

# Canada's Refusal to Implement the Views of the UN Human Rights Committee in [Toussaint v Canada CCPR/C/123/D/2348/2014 \(30 August 2018\)](#) and Ongoing Denial of Access to Essential Health Care to People with Irregular Migration Status

1. Under the International Covenant on Civil and Political Rights (ICCPR), Canada is obliged to provide effective remedies for violations of Covenant rights, including the rights to life and non-discrimination, rights the Human Rights Committee concluded that Canada violated in the case of Nell Toussaint, when it denied essential healthcare coverage on the basis of her irregular migration status.
2. Furthermore, in Canada's Third Periodic Review, it supported recommendation 142.149 from South Africa to: "Ensure the justiciability of economic, social and cultural (esc) rights (South Africa). Canada noted in its agreement to support this recommendation that effective remedies for ESC rights may be available under the *Canadian Charter of Rights and Freedoms*.
3. SRAC and ESCR-Net are addressing, in these submissions, Canada's refusal to implement the Human Rights Committee's Views in the case of Ms. Toussaint and its attempt to deny her access to justice to seek effective remedies under the Canadian Charter.

## **Ms. Toussaint's Petition to the UN Human Rights Committee**

4. On 24 December 2013, after exhausting her domestic remedies,<sup>1</sup> Ms. Toussaint submitted a Communication No. 2348/2014 to the Committee on the basis that Canada violated the ICCPR by denying her access to healthcare necessary for the protection of her life, under Canada's Interim Federal Health Program (IFHP) on the basis of her irregular migration status.<sup>2</sup>
5. In 2015, Ms. Toussaint asked ESCR-Net to provide submissions to the Human Rights Committee concerning her communication to address Canada's failure to provide essential healthcare to people with irregular migration status in Canada. On 22 August 2015, ESCR-Net's opinion was provided to the Committee by the author as supporting documentation to her Response to Canada's Submissions on Admissibility and Merits.<sup>3</sup> ESCR-Net's opinion

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<sup>1</sup> Federal Court of Appeal, *Toussaint v. Canada (Attorney General)*, [2011 FCA 213](#), 27 June 2011. The Federal Court of Appeal dismissed Ms. Toussaint's constitutional claim that her ineligibility to receive medical coverage under Canada's Interim Federal Health Program (IFHP) infringed her section 7 rights to life, liberty, and security, and to her section 15 right to equality, under the *Canadian Charter of Rights and Freedoms*. The application for leave to appeal to the Supreme Court of Canada was dismissed, see: Supreme Court of Canada, *Applications for Leave*, "[Nell Toussaint v. Attorney General of Canada](#)", 5 April 2012.

<sup>2</sup> Human Rights Committee, Views, para 3.1.

<sup>3</sup> These submissions pre-dated the Committee's adoption of its *Guidelines on information and documentation submitted by third parties* and were therefore submitted by the author as supporting documentation to her own submissions. Human Rights Committee, *Guidelines on information and documentation submitted by third parties*, 3 September 2020, CCPR/C/160.

was prepared with the active participation of five human rights organizations that are members of ESCR-Net's Strategic Litigation Working Group.<sup>4</sup>

6. On 31 August 2018, the Committee adopted its Views. The Committee found that as a consequence of Canada's refusal to provide Ms. Toussaint with essential healthcare coverage under the IFHP from 2009 to 2013, Canada violated Ms. Toussaint's right to life, and right to equality and non-discrimination, under articles 6 and 26 of the ICCPR.<sup>5</sup> The Committee's Views included an outline of the submissions of ESCR-Net.<sup>6</sup>
7. The Committee provided that Canada has an obligation under article 2 of the ICCPR to provide Ms. Toussaint with an effective remedy, which required making full reparations and taking steps to provide her with adequate compensation. The Committee noted Canada also has an obligation to take all necessary steps to prevent similar violations in the future, including reviewing national legislation to ensure people with irregular migration status "have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."<sup>7</sup>

### **Canada's Response to the Human Rights Committee**

8. On 1 February 2019, Canada submitted its response to Communication No. 2348/2014.<sup>8</sup> Canada stated that "it is unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views."<sup>9</sup> Canada argued that the Committee took an expansive interpretation of Ms. Toussaint's right to life which conflated it with the right of everyone to enjoy the highest attainable standard of physical and mental health under the International Covenant on Economic, Social and Cultural Rights.<sup>10</sup> Canada further submitted that it believed that Ms. Toussaint's communication was "in essence a claim to access a certain level of publicly-funded health care" and provided that the denial of state-funded health insurance to people with irregular migration status in Canada was not discriminatory.<sup>11</sup> On July 2020, the Committee assigned Canada E grades for its response to the Committee's Views. It was noted that Canada had mistakenly viewed the Committee's request for a report on implementation of the Committee's Views as an opportunity to reargue the case.<sup>12</sup>

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<sup>4</sup> Views concerning communication No. 2348/2014, *supra* note 1 para 7.4. ESCR-Net, ["Legal Opinion of Nell Toussaint v. Canada: Communication No. 2348/201422"](#), August 2015.

