services to certain categories of the population who fall within federal jurisdiction. As such, the federal government has the constitutional authority to provide health care to irregular migrants, such as Nell Toussaint. Moreover, for the reasons outlined below, we believe that it was reasonable for Ms. Toussaint to see the federal, rather than a provincial, government as the appropriate object of her legal challenge.

First, irregular migrants in Canada are disqualified from provincial health insurance coverage, and such disenfranchisement is largely attributable to federal legislation. In particular, the CHA requires the provinces to extend health care coverage to all residents within their respective jurisdictions, but expressly excludes anyone who is not “lawfully entitled to be or to remain in Canada.”³ In turn, federal immigration legislation determines whether foreign nationals are permitted to enter and remain in Canada and under what conditions.

Second, the federal government, through its Interim Federal Health Program (“IFHP”), currently funds the cost of providing health care to certain classes of foreign nationals that do not qualify for provincial health insurance coverage. These include, *inter alia*, individuals under immigration detention, unsuccessful asylum seekers awaiting removal from Canada, and deportees whose removal has been temporarily suspended due to generalized insecurity in their country of origin. These individuals, like irregular migrants, are generally portrayed by the federal government as lacking the proper immigration authorization to enter or to remain in Canada. Given the similarity of their respective situations and legal status, Ms. Toussaint

¹ *Schneider v. R.*, [1982] 2 S.C.R. 112 at 141-142; *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 at paras. 24-25; *Canada (A.G.) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paras. 66-69.

² R.S.C., 1985, c. C-6.

³ *Ibid.*, s. 2.

reasonably concluded that irregular migrants, such as herself, ought likewise to be included in the IFHP and so eligible for federal health care coverage.

Third, the exclusion of irregular migrants from provincial health insurance coverage has been found valid by Canadian courts. In *Manassian v. Alberta (Minister of Health)*, the Alberta Court of Queen's Bench upheld the denial of provincial health care to an asylum seeker, whom the Court deemed to be "a person without status," on the basis that she did not qualify as a resident within the meaning of provincial health insurance legislation.⁴ In *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)*, in which a group of migrants, including a man without legal right to remain in Canada, challenged their ineligibility for provincial health insurance, the Ontario Court of Appeal found that such exclusion did not offend the *Canadian Charter of Rights and Freedoms*.⁵

For these reasons, we are of the opinion that Ms. Toussaint reasonably sought a remedy against the federal government, rather than a province, for failure to provide her with health care coverage.

Yours sincerely,



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⁴ (1990), 65 D.L.R. (4th) 744 at para. 19.

⁵ (2001), 55 O.R. (3d) 43, leave to appeal to Supreme Court of Canada refused, 28571 (September 13, 2001).

* Qualifications of the signatories to this letter are available at the websites shown beneath their respective names.

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