

**NELL TOUSSAINT v CANADA**

COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER THE FIRST OPTIONAL  
PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

*Before:*

**The United Nations Human Rights Committee  
Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
1211 Geneva 10, Switzerland  
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*By:*

**Nell Toussaint**

**Canada**

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## **I. INTRODUCTORY INFORMATION**

### **A. Information Concerning Author**

This petition to the United Nations Human Rights Committee is brought by Nell Toussaint, with the assistance of Andrew Dekany, Legal Counsel to the author, and Bruce Porter, Representative. (See the Author's signed Authorization Form, acknowledging that Andrew Dekany and Bruce Porter are acting with Ms Toussaint's knowledge and consent) (*Annex 1*, Authorization Form). The address for any confidential communication regarding this matter is:

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The author, Nell Toussaint, is a citizen of Grenada who has been residing in Canada since 1999. She is 44 years of age and resides in Toronto, Canada.

In the event that Nell Toussaint should be deceased prior to the resolution of the communication, she has designated her mother, Ann Toussaint, to pursue this communication on her behalf, represented by Messrs. Dekany and Porter.

### **B. Name of and Information Concerning the State Party**

This communication arises in relation to acts by Canada, a State Party to the *International Covenant on Civil and Political Rights* (ICCPR) and to the First Optional Protocol to the ICCPR. The ICCPR and the First Optional Protocol entered into force for Canada on August 19, 1976. This communication concerns acts or omissions by both the judicial and executive branches of the Government of Canada, in particular: the Executive Council of the Government of Canada, the Minister of Citizenship and Immigration of the Government of Canada, the Federal Court of Canada (Federal Court) and the Federal Court of Appeal.

### **C. Articles of ICCPR Alleged to be Violated**

The author submits that a number of her rights under the ICCPR were violated as a result of her being denied access to Canada's Interim Federal Health Program (IFHP) for health care necessary for the protection of her life, because of her immigration or citizenship status, and by subsequent court decisions of the Federal Court and the Federal Court of Appeal permitting the continued denial of health care coverage. She submits that the following provisions of the ICCPR were violated by the State Party:

- Article 2(1), the equal protection and enjoyment of the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- Article 2(3)(a), the right to an effective remedy for violations of rights under the Covenant;
- Article 6, the right to life, the protection of this right by law and the right not to be arbitrarily deprived of life;
- Article 7, the right to be free from torture and from cruel, inhuman or degrading treatment or punishment;
- Article 9(1), the right to security of person;
- Article 26, the right of all persons to equality before the law and to the equal protection of the law without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## II. SUMMARY OF THE COMPLAINT

1. This case raises the important question of whether one of the most vulnerable and disadvantaged groups in Canadian society, migrants without legal residency status, can be denied access to health care necessary for the protection of their lives solely on the grounds of their undocumented immigration/citizenship status; and whether denying access to health care necessary for life is a permissible means of encouraging compliance with immigration laws, as was found by the domestic courts in this case.

### A. Summary of the Facts

2. The author lived and worked in Canada as an undocumented migrant from 1999 until 2008. She has been unable to work at all since November, 2008 due to illness but has continued to live in Canada. She was engaged in a prolonged process of seeking residency status for a number of years, first on humanitarian and compassionate (H & C) grounds, and more recently by way of a common law spousal sponsorship. She was approved in principle for permanent residency status pursuant to the spousal sponsorship on January 30, 2013, and as such became eligible for and has been receiving health care under provincial health care insurance since April 30, 2013. On October 7, 2013 the author was made a permanent resident of Canada. To be clear, then, the challenged federal government policy remains in place but because of the recent change in her immigration status, the author now has access to the health care she needs for the treatment of her serious health problems through provincial health insurance. She was personally subject to the impugned policy from July 2009 through April 2013. Having exhausted domestic remedies the author has chosen to file this petition in the hope of preventing the recurrence of these violations of rights with respect to other victims. This petition alleges that the State Party's denial of access to the Interim Federal Health Program (IFHP) for coverage of health care necessary for the protection of her life on the basis of her immigration status violated her rights under the ICCPR.

3. In spite of the low wages the author was paid for her work during the period of 1999 – 2006, she paid for any medical care she required for minor illnesses during this period. In 2006 her health began to deteriorate and she developed chronic fatigue and an abscess. Eventually she was unable to work.<sup>1</sup> In 2009, her health deteriorated to life-threatening status.<sup>2</sup> She was unable to afford to pay for the health care she needed to protect her life. She applied for coverage for her health care costs under the Interim Federal Health Benefits Program (IFHP) by way of a letter from her Immigration Consultant dated May 6, 2009.<sup>3</sup>

4. The IFHP was authorized to expend funds for medical or dental care, hospitalization, or any incidental expenses for immigrants or “anyone under immigration jurisdiction or for whom immigration authorities feel responsible” where the person lacks the resources to pay the costs of the medical care. The IFHP had operated under the authority of a 1957 Executive Order-in-

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<sup>1</sup> [Toussaint v Canada \(Attorney General\), 2010 FC 810 \(CanLII\)](http://canlii.ca/t/2c43m) at para 6, online <http://canlii.ca/t/2c43m>.

<sup>2</sup> *Ibid* at para 9.

<sup>3</sup> [Letter from Macdonald Scott applying for IFHP Coverage for Nell Toussaint \(May 6, 2009\)](http://www.socialrightscura.ca/documents/legal/toussaint%20IFBH/Application%20Letter%20for%20IFHP.pdf) online <http://www.socialrightscura.ca/documents/legal/toussaint%20IFBH/Application%20Letter%20for%20IFHP.pdf>.

Council (OIC).<sup>4</sup> The OIC did not expressly exclude from coverage persons who are in Canada without legal documentation.

5. In a decision letter dated July 10, 2009, the immigration officer who was delegated the decision-making authority in this case denied the author's application for coverage under the IFHP.<sup>5</sup> The decision letter stated that the author did not fit into any of the four categories of persons eligible for IFHP coverage as set out in departmental guidelines of Citizenship and Immigration Canada (CIC): refugee claimants; resettled refugees; persons detained under the *Immigration and Refugee Protection Act*<sup>6</sup> (IRPA); and victims of trafficking in persons.<sup>7</sup> The individual circumstances of the author and the life threatening nature of her health problems were not mentioned as considerations in the letter.<sup>8</sup>

6. As was subsequently found by the courts in this case, the denial of coverage for health care under the IFHP put the author's life and health at serious risk.<sup>9</sup> 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 and she did not have access to the medical management by skilled professionals that her health problems required.<sup>10</sup> Medical experts whose evidence was accepted by the domestic court found that: "Negotiating pro bono care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous. Delays resulting from lack of coverage and an inability to pay for the health care that she needs and the risk that she will not have access to necessary services creates serious risk to her health and may have life threatening consequences."<sup>11</sup> Delay in obtaining diagnostic and other health care and lack of access to the managed health care she required, endangered the author's life and health in ways which could have been avoided had she been provided health care under the IFHP.<sup>12</sup>

7. The author sought judicial review before the Federal Court of Canada regarding the Immigration Officer's decision to deny her health care coverage. She filed sworn expert medical evidence by physicians familiar with her diagnosis and care that her health and life had been placed at risk by the refusal of coverage under the IFHP. The Federal Court's finding regarding the effect of the refusal of IFHP coverage for the author was as follows:

The evidence before the Court establishes both that the [author] has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment

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<sup>4</sup> [Order-in-Council 1957-11/848 June 20, 1957](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Order-in-Council%20P.C.%20157-11%20848,%20effective%20June%2020,%201957.pdf) online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Order-in-Council%20P.C.%20157-11%20848,%20effective%20June%2020,%201957.pdf>.

<sup>5</sup> [Decision of Craig Shankar dated July 10, 2009](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf) online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf>.

<sup>6</sup> [Immigration and Refugee Protection Act S.C. 2001, c. 27 \(IRPA\)](http://canlii.ca/t/7vwq) online <http://canlii.ca/t/7vwq>.

<sup>7</sup> [Decision of Craig Shankar dated July 10, 2009](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf), note 5 above.

<sup>8</sup> *Ibid.*

<sup>9</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf), note 1 above.

<sup>10</sup> *Ibid* at paras 9 to 13 and 91.

<sup>11</sup> *Ibid* at paras 11 and 91. [Report of Dr. Gordon H. Guyatt August 21, 2009](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Exhibit%20A%20E2%80%93%20Report%20of%20Dr.%20Gordon%20H.%20Guyatt%20August%2021,%202009.pdf) online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Exhibit%20A%20E2%80%93%20Report%20of%20Dr.%20Gordon%20H.%20Guyatt%20August%2021,%202009.pdf> and

[Affidavit of Stephen W. Hwang sworn August 25, 2009](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Stephen%20W.%20Hwang%20sworn%20August%2025,%202009.pdf) online

[www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Stephen%20W.%20Hwang%20sworn%20August%2025,%202009.pdf](http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Stephen%20W.%20Hwang%20sworn%20August%2025,%202009.pdf).

<sup>12</sup> *Ibid* at para 91.

she needs. More importantly, the record before the Court establishes that the author's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences. ....<sup>13</sup>

8. The author argued before the Federal Court that the wording of the OIC was sufficiently broad to include persons in her circumstances. She further argued that the denial of coverage for health care in her circumstances violated her right to life and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* (the *Canadian Charter*).<sup>14</sup> Additionally, she argued that denying her coverage on the grounds of citizenship or immigration status constituted discrimination prohibited under section 15 of the *Canadian Charter*.<sup>15</sup> She argued that all of the above domestic law, including the OIC, should be interpreted and applied in a manner consistent with Canada's international human rights obligations.<sup>16</sup>

9. After reviewing the expert medical reports the Federal Court found that the evidence established a deprivation of the author's right to life and security of the person that was caused by her exclusion from the IFHP.<sup>17</sup> However, the Court found that the deprivation of these rights in the author's case was in accordance with principles of fundamental justice and therefore not contrary to section 7 of the *Canadian Charter*, because the author had chosen to remain in Canada without legal status.<sup>18</sup>

10. The author then appealed to the Federal Court of Appeal, submitting that the Federal Court had erred, including in its interpretation and application of international human rights law. The author argued that the court's decision was contrary to the pre-eminent status of the right to life in Article 6 of the ICCPR and to protections from discrimination on the grounds of immigration status under international human rights law.<sup>19</sup>

11. The Federal Court of Appeal upheld the Federal Court's finding that the author "was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person."<sup>20</sup> The Court held, however, that the "operative cause" of the risk to her life was her decision to remain in Canada without legal status.<sup>21</sup> The Federal Court of Appeal agreed with the lower court's decision that the deprivations of the right to life and security of the

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Toussaint v Canada (Attorney General) (FC)* note 1 above, at paras 20 and 84 to 94. [Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#), online <http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html>. Section 7 of the *Charter* provides: "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"; Section 15 of the *Charter* states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

<sup>15</sup> *Toussaint v Canada (Attorney General) (FC)* note 1 above, at paras 20, 71 – 83.

<sup>16</sup> *Ibid* at paras 20, 63 – 70.

<sup>17</sup> *Ibid* at para 91.

<sup>18</sup> *Ibid* at para 94.

<sup>19</sup> *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 [Appellant's Memorandum of Fact and Law](#) online <http://socialrights.ca/litigation/toussaint/IFH%20APEAL/appellant's%20memorandum%20of%20act%20and%20law%20FCA.pdf> at paras 54 – 62.

<sup>20</sup> *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII) at para 61, online <http://canlii.ca/t/fm4v6>.

<sup>21</sup> *Ibid* at paras 70 to 73.

person in this case accords with the principles of fundamental justice, and therefore does not breach section 7 of the *Canadian Charter*. The Court 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 equality rights protection afforded under section 15 of the *Canadian Charter*.<sup>22</sup> The Court also commented that in assessing whether the exclusion of immigrants without legal status from access to health care is justifiable as a reasonable limit under section 1 of the *Canadian Charter* appropriate weight should be given to “the interests of the state in defending its immigration laws.”<sup>23</sup>

12. The author sought leave to appeal the Federal Court of Appeal’s decision to the Supreme Court of Canada, but the application for leave to appeal was denied in a decision released on April 5, 2012.<sup>24</sup> The Supreme Court of Canada grants leave to appeal only in a minority of cases and does not provide reasons for decisions on leave applications. The fact that a court below reached the wrong result, in itself, may not be sufficient to convince the Supreme Court to grant leave to appeal.<sup>25</sup>

13. Following the Federal Court of Appeal’s decision and the denial of leave to appeal by the Supreme Court of Canada, the executive branch of the Government of Canada repealed the 1957 OIC and replaced it with the *Order Respecting the Interim Federal Health Program, 2012*, which set out a new policy in relation to access to the IFHP. The new policy came into effect in June 2012.<sup>26</sup> The new policy does not provide undocumented migrants with coverage for health care under the IFHP. In addition coverage for certain categories of immigrants previously provided with health care coverage under the IFHP are now excluded. These additional categories include refugee claimants who come to Canada from “Designated Countries of Origin”,<sup>27</sup> and those whose refugee claims have been rejected by the decision-maker of first instance and who have exhausted their judicial review and appeal rights.<sup>28</sup> The new policy makes no explicit exception for situations where life or health is at risk, except where there is a clear health risk to the public.<sup>29</sup>

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<sup>22</sup> *Ibid.* at paras 83 and 99.

<sup>23</sup> *Ibid.* at para 113.

<sup>24</sup> [Nell Toussaint v. Attorney General of Canada, 2012 CanLII 17813 \(SCC\)](http://canlii.ca/t/fqwb8), online <http://canlii.ca/t/fqwb8>.

<sup>25</sup> The Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(1), provides that the Court should grant leave to appeal “where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.”

<sup>26</sup> [Order Respecting the Interim Federal Health Program, 2012, SI/2012-26](http://canlii.ca/t/5212v), online <http://canlii.ca/t/5212v>. The new Order was dated April 5, 2012, the date of the release of the Supreme Court of Canada’s decision to deny the author leave to appeal, and was registered April 25, 2012.

<sup>27</sup> Citizenship and Immigration Canada, [Designated Countries of Origin](http://www.cic.gc.ca/english/refugees/reform-safe.asp) (17 June, 2013), online <http://www.cic.gc.ca/english/refugees/reform-safe.asp>. Designated Countries of Origin are countries generally considered “safe, do not normally produce refugees but do respect human rights and offer state protection”. The Countries on the DCO list are: Australia, Austria, Belgium, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel (excluding Gaza and West Bank), Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, United Kingdom, United States of America.

<sup>28</sup> Note 26 above.

<sup>29</sup> Government of Canada, Citizenship and Immigration Canada, [Information Sheet for Interim Federal Health Program Beneficiaries](http://www.cic.gc.ca/english/refugees/outside/ifhp-info-sheet.asp), online <http://www.cic.gc.ca/english/refugees/outside/ifhp-info-sheet.asp>.

## **B. Summary of Allegations Of Violations of Rights Under the ICCPR**

14. The author requests the Committee to find that:

i) the decision of the delegated immigration officer to deny her IFHP coverage without any consideration of her individual circumstances, in particular the life-threatening illnesses for which she required treatment; and

ii) the policy of excluding undocumented migrants from access to the IFHP, and the decisions of the courts to uphold this policy, where such coverage is necessary for the protection of life and personal security

have violated her rights under the ICCPR as listed below.

15. It is to be noted that the author has at no time claimed that she had a right to remain in Canada in order to receive the health care she needed. Her claim has been restricted to her circumstances while in Canada and awaiting the determination of her application for permanent residency. Nor does the author claim an unqualified right to access publicly funded health care that is available to permanent residents of Canada through provincial health insurance plans, and for which she now qualifies. The IFHP is a program of last resort for immigrants who are not qualified for provincial, publicly funded health care in Canada. Unlike provincial health insurance, the IFHP is restricted to those who cannot afford to pay for the care. It is the denial of coverage of health care for immigrants without legal status who are ineligible for provincial health care insurance on the grounds of immigration or citizenship status, and who have no means to pay for the care themselves that is at issue in the present petition.

### *i) Articles 2(1), 26*

16. The author submits that the exclusion from health care on the basis of her particular “citizenship status” or “immigration status” – that of an immigrant without legal status seeking humanitarian and compassionate consideration of an application for permanent resident status – constitutes a discriminatory distinction and exclusion under Article 2(1) and 26 of the ICCPR. Moreover, the author submits that discrimination on the basis of citizenship or immigration status in her circumstances was not reasonable or justifiable.

17. The domestic courts found that denying health care necessary for life is a reasonable means of promoting compliance with Canada’s immigration laws. The author submits that this finding was unsubstantiated by the evidence and that denial of health care necessary for life to undocumented migrants on the basis of their immigration status is not an objective, proportionate or reasonable means of discouraging illegal immigration. The evidence is clear that the author did not migrate to Canada in order to secure health care. Rather, she remained in Canada, after being admitted as a visitor, in order to work for many years without receiving any health care. Moreover, the uncontroverted evidence before the courts in this case, reinforced by additional evidence presented below, establishes that denying access to health care to undocumented migrants does not act as an effective deterrence of illegal immigration. On the contrary, ensuring access to health care necessary for the protection of life and health of undocumented migrants saves host countries health care costs in the long run.

18. Moreover, even if the State Party had been able to offer reliable corroborating evidence that the denial of health care necessary to life discourages migrants from entering Canada illegally, this would still fail to address the disproportionality between the state’s interest in discouraging illegal

immigration and the violation of the right to life of undocumented migrants as a response. Denying health care necessary for life is an arbitrary punitive measure that has the serious effect of penalizing migrants in dire need of health care when more proportionate measures, including deportation to the country of origin, are available to the State Party.

**ii) Article 6**

19. The Federal Court made a finding of fact with which the Federal Court of Appeal agreed: the author's life and health were placed at significant risk by the State Party's denial of access to health care coverage under the IFHP, violating her right to life. The Committee has recognized in other cases that health care is a necessary component of the right to life. The author submits that the threat to her life in the present case, resulting from the denial of access to health care, equally violated Article 6.

**iii) Article 7**

20. The author submits that the State Party, including the independent judiciary, violated Article 7 of the ICCPR by denying her access to health care necessary for her life in order to "discourage defiance" of Canada's immigration laws. This Committee has previously held that denial of access to medical care constitutes cruel, inhuman or degrading treatment or punishment. The author alleges that such treatment, as authorized by the Federal Court and the Federal Court of Appeal to discourage defiance of immigration laws, constitutes a violation of Article 7.

