



Denial of Access to Justice for Violations of the Right
to Life and Non-Discrimination in Canada:
Submissions to the UN Human Rights Committee
for the List of Issues Prior to Reporting
for Canada’s 7th Periodic Review

May, 2021

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Summary

These submissions focus on access to effective remedies for violations of the rights to life and non-discrimination under the ICCPR as a critical issue that should be included in the List of Issues Prior to Reporting for Canada's 7th Periodic Review. The submissions focus on three, related concerns.

First, the submissions consider Canada's response to the Committee's Views in the case of *Toussaint v. Canada*. This is of critical importance because the lives and health of thousands of irregular migrants in Canada continue to be at risk because of Canada's failure to give effect to the Committee's Views. It also illustrates longstanding and unresolved concerns regarding Canada's failure to engage in good faith with views and recommendations emanating from treaty bodies and its failure to consult with civil society, affected communities and with key decision-makers in provinces and territories regarding the implementation of treaty body views and recommendations.

Second, focusing again on the *Toussaint* case as a key example, the submissions consider the issue of access to justice and effective remedies for victims of violations of rights under the ICCPR. This question is considered in the context of Canada's reliance on courts adopting interpretations of the *Canadian Charter* that conform with international human rights law in order to ensure access to effective remedies for rights. The *Toussaint* case highlights the need to ensure that authors such as Ms. Toussaint have access to courts for effective remedies based on interpretations of rights in the *Canadian Charter* informed by the Committee's Views and consistent with Canada's obligation to respond to the Views in good faith.

And third, the submissions review how Canada has denied effective remedies to rights to life and non-discrimination under sections 7 and 15 of the *Canadian Charter* by misapplying the interdependence and indivisibility of civil and political and economic, social and cultural rights. Violations of rights to life and non-discrimination affecting those who are homelessness or denied access to publicly funded health care have, at the urging of Canadian governments, been denied effective remedies by courts because there are no "self-standing" rights to housing or to health care in the *Canadian Charter*. The Government of Canada has failed to promote and advance interpretations of rights to life and non-discrimination under the *Canadian Charter* that are consistent with the principle of the interdependence and indivisibility of human rights, properly understood and applied, with the result that disadvantaged Canadians have been denied the equal protection of these *Charter* rights.

1. Access to Essential Health Care for Irregular Migrants: Canada's refusal to give effect to the Committee's Views in *Toussaint v Canada*

At its previous periodic review of Canada, the Human Rights Committee recommended that Canada "should ensure that all refugee claimants and irregular migrants have access to essential health-care services, irrespective of their status." In 2018, the Committee released its historic Views in *Toussaint v Canada*¹ finding that "as alleged by the author, recognized by the domestic courts and not contested by the State party, the exclusion of the author from the care under IFHP [Interim Federal Health Programme] could result in the author's loss of life or irreversible, negative consequences for the author's health." The Committee held that "as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life."

The Committee found that Canada had violated the rights to life and non-discrimination in articles 6 and 26 of the ICCPR by denying Ms. Toussaint access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life. The Committee stated that Canada is "under an obligation to take all steps necessary to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."²

Canada responded to the Committee's Views by informing the Committee that it did not agree with the Committee's interpretation of the facts and law and will not be taking any further measures to give effect to those views. Canada's response has had tragic consequences for irregular migrants who continue to be denied access to essential health care, even where their lives are at serious risk.

Multiple treaty bodies have expressed concern about Canada's failure to implement or even to give due consideration to recommendations and views from human rights treaty bodies. Three areas of particular concern have been:

- i) Failure to engage with affected communities, civil society organizations and rights-holders about effective implementation;
- ii) The ineffectiveness of the intergovernmental process to ensure necessary co-ordination with provinces and territories in the implementation of necessary measures; and

¹ *Toussaint v Canada* (30 August, 2018) CCPR/C/123/D/2348/2014.

² *Ibid*, para 13.

- iii) Failure to engage in good faith with the substance of concerns and recommendation and insisting on the correctness of Canada's own interpretation of international human rights.

All of these failures were evident in the response to the Views in *Toussaint v Canada*.

i) Failure to engage in good faith with the substance of the Views

Instead of engaging with the critical issues raised in the Committee's Views or consulting with experts and civil society organizations about them, Canada simply responded to the Committee, six months after the of the Views, to report that "Canada regrets 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." The Response appeared to have been prepared by the same legal team that had prepared submissions to the Committee on admissibility and merits. As noted by a Committee member, Canada appeared to have mistaken a report on follow-up measures for an opportunity to re-argue the case.

