



## **Violations of the Right to Life and to Non-discrimination of those who are Homeless and Migrants in Need of Health Care in Canada**

**Submitted by:**

**ESCR-Net in conjunction with the Social Rights Advocacy Centre and the Charter Committee on Poverty Issues**

**for the Sixth Period Report of Canada under the ICCPR**

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## **A. Introduction: Who we are and the Focus of the Report**

1. ESCR-Net is a collaborative network of groups and individuals from around the world working to secure human rights and social justice, with a focus on the economic, social and cultural (ESC) rights and the rights of the most marginalized and disadvantaged groups. ESCR-Net has over 250 members from 68 countries, including Canada. ESCR-Net conducts ongoing research into the adjudication of cases linked to ESC rights in a wide range of countries and maintains the world's largest international bilingual (English and Spanish) caselaw database on ESC rights cases. ESCR-Net's Strategic Litigation Working Group is composed of human rights experts and advocates from around the world. It focuses on promoting access to justice for victims of violations of ESC rights and provides research and strategic support for important national and international cases or initiatives to improve access to justice.
2. The Social Rights Advocacy Centre (SRAC) is a non-profit NGO located in Canada. It was formed in 2002 for the purpose of ensuring the equal enjoyment of ESC rights through human rights research, public education and legal advocacy. SRAC has co-directed a 10 year community-university research project on social rights partnering four universities with human rights and anti-poverty NGOs. SRAC assists in co-ordinating the ESCR-Net caselaw database and is a member of Steering Committee of the Strategic Litigation Working Group.
3. The Charter Committee on Poverty Issues (CCPI) is a national Committee (NGO) formed in 1988 which brings together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the Canadian Charter of Rights and Freedoms ("the Canadian Charter"), human rights legislation and other law in Canada. CCPI has appeared before UN human rights treaty monitoring bodies during reviews of Canada dating back to 1993 and has been granted

leave to intervene in fourteen cases at the Supreme Court of Canada. CCPI is also a member of ESCR-Net.

4. This Report focuses on two critical issues which have arisen in recent years in Canada and have been the subject of important constitutional litigation in which the three organizations have been involved:

- i) The rights to life under article 6 and the right to non-discrimination under articles 2 and 26 of those who are homeless in Canada;
- ii) The rights to life and non-discrimination of migrants in irregular situations, refugee claimants from particular countries of origin and asylum seekers who have been denied access to health care necessary for life and health.

A third and over-arching issue on which this Report focuses is the indivisibility and interdependence of ESC and civil and political rights as it relates to access to justice under the *Canadian Charter of Rights and Freedoms* (the *Canadian Charter*) in these and other cases.

## **B. Domestic Legal Context: Rights in the Canadian Charter of Rights and Freedoms must be interpreted consistently with international human rights.**

5. As noted by Canada in its Report for this periodic review, “many of the rights contained in the Covenant [ICCPR] are constitutionally protected by the Canadian Charter of Rights and Freedoms, which applies to all levels of government. The Constitution gives Canadian courts powerful remedial tools for the protection of Charter rights.”<sup>1</sup>

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<sup>1</sup> Sixth periodic reports of Canada under the ICCPR CCPR/C/CAN/6 at para 8.

6. Also, as noted in Canada's Core Document:

International treaty documents that Canada has ratified can inform the interpretation of domestic law. This doctrine is of particular importance in the context of the Canadian Charter of Rights and Freedoms. Human rights treaties are relevant in determining the ambit of rights protected by the Charter.<sup>2</sup>

7. While international human rights law is not directly enforceable by Canadian courts, it is an established principle that the Canadian Charter should be interpreted by courts in a manner consistent with Canada's international human rights obligations. This principle was recently reaffirmed by the Supreme Court of Canada in the *Saskatchewan Federation of Labour*<sup>3</sup> case in which the Court held that the right to freedom of association in section 2(d) of the *Canadian Charter* should be interpreted consistently with the ICESCR, the ICCPR and ILO Conventions. The Supreme Court described its interpretive approach as follows:

[I]n interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".<sup>4</sup>

8. Interpreting the Canadian Charter of Rights and Freedoms consistently with international human rights law is a critical aspect of the domestic implementation international human rights in Canada. As noted by Justice L'Heureux Dubé of the Supreme Court of Canada,

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<sup>2</sup> (Common) Core Document, HRI/CORE/CAN/2013 at para 128.