**iv) Article 9(1)**

21. The author submits that the physical and mental suffering endured as a result of the State Party's denial of the author's access to necessary health care, may also constitute a violation of Article 9(1). The Federal Court in this case found on the basis of the evidence that the author's security of the person was violated by the State Party's denial of access to vital health care. As in Article 3 of the *Universal Declaration of Human Rights*, the right to security of the person is guaranteed in the *Canadian Charter* alongside the rights to life and liberty. Canadian courts have applied the right to security of the person, similarly with the right to life, to issues arising both inside and outside of the administration of justice, including access to health care. While the Committee has similarly found that physical and mental health are elements of security of person under Article 9 (1) of the ICCPR, it has generally restricted the application of Article 9 to issues arising in the administration of justice. Nevertheless, the Committee has also recognized that the right to security of person extends beyond circumstances of detention or deprivations of liberty. The author has included an allegation of a violation of Article 9 so as not to foreclose the possibility that the Committee may decide to follow a more expansive approach to the right to security of person under Article 9, parallel to the Canadian courts. In the alternative, the author relies on Article 6 to encompass the components found by the domestic courts in this case to span the rights to both life and security of the person.

**v) Article 2(3)**

22. The author submits that the State Party has violated Article 2(3) of the ICCPR by failing to provide effective remedies for the discrimination the author experienced on the ground of immigration status and the violation of her right to life and to security of person.

23. In the present case, the author submits that effective remedies were available under domestic law, but that the courts failed to provide them. As the Committee has previously stated, the judicial arm of government, like other arms of government, is responsible for ensuring compliance with

the ICCPR in the exercise of its authority.<sup>30</sup> The author recognizes that the Committee does not act in an appellate capacity in its review of domestic court decisions and she does not suggest that the Committee should play such a role in this case. However, there are two aspects of the courts' adjudication of the author's domestic claims which bear on the direct responsibility of independent courts under the Covenant and which in her view constitute serious violations of Article 2(3).

24. The author submits, first, that the courts should have interpreted and applied the relevant domestic law in accordance with the Covenant. The Supreme Court of Canada has established that courts in Canada should, where possible, interpret domestic law consistently with Canada's international human rights obligations and that conferred discretion should be exercised in a manner that is consistent with international human rights. Since the Covenant has no direct application in domestic law, this obligation to ensure consistency with international human rights is a critical component of the State Party's implementation of the rights under the ICCPR within domestic law and has been acknowledged as such by Canada.<sup>31</sup> The author submits that the decision-maker of first instance, as well as the reviewing courts' misapplication of or disregard of Canada's obligations under the ICCPR in interpreting the rights under the *Canadian Charter*, denied the author access to effective remedies that would otherwise have been available under domestic law.

25. Second, the author submits that she was denied an effective remedy to discrimination by the domestic courts' failure to properly consider the evidence about widespread prejudice and stigmatization affecting undocumented migrants. In support of the allegation of discrimination against undocumented migrants, the author relied on objective and reliable expert evidence to challenge common stigma and stereotype regarding members of this group. The Respondent government did not submit any reply evidence to contradict the evidence submitted by the claimant. Nevertheless, the expert evidence was not considered by the courts in their decisions. On the contrary, the courts relied on the stereotypes which the expert evidence refuted in their characterization of the author's claim and its repercussions. The author submits that the consideration of reliable, objective evidence of the sort presented by her rather than assumptions based on stereotypes is critical to ensuring that members of stigmatized groups are able to have access to effective remedies to violations of their right to non-discrimination. The courts' refusal to consider this evidence therefore violated her right to an effective remedy.

### **C. Remedy Sought**

26. The author seeks that the State Party ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP coverage for health care necessary for the protection of their rights to life and security of person, without discrimination on the ground of immigration or citizenship status.

27. The author also requests that the Committee recommend compensation for the severe psychological stress, indignity, and exposure to risk to life and to long term negative health consequences she suffered as a result of the violation of her rights.

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<sup>30</sup> [Anthony Fernando v Sri Lanka, Communication No. 1189/2003 U.N. Doc. CCPR/C/83/D/1189/2003 \(2005\)](http://www1.umn.edu/humanrts/undocs/1189-2003.html), at para 9.2, online <http://www1.umn.edu/humanrts/undocs/1189-2003.html>.

<sup>31</sup> [Core Document Forming Part of the Reports of States Parties \(Canada\), HRI/CORE/1/Add.91 \(12 January, 1998\)](http://www.refworld.org/docid/3de0dc9e4.html) at paras 117, 136 – 142 online <http://www.refworld.org/docid/3de0dc9e4.html>.

### III. FACTS

#### A. Provision of Health Care Coverage for Migrants in Canada

28. In general, provinces are responsible for the provision of health care in Canada. However, the federal government bears the responsibility for those who are under its jurisdiction because of its authority over immigration matters.<sup>32</sup> At the time she sought access to the IFHP, and subsequently, the author was resident in the Province of Ontario. Under Regulation 552 enacted under Ontario's *Health Insurance Act* she was not eligible for provincial health insurance. She was dependent on access to the IFHP as long as she did not have confirmation from CIC of her eligibility to apply for permanent residency status from within Canada, which she did not receive until January 30, 2013.<sup>33</sup>

29. Order-in-Council P.C. 157-11/848 passed on June 20, 1957, governed the provision of health care to immigrants to Canada who were not qualified, because of their immigration and citizenship status, for provincial health care insurance. This OIC remained unchanged until 2012, and was in force at the time the author sought and was denied coverage. It states:

The Board recommends that Order-in-Council P.C. 4/3263 of June 6, 1952, be revoked, and that the Department of National Health and Welfare be authorized to pay costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:

(a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and

(b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer, in cases where the immigrant or such a person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare.<sup>34</sup>

The terms "immigrant" and "Immigration jurisdiction", which are found in paragraph (b) of the Order-in-Council are not defined therein, nor in the current *IRPA* or its Regulations.

30. Following the decision of the Federal Court of Appeal in the author's case, the *Order Respecting the Interim Federal Health Program, 2012*<sup>35</sup> was adopted, which repealed the Order-in-Council P.C. 157-11/848 of June 20, 1957. Under the new Order, immigrants without legal status continue to be excluded from any IFHP coverage, notwithstanding potentially life-threatening situations. The new Order denies IFHP coverage to additional classes of immigrants, except in circumstances involving a disease posing a clear risk to public health or a condition of

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<sup>32</sup> Section 91.25 of the [Constitution Act, 1867](#) gives the federal Government of Canada jurisdiction over naturalization and aliens. Online <http://canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html>.

<sup>33</sup> [Health Insurance Act, RSO 1990, c H. 6](#) ss. 1, 11(1) online <http://canlii.ca/t/l352>; [General RRO 1990, Reg 552](#), s. 1.4.5, online <http://canlii.ca/t/kc73>, version in force between Jul 1, 2009 and Sept 17, 2009 when the author was denied access to the IFHP. Section 1.4 of the regulation has not been amended since then.

<sup>34</sup> [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at para 12.

<sup>35</sup> [Order Respecting the Interim Federal Health Program, 2012, SI/2012-26](#) note 26 above.

public safety. These include: applicants for a Pre-Removal Risk Assessment who previously have not made a refugee claim; refugee claimants who have withdrawn or abandoned their claim or who have been found not eligible to pursue a claim for refugee status; refugee claimants from ‘designated countries of origin’; and rejected refugee claimants who have exhausted all appeals.<sup>36</sup> This new policy significantly expands the number of low-income individuals with life threatening illnesses denied health services because of their immigration status but does not change the policy with respect to undocumented migrants, as challenged by the author before domestic courts.

31. The exclusions of additional classes of refugees and asylum seekers from the IFHP are currently the subject of a constitutional challenge and are not the subject of the present petition. The applicants in the new challenge explicitly distinguish their circumstances as refugee claimants from the circumstances of the author of the present communication, that of an undocumented or illegal immigrant seeking H & C consideration for permanent residency.<sup>37</sup> The exclusion of undocumented immigrants from the IFHP, the subject of the present petition, was fully reviewed by domestic courts in the adjudication of the author’s application for judicial review and appeals therefrom, as described below.

## **B. The Author’s Attempts to Secure Legal Residency in Canada**

32. The author entered Canada lawfully on December 11, 1999 as a visitor from Grenada. At the time she required no visa to visit Canada for a period of up to six months. Between 1999 and November, 2008, the author worked at a variety of jobs. Though she lived in poverty, receiving low levels of compensation in informal employment, she managed to support herself financially including paying privately for any costs related to routine medical care. Although she had no residency status or legal permission to work in Canada, some of her employers made deductions from her compensation and paid federal and provincial taxes, Canada Pension Plan, and Employment Insurance.<sup>38</sup>

33. At the encouragement of an employer who wished to hire her permanently, the author began to seek to regularize her status in Canada in 2005. In that year, she paid a significant amount of her work savings to an immigration consultant who turned out to be dishonest and provided no useful service. She believed that she could not afford to make further attempts to regularize her status for some time.<sup>39</sup>

34. In 2008, the author received free assistance from a qualified immigration consultant and made an application for H & C consideration of an application for permanent resident status to Citizenship and Immigration Canada (CIC). The author was unable to afford the \$550 fee that was generally required by CIC for H & C applications and on September 12, 2008 she forwarded her H & C Application under cover of a request that she be exempted from paying the processing fee. By

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<sup>36</sup> *Ibid.*

<sup>37</sup> [Canadian Doctors For Refugee Care, The Canadian Association of Refugee Lawyers, Garcia Rodrigues, Awatt and Ayubi v Attorney General of Canada \(Minister of Citizenship and Immigration\), \[2013\] \(Notice of Application\)](#) online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/refugee%20IFHP%20NoA.pdf> at paras 56, 58, 59, and 67.

<sup>38</sup> [Affidavit of Nell Toussaint sworn on August 23, 2009](#) at para 6, online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint.pdf>.

<sup>39</sup> [Supplementary Affidavit of Nell Toussaint sworn January 3, 2010](#) at paras 5 – 6 online

<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint%20sworn%20January%203,%202010%20in%20Imm-3761-09.pdf>.

letter, dated January 12, 2009, CIC denied the request for the exemption from the fee requirement.<sup>40</sup>

35. In April 2009, the author was informed that she qualified for provincial social assistance under the Ontario Works program as a result of being in the process of applying for permanent residence from within Canada based on H & C grounds. Subsequently, she was deemed eligible for social assistance from the Ontario Disability Support Program (ODSP). Neither of these programs covers health care however, and neither covers the cost of fees for an H & C Application.

36. The author filed an application for judicial review of the policy of refusing to waive fees for H & C applications for those living in poverty and unable to afford to pay such fees with the Federal Court of Canada. The Federal Court denied her application.<sup>41</sup> The Federal Court decision was subsequently reversed on appeal to the Federal Court of Appeal, which found that the Minister of Citizenship and Immigration was obliged to consider her request for fee waiver on H & C grounds.<sup>42</sup> Further to the decision of the Federal Court of Appeal, the author requested that the fees for H & C review be waived and that her application for permanent residency be considered. This request was in process at the time of the hearing before the Federal Court of Appeal in which the author sought to remedy the denial of coverage for health care under the IFHP, which is the subject matter of the present petition.

37. To summarize the author's immigration status at the relevant times: in May 2009 when the author requested IFHP coverage and in July 2009 when this was denied she was in the process of seeking legal residency status pursuant to processes available under Canadian law. Specifically, she was engaged at that time in legal action to have fees waived for an H & C application for permanent residency. Subsequently, in April 2011 the Federal Court of Appeal found that her request for fee waiver must be considered and the author's H & C application was accepted by CIC without the payment of a fee. She continued to be without health care coverage while her H & C Application was under consideration. It was only as a result of her subsequent application for permanent residence based on spousal sponsorship and a letter from CIC stating that she met the criteria for eligibility for spousal sponsorship that the author was granted health care coverage under the provincial health care insurance program (Ontario Health Insurance Plan or OHIP) effective April 30, 2013.<sup>43</sup> As of that date, she was no longer in need of federal health care coverage. During all of this time period the author remained in Canada at the discretion of Immigration authorities, who could have commenced procedures to remove her from Canada at any time.<sup>44</sup>

### **C. The Denial of Coverage for Health Care under the IFHP**

#### ***i) Application for IFHP***

38. As noted above, after almost a decade of working in Canada, the author developed an abscess and chronic fatigue that left her unable to work. She applied for coverage on May 6, 2009

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<sup>40</sup> [Toussaint v. Canada \(Minister of Citizenship and Immigration\), 2009 FC 873 \(CanLII\), \[2010\] 3 FCR 452 \[Federal Court Judicial Review of Fee Waiver Denial referred to in para 36 below\]](#) at para 3 online <http://canlii.ca/t/25gk0>.

<sup>41</sup> *Ibid.*

<sup>42</sup> [Toussaint v. Canada \(Citizenship and Immigration\), 2011 FCA 146 \(CanLII\)](#), online <http://canlii.ca/t/flb8c>.

<sup>43</sup> [Letter from Ministry of Health and Long Term Care to Macdonald Scott, March 11, 2013](#) online <http://www.socialrightscura.ca/documents/legal/toussaint%20IFBH/OHIP%20confirm.pdf>.

<sup>44</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#), note 1 above at para 90.

under the IFHP but on July 10, 2009 she was denied for the stated reason that she did not fit into any of the four categories of persons eligible for IFHP coverage set out in the departmental guidelines of Citizenship and Immigration Canada (CIC) pursuant to Order-in-Council number 157-11/848, effective June 20, 1957.<sup>45</sup>

39. The author submits that as an immigrant without legal status who had submitted various applications to Citizenship and Immigration Canada and was awaiting determination by the courts as to whether her applications must be considered without payment of a fee that she was unable to afford, she could have been provided coverage by the immigration officer based on a reasonable interpretation of the phrase “subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible” as set out in paragraph (b) of the Order-in-Council. The author alleges that the OIC provided authority to consider individual circumstances, and the decision-maker violated her rights under the ICCPR by failing to do so. In the alternative, she argues that if the immigration officer had no authority under the OIC to provide coverage to someone in her circumstances, then the OIC was in breach of the State Party’s obligations under the ICCPR.

***ii) Application for Judicial Review before the Federal Court of Canada***

40. The author sought judicial review of the immigration officer’s decision before the Federal Court of Canada. The author argued before the Federal Court, among other things, that:

- i) The wording of the 1957 Order-in-Council provided the immigration officer discretion to consider her individual circumstances and to provide coverage under the IFHP and the officer’s exercise of this discretion to deny coverage to the author without considering her individual circumstances, solely on the basis of her immigration status, was unreasonable;
- ii) The restriction of eligibility for the IFHP to four categories of persons unreasonably fettered the discretion of the officer contrary to the broadly framed 1957 Order-in-Council;
- iii) The Order-in-Council should be interpreted and applied in a manner which accords with Canada’s obligations under international human rights law and consistently with the *Canadian Charter* so as to ensure protection of the right to life and security of the person and to ensure equal benefit of the IFHP without discrimination because of citizenship or immigration status and accommodating needs related to disability;
- iv) The discretion ought to have been exercised in a manner that was consistent with Canada’s obligations under international human rights law and with the *Canadian Charter*; and
- v) In the alternative, if the Order-in-Council restricted the Minister from providing for the costs of health care to immigrants without status, then this restriction violated the author’s right to life and security of the person under section 7 and the right to equality under section 15 of the *Canadian Charter* and was therefore of no force and effect.

41. In support of her claims, the author submitted expert evidence to the Federal Court documenting her circumstances and the risk to her life and personal security posed by the denial of access to the IFHP, as well as the impact on the dignity of undocumented migrants of having to beg health care providers to provide treatment without payment. The author submitted a personal

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<sup>45</sup> [Decision of Craig Shankar dated July 10, 2009](#), note 5 above.

affidavit describing the psychological and physical effects of the denial of health care and of the experience of having to plead for health care needed to protect her life.<sup>46</sup>

42. Evidence was also filed documenting: the vulnerable status of undocumented migrants in Canada; prevailing prejudices and stereotypes about this group; and the effect of the denial of health care to this vulnerable group of individuals. The evidence filed with the Federal Court included the sworn affidavit of Ilene Hyman, who holds a Ph.D. in public health, and is a recognized expert in health and health access issues faced by immigrant and marginalized populations in Canada.<sup>47</sup> Dr. Hyman provided extensive evidence on informational, linguistic, cultural, financial and systemic barriers facing immigrants without status.<sup>48</sup> In her affidavit she described the serious effects of lack of access to health care experienced by recent immigrants, asylum seekers and other non-citizens in Canada. She stated that undocumented migrants are the most marginalized and disadvantaged of the class of non-citizens, noting that this group has been recognized both within Canada and internationally as suffering from multiple disadvantages relating to language, poverty, low education and lack of access to basic services.

43. Additional expert evidence was filed with the Federal Court in a sworn affidavit from an internationally renowned expert on migration and health, Dr. Manuel Carballo, the Executive Director of the International Centre for Migration and Health in Geneva.<sup>49</sup> Dr. Carballo drew on extensive experience and research in explaining that contrary to prevalent myths, undocumented migrants are predominantly young and healthy individuals who migrate in search of work and are unlikely to migrate in order to secure health care. He reported that undocumented migrants usually make little or no use of health care services, even when these are provided without cost. After reviewing evidence from a number of countries that provide health care to undocumented migrants, Dr. Carballo also provided the opinion that ensuring access to adequate health care to this group is “sound and rational health care policy, resulting in significant public health benefits and economic savings over the longer term.”<sup>50</sup> It was noted before the Federal Court that the author fit the profile of the typical undocumented migrant described by Dr. Carballo, having migrated for work and having worked for a number of years without the need for significant health care.

44. Dr. Carballo also reviewed the evolution of relevant international human rights norms regarding access to health care for undocumented migrants. He concluded that:

To deny this vulnerable group access to health care is both contrary to the principles of universal access and human rights and short-sighted in terms of public health and sustained socio-economic development. This is being increasingly recognized and the number of countries committed to providing health care to undocumented migrants is growing. They are doing so not only out of a spirit of humanitarianism, but also on the basis of the evidence that undocumented migrants do not abuse health care services, do not arrive looking for health care, and are eager to work and “fit in”. Further, they recognize that prevention, early diagnosis and treatment of illness in this vulnerable population will provide savings in the longer term, both in terms

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<sup>46</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#), note 1 above, at para 13 quoting [Affidavit of Nell Toussaint sworn on August 23, 2009](#) at paras 33-36.

<sup>47</sup> [Affidavit of Ilene Hyman sworn August 25, 2009](#) online <http://www.socialrightscura.ca/documents/legal/toussaint%20IFBH/Affidavit%20of%20Ilene%20Hyman%20sworn%20August%2025,%202009.pdf>.

