Government of Canada
Permanent Mission of Canada
to the United Nations and the
Conference on Disarmament

Gouvernement du Canada
Mission permanente du Canada
auprès des Nations Unies et de
la Conférence du désarmement

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Reference:
HRCttee 2348/2014 Ms. Nell Toussaint
Response to the Committee's Views

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to submit Canada's response to the Committee's views in the above-noted communication.

The submission consists of one PDF document.

The Permanent Mission of Canada to the Office of the United Nations at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Mission permanente du Canada auprès de l'ONU
Permanent Mission of Canada to the UN
Genève / Geneva

Geneva, 1 February 2019

RESPONSE OF THE GOVERNMENT OF CANADA TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE CONCERNING COMMUNICATION NO. 2348/2014 SUBMITTED BY MS. NELL TOUSSAINT

I. INTRODUCTION

1. On 6 August 2018, the Secretary-General of the United Nations (High Commissioner for Human Rights) transmitted to Canada the Human Rights Committee's views concerning communication No. 2348/2014, submitted to the Committee on behalf of Ms. Nell Toussaint (the author).

2. The Committee expressed the view that, by denying the author state-funded health care coverage under the Interim Federal Health Program (IFHP) between 2009 and 2013, Canada had violated the author's right to life under article 6 of the *International Covenant on Civil and Political Rights* (the "*Covenant*"), as well as her right to equality under article 26.

3. In accordance with its *Rules of Procedure*, the Committee requested that Canada provide, within 180 days, information about the measures taken to give effect to its views.

4. In this Response, Canada will explain on what basis it is unable to agree with the Committee's view that Canada violated the author's rights under articles 6 and 26 of the *Covenant*. Canada will also provide its views on the remedies suggested by the Committee.

II. OBSERVATIONS ON THE VIEWS OF THE COMMITTEE

5. Canada takes very seriously its international human rights treaty obligations, including those under the *Covenant*, and fully supports the Committee's important mandate to consider individual communications.

6. Canada does its utmost to cooperate with the Committee's processes and gives serious, good faith consideration to its views. However, Canada does not always agree with the Committee, either in its interpretation of the scope of States parties' obligations under the *Covenant*, or with the Committee's application of *Covenant* obligations to the facts in specific complaints against Canada.

7. Following careful consideration of the Committee's views in the context of the *Covenant* and other human rights treaties to which Canada is a party, Canada regrets that it cannot agree with the Committee's reasoning in this case.

Apparent misunderstanding of domestic court findings

8. In forming the view that Canada violated the author's right to life and right to equality, the Committee appears to rely heavily on domestic Federal Court and Federal Court of Appeal decisions. The Committee portrays these decisions as having found that the author's life and health were placed at significant risk by the denial of publicly-funded health care coverage under the IFHP (at paras. 11.2, 11.4 and 11.8 of the views).

9. However, as stressed in Canada's Second Supplementary Submission on the Admissibility and the Merits of the Communication, dated 5 December 2016, the Federal Court of Appeal in fact disagreed with the Federal Court that the author's ineligibility for IFHP coverage was the operative cause of any risk to her life and security of the person. The Federal Court of Appeal overturned the Federal Court's finding in this regard.

10. As per the Federal Court of Appeal:

> "The appellant has attempted to obtain coverage under the Ontario Health Insurance Plan. Ontario refused coverage because, as a person in Canada contrary to Canadian immigration law, the appellant is not a "resident" of Ontario under R.R.O. 1990, Regulation 552, section 1.4, enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6. She did not judicially review Ontario's refusal, nor did she argue that Ontario's eligibility requirements violate her rights under sections 7 and 15 of the *Charter* against provincial legislation that limits her access to health care.
>
> Further, and most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan […]
>
> In my view, the appellant has not met her burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person under section 7 of the *Charter*."[1]

11. The Supreme Court of Canada, Canada's highest court, denied the author's application for leave to appeal the Federal Court of Appeal's decision.

12. In its 5 December 2016 submission, in light of the appellate court's findings, Canada asked that the Committee reject the author's request that the Committee defer to the "factual

[1] *Toussaint v. Canada* (Attorney General), [2013] 1 F.C.R. 374, 2011 FCA 213, at paras. 70-73 (emphasis added).

findings" of the Federal Court as to the causal connection between the author's exclusion from the IFHP and the risk to her life and long-term health.