<sup>3</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

<sup>4</sup> *Ibid* at para 86.

Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity”.<sup>5</sup>

9. The interdependence and indivisibility of all human rights is also a central tenet of Canadian human right and Canadian Charter jurisprudence. The Canadian Charter was adopted in 1982, before the international trend toward the explicit inclusion of ESC rights in new constitutions took hold and contains no explicit reference to rights in the ICESCR such as a right to an adequate standard of living, adequate housing, food, health, water or sanitation. However Canada’s commitment to both ESC and civil and political rights under international human rights law informed the expected scope and application of broadly framed rights in the Charter.<sup>6</sup> Canada ratified both the ICCPR and the ICESCR prior to the adoption of the Canadian Charter and the Supreme Court of Canada has relied on both the ICCPR and the ICESCR and on the interdependence of all human rights to interpret the scope and application of rights in the *Canadian Charter*.<sup>7</sup>

10. A positive development to note in relation to the recognition of the interdependence of ESC and civil and political rights under the Canadian Charter is the case of *Victoria (City) v. Adams*.<sup>8</sup> In that case the Supreme Court of British Columbia relied extensively on Canada’s international human rights obligations to interpret the right to life and security of the person in section 7 of the Canadian Charter consistently with the right to adequate housing in the ICESCR. A group of homeless people living in a park challenged city bylaws that prevented them from erecting temporary shelter to protect themselves from the weather. On reviewing the evidence, the trial judge found that the

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<sup>5</sup> *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at para. 73.

<sup>6</sup> Martha Jackman & Bruce Porter (eds) *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) pp 1-10.

<sup>7</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para 86.

<sup>8</sup> *Victoria (City) v. Adams* 2008 BCSC 136, *Victoria (City) v. Adams*, 2009 BCCA 563.

government's interference with the ability of homeless people to provide themselves with temporary shelter while sleeping outdoors at night exposed them to a risk of serious harm, including death by hypothermia.<sup>9</sup>

11. It is cause for concern that the City of Victoria, supported by the Attorney General for British Columbia (AGBC) as an intervener, argued that section 7 should **not** be interpreted to include any components of the right to housing under the ICESR because "international agreements do not have a normative effect."<sup>10</sup> The trial court rejected these submissions, however, relying in part on the fact that Canada had stated the opposite to the CESCR regarding the scope of the protection of the right to life and security of the person in section 7. The court noted that in response to the List of Issues from the CESCR in 1993 and again in 1998 Canada had stated that the guarantee of security of the person under section 7 "ensured that persons were not deprived of the basic necessities of life."<sup>11</sup> The trial judge concluded that "while the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of s. 7."<sup>12</sup> Her decision was upheld in substance on appeal. The British Columbia Court of Appeal found that section 7 was engaged by "the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter."<sup>13</sup>

12. Canada made similar assurances to this Committee with respect to the interdependence of the right to life with ESC rights during its first review under the ICCPR in 1983 - the year after the Canadian Charter was adopted. Canada was asked by the Committee: "Is article 6 considered in Canadian law to impose on the State the obligation to take socio-economic measures to protect the

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<sup>9</sup> *Ibid* at para 142.

<sup>10</sup> *Victoria (City) v. Adams* 2008 BCSC 136 at para 93.

<sup>11</sup> Committee on Economic, Social, and Cultural Rights: *Summary Record of the 5th Meeting*, ESC, 8th Sess., 5th Mtg., U.N. Doc. E/C.12/1993/SR.5 (25 May 1993); Federal Responses", *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights* (November 1998).

<sup>12</sup> *Victoria (City) v Adams*, 2008 BCSC 1363.