<sup>48</sup> *Ibid* at paras 7 and 8.

<sup>49</sup> [Affidavit of Manuel Carballo sworn on February 2, 2010](#) online

<http://www.socialrights.ca/documents/Carballo%20AFFADAVIT%20final.pdf>.

<sup>50</sup> *Ibid* at para 24.

of relieving suffering and stress and reducing health care costs associated with longer term health problems in a population without which many local economies would quickly flounder.

A country such as Canada would be well served to respond constructively to the concerns and recommendations from United Nations human rights bodies, and to adopt measures to ensure access to health care for undocumented migrants.<sup>51</sup>

45. Counsel for the respondent Attorney General of Canada did not challenge Dr. Hyman's or Dr. Carballo's qualifications as expert witnesses. They declined to cross-examine the author's expert witnesses and filed no contrary expert evidence to challenge the evidence of the vulnerability or prevalent stereotypes and myths about undocumented migrants. The Respondent also filed no evidence to contest the expert evidence from Dr. Carballo and others that providing health care to those in the author's circumstances would *not* lead to increased illegal immigration of persons in need of health care and would, on the contrary, be sound and fiscally responsible public health care policy.

46. On the basis of the documented medical evidence, the Federal Court found that the refusal of IFHP coverage had put the author's life at risk and that she had been deprived of the right to life and security of the person.<sup>52</sup> However, the Federal Court ruled that the deprivation of the rights to life and security of the person in this circumstance was in accordance with "principles of fundamental justice" and consequently not a violation of section 7 of the *Canadian Charter*. The judge held that providing health care for those who had entered Canada illegally would make Canada a "health-care safe haven".<sup>53</sup> The Court made no reference to the evidence of Dr. Carballo establishing that undocumented migrants do not arrive looking for health care, do not abuse health care services and are eager to work and "fit in." Rather, the court stated as fact, without any substantiation whatsoever, what had been established by Dr. Carballo's uncontested evidence as false stereotype and prejudice regarding undocumented migrants – that they migrate in search of health care and that making health care available would give rise to increased illegal immigration.

47. In response to the author's claim of discrimination contrary to the *Canadian Charter*, the Federal Court found that the reason for the denial of the benefits was the author's immigration status. The Court misunderstood the author's argument regarding citizenship status, however, to be based on an allegation that she had been denied because she is a non-citizen, rather than because she falls into a sub-category of non-citizens denied coverage – i.e. undocumented migrants.<sup>54</sup> The Federal Court noted, however, that:

It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground [under s.15 of the *Canadian Charter*].<sup>55</sup>

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<sup>51</sup> *Ibid* at paras 46 and 47.

<sup>52</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above, at para 91.

<sup>53</sup> *Ibid* at para 94.

<sup>54</sup> [Toussaint v Canada \(Attorney General\) \(FC\) \(Application for Reconsideration - Applicant's Written Representations in Support of Motion\)](#) at para 2, online

<http://www.socialrights.ca/litigation/toussaint/toussaint%20reconsideration%20memorandum.pdf>.

<sup>55</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above, at endnote 3.

48. The author submitted a request for reconsideration of the Federal Court’s decision, clarifying that the allegation of discrimination on the grounds of immigration or citizenship status had in fact been clearly laid out such that the Court had the choice of considering the ground to be either a sub-category of the ground of citizenship (i.e. non-citizens who are undocumented), or as a separate ground of “immigration status”.<sup>56</sup> The Attorney General of Canada agreed at the reconsideration hearing that the allegation of discrimination on the ground of “immigration status” could be put before the Federal Court of Appeal and the Federal Court ruled that the question of “immigration status” was more appropriately dealt with by way of appeal rather than reconsideration.<sup>57</sup>

**iii) Appeal to the Federal Court of Appeal**

49. The author appealed the decision of the Federal Court to the Federal Court of Appeal and was supported in her appeal by an intervener (*amicus curiae*), the Canadian Civil Liberties Association.<sup>58</sup>

50. The Federal Court of Appeal accepted the Federal Court’s finding “that the [author] was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person.”<sup>59</sup>

51. However, the Federal Court of Appeal found that the “operative cause” of the risk to the author’s life was not the denial of access to health care coverage under the IFHP.<sup>60</sup> Rather, it found that:

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.<sup>61</sup>

52. Neither party had advanced this unusual line of reasoning before the Court and Counsel for the author had no opportunity to address the fallacies of such an approach in argument before the Court. Such reasoning, were it to be applied in other cases, would render the protection of the right to life illusory in many of the most critical areas of protection. A deprivation of the right to life found to be a punitive response to the victim’s behavior or choice, including a choice to engage in political protest or civil disobedience, would, under such reasoning, be attributable to the behavior as the “operative cause” rather than to the state’s response to the behaviour.

53. The Federal Court of Appeal proceeded to consider whether, in the alternative, the deprivation of the right to life and security of the person in this case was consistent with principles of fundamental justice. In response to the author’s submissions that denying access to health care

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<sup>56</sup> *Toussaint v Canada (Attorney General)* ([Application for Reconsideration - Applicant’s Written Representations in Support of Motion](#)) note 54 above, at paras 2 and 4.

<sup>57</sup> *Toussaint v. Canada (Attorney General)*, 2010 FC 926 ([CanLII](#)) at para 6 online <http://canlii.ca/t/2clwb>.

<sup>58</sup> *Toussaint v Canada (Minister of Citizenship and Immigration)*, (FCA) note 22 above, ([Memorandum of Fact and Law of the Intervenor, The Canadian Civil Liberties Association](#)) online <http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Cdn%20Civil%20Liberties%20Assn%20Intervener%20Memorandum.pdf>.

<sup>59</sup> *Toussaint v Canada (Minister of Citizenship and Immigration)*, (FCA) note 22 above at para 61.

<sup>60</sup> *Ibid* at para 73.

<sup>61</sup> *Ibid* at para 72.

necessary for life should never be used as a means to punish or discourage unwanted or illegal behavior, the Court found as follows:

The appellant submits at paragraph 34 of her memorandum of fact and law that “[g]overnments ought never to deny access to health care necessary to life as a means of discouraging unwanted or illegal activity, including to those who have entered or remained in a country without legal or documented status.” The appellant submits that “[t]his principle is fundamental to judicial and legislative practice in Canada.

At the root of the appellant’s submission are assertions that the principles of fundamental justice under section 7 of the *Charter* require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.”<sup>62</sup>

54. The Federal Court of Appeal then considered the author’s submission that the denial of health care necessary to life was arbitrary in relation to the purposes of the IFHP, and therefore contrary to principles of fundamental justice. The author had asked the Federal Court of Appeal to disregard the finding of the Federal Court with respect to fears of Canada becoming a “health-care safe haven” because the court had failed to properly consider the uncontested expert evidence on this point. However, the Federal Court of Appeal also made no reference to the evidence, and instead simply stated that it agreed with the Federal Court that granting IFHP coverage to undocumented migrants “would make Canada a health care safe-haven for all who require health care and health care services.”<sup>63</sup>

55. The Federal Court of Appeal continued on to consider whether the denial of health care necessary to life could be justified under section 1 of the *Canadian Charter* as a reasonable limit on the right to life and security of the person. In addressing this question, the Court hypothesized effects of providing health care to undocumented migrants – again, without considering any of the expert evidence. In complete contradiction to the uncontested evidence before it, the Court stated:

In any analysis of justification under section 1 of the *Charter* in this case, the interests of the state in defending its immigration laws would deserve weight. If the appellant were to prevail in this case and receive medical coverage under the Order-in-Council without complying with Canada’s immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could become a health care safe haven, its immigration laws undermined. Many, desperate to reach that safe haven, might fall into the grasp of human smugglers, embarking upon a voyage of destitution and danger, with some never making it to our shores. In the end, the Order-in-Council – originally envisaged as a humanitarian program to assist a limited class of persons falling within its terms – might have to be scrapped.<sup>64</sup>

56. The author had emphasized in her argument before the Court that anyone entering or remaining in Canada illegally, including herself, is subject to immediate deportation proceedings. Canada’s immigration law provides for harsh penalties of fines of up to \$1,000,000 or life imprisonment or both for anyone convicted of assisting more than ten persons to enter Canada in

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<sup>62</sup> *Ibid* at paras 75 and 76.

<sup>63</sup> *Ibid* at para 83.

<sup>64</sup> *Ibid* at para 113.

contravention of immigration laws, as in the hypothetical scenario of the Court.<sup>65</sup> No evidence was presented to the Court by the respondent Attorney General of Canada to demonstrate that existing measures under the legislation are insufficient to satisfy the state interest in discouraging illegal immigration. The Federal Court of Appeal addressed neither the evidence of the ineffectiveness and costliness of denying health care as a means of encouraging compliance with immigration laws, as filed by the author, nor the availability of alternative and more effective and proportionate means already in place under the legislation.

57. With respect to the author's claim that she was discriminated against on the grounds of citizenship or immigration status, the Federal Court of Appeal found that "immigration status" is not a prohibited ground of discrimination under the *Canadian Charter* because, in the Court's view, this ground does not meet the requirement of "immutability." The concept of immutability has been applied, along with other considerations, by the Supreme Court of Canada in assessing whether additional grounds of discrimination not listed in section 15 of the *Canadian Charter* should be recognized as analogous to enumerated grounds, and therefore prohibited. In the author's submission, the immutability criterion as it has been applied by the Supreme Court of Canada does not preclude recognition of immigration status as a prohibited ground of discrimination. Other statuses which are subject to change, such as citizenship, family status, marital status and aboriginal residency status have been recognized by the Supreme Court of Canada as analogous grounds.<sup>66</sup>

58. The Court also held that there is no distinction in the Order-in-Council based on immigration status, because all applicants are "treated the same" and went on to state: "The appellant has been denied coverage because she did not enter as an applicant for permanent residence, is not a person under immigration jurisdiction, and is not a person for whom the immigration authorities feel responsible."<sup>67</sup> This recitation of the provisions of the OIC interpreted and applied to disqualify undocumented migrants, however, does not answer the allegation that excluding undocumented migrants because of their immigration status constitutes discrimination. The fact that all undocumented migrants are "treated the same" – that is, denied coverage – does not, in the author's respectful submissions, answer the allegation of discrimination on the grounds of immigration status.

#### **iv) Application for Leave to Appeal to the Supreme Court of Canada**

59. The author sought leave to appeal the decision of the Federal Court of Appeal before the Supreme Court of Canada.<sup>68</sup> In support of her application for leave to appeal, she filed an affidavit from the Executive Director of the Canadian Civil Liberties Association, which attached a letter from the Office of the High Commissioner for Human Rights. That letter stated that:

The issues considered by the Federal Court of Appeal in this case are matters of significant interest internationally and have been given priority in the work of the Office of the United Nations High Commissioner for Human

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<sup>65</sup> *IRPA* s. 117 note 6 above.

<sup>66</sup> *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 recognizing citizenship as analogous ground of discrimination; *Thibaudeau v. Canada* [1995] 2 S.C.R. 627 recognizing family status as analogous ground; *Miron v. Trudel* [1995] 2 S.C.R. 418 recognizing marital status as analogous ground; and *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 recognizing aboriginal off-reserve residency status as analogous ground.

<sup>67</sup> *Toussaint v Canada (Minister of Citizenship and Immigration), (FCA)* note 22 above at para 104.

<sup>68</sup> See Author's *Memorandum of Argument for Leave to the Supreme Court*, online <http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Applicants%20memorandum%20of%20argument%20for%20leave%20SCC.pdf>

Rights (OHCHR) and other United Nations entities....Should the Court grant leave to appeal in this case, OHCHR will consider seeking leave from the Court to intervene in order to provide assistance.<sup>69</sup>

60. The Supreme Court of Canada denied Ms. Toussaint's application for leave to appeal. As noted above, no reasons are given for denial of leave to appeal by the Supreme Court of Canada.

#### **D. The Author's Reliance on International Human Rights Law before Domestic Courts**

61. International human rights law is not directly enforceable in Canadian courts. However, Canada has committed to bringing domestic law into conformity with ratified international human rights treaties, as well as to providing effective protection of international human rights through domestic constitutional and legislative vehicles.<sup>70</sup> Further to this commitment, the Supreme Court of Canada has established that where possible, domestic law should be interpreted and applied in a manner consistent with ratified international human rights law.<sup>71</sup> In line with Supreme Court of Canada jurisprudence applying this principle to immigration law, the *Immigration and Refugee Protection Act* states that it "is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory."<sup>72</sup>

62. The *Canadian Charter* is the preeminent guarantee of human rights in Canada, and thus the primary vehicle for the implementation of Canada's international human rights obligations.<sup>73</sup> Former Chief Justice Brian Dickson affirmed for the majority of the Court in *Slaight Communications v Davidson*<sup>74</sup> that:

the content of Canada's international human rights obligations is ... an important indicia of the meaning of the "full benefit of the Charter's protection. I believe 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>75</sup>

63. Justice L'Heureux-Dubé echoed this sentiment for the majority of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)* affirming that international human rights law exerts a critical influence on the scope of the rights in the Charter and also plays an important role in statutory interpretation<sup>76</sup> The Justice cited Ruth Sullivan's *Driedger on the Construction of Statutes* in support of this interpretive principle:

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<sup>69</sup> [Letter from Craig Mokhiber, Office of the High Commissioner on Human Rights](http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf), September 21, 2011 online <http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf>.

<sup>70</sup> *Core Document Forming Part of the Reports of States Parties (Canada)*, HRI/CORE/1/Add.91 (12 January, 1998) at paras 136 - 142 online <http://www.refworld.org/docid/3de0dc9e4.html>; Gib van Ert, "Dubious Dualism: The Reception of International Law in Canada." *Val. U.L. Rev.* 44 (2010): 927, online <<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1066&context=vulr>>

<sup>71</sup> *Core Document Forming Part of the Reports of States Parties (Canada)*, *Ibid* at para 117.

<sup>72</sup> *IRPA* s. 3(3)(f) note 6 above.

<sup>73</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73; Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15 online <http://www.socialrights.ca/domestic-political/documents/cambridge.pdf>.

<sup>74</sup> *Slaight Communications v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*]. See also *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 at para 70.

<sup>75</sup> *Slaight Communications*, note 74 above at 1054 citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59.

<sup>76</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, note 73 above at paras 69-71.

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.<sup>77</sup>

64. Following from this principle, a parallel principle affirmed by the Supreme Court of Canada states that conferred decision-making authority and statutory discretion must be exercised consistently with international human rights values in order to meet the requirements of the *Canadian Charter* as well as an administrative law test of reasonableness.<sup>78</sup> In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court found that the exercise of reasonable discretion by an immigration officer in the review of a deportation order required consideration of the provisions of ratified international human rights law - in that case the principle of the best interests of the child as codified in the Convention on the Rights of the Child.<sup>79</sup>

65. The author asked the Federal Court and the Federal Court of Appeal to apply this body of jurisprudence from the Supreme Court of Canada to the interpretation of the Order-in-Council authorizing coverage for health care for anyone “subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible.” The author further urged the courts to interpret section 15 of the *Canadian Charter* consistently with international human rights law, so as to provide her with effective protection against discrimination in access to health care on the ground of citizenship or immigration status. In addition, the author argued that the same international human rights obligations ought to be considered in determining whether denials of access to health care necessary to life are in accordance with principles of fundamental justice under section 7 of the *Canadian Charter*.<sup>80</sup>

66. The Federal Court rejected the author’s argument that denying health care necessary to life on the grounds of citizenship status is contrary to Canada’s obligations under international human rights law. The Court questioned the authority of General Comments of the CESCR and the CERD relied upon by the author. The Court reasoned as follows:

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<sup>77</sup> *Ibid* at para 70, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ontario: Butterworths, 1994) at 330.

<sup>78</sup> In *Doré v Barreau du Québec* 2012 SCC 12, a decision released after the Supreme Court of Canada had denied leave to appeal to the author, the Supreme Court modified the approach taken in previous cases by proposing that, in cases where administrative decision-making under statutory authority is alleged to have been exercised in a manner that is contrary to the *Charter*, judicial review of such decisions may be conducted under an administrative law test of reasonableness, rather than by way of the *Charter*, section 1 and the *Oakes* test. Writing for the Court, Justice Abella argues that the modern view of administrative tribunals has given rise to a more robust form of administrative law reasonableness, nurtured by the *Charter*, which can provide essentially the same level of protection of *Charter* rights as does a section 1 analysis of reasonable limits. Justice Abella suggests that this approach is better suited to reviewing whether administrative decisions have properly ensured *Charter* “guarantees and values” in particular factual contexts.

<sup>79</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, note 73 above. In a more recent case, released after the Federal Court of Appeal considered the author’s appeal, the Supreme Court found that the exercise of conferred discretion, in that case by the Minister, must give due consideration to the right to life in order to meet a standard of reasonableness and to be in accordance with principles of fundamental justice. See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 discussed below.

<sup>80</sup> *Applicant’s Memorandum of Argument* (Federal Court) at paras 42, 72, and 73 online <http://www.socialrights.ca/documents/Toussaint%20M%20o%20A.pdf>.

It is notable that Canada has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, UN Doc. A/RES/45/158. Article 28 of that Convention reads:

‘Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.’

If the right to health is as wide in scope as the above United Nations supervisory organizations [CESCR and CERD] advocate there would be little need for further protection of migrant workers such as those found in Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>81</sup>

67. The Court’s line of reasoning on this issue had not been put to the Court by the Respondent’s counsel and was not raised by the Court during the oral hearing. Had the Court proposed this line of reasoning, counsel for the author could have referred the Court to established principles of interpretation of international human rights law and Article 81 of the *Migrant Workers’ Convention* establishing that the adoption of this Convention should not be interpreted as diminishing existing obligations of States Parties toward migrants under other human rights treaties or as having limited or reduced existing protections of migrants’ rights under other human rights treaties.<sup>82</sup>

68. The author subsequently argued before the Federal Court of Appeal that the Federal Court had failed to properly consider and apply international human rights law in interpreting the Order-in-Council and the *Canadian Charter*. The author specifically referred the Court to the Human Rights Committee’s General Comment 6, noting that the right to life is “the supreme right from which no derogation is permitted” and that “it cannot properly be understood in a restrictive manner.”<sup>83</sup> The author further argued that recognizing the special nature of the inherent right to life, international human rights law prohibits states from depriving anyone of access to health care necessary to protect the right to life as a form of sanction, penalty or deterrence for unlawful conduct.<sup>84</sup>

69. The Federal Court of Appeal held as follows with respect to the application of international human rights law:

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<sup>81</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#), note 1 above at para 69.