13. Canada's 5 December 2016 submission is not mentioned in the Committee's views. It is unfortunate that the views do not indicate whether the Committee considered this important submission in its deliberations.

14. Canada disagrees with the Committee's view of causality of any risk to the author's health and life, for the reasons identified by the Federal Court of Appeal and set out by Canada in its submissions on the admissibility and merits of the communication.

Response to the Committee's view that Canada violated article 6 of the Covenant

15. The Committee expressed the view that "in light of serious implications of the denial of health care coverage to the author from July 2009 to April 2013", Canada had violated the author's rights under article 6. In reaching its conclusion, the Committee opined that "States parties have the obligation to provide access to existing health services that are reasonably available and accessible, when lack of access to health care would expose a person to a reasonably foreseeable risk that can result in loss of life."[2]

16. With respect, Canada cannot accept the broad scope that the Committee has given to article 6 in these views. Article 6 guarantees the inherent right to life, and stipulates that no one shall be arbitrarily deprived of life. Canada accepts that protecting the right to life may entail some limited positive obligations. However, it cannot extend so far as to impose a positive obligation on States to provide state-funded medical insurance to foreign nationals without legal status present in the territory of the State. The Committee's views are not supported by established rules of treaty interpretation – namely, they are not supported by the ordinary meaning of the terms of article 6 read in their context and in light of the *Covenant's* object and purpose, by the negotiating history and the larger context in which the *Covenant* was adopted, nor by the practice of States parties to the *Covenant*.

17. Economic and social rights, including the right to the highest attainable standard of health, are protected by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). While Canada recognizes the interdependence and interrelatedness of rights, 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. The *Covenant* and the ICESCR were developed in parallel to address different categories of rights separately. Negotiating States, including Canada, clearly did not intend for economic and social rights, such as the right to the highest attainable standard of health, to be encompassed under the right to life.

[2] Committee views, at para. 11.3.

19. As Canada recently stated in its comments on Draft General Comment No. 36 on the right to life,[3] Canada disagrees with the Committee's assertion, at paragraph 11.3 of the views, that the right to life includes a right to enjoy a life with dignity to the extent that it may encompass socio-economic entitlements. Canada notes that a number of other States parties similarly raised concerns with the Committee's expansive interpretation and with this potential blending of economic and social rights with the right to life.[4]

20. While rights under the *Covenant* must immediately be realized, social and economic rights, such as the right to the highest attainable standard of health, must be progressively realized, to the maximum of available resources.[5] The Committee in its views imports a standard of progressive realization by suggesting that States parties have an obligation under Article 6 of the *Covenant* to provide access to health care services that are "reasonably available and accessible" in the State in question.[6] This approach both distorts States parties' obligations under the *Covenant* and further indicates that the Committee's views conflate the right to life with an economic and social right.

21. Moreover, the Committee's views fail to distinguish between providing access to health care, and providing state-funded health care coverage. To this extent, Canada recalls its submission on the admissibility and merits of the communication, in which it set out the various health care services that the author was in fact able to access.

22. The facts of the case establish that, while the author did experience some delay in obtaining some medical care or medications, she was in every important instance able to receive it, despite not having state-funded medical insurance or the ability to pay for the care herself.

23. Most importantly, hospitals in Canada are prohibited from denying emergency medical treatment to anyone, if doing so would endanger their life, regardless of their immigration status. Canada believes that this availability of life-saving emergency medical treatment contributes to the fulfillment of Canada's obligations related to the protection of life under article 6(1) of the *Covenant*.

24. Persons without legal status in Canada are also able to access non-emergency health services at their own expense, or on a *pro bono* basis. Indeed, the author was able to receive emergency medical services, and she was also able to access many non-emergency services and medications on a pro bono basis. While the author was denied publicly-funded health insurance under the IFHP, a serious risk to the author's life was in no way a reasonably foreseeable or preventable outcome.

[3] Comments by the Government of Canada to the Human Rights Committee on Draft General Comment No. 36 on Article 6, online at: https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.
[4] See, for example, the submissions of Australia, the United Kingdom and the United States on Draft General Comment No. 36.
[5] ICESCR, Article 2.1.
[6] Committee views, at para. 11.3.