<sup>13</sup> *Victoria (City) v. Adams*, 2009 BCCA 563 29.

right to life?” Canada responded by explaining that Canada recognizes the obligation to take necessary legislative measures to protect the right to life, including “measures to protect the health or social well-being of individuals,” noting that measures required under article 6 must be supplemented by obligations under the ICESCR.<sup>14</sup>

13. Based on Canada’s dialogue with UN treaty bodies, on domestic jurisprudence and on the clear jurisprudence and commentary of this Committee, establishing that positive measures are required for the protection of the right to life and other Covenant rights, there is ample room for courts in Canada to interpret the provisions of the Canadian Charter consistently with international human rights norms. Such interpretations are required to ensure effective remedies for violations of rights to life and non-discrimination affecting the most vulnerable and marginalized groups, who’s life is most likely to be placed at risk by the State’s failure to adopt necessary measures to ensure access to requirements such as health care, food, housing or other necessities.

14. Unfortunately, in the recent cases in which the courts considered alleged violations of the right to life resulting from governments’ failures to take positive measures to address homeless and from decisions to bar certain categories of migrants from access to health care, the courts have accepted arguments from the Government of Canada which are entirely contrary both to Canada’s commitments under international human rights law and to the principle that the Canadian Charter should be interpreted so as provide at least as great a level of protection as international human rights require. Rather than supporting the principle of interdependence of ESC rights with rights in the ICCPR, the Government of Canada has convinced courts in these cases to disaggregate the two categories of rights and successfully argued that even where life is placed at risk or health endangered, deprivations linked to access to housing or health care are not within the scope of the rights to life or security of the person in section 7 of the Canadian Charter. The Government of

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<sup>14</sup> UN Human Rights Committee, *Initial reports of States parties due in 1977: Addendum – Canada*, UN Doc CCP

R/C/1/Add.62 (15 September 1983) at 23



Canada has argued that because the Canadian Charter does not contain self-standing rights to housing or health care, the catastrophic effects of government measures resulting in homelessness or denials of health care on the right to life are immune from the guarantee of the right to life in section 7 of the Canadian Charter. As is described in the following, those whose life and health is affected by homelessness or denials of access to publicly funded health care based on immigration status have therefore been denied access to justice and the equal enjoyment of the right to life.

### **C. Failure to Take Positive Measures to address Homelessness and to address Stigmatization and Discrimination Against The Homeless (Articles 2, 6, 26)**

15. Widespread homelessness in Canada is one of the most, if not the most serious ongoing systemic human rights violation in Canada. In its concluding observations to Canada's fourth period review under the ICCPR, this Committee stated that: "The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem."<sup>15</sup>

16. This concern and recommendation has been echoed by many other human rights bodies. In its 1993 review of Canada, the CESCR noted the emerging problem of homelessness in Canada and cited evidence of families being forced to relinquish their children to foster care because of their inability to provide adequate housing.<sup>16</sup> At its next periodic review in 1998, the CESCR expressed alarm that "such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada's 10 largest cities have

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<sup>15</sup> Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105 (7 April 1999), para. 12.

<sup>16</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, UNCESCROR, 1993, UN Doc E/C.12/1993/5 [Concluding Observations 1993]

now declared homelessness a national disaster.” The Committee urged Canada to adopt a strategy to address homelessness with measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards.”<sup>17</sup> The CESCR expressed frustration, in its subsequent review eight years later, with Canada’s failure to respond constructively to its reports and reiterated its recommendation with respect to the adoption of a housing strategy.<sup>18</sup>

17. The UN Special Rapporteur on Adequate Housing, Miloon Kothari, conducted a special fact-finding mission to Canada in 2008. In his 2009 report, the Special Rapporteur noted that Canada is one of the few countries in the world without a national housing strategy. The report urged the government to adopt a comprehensive and coordinated national housing policy based on the indivisibility of human rights and the protection of vulnerable groups, including measurable goals, timetables, consultation with stakeholders, complaints procedures, and transparent accountability mechanisms. The Special Rapporteur also pointed to the vital role that the *Charter* must play in protecting the right to adequate housing. The report emphasized that denying this right to marginalized groups “clearly assaults fundamental rights in the *Canadian Charter of Rights and Freedoms*, even if the *Charter* does not explicitly refer to the right to adequate housing.”<sup>19</sup>

18. In the years since this Committee urged Canada to adopt positive measures to address homelessness, governments have allowed the problem to become worse. The numbers of homeless have continued to grow. Moreover, evidence of the catastrophic effects on health and longevity of

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<sup>17</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19<sup>th</sup> Sess, UN Doc E/C.12/1/add.31, (1998).