<sup>82</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, (18 December 1990) UN Doc. A/RES/45/158. Article 81: “Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

(a) The law or practice of a State Party; or

(b) Any bilateral or multilateral treaty in force for the State Party concerned.”

<sup>83</sup> [Appellant’s Memorandum of Fact and Law](#) note 19 above at para 55.

<sup>84</sup> [Appellant’s Memorandum of Fact and Law](#) note 19 above at para 56. The author referred the Court to a number of U.N. documents including the *Code of Conduct for Law Enforcement Officials*, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186 U.N. Doc. A/34/46 (1979); and the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1982) G.A. 37/19418 December 1982.

... the appellant submits that the principles of fundamental justice must also take into account Canada's obligations under various sources of international human rights law such as the right to life under article 6 of the International Covenant on Civil and Political Rights and rights to health under article 12 of the International Covenant on Economic, Social and Cultural Rights and article 5 of the International Convention on the Elimination of All forms of Racial Discrimination.

On the basis of *Khadr*, supra at paragraph 23, I accept that, in appropriate cases, courts can be assisted by these sources when defining the precise content of certain principles of fundamental justice under section 7. But in this case we are not at the point of defining the content of a principle of fundamental justice. We are not even at first base. The appellant has not offered a principle that meets the criteria set out in *Malmo-Levine*, supra and *D.B.*, supra for admission as a principle of fundamental justice under section 7 of the *Charter*.

Therefore, I conclude that the appellant's rights under section 7 are not infringed.<sup>85</sup>

70. As will be explained in paragraphs 167 to 175 below the author submits that the Federal Court of Appeal failed to properly apply existing domestic jurisprudence on principles of fundamental justice so as to ensure consistency with the ICCPR. In her view, denying access to health care to someone in her circumstances constituted an arbitrary and grossly disproportionate deprivation of the right to life and security of person that is both inconsistent with protections of the right to life under international human rights law and contrary to principles of fundamental justice under the *Canadian Charter*.

71. The author further submits that the Attorney General of Canada failed to advance before the courts in this case interpretations of the *Canadian Charter* which are consistent with Canada's obligations under the ICCPR to ensure effective remedies. In its periodic review of Canada, the Human Rights Committee has expressed concern about gaps between the protection of rights under the *Canadian Charter* and the protection required under the ICCPR and recommended "measures to ensure full implementation of Covenant rights."<sup>86</sup> Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern about the practice of governments in Canada "of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights."<sup>87</sup> It is submitted that in the author's case, the Government of Canada failed to promote, before the courts, the proper consideration of the requirements of the ICCPR in interpreting the *Canadian Charter*.

## **E. The Petition Raises a Critical Issue of Public Importance**

72. The values and principles at issue in this communication are of immense public importance both within Canada and internationally. An indication of the importance of the issues is found in the OHCHR's letter submitted as an exhibit in the author's application for leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada. The letter from the OHCHR states that it has carefully reviewed the decision of the Federal Court of Appeal

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<sup>85</sup> *Toussaint v Canada (Minister of Citizenship and Immigration)*, (FCA) note 22 above at paras 86-88.

<sup>86</sup> *Concluding observations of the Human Rights Committee: Canada (1999)*, OHCHR, UN Doc CCPR/C/79/Add105 at para 10, online <http://www.unhcr.ch/tbs/doc.nsf/0/e656258ac70f9bbb802567630046f2f2>.

<sup>87</sup> *United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations: Canada (2006)*, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (2006), online <http://socialrightscura.ca/documents/CESCR-COs-2006.pdf>.

in light of Canada's obligations under international human rights law. The letter states that if leave to appeal to the Supreme Court of Canada were granted, the OHCHR would consider seeking intervenor status in order to provide assistance with the international legal dimensions of the issues raised.<sup>88</sup> Migrants' access to health care has been identified as a high priority within the OHCHR.<sup>89</sup> These issues concern the safety and security of large numbers of people resident in Canada, and affect millions worldwide.<sup>90</sup>

## **F. The Author Has Been Personally and Directly Affected**

73. The Federal Court acknowledged and described in its decision several of the typical incidents in which the author experienced serious risks to her health or life because of her lack of health care coverage.<sup>91</sup>

74. Dr. Gordon Guyatt, a specialist in internal medicine and a Professor of Medicine and of Clinical Epidemiology & Biostatistics at McMaster University, gave affidavit expert evidence detailing the author's medical situation:

The author has severe medical problems that markedly impair her quality of life, are likely to decrease her longevity, and could be life-threatening over the short term. She requires intensive medical management by highly skilled professionals, including medical subspecialists. Negotiating pro bono care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous. Delays resulting from lack of coverage and an inability to pay for the health care that she needs and the risk that she will not have access to necessary services creates serious risk to her health and may have life threatening consequences.<sup>92</sup>

75. Dr. Stephen Hwang, a specialist in internal medicine at St. Michael's Hospital and a professor in the Faculty of Medicine at the University of Toronto, also gave affidavit expert evidence detailing the author's medical condition. He commented on the likely medical outcome for the author, should she be unable to obtain adequate health care:

The [author] would be at extremely high risk of suffering severe health consequences if she does not receive health care in a timely fashion. As noted above, she has already suffered from serious and to some degree irreversible health consequences due to lack of access to appropriate care, resulted in inadequately treated, uncontrolled diabetes and hypertension. As documented in her medical records, her inability to afford medications in the past has also contributed to the poor control of her diabetes and hypertension. If she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes

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<sup>88</sup> [Letter from Craig Mokhiber, Office of the High Commissioner on Human Rights](#) note 69 above.

<sup>89</sup> *Ibid.*

<sup>90</sup> [Affidavit of Denise Gastaldo sworn September 22, 2011](http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/19%20affidavit%20of%20denise%20gastaldo%20sworn%202011_09_22.pdf), online [http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/19%20affidavit%20of%20denise%20gastaldo%20sworn%202011\\_09\\_22.pdf](http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/19%20affidavit%20of%20denise%20gastaldo%20sworn%202011_09_22.pdf).

<sup>91</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 9.

<sup>92</sup> *Ibid* at para 11, quoting [Report of Gordon Guyatt re Nell Toussaint, August 29, 2009](#) note 11 above at 7.

and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).<sup>93</sup>

76. The author provided an affidavit in which she addressed the impact of her health care situation on her wellbeing:

I never know whether I will be able to get treatment or tests I need in a timely fashion. I cannot predict when doctors or service providers will agree to provide services without pay and when they will not. This makes me feel that I lack control over my health.

I am extremely grateful for the services that I have been provided by doctors and service providers, despite the fact that I am unable to pay for them. On the other hand, I find it humiliating and degrading to have to negotiate with doctors and other healthcare service providers to receive healthcare, out of charity. It makes me feel that I am not considered of the same worth or value as other patients.<sup>94</sup>

77. The author also provided sworn evidence that due to a family history of large bowel cancer, and the fact that she is at high risk due to her recent pulmonary embolus, on July 16, 2009 a gastroenterologist recommended that she undergo a gastro-colonoscopy. This procedure was denied to her due to her lack of health coverage.<sup>95</sup>

78. These risks to the author's life and long term effects on health and longevity resulting from the denial of IFHP coverage were accepted by the Federal Court based on a thorough review of the evidence, and that court's findings of fact were upheld by the Federal Court of Appeal.

## IV. ADMISSIBILITY

### A. Standing

#### *i) Ratione Personae*

79. At the relevant time, Ms. Toussaint was a resident of Canada, and although she was undocumented, she was residing within the territory of the State Party and therefore has standing to bring a communication against Canada as described in General Comment 31.<sup>96</sup> Due to her citizenship/immigration status, the author was denied necessary health care coverage by the State Party. The policy of denying the IFHP to undocumented migrants remains in place. Although the author now has legal residency and is covered by the Ontario Hospital Insurance Programme (OHIP), she has standing to challenge a policy which, until earlier this year, put her life at risk.<sup>97</sup>

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<sup>93</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 12, quoting [Affidavit of Stephen W. Hwang sworn August 25, 2009](#) note 11 above at para 4.

<sup>94</sup> *Ibid* at para 13.

<sup>95</sup> [Affidavit of Nell Toussaint sworn on August 23, 2009](#) note 46 above at paras 28 and 29.

<sup>96</sup> Human Rights Committee [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), UNCCPR, 2004, CCPR/C/21/Rev.1/Add. 13, (adopted 29 May 2004) at para 10.

<sup>97</sup> The author's circumstance is similar to the case of [Llantoy Huamán v Peru](#). In that case, the failure of the Peruvian government to ensure the complainant's access to an abortion within the health care system was found to constitute a violation of the complainant's right to life because she was not provided with the medical and psychological support necessary to sustain a healthy pregnancy. The petition was filed after she had given birth and her life was no longer endangered. [Llantoy Huamán v](#)

80. Ms. Toussaint has also been psychologically harmed by the State Party's denial of coverage under the IFHP. She experienced anxiety about whether or not she would be able to receive vital treatment and whether delays in obtaining such treatment would jeopardize her health or life.<sup>98</sup> These stresses caused her to be exhausted, depressed and unable to sleep.<sup>99</sup> These effects establish her standing as a victim to bring this communication.<sup>100</sup>

*ii) Ratione Materiae*

81. Although the specific issue raised in the present case has not been brought before the Committee previously, its subject matter falls squarely within the scope of the relevant protections under the ICCPR as interpreted and applied by the Committee in its General Comments and in previous cases.

82. As documented below, the Committee has recognized that positive measures may be required to protect the right to life under Article 6, and that violations of the right to life may result from a denial of access health care.<sup>101</sup> The Committee has also held that denial of access to proper medical and psychological care may violate Articles 2 and 7.<sup>102</sup>

83. The domestic courts considering the author's claim found that she had been deprived of both her right to life and of her right to security of the person as these rights have been interpreted under s. 7 of the *Canadian Charter*. The Committee has held in previous cases that the right to security of person under Article 9 has been violated by the denial of access to necessary health care.<sup>103</sup> While the Committee's previous jurisprudence has been largely restricted to the administration of justice and to circumstances of detention, the wording of Article 9 (1) does not preclude a more expansive scope for the protection of security of person under the ICCPR, as has been adopted by the Supreme Court of Canada.<sup>104</sup> The author submits that the Committee may wish to consider an expanded scope of application of the right to security of person outside of the context of detention in the present case, for reasons developed in paragraphs 167 to 175 below.

84. Finally, distinctions based on immigration or citizenship status have been found by the Committee and by other treaty monitoring bodies to violate the right to non-discrimination.<sup>105</sup>

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[Peru](http://www1.umn.edu/humanrts/undocs/1153-2003.html), Communication No. 1153/2003, Views of 24 October 2005 online <http://www1.umn.edu/humanrts/undocs/1153-2003.html>.

<sup>98</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above, paras 84 and 91.

<sup>99</sup> [Affidavit of Nell Toussaint sworn on August 23, 2009](#), note 46 above at paras 24, 29, 36.

<sup>100</sup> The policy at issue in this case has broad systemic effects as well as personal effects on the author, analogous to [Lovelace v Canada](#), Communication No. 24/1977 and [Broeks v The Netherlands, Communication No. 172/1984, Views of 9 April 1987](#) at 196 In these cases the appropriate remedy is that the discriminatory policy be struck down so as to extend the benefit to the excluded group.

<sup>101</sup> [Concluding observations of the Human Rights Committee: Canada \(1999\)](#), OHCHR, UN Doc CCPR/C/79/Add105 at para 12.; [Lantsova v Russian Federation](#), Communication No. 763/1997, , Views of 26 March 2002.

<sup>102</sup> [Llantoy Huamán v Peru](#), Communication No. 1153/2003, Views of 24 October 2005, note 97 above. In this case the Committee found that lack of access to proper medical and psychological care for the mother was a violation of Articles 2, 7, 17 and 24. A compelling dissenting opinion by Hipólito Solari-Yrigoyen argued that by denying access to a therapeutic abortion, the authors' life was placed in grave danger and was a violation of Article 6.

<sup>103</sup> [Carolina Teillier Arredondo, on behalf of her mother, María Sybila Arredondo, v Peru](#), Communication No. 688/1996, Views of 14 August 2000 at para 10.3; [Francesco Maddaferri and Anna Maria Immacolata Maddaferri v Australia, Communication No. 1011/2001](#), Views of 26 August 2004 at para 8.8.

<sup>104</sup> See [Chaoulli v Quebec \(Attorney General\) \[2005\]](#) 1 SCR. 791, 2005 SCC 35, in which unreasonable wait times for health care procedures were found to violate the right to security of the person.

<sup>105</sup> See Section D below.

Given the significance of the interest at stake in the present case – health care necessary for life – the author submits that her allegation of discrimination on this ground is squarely within the scope of protections from discrimination under Articles 2(1) and 26 of the ICCPR.

85. The Committee has also recognized that courts may bear central responsibility for ensuring access to effective remedies for violations of rights under the ICCPR in domestic law, including, as in the present case, through the “application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”<sup>106</sup> The courts in this case had the obligation to interpret domestic law consistently with the ICCPR and other international human rights law binding on Canada but failed to do so.

86. The author submits that the subject matter of the petition falls squarely within the accepted scope of the ICCPR and that the petition is clearly within the competence of the Committee under the Optional Protocol.

### *iii) Ratione Temporis*

87. This communication concerns the application of the ICCPR to the denial of the author’s access to the IFHP. The author was denied access to any coverage for the costs of health care under the IFHP due to her citizenship/immigration status from the date of the decision of July 10, 2009 until she became eligible for coverage under the provincial health care insurance on April 30, 2013. Therefore the period during which the author was denied access to health care in violation of her rights under the ICCPR is July 10, 2009 to April 30, 2013.

88. Changes to IFHP eligibility took effect on June 30, 2012. These did not, however, affect the exclusion of the author or other undocumented migrants from coverage of health care necessary to life. Rather, the changes extended such exclusion to further classes of non-citizens.

89. The violations of the author’s rights which began with the decision to deny coverage on July 10, 2009 were allowed to continue after the Federal Court upheld the decision to deny her coverage on August 6, 2010, after the Federal Court of Appeal upheld the denial of health care to the author on June 27, 2011 and after leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada was denied on April 5, 2012.

### *iv) Ratione Loci*

90. The author was a resident of Canada during the entire period of the alleged violation of her rights and she continues to be a resident of Canada, subject to the jurisdiction of Canada, pursuant to Article 1 of the Optional Protocol of the ICCPR.

91. Undocumented migrants have been recognized as being subject to the jurisdiction of the State Parties in which they reside. In *Toala et al v New Zealand*, Samoans without status brought a case against New Zealand.<sup>107</sup> As well, a case against Australia was deemed admissible when the author’s refugee status remained to be determined at the time of submission of the communication.<sup>108</sup> The Committee has also admitted the communication of a stateless person who was detained indefinitely in Australia after being denied refugee status.<sup>109</sup> Moreover, the

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<sup>106</sup> [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), note 96 above, at para 15.

<sup>107</sup> [Toala et al v New Zealand, Communication No. 675/1995](#), Views of 22 November 2000.

<sup>108</sup> [A \(name deleted\) v Australia, Communication No. 560/1993](#), Views of 30 April 1997.

<sup>109</sup> [Danyal Shafiq v Australia, Communication No. 1324/2004](#), Views of 13 November 2006.

requirement of citizenship as a prerequisite for compensation was found to be arbitrary and unreasonable in *Junglingova v Czech Republic*.<sup>110</sup>

92. Therefore, the Committee has recognized the standing under the Optional Protocol to the ICCPR of residents without legal status within the territory and jurisdiction of a state, which supports the presence of *ratione loci* for this communication.

## B. Exhaustion of Domestic Remedies

93. There has been no dispute before domestic courts as to the federal government's constitutional authority to provide health care to someone in the author's circumstances. While the provinces have extensive authority over health care under Canada's Constitution<sup>111</sup> the federal government has responsibility for "Naturalization and Aliens"<sup>112</sup> and is responsible for ensuring access to health care for immigrants who are not eligible for provincial health care coverage.<sup>113</sup> Citizenship requirements for provincial public health care insurance have been challenged as discriminatory but these challenges have been unsuccessful.<sup>114</sup> Prior to her successful application for residency status, the author was unable to access provincial health care insurance. She filed an application with the Ontario Human Rights Tribunal for a remedy with respect to access to provincial health insurance, which was denied.<sup>115</sup>

94. The domestic courts found that the Federal Government's denial of access to the IFHP on the basis of the author's immigration status placed her life and health at risk.<sup>116</sup> As described above, the author sought judicial review before the Federal Court of the Immigration Officer's decision to deny her coverage under the IFHP, relying on statutory interpretation consistent with international human rights law and, in the alternative, on the *Canadian Charter*. She argued the denial of IFHP constituted discrimination on the ground of immigration or citizenship status contrary to section 15 of the *Canadian Charter* and deprived her of her right to life and security of the person contrary to section 7 of the *Canadian Charter*. The author sought to rely on interpretations of the *Canadian Charter* consistent with international human rights treaties ratified by Canada.<sup>117</sup>

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<sup>110</sup> [Junglingova v Czech Republic, Communication No. 1563/2007](#), Views of 24 October 2011.

<sup>111</sup> [Constitution Act, 1867](#) note 32 above. The relevant sections on provincial responsibility are 92.7, 92.13 and 92.16.

<sup>112</sup> [Constitution Act, 1867](#) s. 91.25 note 32 above.

<sup>113</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at paras 71-72; see also Parliament of Canada [Immigration Status and Legal Entitlement to Insured Health Services](#) October 2008, online <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0828-e.htm>.

<sup>114</sup> In [Irshad \(Litigation Guardian of\) v. Ontario \(Minister of Health\)](#), 2001 CanLII 24155 (ON CA), the Court dismissed a s. 15 *Canadian Charter* challenge on various grounds, including citizenship, to restrictions on access to provincial health insurance based on immigration status. The Court held as follows:

"Immigration status can determine a person's right to take up permanent residence in a province. Once it is accepted that the process that results in a particular immigration status does not offend s. 15(1), I fail to see how Ontario's reliance on that status in determining the nature of an individual's residence in the province can be classified as discriminatory." (para 37).

<sup>115</sup> See [Toussaint v. Ontario \(Health and Long Term Care\), 2010 HRTO 2102](#) (CanLII) online <http://canlii.ca/en/on/onhrt/doc/2011/2011hrto760/2011hrto760.html> <http://canlii.ca/t/2d03n>. and [Toussaint v Ontario \(Health and Long-term Care\), 2011 HRTO 760](#) online

<sup>116</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 91; [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at para 61.