<sup>5</sup> Human Rights Committee, Views, paras 11–12.

<sup>6</sup> *Ibid.*, paras 7.4–7.9.

<sup>7</sup> *Ibid.*, para 13.

<sup>8</sup> Government of Canada, ["Response of The Government Of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 Submitted By Ms. Nell Toussaint"](#), 1 February 2019.

<sup>9</sup> *Ibid.*, para 4,

<sup>10</sup> *Ibid.*, paras 7, 16–17, 19–20.

<sup>11</sup> *Ibid.*, paras 26, 30.

<sup>12</sup> Human Rights Committee, ["Follow-up to Views under the Optional Protocol to the Covenant"](#), Summary record of the second part (public) of the 3723rd meeting, 129th session, 23 July 2020, CCPR/C/SR.3723/Add.1, paras 6–12.

## **Ms. Toussaint’s Continuing Struggle for Access to Justice and Effective Remedy**

9. In response to Canada’s refusal to implement the Committee’s Views, on 14 October 2020, Ms. Toussaint initiated a claim before the Ontario Superior Court of Justice (ONSC) challenging the federal government’s continued denial of essential healthcare to people with irregular migration status, despite the Committee’s Views.<sup>13</sup> Ms. Toussaint noted that the Supreme Court of Canada has affirmed that in order to provide effective remedies to violations of international human rights, the *Canadian Charter* is presumed to provide protections at least as great as those contained in Canada’s ratified international human rights treaties.<sup>14</sup> Ms. Toussaint asked the court to consider the scope of the rights to life and non-discrimination of people with irregular migration status under the *Canadian Charter* in light of the Committee’s Views in order to determine if Canada’s refusal to provide essential health care to people with irregular migration status is in violation of the *Canadian Charter*. She also argued that the obligation to perform international treaty obligations in good faith is universally recognized and that Canada had failed to meet this standard.
10. The federal government moved to dismiss the claim by filing a motion to strike.<sup>15</sup> Canada argued that because the Committee’s Views are not binding in either international or domestic law, “Canada is within its rights to disagree with the Committee’s views, and to choose not to implement the Committee’s recommendations.”<sup>16</sup>
11. ESCR-Net sought and was granted leave to intervene in the hearing on the motion to jointly with Amnesty International Canada as a friend of the court.<sup>17</sup>
12. Amnesty and ESCR-Net made submissions regarding Canada’s international legal obligations to implement the Committee’s Views in good faith and to permit Ms. Toussaint to pursue remedies under Canadian domestic law so as to ensure that people with irregular migration status in Canada have access to essential healthcare to protect their right to life.<sup>18</sup>
13. On 17 August 2022, the Court dismissed Canada’s motion to strike the claim. The Court held that Canada’s argument that Ms. Toussaint was only claiming a socio-economic right that is outside the scope of the right to life “mischaracterizes Ms. Toussaint’s human rights claim and

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<sup>13</sup> Ontario Superior Court of Justice, *Toussaint v. Canada (Attorney General)*, [2022 ONSC 4747](#), 17 August 2022, [2022 ONSC 4747].

<sup>14</sup> Ibid., paras 88(d) and 151, citing: Supreme Court of Canada, *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 5 November 2020, [2020 SCC 32](#), para 31.

<sup>15</sup> Ontario Superior Court of Justice, *Toussaint v. Canada (Attorney General)*, [2022 ONSC 5851](#), 14 October 2022.

<sup>16</sup> Ontario Superior Court of Justice, Factum of the Attorney General of Canada on the Motion to Strike, para 70.

<sup>17</sup> Ontario Superior Court of Justice, 2022 ONSC 4747, paras 7–8. A friend of the court is a legal term of art used to describe an intervenor for the purpose of rendering assistance to the court by way of argument, see: Government of Ontario, e-Laws, *Rules of Civil Procedure*, RRO 1990, Reg 194, [Rule 13.02](#).