<sup>18</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, E/C.12/CAN/CO/4-5 (22 May 2006), paras. 24, 62

<sup>19</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UN Human Rights Council OR, 10<sup>th</sup> Sess, UN Doc A/HRC/10/7/Add.3, (2009) at paras 90,

homelessness and precarious housing has mounted.<sup>20</sup> After many years of repeated attempts to convince the Government of Canada to respond to the concerns and recommendations of multiple international and domestic human rights and advisory bodies urging action to address the crisis of homelessness, a group of victims organized to advance a Charter claim identifying violations of rights and requiring a remedial response from the Government in the form of a national strategy to address homelessness. The claimants filed an application with Ontario Superior Court alleging that the failure by the federal and provincial government of Ontario to adopt housing strategies violated their *Charter* rights, including the rights to life and security of the person under section 7. In addition, the claimants provided evidence regarding stigmatization and discrimination against the homeless and of the disproportionate effect of homelessness on people with mental and physical disabilities, Indigenous people, women, children and recent immigrants, thus alleging that the governments' failure to implement a strategy to address homelessness had a discriminatory effect on protected groups.

19. In her Affidavit in support of the *Tanudjaja* claim, Cathy Crowe, a street nurse who has worked with homeless people in Toronto for more than twenty years, describes some of the consequences of homelessness that she has witnessed:

I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhoea, hepatitis, HIV infection, and skin infections from bedbug bites. For people who live in adequate housing, these conditions are curable or manageable. For homeless people, however, it is much more difficult. The homeless experience greater exposure to upper respiratory disease; more

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<sup>20</sup> A recent Canadian longitudinal study on the effects of homelessness also found that the negative health outcomes associated with living on the streets or in shelters extend to a much wider segment of the population and also affect those living in inadequate or precarious housing. The results of the study showed that “for every one person sleeping in a shelter there are 23 more people living with housing vulnerability. They are all at risk of devastating health outcomes.”<sup>20</sup> (). People who are vulnerably housed face the same severe health problems as those who are homeless, including reduced life expectancy, increased chronic health conditions, reduced access to health care, and suicide rates that are twice the national average for men and six times the national average for women. (Holton, Gogogis & Hwan, *Housing Vulnerability and Health*, above note 37 at 4). See also Mental Health Commission, *At Home/Chez Soi*, at 11-12; Michael Shapcott, “Housing” in Dennis Raphael, ed, *Social Determinants of Health*, 2d ed (Toronto: Canadian Scholars’ Press, 2008) 221.

trauma, including violence such as rape; more chronic illness, greater exposure to illness in congregate settings; more exposure to infectious agents and infestations such as lice and bedbugs; suffer more from a greater risk of depression. This is compounded by their reduced access to health care.<sup>21</sup>

20. The claimants in this case worked with volunteers, experts and community organizations to assemble a 16-volume record, totalling nearly 10,000 pages, containing 19 affidavits, 13 of which were from experts, (including Miloon Kothari, the former Special Rapporteur on Adequate Housing). Only after all of the evidence was filed did the Governments of Canada and Ontario bring a motion to dismiss the case without a hearing and without any consideration of the evidence, on the grounds that the claim as described in the Notice of Application served at the commencement of the action is non-justiciable and has no reasonable chance of success.

21. Ontario and Canada argued that the applicants' claims to violations of the rights to life, security of the person and equality linked to homelessness were non-justiciable because the Canadian Charter should not be interpreted to impose positive obligations on governments in general, and should not be interpreted to impose positive obligations to ensure access to adequate housing. With respect to Canada's international human rights obligations, the government of Canada argued as follows:

The Applicants cite international law as a source of the right to housing, but it is plain and obvious that this allegation must fail. It is trite law that international treaties do not create unique domestic-law entitlements. The entitlement must first be specifically incorporated into domestic law. While international law binding on Canada may be a relevant and persuasive source for interpreting the Charter, it cannot be used to rewrite the text of the constitution to add new rights.

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<sup>21</sup> Cathy Crowe, "Affidavit for *Tanudjaja v Attorney General (Canada)*", Ont Sup Ct File no CV-10-403688 (2011) at paras 23-24 [Crowe, "Affidavit for *Tanudjaja*"]; see also Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada's Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing and Health, 2010) [Holton, Gogosis & Hwan, *Housing Vulnerability and Health*].