<sup>117</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above.

95. When the Federal Court found that the deprivation of her right to life and security of the person was permitted under the *Canadian Charter*, the author appealed to the Federal Court of Appeal, relying on international human rights law, including the ICCPR as a basis for interpreting and applying the OIC and the *Canadian Charter* in this case.<sup>118</sup> After her appeal was denied, the author sought leave to appeal to the highest court, the Supreme Court of Canada, but was denied leave.<sup>119</sup>

96. The author's life has been put at risk by the denial of access to the IFHP because of her immigration status and she has exhausted all domestic remedies in challenging that denial. Constitutional challenges to restrictions on provincial health insurance based on immigration status have been unsuccessful in the past, would be based on the same grounds as the author's challenge to her exclusion from the IFHP and would be ill-founded because the federal government has assumed responsibility for health care of immigrants. It is well established in the Committee's jurisprudence that the exhaustion of domestic remedies is satisfied "if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts."<sup>120</sup>

97. The author has demonstrated that all domestic remedies have been exhausted with respect to the denial of access to the IFHP.

### **C. Other Admissibility Criteria**

98. The complaint is not simultaneously before another procedure of international investigation or settlement.

## **V. MERITS**

### **A. Article 6: The Right to Life**

99. The evidence is clear in this case that the State Party's policy is to deny coverage for health care to migrants who have entered or remained in Canada without legal status, even when they are pursuing legal status through proper channels and including when their life is placed at risk by the denial of health care coverage. The Respondent Attorney General of Canada at no time argued that it would approve IFHP coverage or any other health care options for undocumented migrants in cases where a determination is made that their lives are at risk. Under the policy in place when the author applied and under the policy as revised in June, 2012, risk to the life of the applicant is not identified as a factor to be considered for eligibility. On the contrary, the Attorney General of Canada has argued (and the courts have agreed) that denying health care necessary for life is a justifiable means of discouraging illegal immigration.

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<sup>118</sup> [Toussaint v Canada \(Minister of Citizenship and Immigration\)](#), (FCA) note 22 above.

<sup>119</sup> [Nell Toussaint v. Attorney General of Canada, 2012 CanLII 17813 \(SCC\)](#) note 24 above.

<sup>120</sup> [Tillman v Australia, Communication No. 1635/2007](#), Views of 18 March 2010, para 6.3 (citing [Ondracka and Ondracka v Czech Republic, Communication No. 1533/2006](#), Views of 31 October 2007, para 6.3; [Gomariz Valera v Spain](#), Communication No. 1095/2002, Views of 22 July 2005, para 6.4; [Länsmän et al. v Finland, Communication No. 511/1992](#), Views of 14 October 1993, para 6.3. See also [Castaño López v Spain, Communication No. 1313/2004](#), Views of 25 July 2006, para 6.3; [De Dios Prieto v Spain](#), Communication No. 1293/2004, Views of 25 July 2006, para 6.3.

100. The immigration officer considering the author's application for IFHP coverage had not been instructed to consider risk to life as a relevant factor in the determination of whether coverage should be provided. Instead he relied solely on her immigration or citizenship status to make the determination. Subsequently, the Federal Court and the Federal Court of Appeal recognized that the author had been deprived of the right to life by the denial of IFHP coverage, but held that such a deprivation was permitted because the author did not have legal status. The Courts had the authority to reverse the decision of the immigration officer in order to protect her right to life or to order that the decision be made again with a proper consideration of the whether a denial of coverage would place the author's life at risk. Instead, the courts permitted the continuation of the violation of her right to life as a means to encourage compliance with Canada's immigration laws.

101. The Federal Court and the Federal Court of Appeal of Canada both found on the basis of extensive expert evidence that the author's life and health were placed at significant risk by the denial of access to health care through the IFHP. The evidence is clear that the author's life was put at risk by the decision to refuse coverage of the author's health care under the IFHP.

102. The author submits that the justification for the deprivation of her right to life offered by the Respondent and accepted by the courts in this case is entirely inconsistent with Canada's obligations under the ICCPR. The Committee has recognized that "the inherent right to life" guaranteed in Article 6 of the ICCPR cannot properly be understood in a restrictive manner and that it is "the supreme right from which no derogation is permitted"<sup>121</sup> The right to life is not restricted to protection from state action infringing on the right to life. It also "requires that States adopt positive measures."<sup>122</sup> These may include, for example, measures to reduce infant mortality and to increase life expectancy.<sup>123</sup> Canada has stated to the HRC that it recognizes that the right to life in the *ICCPR* "requires Canada to take the necessary legislative measures to protect the right to life. These measures, as indicated by Canada in its report, may relate to the protection of the health or social well-being of individuals."<sup>124</sup>

103. As noted earlier, the Committee has expressed its concern that homelessness in Canada leads to serious health problems and may even lead to loss of life. The Committee has recommended that Canada take "positive measures required by Article 6" to address this serious problem.<sup>125</sup> It is submitted that positive measures to ensure access to health care necessary to protect life is also a requirement of compliance with Article 6.

104. In the present case, the Committee need not establish that the State Party is required by Article 6 to implement a program to provide for health care for those who are resident in Canada and who are not eligible for provincial health care coverage. The IFHP already exists and the author challenges the decision of the State Party to deny her access to this program because of her immigration status when her life was at risk. The question in the present case is whether an existing program must be administered in a manner which respects the right to life.

105. For clarity, the author is not relying on her right to health as guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Her claim is

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<sup>121</sup> Human Rights Committee, [General Comment 6, Article 6](#) (Sixteenth session, 1982) U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) at para 1.

<sup>122</sup> *Ibid* at para 5.

<sup>123</sup> *Ibid* at para 5.

<sup>124</sup> *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983) at p. 23.

<sup>125</sup> [Concluding observations of the Human Rights Committee: Canada \(1999\)](#), note 101 above at para 12.

restricted to rights guaranteed under the ICCPR which have also been included in the *Canadian Charter*. The fact that an alleged violation of the ICCPR could also be framed as a violation of the ICESCR or another International Human Rights treaty does not render the alleged violation beyond the scope of the ICCPR.<sup>126</sup> The Committee has recognized that the rights in the two Covenants are indivisible and frequently overlap and that although there is no specific ‘right to health’ provision within the ICCPR, issues of access to health care may be raised under the right to life (Article 6).<sup>127</sup>

106. Canada has acknowledged before the Human Rights Committee that the right to life under the ICCPR imposes minimum positive obligations to protect health and well-being, and that the positive requirements of the right to life “must be supplemented by the provisions of the International Covenant on Economic, Social and Cultural Rights.”<sup>128</sup> In *Fabrikant v Canada*, Canada did not dispute that access to medical care necessary to life would be required by Article 6, but argued in that case that the author sought medical care of his own choosing, contrary to the advice of medical experts. In the present case, the author only sought access to medical care that, in the opinion of medical experts, would be necessary for the protection of her life and health.<sup>129</sup> It has been suggested that the *Fabrikant* decision expands the positive obligations of the state under the right to life “... to the taking of such steps to maintain an adequate standard of health”, which would include providing adequate medical services.<sup>130</sup> The Committee’s jurisprudence indicates that the failure to take steps to prevent the spread of diseases in prisons, such as tuberculosis, may similarly violate Article 6 of the Covenant.<sup>131</sup> In this case, however the issue is whether Canada has complied with the obligation to administer an existing program in conformity with the obligation to protect the right to life and other rights guaranteed under the ICCPR.

107. In the author’s submission, it would be an untenable restriction on the broad guarantee of the right to life in article 6 to limit protections from being deprived of health care necessary for life to those who are in detention. In this case the author had made herself known to authorities and could have been placed in detention under the provisions of the *Immigration and Refugee Protection Act*.<sup>132</sup> It would be unreasonable to find that the State is relieved of the obligation to protect the right to life so long as it chooses not to place a person in detention. So fundamental a right as the right to life should not be contingent upon the exercise of the government’s broad discretion as to whether to place an undocumented migrant in detention. It also would be unreasonable for a person to be deprived of the right to life by a decision or order that she or he be released from detention and hence deprived of the right to access health care necessary to the protection of life.

108. The Committee also may find guidance from regional and domestic human rights jurisprudence on the interpretation of the right to life. Access to health care has been widely

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<sup>126</sup> [Hendrika S. Vos. v. the Netherlands, Communication No. 218/1986](#), Views of 29 March 1989.

<sup>127</sup> [Cabal and Pasini v Australia, Communication No. 1020/2001](#), Views of 7 August 2003 at para 7.7.

<sup>128</sup> *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983) at p. 23.

<sup>129</sup> [Fabrikant v Canada, Communication No. 970/2001](#), Views of 6 November 2003 at para 9.3.

<sup>130</sup> Sarah Joseph, Jenny Schultz & Melissa Castan, “*The International Covenant on Civil and Political rights: cases, materials, and commentary*” (Oxford University Press: 2004) at 183.

<sup>131</sup> Human Rights Committee [Concluding Observations: Republic of Moldova, \(2002\)](#) UN Doc A/57/40 vol I 76 at para 84(9) online

<http://www.unhchr.ch/tbs/doc.nsf/0/7945fe5e4947c21bc1256c3300339d88?Opendocument>.

<sup>132</sup> [Immigration and Refugee Protection Act S.C. 2001, c. 27 \(IRPA\)](#) note 6 above s. 55.

recognized in domestic, regional and international human rights law as protected under the ‘right to life’ particularly when denial of access to health care creates a risk to life as in the present case.

109. The Inter-American Court of Human Rights has held that under the American Convention on Human Rights, the right to life (Article 4) includes the right to health.<sup>133</sup> That Court has held that inadequacy of health care, or physical and financial impediments to accessing health care constitute violations of the right to life.<sup>134</sup>

110. According to the European Court of Human Rights, the right to life “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”<sup>135</sup> The European Court of Human Rights has considered the issue of access to health care under Article 8 of the *European Convention on Human Rights*, which protects the right to respect for one's private life. In *Tysiac v Poland* (2007) the European Court on Human Rights found that a denial of access to an abortion exposed the claimant to a serious health risk and amounted to a violation of her right to respect for her private life under Article 8 of the *Convention*.<sup>136</sup>

111. The Supreme Court of Canada also has found that although there is no freestanding right to publicly funded health care in the *Canadian Charter*, the right to life in section 7 of the *Canadian Charter*, and in Quebec's human rights legislation was violated by a denial of access health care of reasonable quality within a reasonable time.<sup>137</sup>

112. In India, in a series of decisions from the 1980s onwards, the Supreme Court established that the ‘right to life’ under Article 21 of the Indian Constitution includes a right of access to health care. In 1996, the Court affirmed “it is now settled law that right to health is integral to right of life”.<sup>138</sup> The Indian Supreme Court has recognized that health services are vital and should

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<sup>133</sup> *Indigenous Community of Yakye Axa v Paraguay*, Merits, Reparations and Costs, Inter-Am Ct (Ser C) No 125, *Annual Report of the Inter-American Court of Human Rights: 2005*, OEA/Ser.L/V/III.65/doc.1 (2005) [*Yakye Axa*] at 221 online [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_142\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_142_ing.pdf). In this case, the Court required “appropriate” medicine and food in “quantities, variety and quality, that are sufficient”. In the *Ximenes-Lopes* case, the Court emphasized that health care must be effective and that there is a duty to provide decent health treatment both publicly and privately for a right to life. Pursuant to this holding, the Court required that health care workers be adequately trained (*Ximenes-Lopes v Brazil* (2006) Inter-Am Ct HR (Ser C) No 149, at paras 89-90, 128-36, 243, 250 online [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_139\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_139_ing.pdf). The Court also held that the state has a duty to take positive measures towards the fulfillment of the right to a dignified life, especially for those who are vulnerable and at risk.

<sup>134</sup> For example in *Sawhoyamaya Indigenous Community v Paraguay* (2006) Inter-Am Ct HR (Ser C) No 146 at 174-76 online [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf), the Court commented on the physical and financial impediments faced by community members when attempting to access health facilities, and the inadequacy of health care as evidence of a violation of the right to life. In that case, the communities were indigenous groups whose lack of clean water, sanitation, and access to medical care led to desperate living conditions that included malnutrition, anemia, widespread parasitism, and high infant mortality.

<sup>135</sup> *Edwards and another v United Kingdom* (2002) 35 EHRR 417 at para 54 online <http://www.bailii.org/eu/cases/ECHR/2002/303.html>; See also *Osman v United Kingdom* (1999) 29 EHRR 45 online <http://www.bailii.org/eu/cases/ECHR/1998/101.html>.

<sup>136</sup> *Tysiac v Poland* (2007) IV ECtHR No. 5410/03 at 77 online [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812#{\"itemid\":\[\"001-79812\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812#{\).

<sup>137</sup> *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR. 791, 2005 SCC 35.

<sup>138</sup> CMI Brief *Litigating the right to health in India: Can litigation fix a health system in crisis?* (May 2012) CMI 11:4 at 2 online <http://www.cmi.no/publications/file/4475-litigating-the-right-to-health-in-india.pdf>.

be available across states.<sup>139</sup> That Court also has stated that there is a constitutional obligation to provide medical services to preserve human life and the obligation cannot be avoided by pleading financial constraints.<sup>140</sup> The Court has directed the government to pay compensation to an applicant with a medical emergency after the applicant had been denied treatment by seven hospitals.<sup>141</sup>

113. In Colombia, in the well-known Constitutional Court judgment T-760 the Court required significant structural reform of the health care system to ensure access to health care for displaced persons. The case was found to be within the scope of a *tutela* action because of the connection between the right to life and the right to access health care.<sup>142</sup> In El Salvador, the Constitutional Court has found that the right to life, interpreted consistently with international human rights law, includes positive obligations to provide health care and has ordered the provision of anti-retroviral medicines to those with HIV (AIDS).<sup>143</sup> In Ecuador, the Constitutional Court has held that although the right to health is an autonomous right, it also forms part of the right to life, entitling citizens to not only take legal action for the adoption of policies and plans related to general health protection, but to also demand that appropriate laws be enacted and that the Government provide the necessary resources.<sup>144</sup> In *Cruz del Valle Bermudez y otros v MSAS*, the right to life in the Constitution of Venezuela was relied upon to require the Ministry of Health to deliver drugs to treat the HIV virus.<sup>145</sup> There are many more domestic cases that have recognized positive obligations imposed on governments to ensure access to health care necessary for the protection of life and personal security.<sup>146</sup>

114. The author submits that in light of the Committee's jurisprudence and that of domestic and regional bodies, the denial of access to the IFHP when such denial puts a person's life at risk, violates that right to life under article 6 of the ICCPR.

115. It is further submitted that the deprivation of the right to life in the author's circumstances was arbitrary and unjustified in the circumstances for the following reasons:

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<sup>139</sup> *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors*, W.P.(C) Nos. 8853 of 2008 High Court of Delhi, India (June 4, 2010) online [http://www.escri-net.org/sites/default/files/Mandal\\_Court\\_Decision.pdf](http://www.escri-net.org/sites/default/files/Mandal_Court_Decision.pdf).

<sup>140</sup> *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor.* (1996) AIR SC 2426/ (1996) 4 SCC 37, Supreme Court of India, May 6, 1996 at para 16 online [http://www.escri-net.org/sites/default/files/Paschim\\_banga\\_Khet\\_Samity\\_judgment.doc](http://www.escri-net.org/sites/default/files/Paschim_banga_Khet_Samity_judgment.doc).

<sup>141</sup> *Ibid.*

<sup>142</sup> *Sala Segunda de Revisión, Sentencia T-760 (2008)*. Corte Constitucional de Colombia July 31, 2008 at para 3.2.4 online [http://www.globalhealthrights.org/wp-content/uploads/2013/08/English\\_summary\\_T-760.pdf](http://www.globalhealthrights.org/wp-content/uploads/2013/08/English_summary_T-760.pdf).

<sup>143</sup> *Mr Jorge Odir Miranda Cortez vs la Directora del instituto Salvadoreño del Seguro Social*. Constitutional court, File no. 348-99 (April 4, 2001; El Salvador) online [https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFIQFjAG&url=http%3A%2F%2Fgestor.pradpi.org%2Fdownload.php%3Fid\\_doc%3D931&ei=39mtUryeNNSqsQTBN4GwAg&usq=AFQjCNGqD5thi3wSE7DGvxE9mlcRPG9T](https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFIQFjAG&url=http%3A%2F%2Fgestor.pradpi.org%2Fdownload.php%3Fid_doc%3D931&ei=39mtUryeNNSqsQTBN4GwAg&usq=AFQjCNGqD5thi3wSE7DGvxE9mlcRPG9T) See also the Report of the Inter-American Commission on Human Rights: [Jorge Odir Miranda Cortez et al v. El Salvador, Case 12.249](#), Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000).

<sup>144</sup> *Mendoza & Ors v. Ministry of Public Health Resolution No. 0749-2003-RA* (28 Jan 2004) (Constitutional Court of Ecuador).

<sup>145</sup> *Cruz del Valle Bermúdez y otros v MSAS s/amparo. Expediente N° 15.789. Sentencia N° 196*. Tribunal Supremo de Venezuela (May 15, 1999) online [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=406005&focus=13991](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=406005&focus=13991)

<sup>146</sup> See *Estado do Rio de Janeiro AgR No. 486.816-11* (Brazil); *Programa Venezolano de Educación-Acción en Derechos Humanos (PROVEA) y otros c. Gobernación del Distrito Federal s/ Acción de Protección. Expediente N° 3174*. Caracas City Juvenile Court (July 16, 2001) (Venezuela).

- i) A deprivation of the right to life as a consequence for remaining in a country in order to work without legal documentation is a grossly disproportionate response to this form of illegality;
- ii) The evidence is clear in this case that denying health care to those who become ill does not act as an effective deterrence to illegal migration, which occurs primarily among young and healthy persons in need of work;
- iii) The justification of discouraging migrants from entering Canada in order to secure health care does not apply to the author, who remained in Canada to work for many years without needing significant health care, paying privately for any health care she required;
- iv) The uncontested expert evidence in this case is that providing health care to migrants regardless of immigration status is sound policy both in terms of allocation of public resources and protection of public health;
- v) Alternative means of discouraging illegal immigration, including detention and deportation and severe penalties for those who aid migrants to enter Canada illegally are already available to the State Party; and
- vi) As a penalty or consequence of illegal migration, depriving those who need health care necessary for life is a selective and discriminatory penalty since only those who become ill or disabled and whose lives are at risk without access to health care suffer the consequences of this sanction.