Canada's response failed show any concern about the implications for the life and health of irregular migrants of its refusal to review laws and policies so as to ensure access to essential health care. It cited no adverse consequences that might result from implementing the Committee's Views. A serious issue involving the life and health of thousands of irregular migrants in Canada was treated as a legal dispute about the interpretation of the provisions of the ICCPR between Canada's lawyers the Human Rights Committee, with the final authority given to the lawyers. The assumption was that regardless of the consequences for one of the most vulnerable groups in society, if Canada did not agree with the Committee's interpretation of its obligations under the ICCPR, it would stand by the decisions of its courts and it own policies and practices.

ii) Failure to engage with civil society organizations and affected communities

Canada did not conduct any open or inclusive engagement with human rights or civil society organizations or community-based organizations working with irregular migrants in need of health care to discuss the Committee's Views in *Toussaint v Canada*, or to consider how to implement necessary measures.

Canada has recently adopted a new *Engagement Strategy on Canada's International Human Rights Reporting Process*.³ The Strategy was developed and adopted, however, without any

³ *Engagement Strategy on Canada's International Human Rights Reporting Process* (2019) Available at <https://www.canada.ca/en/canadian-heritage/services/about-human-rights/engagement-strategy-human-rights-reporting.html>.

meaningful consultation with civil society and civil society organizations have communicated shared concerns about the inadequacy of both documents.

Canada's engagement with civil society in relation to the Views in *Toussaint v Canada* has failed to meet even the principles articulated in the Engagement Strategy: Transparency and accountability; Inclusion and accessibility; Collaboration with civil society and Indigenous representatives; Sustainability; and Autonomy of FPT governments.⁴

iii) **Failure to engage with key decision-makers in provinces and territories**

In the *Toussaint* case, the Federal Government argued that Ms. Toussaint should have exhausted domestic remedies against her provincial government, because health care administration is within provincial/territorial jurisdiction, and that the cause of her lack of access to health care was restrictions on access to provincial health care.

The Committee correctly found in its Views that the direct cause of the violation of Ms. Toussaint's right to life was the denial of essential health care under the federal government's Interim Federal Health Programme. It noted that "the Federal Government has not denied that it could have provided the author with necessary health care by permitting her, as an undocumented migrant with a need for urgent medical assistance, to receive coverage for essential health care under IFHP."⁵

Nevertheless, effective follow-up to the Committee's Views should involve meaningful consultation with and co-ordination of governments of provinces and territories. In accordance with article 50 of the ICCPR, good faith engagement with the Committee's Views in the context of Canadian federalism and overlapping jurisdiction requires the consideration of the Views by health ministers of all provinces and territories and a collaborative response. Some or all provinces and territories may have chosen, on their own accord, to ensure that provincial or territorial health insurance was made available to irregular migrants.

The Continuing Committee of Officials on Human Rights (CCOHR) is the federal/provincial/territorial (FPT) Committee of officials responsible for consultation and collaboration among governments in Canada with respect to the domestic implementation of international human rights treaties. This Committee has generally failed to engage higher level decision-makers at the provincial-territorial level in developing effective responses to treaty bodies' concerns and recommendations. In 2017, a meeting of federal/provincial/territorial ministers responsible for human rights established an FPT Senior Officials Committee Responsible for Human Rights (SOCHR) composed of Assistant Deputy Ministers representing FPT governments. The SOCHR should also have considered the Committee's Views in *Toussaint v Canada* but there does not seem to have been any effective follow-up or engagement by provincial and territorial ministers of health to consider whether provinces and territories

⁴ *Ibid.*

⁵ *Toussaint v Canada* (30 August, 2018) CCPR/C/123/D/2348/2014 para 10.11.

agreed with the federal governments' refusal to give effect to the views, and whether provinces and territories might choose to respond differently.

In 2019 a *Protocol for Follow-up to Recommendations from International Human Rights Bodies* was adopted at a meeting of FPT Ministers Responsible for Human Rights.⁶ Like the *Civil Society Engagement Strategy*, the Protocol was adopted with out any consultation with civil society or Indigenous representatives, and failed to address longstanding concerns. Canada's response to the Committee's Views in *Toussaint v Canada* failed to comply with the stated principles of collaboration within and between governments, autonomy and accountability of respective FPT governments, and transparent decision-making.

