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Denied health care, she's suing the feds

Migrant lost leg, sight and kidneys while in immigration limbo. Now she's fighting for others in need

Nicholas Keung Toronto Star

Nell Toussaint knew what her stakes were.

Diagnosed with diabetes and other chronic ailments, she understood that, if she didn't get treatment, the day could come when she would lose a limb, her vision and even her kidneys.

It's why she had pleaded with the Canadian government as early as 2010 to grant her and other undocumented migrants access to essential government health care. That request was dismissed by a court.

By the time Toussaint finally got her permanent residence on humanitarian grounds in 2013 - and the much-needed health insurance coverage - she had already suffered "irreversible sicknesses."

As years passed, she had one leg amputated above the knee and became blind. Her kidneys failed. She had a stroke and an anoxic brain injury due to heart failure.

But her permanent status and health problems have not stopped her from fighting for others still in immigration limbo and who have dire medical needs.

Last week, Toussaint scored a victory in her latest legal saga when an Ontario court dismissed an attempt by the federal government to strike down her claim, which has been boosted by a United Nations investigation that found Canada failed to meet its international obligations to her "right to life."

Conceding to the complexity of a case that intersects international and domestic laws as well as the Canadian Charter of Rights and Freedom, the Ontario Superior Court of Justice said there are reasons to hear the merits of the 51-year-old woman's claim.

The ruling means her lawsuit can proceed.

"Given the land, sea, air, submarine, and celestial procedural attack that Canada makes against Ms. Toussaint's pleading, there are many factual and legal issues to address in this pleadings motion in what is a complex factual and legal matrix that may affect others by the precedent set by Ms. Toussaint's sad case," wrote Justice Paul Perell in a 60-page judgment released this week.

"It pains me to have to say that Canada's

Nell Toussaint has spent two decades fighting with the Canadian government. She may be a step closer to her day in court.
Andrew Dekany

argument that it is plain and obvious that Ms. Toussaint's claim is doomed to fail does it no pride, because Canada pejoratively mischaracterizes Ms. Toussaint's human rights claim and thus its rhetorical and largely conclusory argument misfires and is also unfair."

Supporters and advocates for Toussaint say they are thrilled with the court decision.

"This is a major victory because, unfortunately, our experience in these test-case charter claims is that the judges are often willing to strike them," said Martha Jackman, a University of Ottawa law professor, who represented one of the 10 intervening community and rights groups in the case.

"Justice Perell says many times that this is a complex evidentiary and doctrinal case. Often courts find the complexity a reason that these cases are nonjusticiable, that they should not be heard and they should be struck."

Toussaint came to Canada from Grenada in 1999 and remained in the country as an irregular migrant after her visitor visa expired and numerous attempts to regularize her status failed.

She asked the Canadian government for urgently needed health care under Canada's Interim Federal Health Program, which covers limited health-care benefits for asylum seekers, resettled refugees and migrants held in detention.

Although the immigration minister has the discretionary power to extend the coverage in some circumstances, Toussaint's request for exemption was refused. Her challenge of the minister's decision was dismissed by the Federal Court and the Federal Court of Appeal.

In 2013, she made a submission to the United Nations Human Rights Committee that Canada had violated her right to life and her right to non-discrimination.

In 2018, the committee concluded that Toussaint's rights were violated and that Canada was obligated to offer the woman an effective remedy, including appropriate compensation, and all steps necessary to prevent similar violations in the future.

In 2020, Toussaint took the federal government to the Ontario court, suing the government for \$1.2 million and demanding that irregular migrants be granted access to essential health care after the federal government refused to follow the UN committee's directive.

During a one-day hearing in June, government lawyers argued that the case was an abuse of the process as it had already been adjudicated by federal courts. Her legal action, they contended, was essentially a request for a judicial

review, which is beyond the Ontario court's jurisdiction.

Justice Perell disagreed.

"The Ontario Court has concurrent jurisdiction with the Federal Court with respect to Charter claims brought against the Federal Government. There is nothing in the Federal Court Act that precludes a claim for damages against Canada for breach of Ms. Toussaint's rights under the Charter or under international law," he said.

"The immediate case raises new issues that were not before the Federal Court in 2010-12. The immediate case addresses additional and different legislation than was before the Federal Court."

The judge was also critical of the government's argument that granting publicly funded health care for undocumented migrants would provide an incentive for more people to come take advantage of Canada's generosity.

"In a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system, Canada mischaracterizes Ms. Toussaint's Charter claim as a right to receive free health care anywhere in the world regardless of one's lack of status," Perell said.

"Since Ms. Toussaint's claim does not assert a right to free health care anywhere in the world regardless of one's lack of status, Canada's argument is a fallacious straw man argument that might successfully knock down claims that are not being asserted."

The court's decision to let Toussaint's case go ahead is particularly meaningful in the wake of the federal and provincial

measures in place during the pandemic to ensure access to public health services regardless of immigration status, said Jackman.

"The COVID pandemic really illustrated that keeping everyone healthy is in the best interests of everyone in Canada. Canadian governments recognized in the pandemic that we all live together," she said.

"The sky did not fall and public finances were not crippled. In a way, the evidence suggests that this is actually... economically rational, as well as a human-rights-compliant policy."

The court has given the federal government 40 days to submit a statement of defence. The merits of Toussaint's claim can be heard as early as next year.

"Nell is a strong individual. She participated in a protest in the middle of a winter blizzard in downtown Toronto a couple of years ago for a cross-country health for all (campaign)," said her lawyer, Andrew Dekany.

"She's very involved and she has a fine mind. And it's been very hard on her not to have had a decision for so long. We are into it now. She is persistent in a good way, in a fighting way. So, subject to her own health issues, the persistence and the will is there."

Toussaint, who has been in and out of hospital, said she's elated with the court decision and hopes her persistence will pay off.

"It's a good decision. I love this judge," she said, adding that what's kept her going is her motto, "To fight for others and win."