116. The author's submission to the Federal Court of Appeal to the effect that the deprivation of her right to life was not in accordance with principles of fundamental justice applies to any purported justification of the deprivation of the right to life under article 6 of the ICCPR:

In the appellant's respectful submission, her exclusion from IFHP coverage was arbitrary, was based on vague and ambiguous legal authority, was based on a discriminatory premise and was in contravention of Canada's obligations under binding international human rights law. Further, there is consensus that the rule or principle at stake is "fundamental to the way in which the legal system ought fairly to operate". Governments ought never to deny access to healthcare necessary to life as a means of discouraging unwanted or illegal activity, including to those who have entered or remained in a country without legal or documented status. This principle is fundamental to judicial and legislative practice in Canada and internationally and is a core principle of international human rights law binding on Canada.<sup>147</sup>

## **B. Article 7: Cruel, Inhuman, or Degrading Treatment or Punishment**

117. The author submits that the State Party has violated her right to be free from cruel, inhuman or degrading treatment or punishment contrary to Article 7 of the ICCPR. Because there was no mention of deterrence or sanction for illegal activity in the original decision letter denying the author's request for IFHP coverage, the violation of Article 7 of the ICCPR was not initially transparent. However, the author submits that the basis on which the Federal Court and the Federal Court of Appeal subsequently upheld the policy and permitted the denial of health care to continue brings the actions of the State Party (including the judiciary) within the scope of Article 7.

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<sup>147</sup> [Appellant's Memorandum of Fact and Law \(FCA\)](#) note 19 above at para 34.

The courts upheld the violation of the right to life in the author's case as a reasonable sanction to impose on the author for her choice to illegally remain in Canada, justifying the policy as a deterrent through which to discourage defiance of Canada's immigration laws. This is clear from the following passage from the Federal Court of Appeal, among others:

At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.<sup>148</sup>

118. Rather than relying on the penalties provided under the *Immigration and Refugee Protection Act* for violation of the Act described above, which include arrest, detention and removal of foreign nationals without legal status and severe penalties for anyone convicted of assisting groups of foreign nationals to enter Canada illegally, the courts authorized the State's use of its power to deny access to health care necessary to life as an additional deterrence to unauthorized residency in Canada.<sup>149</sup> Following on the decision of the Federal Court of Appeal, the Government of Canada proceeded to apply this sanction to other classes of migrants and asylum seekers, including refugee claimants from designated countries.

119. It is to be noted that the policy applied to the author was not to deny health care specifically to those who have migrated illegally to secure health coverage. The evidence was clear in the author's case that she had not migrated to Canada with health problems for which she sought treatment. Like most migrants, she had migrated for work. After a number of years of working she developed health problems for which she needed treatment. The Government of Canada argued and the courts accepted that the violation of the author's right to life was a just and reasonable consequence of her choice to remain in Canada illegally.<sup>150</sup> Therefore, the policy at issue in the author's case is the deprivation of the right to life applied to those who have entered or remained in Canada to work without status and who are seeking to regularize their status through legal means. The author submits that the deprivation of access to health care necessary for the protection of life in these circumstances, as upheld by the courts, constitutes cruel and inhuman treatment or punishment.

120. The Committee has explained in General Comment 20 that the aim of Article 7 "is to protect both the dignity and the physical and mental integrity of the individual."<sup>151</sup> Access to health care is clearly a component of such protection. Denial of access to health care has therefore been found to constitute a violation of Article 7 both inside and outside the context of detention or criminal sanction. A leading example of the latter type of violation is found in the case of *L.M.R. v Argentina* in which the Committee found that the denial of a legal abortion for a rape victim

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<sup>148</sup> [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at paras 75-76.

<sup>149</sup> [IRPA](#) s. 117 note 6 above; Paragraph 54 above.

<sup>150</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at paras 93 and 94; [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at para 83.

<sup>151</sup> Committee on Economic, Social and Cultural Rights, [General comment No. 20: Non-discrimination in economic, social and cultural rights \(art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights\)](#), E/C.12/GC/20, UNCESCR, (2 July 2009) at para 2.

inflicted physical and mental suffering and therefore violated the author's right to be free from torture or cruel, inhuman, or degrading treatment.<sup>152</sup>

121. The Committee has also considered a number of cases under both Articles 7 and 10 in which health care was denied in circumstances of detention. It is submitted that while Article 10 does not pertain to the present case, the Committee's findings with respect to Article 7 in these cases is applicable to the author's circumstances. As noted above, having made herself known to Immigration Authorities, the author could at any time have been detained and subsequently removed from Canada. She was subject to the jurisdiction and authority of the Immigration authorities such that her liberty and residence in Canada was at the discretion of these authorities at the time of her application for health care coverage. The author was unable to work or to pay for her own health care and was dependent on public assistance for access to basic requirements of life.

122. In a series of cases concerning detained persons the Committee's findings of violations of Article 7 have cited the failure of authorities to provide medical assistance. For example, in *Setelich/Sendic v Uruguay*, the Committee found violations of Article 7 and Article 10 (1) because the victim "was subjected to torture for three months in 1978 and is being denied the medical treatment his condition requires".<sup>153</sup> In *Pennant v Jamaica*, the Committee found a violation of Article 7 ICCPR in part because the author "... did not receive medical treatment until the committing magistrate ordered the police to take him to hospital".<sup>154</sup> In *Leehong v Jamaica*, the Committee found violations of Articles 7 in part, because the author had "only been allowed to see a doctor once, despite having sustained beatings by warders and having requested medical attention".<sup>155</sup> The denial of adequate medical care after injuries from an attempted escape was held by the Committee to violate Articles 7 and 10 in *Linton v Jamaica*.<sup>156</sup> In *Raul Sendic Antonaccio v Uruguay*, the Committee found a violation of Article 7 in part because the author, Sendic, was denied medical treatment for conditions resulting from solitary confinement and torture.<sup>157</sup> In *Leslie v Jamaica*, the author had to wait two hours before he was taken to a doctor after a stabbing and was subsequently denied follow-up medical treatment and painkillers.<sup>158</sup> This was held to constitute a violation of Articles 7 and 10 of the ICCPR. In *Williams v Jamaica* a violation of Article 7 and Article 10(1) was found because "the author did not receive any or received inadequate medical treatment for his mental condition while detained on death row."<sup>159</sup>

123. African Commission cases have similarly qualified denial of medical care as a basis for finding the state imposed cruel, inhuman or degrading treatment.<sup>160</sup> Inter-American Human Rights

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<sup>152</sup> [LMR v Argentina, Communication No. 1608/2007, Views of 29 March 2011](http://www.esqr-net.org/sites/default/files/Decision.pdf) at para 3.6 online <http://www.esqr-net.org/sites/default/files/Decision.pdf>.

<sup>153</sup> [Setelich/Sendic v Uruguay, Communication No. R.14/63, Views of 28 October 1981](#) at para 20. See also [Vasilskis v Uruguay, Communication No. 80/1980, Views of 31 March 1983](#); [Viana v Uruguay, Communication No. 110/1981, Views of 31 March 1983](#).

<sup>154</sup> [Pennant v Jamaica, Communication No. 647/1995, Views of 20 October 1998](#) at para 8.3.

<sup>155</sup> [Leehong v Jamaica, Communication No. 613/1995, Views of 12 August 1999](#) at para 3.11.

<sup>156</sup> [Linton v Jamaica, Communication No. 255/1987, Views of 22 October 1992](#) at para 8.5.

<sup>157</sup> [Setelich/Sendic v Uruguay, Communication No. R.14/63, Views of 28 October 1981](#), note 153 above, at 114.

<sup>158</sup> [Leslie v Jamaica, Communication No. 564/1993, Views of 31 July 1998](#) at para 3.2.

<sup>159</sup> [Williams v Jamaica, Communication No. 609/1995, Views of 17 November 1997](#) at para 6.5.

<sup>160</sup> [Constitutional Rights Project and Civil Liberties Organisation v Nigeria](#) (1999) African Commission on Human and Peoples' Rights Comm. Nos 143/95, 150/96 at para 5 online <http://www1.umn.edu/humanrts/africa/comcases/102-93.html>; [Malawi African Association and others v Mauritania \(2000\)](#) African Commission on Human and Peoples' Rights Comm. Nos. 54/91, 61/91, 98/93, 164/97 a' 196/ 97 and 210/98 at paras 12, 116 online <http://www1.umn.edu/humanrts/africa/comcases/54-91.html>; [International PEN and Others v](#)

jurisprudence has also found that “very deficient”<sup>161</sup> or “inadequate or unresponsive”<sup>162</sup> medical attention has contributed to cruel, inhuman or degrading treatment. Similarly, in *Paladi v Moldova*, the European Court of Human Rights found that the interruption of the treatment once it had been initiated amounted to a violation of Article 3 (cruel and inhumane treatment).<sup>163</sup>

124. As with the right to life under Article 6, the author submits that any restriction of the right to freedom from cruel and inhuman treatment under Article 7 to circumstances of detention would be an unwarranted restriction of the scope of the right, at odds with the Committee’s jurisprudence and with the broad aim of Article 7. In the author’s submission, denying medical care necessary for the protection of her life as a punitive response to illegal residency in Canada constituted cruel and inhuman treatment whether or not the State Party exercises a discretion to detain illegal immigrants pursuant to its authority under the *Immigration and Refugee Protection Act*.

### C. Article 9(1): Security of Person

125. The author submits that, in line with the findings of the domestic courts, she has also been deprived of her right to security of person by the denial of access to IFHP coverage for vital health care. As noted above, although the Committee has generally applied Article 9 to the administration of justice and restrictions on liberty, it has recognized that the “the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.”<sup>164</sup> In *Gunaratna v Sri Lanka*, the Committee recognized that “Article 9, on its proper interpretation, does not allow the State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction”<sup>165</sup> The author submits that it would not be unreasonable to find that Article 9 also applies in the present case.

126. Physical and mental health has been held by the Committee to be an essential element of ensuring that security of person is safeguarded by the state. The Committee held in *Mukong v Cameroon*, that the provision of food with nutritional value for adequate health and strength is essential for Article 9.<sup>166</sup> Further, the Committee held that Article 9 had been violated in *Arredondo v. Peru* when Arredondo was detained with no access to health care because she had

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[Nigeria \(1998\)](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html) African Commission on Human and Peoples’ Rights Comm. Nos. 137/94, 139/94, 154/86, 161/97 at para 80 online [http://www1.umn.edu/humanrts/africa/comcases/137-94\\_139-94\\_154-96\\_161-97.html](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html); [Amnesty International \(On behalf of Orton and Vera Chirwa\) v Malawi \(1994\)](http://www1.umn.edu/humanrts/africa/comcases/64-92b.html) African Commission on Human and Peoples’ Rights, Comm. Nos. 64/92, 68/92, 78/92 at para 7 online <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html>.

<sup>161</sup> [Cantoral Benavides Case \(Judgment\) Inter-Am Crt. of HR Ser C No. 69 \(18 August 2000\)](http://www1.umn.edu/humanrts/iachr/C/69-ing.html) at para 85 online <http://www1.umn.edu/humanrts/iachr/C/69-ing.html>.

<sup>162</sup> [Caesar v. Trinidad and Tobago \(Judgment\) Inter-Am Crt. of HR Ser. C \(11 March 2005\)](http://www1.umn.edu/humanrts/iachr/C/123-eng.html) at para 50(p) online <http://www1.umn.edu/humanrts/iachr/C/123-eng.html>.

<sup>163</sup> [Paladi v Moldova, Application No. 39806/05 ECHR \(judgment 10 July 2007\)](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2664621-2906501) at para 81, 85 online <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2664621-2906501> - {"itemid":["003-2664621-2906501"]}

<sup>164</sup> [Marcellena and Gumanoy v Philippines, Communication No. 1560/2007](http://www1.umn.edu/humanrts/iachr/C/1560-2007), paras 7.6-7.7.; [Sathasivam v. Sri Lanka, Communication No.1436/2005](http://www1.umn.edu/humanrts/iachr/C/1436-2005) at para 6.4; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, note 96 above, paras 15, 18.

<sup>165</sup> [Dalkadura Arachchige Nimal Silva Gunaratna v. Sri Lanka Communication No. 1432/2005, Views of 17 March 2009](http://www1.umn.edu/humanrts/iachr/C/1432-2005) at para. 8.4.

<sup>166</sup> [Albert Womah Mukong v Cameroon, Communication No. 458/1991](http://www1.umn.edu/humanrts/iachr/C/458-1991), U.N. Doc. CCPR/C/51/D/458/1991at para 9.3.

not been granted authorization for X-rays.<sup>167</sup> In *Madafferi v Australia*, a violation of Article 9 was found to result from the State's failure to monitor Madafferi's mental health while being detained at home.<sup>168</sup>

127. In the present case, the Federal Court agreed that the evidence established a deprivation of the author's right to security of the person under the *Canadian Charter* as a result of her exclusion from the IFHP.<sup>169</sup> The Committee may consider whether the physical and mental effect of the denial to access health care in this case may be found to constitute a violation of that right under Article 9(1) of the ICCPR parallel to the finding of the domestic courts that the right to security of the person guaranteed by section 7 of the *Canadian Charter* was violated. Alternatively, the author relies on the Committee's more expansive approach to the right to life as subsuming the violation of the right to security of the person found by the domestic courts.

128. The submissions made above with respect to the arbitrary and grossly disproportionate nature of a denial of the right to life as a consequence for non-compliance with immigration laws are relied upon by the author in seeking a finding that the violation of her right to security of person under Article 9 of the ICCPR was also arbitrary and unreasonable in her circumstances.

#### **D. Article 26 and Article 2(1): The Exclusion of the Author from the IFHP on the Basis of her Citizenship/Immigration Status Violated her Right to Access Health Care and to be Ensured the Rights to Life and to Security of Person without Discrimination**

129. The author submits that exclusion from IFHP coverage on the basis of her particular "citizenship status" or "immigration status" – that of an undocumented migrant seeking humanitarian and compassionate consideration of an application for permanent resident status -- violates her rights under Articles 2(1) and 26 of the ICCPR. The author submits that the discrimination on the basis of "immigration status" or "citizenship status" – i.e. discrimination against migrants lacking legal residency status in their country of residence – should be recognized as a prohibited ground of discrimination under the ICCPR.

130. The jurisprudence of this Committee has established a freestanding guarantee of equality before the law and equal protection under the law pursuant to Article 26.<sup>170</sup> The Committee has

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<sup>167</sup> [Carolina Teillier Arredondo, on behalf of her mother, María Sybila Arredondo, v Peru](#), Communication No. 688/1996, Views of 14 August 2000 at para 10.3.

<sup>168</sup> [Francesco Madafferi and Anna Maria Immacolata Madafferi v Australia, Communication No. 1011/2001](#), Views of 26 August 2004 at para 8.8.

<sup>169</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 93. The Court recognized that some illegal immigrants who are victims of human trafficking receive IFH program coverage but distinguished those persons as being "often unwittingly illegal immigrants." The Court in this part of its reasons made no mention of "persons under detention and in the custody of the Immigration authorities", who usually are without immigration status or "illegal", and who it had found earlier in its reasons at 49 are eligible for IFHP coverage because they are under the jurisdiction of Immigration authorities. The Court did not consider in its reasons whether once released from detention such persons are still "subject to Immigration jurisdiction" and eligible for coverage even though "illegal", and if not eligible whether it is arbitrary for illegal immigrants to be eligible for coverage under the IFH program while in Immigration detention and custody but not after being released nor, presumably, before being detained.

<sup>170</sup> See, for example [Broeks v Netherlands, Communication No. 172/1984](#), note 100 above; [Zwaan de Vries v Netherlands, Communication No. 182/1984, Views of 9 April 1987](#); [Adam v Czech Republic, Communication No. 586/1994, Views of 23 July 1996](#); [Brinkhof v Netherlands, Communication No. 402/1990, Views of 27 July 1994](#).

also held that the prohibition of discrimination encompasses indirect, as well as direct discrimination.<sup>171</sup> The Committee has clarified that “the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant.”<sup>172</sup> In the present case, however, the author submits not only that she has faced discrimination under Article 26 in relation to access to the IFHP being denied to her because of her immigration/citizenship status but also that the denial of access to health care necessary to life and security has also denied her equal enjoyment of rights guaranteed in Articles 6, 7 and 9 of the ICCPR, as described above. Therefore the discrimination in the present case falls within the scope of both Articles 2(1) and 26.

### *i) Differential Treatment on the Ground of Immigration Status*

131. As noted above, the author was initially denied access to the IFHP because she did not fall into one of four categories of immigrants identified for coverage in a policy guideline adopted by Citizenship and Immigration Canada (CIC): refugee claimants; resettled refugees; persons detained under the *Immigration and Refugee Protection Act* (IRPA); and victims of trafficking in persons.<sup>173</sup> In its review of the immigration officer’s decision, however, the Federal Court found that the decision-maker’s discretion had been fettered by the restriction of eligibility to four categories and that he had failed to consider whether the author may have qualified under the provisions of the Order in Council. The Court concluded, however, that had the decision-maker engaged in the proper assessment, he would have distinguished the author from those who qualified for the IFHP on the basis that “[t]he applicant was in Canada on her own volition and without any legal status.”<sup>174</sup> On the basis of this differentiation, the Court found that the author “did not and would not qualify for IFHP coverage under the Order-in-Council.” The Court exercised its discretion not to set aside the decision the immigration officer’s decision on the basis that the outcome would not have been altered.

132. The Federal Court of Appeal more formally referenced the wording of the OIC in holding that the author was denied coverage under the IFHP “because she did not enter as an applicant for permanent residence, is not a person under immigration jurisdiction, and is not a person for whom the immigration authorities feel responsible”<sup>175</sup> In finding that the denial of coverage and the consequent violation of the right to life and security of the person were justified, the Federal Court of Appeal found that the OIC was meant to provide assistance “to those who lawfully enter Canada and find themselves under the jurisdiction of the immigration authorities, or for whom the immigration authorities feel responsible.” The Federal Court of Appeal agreed with the Federal Court in stating that “there is nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally.”<sup>176</sup>

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<sup>171</sup> See [Derksen v Netherlands, Communication No. 976/2001, Views of 1 April 2004](#); [Bhinder v Canada, Communication No. 208/1986, Views of 9 November 1989](#); [Simunek et al. v Czech Republic, Communication No. 516/1992, Views of 19 July 1995](#); [Althammer v Austria, Communication No. 998/2001, Views of 8 August 2003](#). See also Human Rights Committee, [General Comment No. 18, UN Human Rights Committee \(Thirty-seventh session, 1989\)](#) at para 7.