Suggested Question Regarding Access to Health Care for Irregular Migrants

- 1. Please provide information on any consultations with civil society organizations or experts in follow-up to the Committee's Views in *Toussaint v Canada*.**
- 2. Apart from Canada's disagreement with the Committee's interpretation of the facts and the law in this case, please clarify if Canada would be prepared to ensure that irregular migrants have access to essential health care and if not, why not.**
- 3. Please provide information on the position of each province and territory on whether irregular migrants should have access to essential health care and on what measures have been taken within their jurisdiction in response to the Committee's Views.**

2. Ensuring access to effective remedies under the *Canadian Charter* in light of the Committee's Views in *Toussaint v Canada*

Rights under International human rights treaties are not directly enforceable as such by domestic courts. Effective domestic remedies are instead provided by way of necessary domestic constitutional or legislative protections, and by courts interpreting domestic law in conformity with Canada's international human rights obligations.⁷ The Supreme Court of Canada has stated that: "It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law ... and that courts will strive to

⁶ Online at <https://www.canada.ca/en/canadian-heritage/services/about-human-rights/protocol-follow-up-recommendations.html>.

⁷ Gib Van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) p. 501; Gib Van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in *Centre for International Governance Innovation, Canada in International Law at 150 and Beyond*, Paper No. 2. (Waterloo, Ontario: Centre for International Governance Innovation, 2018).

avoid constructions of domestic law pursuant to which the State would be in violation of its international obligations.”⁸

The presumption of conformity is particularly important with respect to rights in the *Canadian Charter*, which is the “primary vehicle” through which Canada gives domestic effect to rights in international human rights law – and particularly to the rights in the ICCPR. The Supreme Court of Canada 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.”⁹

Prior to submitting her communication to the Human Rights Committee, Ms. Toussaint sought effective remedies by way of an application relying on, *inter alia*, sections 7 and 15 of the *Canadian Charter*.¹⁰ Ms. Toussaint argued before the federal court and, on appeal to the Federal Court of Appeal, that her rights under sections 7 and 15 of the *Charter* should be interpreted consistently with international human rights treaties ratified by Canada.

Both the Federal Court and the Federal Court of Appeal agreed that international human rights law is relevant to the interpretation of the rights under the *Charter*. At the time the cases were heard by these courts, there was no jurisprudence or commentary from the UN Human Rights Committee or jurisprudence under any other human rights treaty body petition procedure, considering whether the denial of access to essential health care to irregular migrants violated the rights to life and non-discrimination. The Federal Court reviewed various international sources, including opinions from the Committee on Economic, Social and Cultural Rights and from the Office of the High Commissioner of Human Rights on obligations with respect to the right to health of irregular migrants. It found that the scope of the right to health under international law for irregular migrants at that time was “contested.”¹¹

At the Federal Court of Appeal, Justice Stratas, writing for the Court, accepted that international human rights law could be relevant to defining “the precise content of certain principles of fundamental justice under section 7.” The Court found that in this case, however, “we are not at the point of defining the content of a principle of fundamental justice.”¹²

⁸ *R. v. Hape*, 2007 SCC 26 at para 53.

⁹ *Ibid* at para 55; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503; *Suresh*; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4.

¹⁰ The right to life is protected in section 7 of the *Canadian Charter*, which states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The right to equality and non-discrimination is protected in section 15 of the *Canadian Charter*. These rights are generally to be interpreted as providing protection at least as great as that afforded by articles 6 and 26 of the ICCPR.

¹¹ *Toussaint v. Canada (Attorney General)*, 2010 FC 810 (CanLII), <<https://canlii.ca/t/2c43m>> paras 63-70.

¹² *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII), <<https://canlii.ca/t/fm4v6>> para 87.

The critical question raised in the *Toussaint* case is how victims such as Ms Toussaint may access courts to have them consider whether the Committee's clarification of Canada's obligations under articles 6 and 26 of the ICCPR may affect her rights under the *Charter* and may be relied upon to support interpretations of articles 7 and 15 of the *Charter* that would require Canada to ensure access to essential health care to irregular migrants. While the rights under the ICCPR and the Views of the Committee are not directly binding on domestic courts or enforceable as such, courts in Canada have a critical role to play in ensuring effective remedies for violations of the ICCPR by applying the presumption of conformity of the *Charter* and international human rights. The Committee's Views may be considered a relevant and persuasive source for a judicial determination of whether the rights to life and non-discrimination in sections 7 and 15 of the *Charter* require Canada to ensure access to essential health care for irregular migrants.