As adequate housing is not a benefit conferred by domestic law, the Applicants' claim has "no reasonable chance of succeeding".<sup>22</sup>

22. These arguments were accepted both by the Ontario Superior Court and by two of three judges on the Ontario Court of Appeal. The Superior Court held that because there is no right to housing in the Charter, the right to life and security of the person does not impose positive obligations to address homelessness even when it deprives those affected of life, health or personal security. The majority of the Ontario Court of Appeal upheld the decision of the Superior Court, finding that the claim is non-justiciable.<sup>23</sup> The claimants have filed a motion for leave to appeal to the Supreme Court of Canada.

### **Recommendations Regarding Homelessness**

- 1. The State party should urgently respond to the crisis of homelessness by adopting positive measures as required by article 6, including effective strategies with goals, timelines and independent monitoring and complaints procedures as recommended by the previous Special Rapporteur on Adequate Housing following his mission to Canada.**
- 2. Governments in Canada should promote and courts should adopt interpretations of the right to life and the right to security of the person in section 7 of the Canadian Charter that are consistent with the obligation under article 6 to take positive measures to ensure access to housing and other necessities of life, dignity and security, consistent with Canada's earlier submissions to this Committee with respect to the scope of section 7.**
- 3. Discrimination on the basis of homelessness or socio-economic situation should be recognized as a prohibited ground of discrimination and necessary measures should be taken to combat criminalization and stigmatization of those who are homeless.**

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<sup>22</sup> At paras 40-41.

<sup>23</sup> *Ibid*, at para 34.

## **D. Rights of Migrants to Access to Health Care Without Discrimination (Articles 2, 6 and 26)**

### *i) Toussaint v. Canada (Attorney General) (Right to life and non-discrimination of Migrants in Irregular Situations)*

23. The case of *Toussaint v. Canada*<sup>24</sup> raised for the first time in Canadian courts the question of whether migrants in irregular situations in Canada can be denied access to health care necessary for the protection of their lives solely on the grounds of their immigration/citizenship status; and whether denying access to health care necessary for life is a permissible means of encouraging compliance with Canada's immigration laws.

24. After a number of years working in Canada after entering as a visitor, and while in the process of seeking to obtain legal residency status, Nell Toussaint became ill with life-threatening medical conditions. She applied for coverage under the federal government's program to provide health care to immigrants - the Interim Federal Health Benefit Program (IFHP) - but was denied coverage solely on the basis of her immigration status.

25. Although she was intermittently able to obtain emergency health care from hospitals and some assistance from a community health service, there were serious delays in obtaining necessary treatment which put her life at risk and had long term health consequences. The evidence was clear in this case, and in general, that access to emergency care does not adequately protect life or health and is, additionally, an expensive and ineffective way to provide health care.

26. Ms. Toussaint sought judicial review of the federal Government's decision before the Federal Court of Canada, arguing that the decision to deny coverage was contrary to the protections of rights

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<sup>24</sup> *Toussaint v. Canada (Attorney General)* 2011 FCA 213.

to life and to security of the person under section 7 and to non-discrimination under section 15 of the Canadian Charter and that the immigration officer had failed to apply domestic law consistently with the international human rights treaties ratified by Canada. She argued that denials of access to health care based on irregular immigration status constituted discrimination on the ground of citizenship or immigration status, filing extensive expert evidence regarding stereotypes and discrimination against undocumented migrants. The evidence showed, inter alia, that undocumented migrants are unfairly stereotyped as having migrated to get access to health and other social programs, when in fact they, like Ms. Toussaint, migrate to or remain in host countries because they are able to access, and are in demand, for work. The evidence showed that providing access to health care for undocumented migrants does not encourage illegal immigration and that providing access to health care without discrimination because of immigration status is cost effective and rational public policy.

27. After reviewing the expert medical reports filed by Ms. Toussaint, the Federal Court found that the evidence established a deprivation of Ms. Toussaint's right to life and security of the person caused by her exclusion from the Federal health care program. However, the Federal Court found that denying financial coverage for health care to persons who have chosen to enter or remain in Canada illegally is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws.