<sup>172</sup> [General Comment No. 18, UN Human Rights Committee \(Thirty-seventh session, 1989\)](#) at para 12.

<sup>173</sup> [Decision of Craig Shankar dated July 10, 2009](#), note 5 above.

<sup>174</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 62.

<sup>175</sup> [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at para 104.

<sup>176</sup> [Toussaint v Canada \(Attorney General\) \(FC\)](#) note 1 above at para 94 cited with approval in [Toussaint v Canada \(Minister of Citizenship and Immigration\), \(FCA\)](#) note 22 above at para 83

133. The characteristic of the author's circumstances which, in the view of the courts, disqualified her from IFHP coverage was therefore the status of having chosen to remain in Canada as an illegal or undocumented resident. This characteristic of being an illegal or undocumented migrant is referred to herein as the author's immigration or citizenship status.<sup>177</sup>

134. It is submitted that immigration or citizenship status, including undocumented status, should be accepted as a prohibited ground of discrimination under Articles 2(1) and 26, under the category of "other status." Recent commentary from the Committee on Economic, Social and Cultural Rights on the right to non-discrimination has established that "Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."<sup>178</sup> In another general recommendation concerning non-citizens, the Committee on the Elimination of Racial Discrimination has said that State Parties must respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.<sup>179</sup> Furthermore, in a number of periodic reviews for a number of countries, the CERD has recognized the problems associated with discriminating against undocumented migrants, particularly in the area of health.<sup>180</sup>

135. Since these treaties list the same prohibited grounds of discrimination as those listed in Articles 2(1) and 26 of the ICCPR it is submitted that the Committee should similarly recognize that immigration status of undocumented migrants is a prohibited ground of discrimination.

136. Jurisprudence from regional bodies reinforces that of the UN treaty bodies in this respect. The Fundamental Rights Agency (FRA) of the European Union has affirmed that accessing health care should not depend upon an individual's administrative situation. The FRA has affirmed that

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<sup>177</sup> As the Federal Court of Appeal observed in paragraph 98 of its decision, the author "might have been covered by the Order in Council upon her arrival in Canada. Upon entry, she was legally admitted as a visitor. Had she been in desperate need of emergency medical attention at that time and could not otherwise afford it, and if the immigration authorities felt obligated to assist, she would have been covered by the Order in Council." Unlike the Federal Court, however, the Federal Court of Appeal held that attempting to regularize her status by lawfully applying for permanent residence on humanitarian and compassionate grounds could not make the author eligible for coverage under the IFHP. *Toussaint v Canada (Minister of Citizenship and Immigration)*, (FCA) note 22 above at paras 39-40.

<sup>178</sup> [General comment No. 20: Non-discrimination in economic, social and cultural rights \(art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights\)](#), E/C.12/GC/20, UNCESCR, (2 July 2009) at para 30.

<sup>179</sup> [General Recommendation No.30: Discrimination Against Non Citizens: 10/01/2004. Gen. Rec. No. 30.](#) (General Comments), CERD.

<sup>180</sup> For example, in 2006, the CERD Committee recommended that Norway take all necessary measures to ensure the right of non-citizens to an adequate standard of physical and mental health by, inter alia, improving their access to preventive, curative and palliative health services. The Committee was concerned that many municipalities did not provide sufficient protection from disease in health services for asylum-seekers, refugees and persons reunified with their families (CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Norway*, 19 October 2006 CERD/C/NOR/CO/18); In 2005, the Committee remained concerned that migrant workers in Bahrain were not able to enjoy their economic, social and cultural rights. [CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Bahrain*, 14 April 2005 CERD/C/BHR/CO/7]; The Committee recommended, in 2006 that Estonia change its definition of 'minority' under the *Law on Cultural Autonomy of National Minorities*, to include non-citizens and enact comprehensive anti-discrimination legislation in accordance with the provisions of the Convention, in particular in the areas of: housing, health care, social security, and access to public services. [CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Estonia*, 19 October 2006 CERD/C/EST/CO/7].

“Access to necessary healthcare should be made available to irregular migrants on the same basis as for nationals, applying the same fee payment and exemption rules.”<sup>181</sup> Similarly, the Inter-American Court held in its Advisory Opinion OC-18 of September 17, 2003, that nondiscrimination prohibits the denial of human rights on the basis of migratory status. The Court held that any distinctions between migrants and nationals must be “reasonable, objective, proportionate and [must] not harm human rights.”<sup>182</sup> The Court ultimately held that “the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person’s migratory status.”<sup>183</sup>

137. The Human Rights Committee has also sought to ensure that those without legal citizenship status are not deprived of equal enjoyment of rights under the ICCPR. Samoans who did not have citizenship status of any kind in New Zealand were found to have standing to bring a case against that state.<sup>184</sup> The Committee has also admitted a case of a stateless person who was detained indefinitely in Australia after being denied refugee status for involvement with a serious non-political crime.<sup>185</sup> Also, the requirement of citizenship as a prerequisite for compensation was found to be arbitrary and unreasonable in *Junglingova v Czech Republic*.<sup>186</sup>

138. Additionally, in *Mümtaz Karakurt v Austria*, the Committee found a violation when a Turkish citizen with a residence permit in Austria was stripped of his position on his work-council because he was not a national of Austria.<sup>187</sup> Similarly, in *Adam v Czech Republic*, the Committee found that there was a violation of Article 26 when property or loss would only be given if the claimants were Czech citizens.<sup>188</sup>

139. As noted by Tom Clark, withholding normally available treatment for a life-threatening health condition on the basis of citizenship or immigration status of non-citizens should be found to be contrary to Article 26 of the ICCPR.<sup>189</sup> The right to non-discrimination has been deemed to be an autonomous right, and it may be applied to non-discrimination with respect to the right to property and with respect to the right to asylum benefits whether or not the benefits themselves are protected as self-standing rights under the ICCPR.<sup>190</sup> As noted above, Article 26 of the ICCPR

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<sup>181</sup> According to the FRA: “Where irregular migrants are entitled to cost-free treatment under national law, they may still have to satisfy administrative requirements that make it difficult for them to access healthcare in practice, such as the need to prove a fixed residence. Access to necessary healthcare should be made available to irregular migrants on the same basis as for nationals, applying the same fee payment and exemption rules.” European Union Agency for Fundamental Rights, *Factsheet: The fundamental rights of migrants in an irregular situation in the European Union* (2011) Online [http://fra.europa.eu/sites/default/files/fra\\_uploads/1848-FRA-Factsheet-fundamental-rights-irregular-migrants\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1848-FRA-Factsheet-fundamental-rights-irregular-migrants_EN.pdf).

<sup>182</sup> *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, at 119 (Sep. 17, 2003)* online [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-18.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Toala et al v New Zealand, Communication No. 675/1995* note 107 above.

<sup>185</sup> *Danyal Shafiq v Australia, Communication No. 1324/2004* note 109 above.

<sup>186</sup> *Junglingova v Czech Republic, Communication No. 1563/2007* note 110 above.

<sup>187</sup> *Mümtaz Karakurt v Austria, Communication No. 965/2000, Views of 4 April 2002*.

<sup>188</sup> *Adam v Czech Republic, Communication No. 586/1994* U.N. Doc. CCPR/C/57/D/586/1994.

<sup>189</sup> Tom Clark in cooperation with Francois Crepeau, “*Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law*” (1999) *Netherlands Quarterly of Human Rights*, 17:4, 389-410 at 401 online

<sup>190</sup> Alfred De Zayas “Petitions Before The United Nations Treaty Bodies: Focus On The Human Rights Committee's Optional Protocol Procedure” 35-76 at 69 in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2<sup>nd</sup> ed. Eds. G. Alfredsson, J. Grimheden, B.G. Ramcharan and A. De Zayas (Martinus Nijhoff Publishers, 2009).

limits any differentiations in any rights and benefits so as to ensure non-discrimination, including rights protected under the ICESCR for the State Party.<sup>191</sup>

140. The Committee has held that notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the ICCPR.<sup>192</sup> In *Broeks v Netherlands*, the Committee found that Ms Broeks was affected by the differentiation between men and women for unemployment benefits, a victim of violation based on sex under Article 26 of ICCPR. Ms Broeks was entitled to seek as a remedy a striking down of the policy in its general application.<sup>193</sup> In the case *Hendrika S. Vos. V The Netherlands*, the Committee considered whether a denial of a disability benefit represented a violation of Article 26. Although the Committee did not find a violation in that specific case, the fact that the Committee considered the denial of sickness benefits as contrary to Article 26, showed that it did not exclude issues of access to rights protected under the ICESCR, such as the right to social security, from the nondiscrimination protections afforded by the ICCPR.<sup>194</sup>

141. In summary, the author submits that she was subjected to differential treatment with respect to access to health care on the basis of her immigration/citizenship status – that of an illegal or undocumented resident or migrant – which the author submits, is discriminatory differentiation under Article 26. The denial of access on the basis of immigration status denied the equal enjoyment of rights guaranteed in Articles 6, 7 and 9 of the ICCPR on the basis of her immigration status.

142. The Committee has held that “not every distinction constitutes discrimination, in violation of Article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant.”<sup>195</sup>

## ii) Does the Differential Treatment Have a Legitimate Aim?

143. Two different though interrelated aims were accepted by the domestic courts in this case as a legitimate basis for excluding undocumented migrants from access to health care coverage. The first aim was simply to restrict access to health care to those deemed deserving or worthy of receiving it, because they had entered Canada legally to seek residency or were persons for whom the government otherwise “felt responsible” such as those who are victims of trafficking.<sup>196</sup> The Government of Canada asserted before the Federal Court that Canada has the right to make IFHP available “only to those persons who have legal status in this country.”<sup>197</sup> The Federal Court of

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<sup>191</sup> Li Weiwei, “Equality and Non-Discrimination Under International Human Rights Law” Norwegian Centre for Human Rights, Research Notes 03/2004.

<sup>192</sup> *Danning v the Netherlands*, Communication No. 180/1984; *Zwaan de Vries v Netherlands*, Communication No. 182/1984, note 170 above.

<sup>193</sup> *Broeks v Netherlands*, Communication No. 172/1984, note 100 above at 196.

<sup>194</sup> *Hendrika S. Vos. v. the Netherlands*, Communication No. 218/1986, adopted 29 March 1989.

<sup>195</sup> *Haraldsson and Sveinsson v Iceland*, Communication No. 1306/2004, views of 24 October 2007, at para 10.2. See, e.g., *Gonçalves et al. v Portugal*, 1565/2007, Views of 18 March 2010, at para 7.4; *Love et al. v Australia*, Communication No. 983/2001, Views of 25 March 2003, at para 8.2; *Danning v the Netherlands*, Communication No. 180/1984, Views of 9 April 1987, at paras 13, 14; *Adam v Czech Republic*, Communication No. 586/1994, Views of 23 July 1996. See also *General Comment No. 18, UN Human Rights Committee (Thirty-seventh session, 1989)* at paras 12,13.

<sup>196</sup> *Toussaint v Canada (Attorney General) (FC)* note 1 above at para 82.

<sup>197</sup> *Toussaint v Canada (Attorney General)*, (FC) note 1 *Memorandum of Fact and Law of the Respondent* online

Appeal described the policy as making IFHP available “primarily to those persons having legal status in this country.”<sup>198</sup>

144. The author submits that restricting access to health care to those deemed deserving or for whom the government “feels responsible” is not a legitimate aim for the purposes of considering whether the exclusion of a group on the basis of a prohibited ground is justified on objective and reasonable grounds. Differential treatment on a discriminatory ground could almost always be justified on the basis of an aim to restrict the benefit to “deserving” recipients or to those for whom the state “feels responsible” where the assessment of who is deserving of a benefit is informed by the prejudices and stereotypes which the victim of discrimination seeks to challenge. Stigmatization and prejudice against particular groups invariably lead to widespread notions that they are not as deserving of benefits. The expert evidence in this case as well as the affidavit evidence submitted by the author demonstrated widespread false stereotypes and stigma attached to undocumented workers as being underserving of concern or respect, even of their right to life. The author described her experience of these attitudes in her affidavit, as cited by the court:

I am aware that many doctors, receptionists and people in waiting rooms who hear me explain why I have no health coverage and ask for compassion based on my serious circumstances may have negative attitudes about immigrants seeking healthcare in Canada. I feel vulnerable to being treated as an outsider. I feel that administrators, receptionists, other patients and doctors who do not know the details of my circumstances may have negative ideas about people in my situation. They may think that I have set out to ‘take advantage’ of Canada’s healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society but who has become ill and needs healthcare to save my life.

When people are hostile toward me or do not want to allow me to have access to the healthcare I require, I feel that my life and health are devalued because of my immigration status and my disability. This leaves me depressed and anxious about my vulnerable situation and I have to work hard to maintain my dignity and self-esteem.<sup>199</sup>

145. As affirmed in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, the scope of any limitation on a right may not be interpreted so as to jeopardize the essence of the right.<sup>200</sup> The essence of the right to non-discrimination includes the right to be free of treatment that is based on discriminatory prejudice, false stereotypes and stigmatization that deprives individuals of equal concern, dignity and rights. As noted by the UN Special Rapporteur on the Right to Health: “Laws linking immigration control and health systems are particularly damaging as they are a direct barrier to accessing health care, and perpetuate discrimination and stigma rather than promote social inclusion.”<sup>201</sup> To justify

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<http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Respondent's%20memorandum%20of%20fact%20and%20law.pdf> at para 19.

<sup>198</sup> *Toussaint v Canada (Minister of Citizenship and Immigration)*, (FCA) note 22 above at para 3.

<sup>199</sup> *Affidavit of Nell Toussaint sworn on August 23, 2009*, note 46 above, cited in *Toussaint v Canada (Attorney General)* (FC) note 1 above, at para 13.

<sup>200</sup> United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

<sup>201</sup> UN Special Rapporteur on the Right to Health, Anand Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Human Rights Council (Twenty-third session) (15 May, 2013) UN Doc A/HRC/23/41 online

the exclusion of undocumented migrants from health care necessary to life on the basis that the state does not “feel responsible” for members of the excluded group or on the basis that members of the group are not deserving of health care would undermine the universality of human rights and the notion that every individual is worthy of respect and dignity.

146. A second aim of the policy accepted by the domestic courts is deterrence of illegal immigration. While deterrence of unlawful acts would clearly be a legitimate aim in general, the author submits that it should be viewed with some caution in relation to the denial of health care necessary to life in the present case. There is no evidence that the government ever considered whether denying access to health care ought to be utilized as a means to discourage defiance of immigration laws. Neither the government nor the courts considered the evidence as to the effectiveness of denying access to health care as a means of deterrence of illegal immigration. There is no evidence that this measure was assessed in relation to other deterrents authorized under the *Immigration and Refugee Protection Act*, such as detention and removal. Nevertheless, this aim was accepted by the domestic courts as a legitimate purpose on the basis of which the policy could be justified. In the author’s submission, even if the aim of deterrence of illegal immigration is accepted as a legitimate aim, the differential treatment of undocumented migrants for this purpose is not justified on objective and reasonable grounds.

### **iii) Was the Differential Treatment Justified on Objective and Reasonable Grounds?**

147. The evidence in this case is that denying access to health care is not rationally connected to deterrence of illegal immigration, that there are no objective considerations justifying a denial of health care as a means of encouraging compliance with immigration laws and that denial of health care necessary to life is a grossly disproportionate response to illegal immigration. Other rational and more proportionate measures were available to the government.

148. As noted above, the objective, uncontested expert evidence in this case is that people migrate for work rather than for health care. Denying access to health care to undocumented migrants who develop a need for health care only leads to undesirable public health and budgetary consequences.<sup>202</sup> The evidence of Dr. Carballo established that undocumented migrants do not migrate in search of health care, do not abuse health care services and are eager to work and “fit in.”<sup>203</sup> Dr. Carballo found no evidence that illegal migration is reduced by denying migrants access to health care when they become ill. In fact, more often than not, undocumented migrants fail to make use of services when they should. In countries of migration, many undocumented migrants feel as though their options for health care are limited and may try to “live with” illness.<sup>204</sup>

149. As Dr. Carballo testified in his affidavit, undocumented migrants represent a small percentage of all migrants, and denying this vulnerable group access to health care undermines important public policy principles of universal access and respect for human rights. Furthermore, he explained that the denial of access to health care is short-sighted with respect to public health and sustained socio-economic development.<sup>205</sup>

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[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A\\_HRC\\_23\\_41\\_ENG.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC_23_41_ENG.pdf).

<sup>202</sup> Paragraphs 43 – 45 above.

<sup>203</sup> [Affidavit of Manuel Carballo sworn on February 2, 2010](#), note 49 above at para 15.

<sup>204</sup> *Ibid* at para 16.

<sup>205</sup> *Ibid* at paras 45 and 46.

150. In public health, it is understood to be more cost effective to prevent diseases than it is to treat them later. It is also well known that if, and when, health issues occur, an early diagnosis and timely treatment assists in avoiding more complex problems and greater health care costs later.<sup>206</sup>

151. At the time of Ms. Toussaint's applications to the Canadian courts, Dr. Carballo provided evidence of the experience of other countries in providing health care for undocumented migrants. At that time Spain, for example ensured that "free and holistic health care is available to all Spanish citizens and foreign nationals residing in the national territory" and the health care system was financed by general taxes like income tax and regional taxes.<sup>207</sup>

152. In the Netherlands, an insurance-based health care system had been in operation since 2006, and was controlled by the private health insurance companies. From 2009 on, undocumented migrants in the Netherlands were covered under a governmental health fund (CVZ) which provided for the same basic health insurance as what Dutch nationals and regular migrants receive. Dr. Carballo noted that coverage included primary and secondary care, hospitalization, dental care for children under 22 years of age, as well as maternity care and medical transportation.<sup>208</sup> Dr. Carballo noted that Belgium, much like the Netherlands, finances its health care system through a parallel administrative system. The system ensures that undocumented migrants have access to various health care services, such as long-term care.<sup>209</sup>

153. Dr. Carballo noted that France provided undocumented migrants with free access to health care, through the state medical assistance system. In order to be eligible for health care in France, undocumented migrants need only show that they have been in the country for more than three months, and that they do not have the means to pay themselves.<sup>210</sup> Similarly, Dr. Carballo noted that Portugal, like France, required undocumented migrants to demonstrate that they have been in the country for a minimum of ninety days. Once that is shown, if the patient is unable to pay for the treatment, the health facility bears the cost.<sup>211</sup>

154. In Italy, at the time Dr. Carballo's affidavit was completed, undocumented migrants had a guaranteed right to necessary urgent and non-urgent medical assistance, even if it was required for a continued period. Undocumented migrants were entitled to access preventative care and were able to seek medical assistance within both public institutions and those operating with the National-Health-Service.<sup>212</sup>

155. Subsequent to Dr. Carballo's affidavit, as of December 20, 2012, the Italian government entered into an agreement that would implement "good standards" in access to health care for

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<sup>206</sup> *Ibid* at para 18.