Under section 7 of the *Canadian Charter*, deprivations of the right to life are not permitted unless they are "in accordance with the principles of fundamental justice." Principles of fundamental justice require, as does article 6 of the ICCPR, that the deprivation not be arbitrary. In addition, the Supreme Court of Canada has recognized that peremptory norms (*jus cogens*) of international human rights may be included in the content of principles of fundamental justice under section 7 of the *Charter*. The obligation of *pacta sunt servanda* is widely recognized as *jus cogens*.¹³ Canada's international human rights obligations as described in the Committee's Views can no longer be considered "irrelevant" in assessing whether continuing to deny access to essential health care, in contradiction of the Committee's Views, accords with principles of fundamental justice. This may be highly relevant to the question of whether Canada's decision not to implement the Committee's Views violates section 7 of the *Charter*.

To ensure access to effective remedies, it is essential that Ms. Toussaint have access to effective remedies under the *Charter*, interpreted in light of the Committee's Views. Ms Toussaint has therefore filed a Statement of Claim before Ontario Superior Court, seeking remedies for the denial of access to essential health care under sections 7 and 15 of the *Canadian Charter*, interpreted in light of the Human Rights Committee's Views. She is also seeking a determination of whether Canada's decision not to implement the Committee's views is compliant with sections 7 and 15 of the *Charter*.

Suggested Questions Regarding Access to Effective Remedies

- 1. Please explain if individuals found by the Committee to have been victims of violations of rights under the ICCPR may seek access to effective remedies under the**

¹³ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, para. 151.

***Canadian Charter*, based on the presumption of conformity of the *Charter* with international human rights obligations and the Committee's Views in their case.**

- 2. Does Canada support the right of the author in *Toussaint v Canada* to seek a judicial determination of whether her rights have been infringed under sections 7 and 15 of the *Canadian Charter*, interpreted in light of the Committee's Views, and to seek in this way an effective domestic remedy?**
- 3. Would governments in Canada benefit from a judicial determination of whether the *Charter*, interpreted in light of the Committee's Views, requires the provision of essential health care to irregular migrants?**
- 4. Canada's Response to the Committee's Views in *Toussaint v. Canada* states that Canada "gives serious, good faith consideration" to the Committee's views." Is the standard of "good faith" under international law also a standard in Canada's domestic legal system, and if so, is compliance with this standard subject to judicial review and effective remedies?**

3. Denial of access to justice for violations of the rights to life and non-discrimination based on an incorrect application of indivisibility and interdependence of human rights

Canadian governments and Canadian courts have accepted in recent years what Craig Scott and Philip Alston have labelled a false "negative inference" from the indivisibility and interdependence of civil and political and economic, social and cultural rights.¹⁴ Where effective remedies to violations of the rights to life and equality require positive measures to address homelessness or access to publicly funded health care, governments have successfully argued that in the absence of a self-standing constitutional right to housing or to publicly funded health care, such claims are non-justiciable. On the basis of these arguments, courts have declined to require governments to ensure access to publicly funded health care or to housing for disadvantaged groups, even when it is necessary to protect the right to life. The result has been a systemic, discriminatory denial of the equal protection of *Charter* rights to life and equality for those who live in poverty and require positive measures to ensure access to housing or to publicly funded health care.

¹⁴ Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16(2) South African Journal on Human Rights 206, 227-228

Lower court decisions that have relied on a statement made by former Chief Justice Beverley McLachlin, in the case of *Chaoulli v. Quebec*, that “The *Charter* does not confer a freestanding constitutional right to health care.”¹⁵ That statement is uncontentious, and the Chief Justice proceeded to explain that “where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.” However, in the context of the *Chaoulli* case, in which the Court held that interference with access to *private* health care violated the right to, the statement has been widely relied upon by courts to reject claims challenging the denial of access to publicly funded health care or failures to take positive measures to address homelessness.

As the Federal Court noted in a case challenging the denial of access to the IFHP to certain classes of refugees, “the current state of the law in Canada is that 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”.¹⁶ Wealthy peoples’ right to life includes the right not to be deprived of access to essential *privately funded* health care, but poor peoples’ right to life, which requires access to publicly funded health care, does not.