<sup>18</sup> Amnesty and ESCR-Net, *Toussaint v. Canada (Attorney General)*, Factum of the Interveners: Amnesty International Canada and ESCR-Net – International Network for Economic, Social and Cultural Rights, Ontario Superior Court of Justice, Court File No. CV-20-00649404-0000, paras 13, 17, 24, 34.

thus its rhetorical and largely conclusory argument misfires and is also unfair.”<sup>19</sup> The Court found that Canada’s submissions were based on a “dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system.”<sup>20</sup> In agreement with submissions made by Amnesty International and ESCR-Net the Court found that “[p]acta sunt servanda, the principle that all treaties are binding and must be performed in good faith is a principle of *jus cogens* and as a central unifying principle of the international legal system.”<sup>21</sup> The Court therefore ordered that Ms. Toussaint’s action should proceed.

14. Although Ms. Toussaint was in precarious health, the Attorney General sought and was granted a stay of Ms. Toussaint’s action pending an appeal.<sup>22</sup> The Court of Appeal for Ontario agreed to hear the appeal on an expedited basis because of Ms. Toussaint’s fragile health. A hearing was held on December 2, 2022.

### **Ms. Toussaint Died Still Awaiting Justice from Canada**

15. Tragically, Ms. Toussaint passed away on January 9, 2023, four and a half years after the release of the Committee’s Views, still seeking a hearing before Canadian courts to secure an effective remedy. The Court of Appeal released its decision, revising elements of the lower decision but finding that the claim was within the jurisdiction of the Superior Court of Justice and should proceed.<sup>23</sup>
16. Amnesty International and ESCR-Net issued a joint press release to honour Ms. Toussaint’s life and once again urged Canada to implement the Committee’s Views and uphold its international legal obligations, including the obligation to ensure access to effective remedies through appropriate interpretation and application of relevant domestic law, as will be considered by the Ontario Superior Court of Justice in its adjudication of the domestic legal challenge.<sup>24</sup>

### **Ongoing Follow-up to the Views**

17. The UN Human Rights Committee has continued to engage with Canada to encourage implementation of the Views, requesting that Canada report on follow-up measures. On April 7, 2022, in response to the Committee’s request for information on follow-up measures, Canada stated that it had made it already explained to the Committee that it did not agree with

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<sup>19</sup> Ontario Superior Court of Justice, 2022 ONSC 4747, para 133.

<sup>20</sup> Ontario Superior Court of Justice, 2022 ONSC 4747, para 134.

<sup>21</sup> *Ibid.*, para 181.

<sup>22</sup> Court of Appeal for Ontario, *Toussaint v. Canada*, Court File: M53747.COA-22-CV-0101.

<sup>23</sup> [Toussaint v. Canada \(Attorney General\)](#), 2023 ONCA 117

<sup>24</sup> Amnesty International Canada, [“Canada: Joint statement on the passing of groundbreaking human rights defender Nell Toussaint”](#), 20 January 2023; ESCR-Net, [“Statement on the Passing of Groundbreaking Human Rights Defender Nell Toussaint”](#), 19 January 2023.

the Committee's reasoning and would not adopt any further measures to give effect to the Views. Canada stated that it has closed this file and requested that the Human Rights Committee do the same.

18. Canada failed to provide the Committee with any information about the very active and ongoing follow-up to the Views within Canada's judicial branch.
19. ESCR-Net and Amnesty International sent third party submissions to the Committee providing information on the ongoing follow-up to the Views within the Canadian judicial branch of government and submitting that Canada's reasons for refusing to implement the Views failed to meet a standard of good faith under article 26 of the Vienna Convention on the Law of Treaties. Nell Toussaint's mother, Ann Toussaint, requested to be recognized as the complainant for the purposes of follow-up and also made submissions, urging the Committee to continue its dialogue with Canada. Ann Toussaint also noted that the ongoing action in the Ontario Superior Court of Justice. The action is subject to mandatory mediation, during which Canada will be required to reconsider its decision not to implement the Views. The Committee's continued attention to and engagement with follow-up to its Views will be critically important to these ongoing processes.
20. Canada's suggestion that the file simply be closed ignores the urgent matter of the continued violations of the right to life and non-discrimination of people with irregular migration status in need of essential health care in Canada. In the complainant's submission, the plight of thousands of persons with irregular migration status whose lives continue to be placed at risk because of Canada's disagreement with the Committee's Views demands the attention of members of the UN Human Rights Council.