28. Ms Toussaint did not claim that she had a right to remain in Canada in order to receive the health care she needed. Her claim was restricted to her circumstances while in Canada attempting to legally secure permanent residency. Nor did she claim an unqualified right to access publicly funded health care that is available to permanent residents of Canada through provincial health insurance plans. At issue in this case was the denial of essential health care for immigrants without residency status who are ineligible for provincial health care insurance and who have no means to pay for the care themselves.

29. The Federal Court did not refer to any of the uncontested expert evidence showing that denying access to health care is not an effective means to promote compliance with immigration laws and that the idea that undocumented migrants enter countries to take advantage of health care and other programs is simply based on unfounded discriminatory stereotype.

30. The Federal Court's decision was appealed to the Federal Court of Appeal, which upheld the finding of the Federal Court that the violation of right to life in this case was a result of Ms. Toussaint's decision to remain and work in Canada without documentation and was justifiable as a means to encourage compliance with immigration law. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status does not qualify for protection as an "analogous ground" of discrimination under the *Canadian Charter*.

31. The Government of Canada argued in this case that its domestic law was intentionally non-compliant with international law:

Canada has clearly and intentionally chosen to enact domestic legislation which grants access to her public healthcare system on a strictly defined and much more limited basis, specifically to those present in Canada who meet the defined eligibility criteria set out in her domestic laws. Where a nation's domestic law is incompatible with international law, domestic statutes prevail over international law, for the purposes of Canadian law.<sup>25</sup>

32. The Federal Court of Appeal held that while international human rights law can be considered in interpreting the *Canadian Charter*, it is not relevant in this case.

33. Ms. Toussaint sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, including as an exhibit a letter from the Office of the High Commissioner for Human

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<sup>25</sup> Factum of the Attorney General of Canada online at <<http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Respondent's%20memorandum%20of%20fact%20and%20law.pdf>>



Rights affirming the importance of the issues raised in relation to Canada's compliance with its international human rights treaty obligations. The application for leave to appeal was denied in 2012.

## **ii) *Canadian Doctors For Refugee Care v. Canada (Attorney general)* [Challenge to Denial of Access to Healthcare for Categories of Refugee Claimants]**

34. As soon as leave to appeal the to the Supreme Court of Canada was denied in the *Toussaint* case, the Federal Government introduced changes to the IFHP to exclude additional classes of migrants, including refugees from designated countries and failed refugee claimants. As in the *Toussaint* case, the issue was not exclusion from the health coverage available to Canadian citizens under provincial health insurance coverage, but rather, health care coverage of essential care for immigrants who are not eligible for provincial health care. These changes have been the subject of an additional constitutional challenge in the case of *Canadian Doctors for Refugee Care v. Canada (Attorney General)*.<sup>26</sup>

35. In this case, the Federal Court found that "the executive branch of government has in this case intentionally targeted an admittedly vulnerable, poor and disadvantaged group for adverse treatment, making the 2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada."<sup>27</sup> On this basis the court found that the changes to the program constitute "cruel and unusual treatment" under s. 12 of the Canadian Charter.

36. With respect to the right to life, the Federal Court found on the evidence that the lives of the refugee claimants denied health care, as well the lives of their children, had been placed at serious

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<sup>26</sup> *Canadian Doctors For Refugee Care v. Canada (Attorney general)*, 2014 FC 651

<sup>27</sup> *Canadian Doctors For Refugee Care v. Canada (Attorney general)*, 2014 FC 651 at para 587.

risk by the changes made to deny them coverage under the IFHP.<sup>28</sup> The court noted, for example, that no health care insurance would be available to a refugee from a designated country of origin (DCO) who is having a heart attack.<sup>29</sup> “The pregnant victim of sexual violence from a DCO country will have no coverage for prenatal or obstetrical care, potentially putting the lives of both mother and baby at risk.”<sup>30</sup> “A young child infected at birth with HIV would have no right to insurance coverage for any kind of medical treatment, effectively condemning the child to an early death.”<sup>31</sup>

37. In spite of these disturbing evidentiary findings, however, the Federal Court was persuaded by the Federal Government’s submissions that the changes did not violate the right to life of those affected. The court’s unfortunate reasoning was that in this case, the health care that was denied is publicly funded and because the Canadian Charter does not include a freestanding right to health, “section 7 of the Charter’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care.”<sup>32</sup>