Applying this distinction in the *Toussaint* case, the Federal Court of Appeal found that denying access to health care essential for the protection of life was not a violation of section 7 if the *Charter* because it does not contain a freestanding right to health. Canada subsequently invoked the same argument before the Human Rights Committee to argue that Ms. Toussaint’s communication amounted to a claim to a right to health as guaranteed under the ICESCR, and was therefore outside of the scope of article 6 of the ICCPR. The Committee rejected Canada’s argument, noting that “the author has explained that she does not claim a violation of the right to health but of her right to life, arguing that the State party failed to fulfil its positive obligation to protect her right to life which, in her particular circumstances, required provision of emergency and essential health care.”¹⁷

Canada continues to invoke the same argument to justify its refusal to give effect to the Committee’s Views. In its response explaining why it does not agree with the Committee’s Views, Canada states that “the Committee’s approach in its views essentially conflates the right to health under the right to life, resulting in an apparent conclusion that a certain level of health care, or of health insurance, may be “necessary” to protect the right to life.”¹⁸

A similar pattern has emerged in the consideration of the right to life and non-discrimination in the context of homelessness. In the *Tanudjaja* case those affected by homelessness argued that positive measures were required by the rights to life and non-discrimination under the *Charter*. The fact that homelessness in Canada may lead to serious health consequences and even death

¹⁵ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 para 101.

¹⁶ *Canadian Doctors for Refugee Care v. Canada (Attorney general)* 2014 FC 651.

¹⁷ *Toussaint v Canada* CCPR/C/123/D/2348/2014 para 10.9.

¹⁸ Canada’s Response to the Committee’s Views in *Toussaint v Canada* (1 February, 2019) online at <http://www.socialrights.ca/2019/CanadaToussaintResponseonImpl.pdf>.

was not contested. The Ontario Court of Appeal, however, upheld the federal government's motion to strike, mischaracterizing their claim to the equal protection of *Charter* rights to life and non-discrimination as a claim to "a general freestanding right to adequate housing."¹⁹

When concerns were raised about the positions that Canada was taking in this kind of *Charter* litigation, the Prime Minister's requested in his 2015 Mandate Letter to the then Minister of Justice, that she review the government's litigation strategy in order to identify "positions that are not consistent with our commitments, the *Charter* or our values."²⁰ The the *Principles guiding the Attorney General of Canada in Charter litigation* were adopted in 2017. The Principles make no mention, however, of the importance of advancing positions in litigation consistent with Canada's international human rights obligations or with the interdependence and indivisibility of all human rights.²¹

Whether those in Canada who are deprived of their *Charter* rights by homelessness or denial of access to publicly funded health care will be treated as "constitutional castaways" by Canadian courts remains an unresolved question that will ultimately be resolved by the Supreme Court of Canada.²² Guidance from the Human Rights Committee in the upcoming period review, however, would be helpful in resolving it.

Suggested Questions regarding Interdependence and Indivisibility

- 1. The current state of *Charter* interpretation seems to deny people living in poverty or homelessness the equal protection of the rights to life and non-discrimination in the *Charter*. Will the government of Canada agree that the *Charter* should equally protect the rights to life and non-discrimination of those who require access to publicly funded, rather than privately funded health care, or access to subsidized housing rather than privately funded housing.**

- 2. Will the Attorney General revise the *Principles guiding the Attorney General of Canada in Charter litigation* (2017) to clarify that the federal government will promote interpretations of the Charter that provide at least the same level of protection as is provided by international human rights treaties ratified by Canada and ensure access to effective remedies for *Charter* rights, including there they are interdependent with and indivisible from economic, social and cultural rights that do not appear as self-standing rights in the *Charter*?**

¹⁹ *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, para 30.

²⁰ Mandate Letter from the Prime Minister of Canada, the Hon. Justin Trudeau to Ms Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada (15 November, 2015). Online at <http://www.davidmckie.com/Ministers%20Mandate%20letters%20Consolidated%20with%20Index%20Nov%2016%202015.pdf>.

²¹ Attorney General of Canada, *Principles guiding the Attorney General of Canada in Charter litigation* (10 December, 2018) on line at <https://www.justice.gc.ca/eng/csj-sjc/principles2-principes2.html>.

²² Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court." *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 297-328.