### **Canada's Apparent Misunderstanding of its Good Faith Obligations**

21. Canada's response to the Committee's Views is based on what appears to be a serious misunderstanding of the obligation of good faith as it applies to the obligation to ensure access to effective remedies in follow-up to the Committee's Views. In its report, Canada states that it has considered the Committee's views "in good faith" but cannot agree with the Committee's reasoning or interpretation of articles 6 and 26 of the ICCPR and therefore refuses to take measures to give effect to the Views.
22. Canada has consistently argued that because it considers the Committee's Views to be non-binding, it is free to disagree with the Committee's interpretation and on this basis may, "in good faith", continue to deny access to essential health care to irregular migrants. It would be helpful to clarify with Canada in the context of its UPR whether it is of the view that a refusal to implement the Human Rights Committee's Views by merely stating its disagreement about the correct interpretation of the provisions of the ICCPR meets the standard of good faith. In our submission, it does not. As Martin Scheinin has noted, to "simply replace the Committee's position with its own interpretation" is inconsistent with the nature of the adjudicative

procedure to which States Parties to the OP-ICCPR have acceded, and with the recognition of the competence of the Committee to consider individual communications.<sup>25</sup>

## Clarification of the Roles of Different Branches of Government

23. It would also be helpful if Canada could clarify the roles of different branches of government with regard to the interpretation of Canada’s obligations under international human rights treaties. It appears that Canada is relying on the federal executive branch to decide whether Canada agrees with the Human Rights Committee’s interpretation of the ICCPR. Yet, as the international human rights scholar, Gib Van Ert has explained: “Canadian law recognizes no doctrine by which courts defer to governmental interpretations of international legal questions, including the meaning of treaties. Rather, Canadian courts appear to regard international legal questions as just that—legal questions for determination by courts.”<sup>26</sup>
24. The Supreme Court has affirmed on multiple occasions that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”<sup>27</sup> The Committee’s jurisprudence has been considered “persuasive authority” for the interpretation of Canada’s obligations under the *ICCPR* and therefore, under the *Charter*.<sup>28</sup> It is critical, therefore, that subsequent to the issuance of Views, victims have access to Canadian courts to remedies under domestic law, interpreted in light of the Views.
25. The issues raised by Nell Toussaint’s claim would allow the Canadian courts to consider what follow-up measures to the Views may be required under Canadian law. While recognizing that the Canadian legal system is an adversarial system, Canada’s litigation strategies should be consistent with the obligation to ensure that victims have access to justice and that courts are able to consider the effect of international human rights on the interpretation of the *Charter* and other domestic law. Domestic courts must be afforded the opportunity to give due consideration to the Committee’s Views and to victims’ claims to effective remedies.

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<sup>25</sup> Martin Scheinin, “[The Work of the Human Rights Committee](#)” in Raija Hanski & Martin Scheinin, [Leading Cases of the Human Rights Committee](#), 2nd ed (Turku: Abo Akademi University, 2007) [at 23](#).

<sup>26</sup> Gib Van Ert “Dubious Dualism: The Reception of International Law in Canada” *Valparaiso University Law Review* Volume 44 Number 3 Spring 2010 pp.927-934, at 930; S. Beaulac and J.H. Currie, ‘Canada’ in D. Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 132, cited in Julian Arato, “Deference to the Executive: The US Debate in Global Perspective” in Helmut Philipp Aust & Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts.*, Oxford University Press, 2016) p. 206.

<sup>27</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056.

<sup>28</sup> See, for example, *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32; *Nevsun Resources Ltd. v. Araya*, 2020 .CC 5; *R. v. Poulin*, 2019 SCC 47.

## Recommendations

- i) Canada should recognize the interdependence and indivisibility of ESC rights with rights to life and equality under the ICCPR and under and domestic law to ensure access to justice and effective remedies for all human rights by interpreting the *Canadian Charter* consistently with international human rights law binding on Canada.**
- ii) Canada should implement the Views of the UN Human Rights Committee in *Toussaint v Canada* in good faith and should not refuse to implement Views of human rights treaty bodies acting under ratified complaints procedures simply because the Executive Branch of the Canadian Government states its disagreement with a treaty body's authoritative interpretation of a human rights treaty.**
- iii) Canada should ensure that where human rights treaty bodies find that an author of a communication has been a victim of a violation of their rights under binding international human rights law, the victim will have access to domestic courts for them to consider the effect of the Views on the interpretation of Canadian law and the provision of an effective remedy.**
- iv) Canada should remain open to further dialogue with the UN Human Rights Committee regarding follow-up to the Views in *Toussaint v Canada*.**
- v) Canada should ensure meaningful engagement with affected communities and consultation with other branches of government in giving due legal weight to the UN Committee's interpretation of the scope of ICCPR rights.**
- vi) All branches of government in Canada should give full consideration to the importance of an inclusive understanding of the right to life, as has been adopted by many courts, regional and international human rights bodies in response to serious threats to life, such as climate change, migration, hunger and homelessness.**