Response to the Committee's view that Canada violated article 26 of the Covenant

25. The Committee expressed the view that States "cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants."[7] In the Committee's view, distinctions in the IFHP coverage between persons having legal status in Canada and "those who have not been fully admitted to Canada" were not based on reasonable and objective criteria in the particular circumstances of the author's case, and therefore constituted discrimination under article 26.[8]

26. As explained above, Canada cannot accept the Committee's view that the author's right to life is engaged in this communication. Canada believes the communication is in essence a claim to access to a certain level of publicly-funded health care.

27. Canada's position is that legality of residence in a country does not come within the scope of "other status" under article 26. Unlike many of the other grounds listed in article 26, legality of status is not a characteristic inherent to the person. It is a characteristic that can change with time and it is one that States may have a legitimate interest in expecting the person to change. Indeed, as soon as the author applied for and obtained permanent resident status in Canada, she became eligible for health insurance under the provincial health insurance plan.

28. Moreover, Canada disagrees with the Committee's view that the differential treatment in this case is not based on reasonable and objective criteria. It is important to underline again that in Canada, all migrants can access basic services, including emergency health care, regardless of migration status. More specifically, Canadian hospitals are prohibited from denying emergency medical care to anyone whose life is at risk. Persons without legal status in Canada are also able to access non-emergency health services at their own expense. Canada does not accept that failing to provide persons without legal status in Canada with state-funded health insurance is discriminatory within the meaning of Article 26 of the Covenant.

29. The distinction in treatment reasonably and objectively recognizes public health insurance as a reciprocal scheme, in which beneficiaries make contributions to the insurance scheme from which they then seek a benefit on a prepaid basis, and on uniform terms and conditions.[9] The distinction further advances a legitimate aim of encouraging persons not lawfully present in Canada to take steps to regularize their status. This is consistent with

[7] Committee views, at para. 11.7.

[8] Committee views, at para. 11.8.

[9] Health Canada, "Canada Health Act – Frequently Asked Questions," online: http://hc-sc.gc.ca/hcs-sss/medi-assur/faq-eng.php (The *Canada Health Act* affords provinces and territories discretion in determining how to finance health insurance plans. Financing can be through the payment of premiums, payroll taxes, sales taxes, other provincial or territorial revenues, or by a combination of methods. Provinces/territories that levy premiums also offer financial assistance based on income so that low-income residents can have their payment reduced or be entirely exempted from the cost).

the well-recognized principle that States may control immigration and decide who they will admit to their territory.[10]

30. Just as it cannot be considered discriminatory not to provide visitors to Canada with state-funded health insurance, nor can it be considered discriminatory to deny state-funded health insurance to persons who choose to overstay their visitor visas and remain in Canada without legal status.

Response to the Committee's views on remedies

31. In its views, the Committee stated that Canada has an obligation to provide the author with adequate compensation for the harm that she suffered, and to take steps 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.

32. With respect, Canada believes that the proposed compensation to the author is unwarranted. Canada sympathizes with the author for the serious health-related challenges that she has experienced. Canada recognizes the stress that can be caused by having to access medical care without health insurance. At the same time, Canada reiterates that the evidence demonstrates that, while the author did experience some delay in obtaining some medical care and medications, she was in every important instance able to receive it, despite not having state-funded medical insurance or the ability to pay for the care herself. Further, and as clearly found by the Federal Court of Appeal, the denial of IFHP coverage could not be said to be the operative cause of the risk to the author's life, even should such a risk have been established.

33. In relation to proposed systemic changes, Canada reiterates its position that the provision of life-saving emergency medical services to irregular migrants at Canadian hospitals is sufficient to meet Canada's obligations under the *Covenant*. In addition, since 2012, the IFHP has included a discretionary power for the Minister of Immigration, Refugees and Citizenship to grant persons without residency status in Canada, including undocumented migrants, with IFHP benefits in exceptional and compelling circumstances. Between 2012 and November 2018, the Minister received 7 requests for IFPH coverage from undocumented migrants. Five of these requests were approved, and one is currently under consideration.

III. CONCLUSION

34. For the reasons stated, 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. As requested by the Committee,

[10] HRC General Comment No. 15: The position of aliens under the Covenant (1986).

the Government of Canada has published the views on a government website,[11] and intends to publish them on an additional website shortly.

Ottawa, Canada
January 29, 2019

[11] See: https://www.canada.ca/en/canadian-heritage/services/human-rights-complaints/international.html.