38. In response to arguments based on the interdependence of the right to life and security of the person under the ICCPR with the right to health under the ICESCR, and reference to this Committee’s clarification in General Comment 6 that the guarantee of the right to life requires positive measures to reduce infant mortality and increase life expectancy, the Federal Court held, in line with arguments advanced by the Government of Canada, that:

This Court has confirmed in *Toussaint (FC)*, above, that there is no right in Canada to health care based upon international law, either for citizens or non-citizens, that the scope of the international legal right to health is contested, and that claims to the right to health care based on

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<sup>28</sup> *Ibid* at paras 855, 851.

<sup>29</sup> *Ibid*, at para 671.

<sup>30</sup> *Ibid*, at para 670.

<sup>31</sup> *Ibid*, at para 654.

<sup>32</sup> *Ibid*, at paras 511, 570.

alleged international law obligations cannot succeed on the basis of international conventions that Canada's Parliament has not expressly implemented through specific legislation: *Toussaint* (FC) at paras 67 and 70. See also *Toussaint* (FCA), above at para 99.<sup>33</sup>

39. The Government of Canada argued that this case is distinguished from the situation considered by the Supreme Court of Canada in *Chaoulli v. Quebec* in which the Supreme Court of Canada found that measures which denied more affluent health care consumers access to privately funded health insurance violated the right to life.<sup>34</sup> In this case, the claimants were largely poor and unable to afford private health care. Although the risks to life and health were significantly more severe in this case compared to the evidence in the *Chaoulli* case, the applicants were denied any protection of the right to life on grounds that, they were "free" (thought not able) secure health care through their own means. "As a result, the respondents [the government of Canada] say that the rights at issue in this case are economic in nature, and are not protected by section 7 of the Charter".<sup>35</sup>

40. The government's argument and the court's reasoning in this case demonstrate the unacceptable result of attempts to sever any positive obligations to provide health care from the protection afforded by the right to life on the basis that any positive obligations must be associated with explicit protection of ESC rights. According to the decision of the Federal Court in this case, the current state of the law in Canada would only protect the right to life in relation to ensuring access to necessary health care for those who are able to afford to pay for it themselves. Those who are impoverished or otherwise in need of positive measures for access to health care would be denied any protection of their right to life. This result is clearly inconsistent with Canada's obligation under article 2(3) to ensure the equal enjoyment of Covenant rights without discrimination

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<sup>33</sup> *Ibid*, at para 469.

<sup>34</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791

<sup>35</sup> Canadian Doctors for Refugee Health Care [supra] at para 508.

**Recommendations with Respect to Migrants' Right to Life and Non-Discrimination in Access to Health Care**

- 1. Changes should be implemented to the Interim Federal Health Programme (IFHP) to ensure access to necessary health care for migrants in irregular situations and to all categories of refugees and asylum seekers who are ineligible for provincial health insurance.**
- 2. No distinction should be made between the protections of the right to life of those who are able to afford private health care, as considered in the case *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 and those who rely on publicly funded health care. The State party should ensure that all residents of Canada enjoy the equal protection of the right to life in relation to access to health care, regardless of immigration status or social and economic situation.**
- 3. The state party should promote and adopt interpretations of section 7 of the Canadian Charter which accord with the requirements of positive measures to protect the right to life under article 6 of the ICCPR and with the recognition of the interdependence of the right to life with the right to health and other rights guaranteed in the ICESCR.**

## **E. Conclusion**

41. The integrity and equal enjoyment of rights under the ICCPR in particular the rights to life and to non-discrimination, would be gravely undermined if the rights in the Canadian Charter were no longer understood and interpreted as substantive rights, consistently with the substantive understanding of rights to life and non-discrimination that have been adopted by this Committee.

42. Moreover, it is of critical importance that rather than attempting to restrict the scope of broadly framed rights such as the right to life, security of the person and equality under the Canadian Charter, so as to exclude any socio-economic component linked to ESC rights, these rights be interpreted, applied and promoted as fully interdependent with and indivisible from ESC rights.

43. Guidance which the Committee may provide to Canadian governments and courts in the context of the present review would be extremely timely.