<sup>207</sup> *Ibid* at paras 31-34. Since the time of the *Affidavit*, Spain has changed a number of health care policies with respect to migrant workers. See, "Platform for International Cooperation on Undocumented Migrants", *PICUM Bulletin 12 July, 2013* "Health Care – Spain: Municipalities Already Rejected Criminalization of Solidarity in the Criminal Code, online [http://picum.org/en/news/bulletins/41469/#news\\_41416](http://picum.org/en/news/bulletins/41469/#news_41416); also see: Platform for International Cooperation on Undocumented Migrants, *PICUM Bulletin 17 May, 2013* "Health Care – Spain: First Death After the Approval of the Royal Decree-Act that Restricts Healthcare for Irregular Migrants", online [http://picum.org/en/news/bulletins/40483/#news\\_40451](http://picum.org/en/news/bulletins/40483/#news_40451)).

<sup>208</sup> *Ibid* at paras 35-37.

<sup>209</sup> *Ibid* at para 38.

<sup>210</sup> *Ibid* at para 39.

<sup>211</sup> *Ibid* at para 40.

<sup>212</sup> *Ibid* at paras 26-30.

foreign nationals. The agreement (“Guidelines for the Correct Application of Legislation on Health Care to the Foreign Population by the Italian Regions and Autonomous Provinces”), intends to ensure that access to health care for undocumented migrants is applied equally throughout the country. The agreement further clarified that health care professionals are not required to report irregularities to public authorities.<sup>213</sup>

156. Since the time of Dr. Carballo’s affidavit in respect to these matters, other nations have recognized the importance of providing undocumented migrants with access to health care. In Sweden, for example, undocumented migrants have recently been provided with increased access to health care.<sup>214</sup> Likewise, the Finnish government has undertaken to set clear directions to ensure that undocumented migrants receive access to health care services beyond just emergency care.<sup>215</sup>

157. Carin Björngren Cuadra has conducted a study considering how the different health care policies in various European countries relate to the presence of undocumented migrants. From her results, it was determined that the amount of irregular migration is not connected to health care policies.<sup>216</sup> This evidence is consistent with the conclusions of Dr. Carballo that providing health care to undocumented migrants cannot be linked to an influx of illegal migration.

158. There is no fiscal justification for denying healthcare to undocumented migrants. As was stated in a report by the Organization for Economic Cooperation and Development, the fiscal impact of immigration upon host governments is negligible. According to the report, immigrants contribute more in tax and social contributions than the benefits they receive.<sup>217</sup> Although the study did not specifically address illegal immigration, Jean-Christophe Dumont, the official who headed the study, said that in the majority of cases such migrants are net contributors. Often, undocumented migrants pay substantial taxes yet have limited access to services.<sup>218</sup> The OECD study refuted widespread discriminatory perceptions of migrants, including the notion that they take more from services provided by host countries than they contribute.<sup>219</sup>

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<sup>213</sup> Platform for International Cooperation on Undocumented Migrants, *PICUM Bulletin 22 January, 2013* “Health Care – Italy: Agreement Ensuring Inclusive Health for Undocumented Workers”, online [http://picum.org/en/news/bulletins/38519/#cat\\_25446](http://picum.org/en/news/bulletins/38519/#cat_25446); For original reports in Italian, see: <http://www.simmweb.it/index.php?id=384>

<sup>214</sup> Platform for International Cooperation on Undocumented Migrants, *PICUM Bulletin 12 July 2013*, “Sweden, a New Reform Will Grant Access to Health Care for Undocumented Workers” online [http://picum.org/en/news/bulletins/41469/#news\\_41417](http://picum.org/en/news/bulletins/41469/#news_41417); Prior to the amendments being made, Social Affairs Minister Göran Hägglund said that the expected changes to health care would cost “a few hundred million kronor, [and] compared with the total cost of healthcare [in Sweden] that [would be] nothing.” *The Local, Sweden’s News in English* online <http://www.thelocal.se/32372/20110303/>

<sup>215</sup> Platform for International Cooperation on Undocumented Migrants, *PICUM Bulletin 17 May, 2013* “Health Care – Finland: Department of Social Affairs and Health Promises Clear Regulation for Care of Undocumented Patients” online [http://picum.org/en/news/bulletins/40483/#news\\_40450](http://picum.org/en/news/bulletins/40483/#news_40450); For original source, see YLE:

[http://yle.fi/uutiset/valtio\\_lupaa\\_kunnille\\_vihdoin\\_selkeat\\_ohjeet\\_paperittomien\\_hoidosta/6608571](http://yle.fi/uutiset/valtio_lupaa_kunnille_vihdoin_selkeat_ohjeet_paperittomien_hoidosta/6608571)

<sup>216</sup> Björngren Cuadra, Carin. “Right of Access to Health Care for Undocumented Migrants in EU: A Comparative Study of National Policies” *The European Journal of Public Health* 22.2 (2012): 267-271.

<sup>217</sup> OECD, *Newsroom* “[Migration Picking Up But Rising Unemployment Hurting Immigrants](#)” June 13, 2013, online

<http://www.oecd.org/newsroom/migrationpickingupbutrisingunemploymenthurtingimmigrants.htm> ; For Jean-Christophe Dumont’s comments, also see: Jolly, David [Immigration Cost to Countries is Overstated](#), *The New York Times*, June 2013 online

[http://www.nytimes.com/2013/06/14/business/global/immigration-costs-are-overstated-study-finds.html?\\_r=0](http://www.nytimes.com/2013/06/14/business/global/immigration-costs-are-overstated-study-finds.html?_r=0)

<sup>218</sup> *Ibid* note 217.

<sup>219</sup> *Ibid* .

159. Thus, recent studies have validated the evidence of Dr. Carballo filed in the domestic courts by the author in support of her claim, showing that widespread myths about undocumented migrants abusing health care and other public services with economic consequences for other residents are false.

160. As Dr. Carballo's evidence before the Federal Court established, providing preventative care to the author and to other migrants is a reasonable, fiscally responsible measure, reducing long term emergency and public health costs associated with undiagnosed or untreated illness. Dr. Carballo notes that "prevention, early diagnosis and treatment of illness in this vulnerable population will provide savings in the longer term, both in terms of relieving suffering and stress and reducing health care costs associated with longer term health problems in a population without which many local economies would quickly flounder."<sup>220</sup>

#### **iv) Was the Measure Proportionate?**

161. The author submits that even if there were evidence that denying access to health care discouraged illegal immigration, when weighing the value of discouraging illegal immigration activity against the harm of ill health, reduced longevity and risk to life that faced the author and others in her position, denying health care necessary to life to those who enter or remain in Canada without legal status is grossly disproportionate to the professed aim of encouraging compliance with Canada's immigration laws. As noted above, in relation to the allegation of cruel and inhuman treatment or punishment, it is a long established principle of international human rights and humanitarian law that health care necessary for life should not be denied to those requiring it as a means of discouraging even the most serious forms of crime or illegal activity.

162. As noted by the Global Migration Group on the Human Rights of Migrants:

Too often, States have addressed irregular migration solely through the lens of sovereignty, border security or law enforcement, sometimes driven by hostile domestic constituencies. Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the "obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security."<sup>221</sup>

163. The author submits that existing penalties under the *Immigration and Refugee Protection Act* for entering or remaining in Canada without legal documentation and for assisting individuals or groups to enter Canada illegally act as a sufficient deterrence to discourage illegal immigration.<sup>222</sup> Adding to these penalties the denial of health care necessary to life of those unfortunate enough to become ill is grossly disproportionate to the problem being addressed.

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<sup>220</sup> Affidavit of Manuel Carballo, note 49 above, at para 46.

<sup>221</sup> [Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation \(Geneva, September, 2010\)](http://www.globalmigrationgroup.org/uploads/news/GMG%20Joint%20Statement%20Adopted%20030%20Sept%202010.pdf) online  
<http://www.globalmigrationgroup.org/uploads/news/GMG%20Joint%20Statement%20Adopted%20030%20Sept%202010.pdf>

<sup>222</sup> [IRPA](#) above note 6 s. 117.

### **E. Article 2(3)(a): The Author Has Been Denied the Right to an Effective Remedy**

164. The author submits that in the present case, there was ample scope for the interpretation and application of domestic law so as to have provided her with access to the IFHP. As noted above, the immigration officer who denied her IFHP coverage was obliged under domestic law to interpret and apply the Order-in-Council in a manner that was in accordance with international human rights values as embodied in ratified human rights treaties, including the ICCPR and with the rights to life, security of the person and non-discrimination under the *Canadian Charter*. His failure to do so denied the author access to health care necessary for the protection of her life and security on the basis of her immigration or citizenship status.

165. Subsequent to the immigration officer's denial of access to the IHFP, there was ample scope within the proper interpretation and application of domestic law, as described above, including the right to life, security of the person and the right to non-discrimination as guaranteed under the *Canadian Charter of Rights and Freedoms*, for the author to have been granted an effective remedy by the Federal Court and, failing this, by the Federal Court of Appeal.

166. The Committee has made it clear in General Comment No. 31 and in jurisprudence that the obligations of the State Party extend to the independent judicial arm of government.<sup>223</sup> Covenant obligations in general and Article 2 obligations in particular are binding on the judicial branch as well as other branches of government. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.<sup>224</sup>

167. The ICCPR is not directly enforceable by domestic courts in Canada. Effective remedies to violations of the ICCPR fundamentally rely on the courts interpreting domestic law in a manner that is consistent with the ICCPR. The immigration officer who denied IFHP coverage to the author, and the courts considering her application for judicial review of this decision, failed to interpret and apply the Order-in-Council consistently with the ICCPR. In particular the officer and the courts failed to interpret the phrase "anyone under immigration jurisdiction or for whom immigration authorities feel responsible" in a manner that is consistent with the responsibility of the State Party under the ICCPR to ensure the right to life for anyone under its jurisdiction.

168. Similarly, effective domestic remedies to violations of the right to life, to security of person and the right to non-discrimination as guaranteed under the ICCPR rely on domestic courts in Canada interpreting and applying the rights to life, to security of the person and to non-discrimination, and limitations to these rights under the *Canadian Charter*, in a manner that is consistent with the ICCPR. As noted above, the Supreme Court of Canada has given direction that courts should, wherever possible, adopt such interpretations. In the author's case, the Federal

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<sup>223</sup> Human Rights Committee, [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), note 96 above; [Anthony Fernando v Sri Lanka, Communication No. 1189/2003 U.N. Doc. CCPR/C/83/D/1189/2003 \(2005\)](#) note 30 above.

<sup>224</sup> Human Rights Committee, [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), note 96 above.

Court and the Federal Court of Appeal failed to fulfill their responsibility to interpret domestic law in this fashion. In so doing, they denied the author access to an effective remedy.

169. In the present case, the state argued before the courts that ensuring access to health care necessary for life and security for undocumented migrants would cause “a steady influx of illegal migration to Canada by those seeking healthcare.”<sup>225</sup> The author filed evidence to contest the argument of the state in this respect. The Respondent did not cross-examine the expert witness and filed no contrary evidence. Without commenting on the expert evidence the courts simply accepted the government’s submissions based on common stereotypes, myths and unproven speculation that undocumented migrants would flock to Canada as a “health care safe haven” if access to health care under the IFHP were not restricted to legal immigrants.

170. These false stereotypes of migrants also informed the characterization of the author herself before the court. For example, counsel for the Government of Canada falsely described the author’s legitimate attempts to secure legal residency status in Canada, which on the uncontested evidence before the Court had been initiated on the suggestion of an employer who wished to hire her full time, as an attempt to “gain access to the Canadian healthcare system.”<sup>226</sup> Her claim was thus characterized by the Government of Canada as demanding for undocumented migrants “free and unlimited full access to Canada’s healthcare system when they require it, because it is convenient and in many cases preferable to the healthcare available to them in their own country.”<sup>227</sup> The characterization of the author’s claim to health care as a matter of “convenience” when the court had found that her life was at risk is symptomatic of the way in which the author’s dignity and equal respect were denied by decisions based on stereotype and myth rather than on evidence. There was no evidence before the court that health care in Canada was preferable to that available in the author’s country of origin and it was clear that this had played no part in her decision to remain in Canada to work. The author’s claim was in fact subject to restrictions within the IFHP to those immigrants who were unable to afford to pay for their own health care, and addressed the denial of healthcare that was necessary for the protection of her life, not for “convenience.” Nevertheless, common demeaning stereotypes suggesting that undocumented migrants are simply out to take advantage of free services in their destination countries were relied upon by the respondent government and largely accepted by the courts without being tested against reliable evidence. These stereotypes formed the basis for the courts’ finding that the deprivation of the right to life and the differential treatment of undocumented migrants were justified.

171. As noted above, under section 7 of the *Canadian Charter*, a person may be deprived of the right to life only where such deprivation is found by the courts to be in accordance with “principles of fundamental justice.” The Federal Court and the Federal Court of Appeal found the violation of the right to life of the author in this case to be in accordance with principles of fundamental justice because the courts considered the violation of the right to life to be a reasonable means for the State Party to discourage illegal immigration. The author submits that the courts’ interpretation of “fundamental justice” was inconsistent with the ICCPR and therefore incompatible with the values underlying the *Canadian Charter*.

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<sup>225</sup> [Memorandum of Fact and Law of the Respondent](#) note 197 above at para 57.

<sup>226</sup> *Ibid* at para 6.

<sup>227</sup> *Ibid* at para 37.

172. In other cases, principles of fundamental justice under section 7 of the *Canadian Charter* have been interpreted consistently with relevant international human rights law and in a manner which is in accordance with the preeminent status of the right to life under international human rights law. In the author's submission, existing domestic jurisprudence on principles of fundamental justice could have been applied by the domestic courts in her case so as to achieve consistency with Canada's obligations under the ICCPR. This was made evident in a recent case before the Supreme Court of Canada dealing with the right to life of intravenous drug users.

173. In *Canada (Attorney General) v PHS Community Services Society* the Government of Canada argued that it was not required to permit safe injection sites as health care to protect the right to life of intravenous drug users by section 7 of the *Canadian Charter*. As in the author's case, the Government argued that to provide this kind of health care for intravenous drug users "absolves drug users of responsibility for the choices they make."<sup>228</sup> In that case, however, the Supreme Court took note of reliable evidence showing that, contrary to prevalent myths, provision of safe injection facilities did not, in fact, lead to increased illegal drug use.<sup>229</sup> Moreover, the Court found that even if there were benefits to the government's denial of the service in terms of the broader aims of discouraging illegal drug use, the deprivation of the right to life was "grossly disproportionate: the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises."<sup>230</sup> The Court thus found that the denial of the health care at issue was "arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice."<sup>231</sup>

174. The Federal Court of Canada and the Federal Court of Appeal considering the author's case could similarly have assessed the expert evidence before it as to the effectiveness of denying health care as a means of discouraging illegal immigration. These courts could have recognized the disproportionality between any purported benefits from such deterrence and the deprivation of the right to life through the denial of health care as did the Supreme Court of Canada in the Insite case. An effective remedy was therefore available to the courts under domestic law. The courts' failure to interpret and apply domestic law consistently with the ICCPR denied the author an effective remedy and allowed the violation of her rights to continue.

175. The author is seeking a finding with respect to Article 2(3) of the ICCPR that the Government of Canada as well as Canada's federal courts exercised their authority in matters of interpretation, administration and application of domestic law in a manner that was inconsistent with the ICCPR and thereby denied the author an effective remedy.

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<sup>228</sup> *Ibid*, Appellants' Factum at para 97 online [http://www.scc-csc.gc.ca/factums-memoires/33556/FM010\\_Appellants\\_Attorney-General-of-Canada-and-Minister-of-Health-for-Canada.pdf](http://www.scc-csc.gc.ca/factums-memoires/33556/FM010_Appellants_Attorney-General-of-Canada-and-Minister-of-Health-for-Canada.pdf)

<sup>229</sup> *Canada (Attorney General) v PHS Community Services Society*, note 79 above at para 28.

<sup>230</sup> *Ibid* at para 136.

<sup>231</sup> *Ibid* at para 127.

## VI. REMEDY SOUGHT

176. The author seeks that the State Party ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP coverage for health care necessary for the protection of their rights to life and security of person, without discrimination on the ground of immigration or citizenship status. The author also requests that the Committee recommend compensation for the severe psychological stress, indignity, and exposure to risk to life and to long term negative health consequences she suffered as a result of the violation of her rights.

Date/place: December 28, 2013 at Toronto, Ontario, Canada

Signature of author:

A handwritten signature in blue ink that reads "Nell Toussaint". The signature is written in a cursive style with a large initial "N".

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Nell Toussaint

## VII. SUPPORTING DOCUMENTS

<i>Annex 1</i>	Authorization Form
<i>Annex 2</i>	<a href="#">Letter from Macdonald Scott applying for IFHP Coverage for Nell Toussaint (May 6, 2009)</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Application%20Letter%20for%20IFHP.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Application%20Letter%20for%20IFHP.pdf</a> .
<i>Annex 3</i>	<a href="#">Order-in-Council 1957-11/848 June 20, 1957</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Order-in-Council%20P.C.%20157-11%20848,%20effective%20June%2020,%201957.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Order-in-Council%20P.C.%20157-11%20848,%20effective%20June%2020,%201957.pdf</a> .
<i>Annex 4</i>	<a href="#">Decision of Craig Shankar dated July 10, 2009</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Decision%20Letter%20re%20Application%20for%20IFHP.pdf</a> .
<i>Annex 5</i>	<a href="#">Report of Dr. Gordon H. Guyatt August 21, 2009</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Exhibit%20A%20E%2080%93%20Report%20of%20Dr.%20Gordon%20H.%20Guyatt%20August%2021,%202009.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Exhibit%20A%20E%2080%93%20Report%20of%20Dr.%20Gordon%20H.%20Guyatt%20August%2021,%202009.pdf</a>
<i>Annex 6</i>	<a href="#">Affidavit of Stephen W. Hwang sworn August 25, 2009</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Stephen%20W.%20Hwang%20sworn%20August%2025,%202009.pdf">www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Stephen%20W.%20Hwang%20sworn%20August%2025,%202009.pdf</a>
<i>Annex 7</i>	<a href="#">Order Respecting the Interim Federal Health Program, 2012, SI/2012-26</a> , online <a href="http://canlii.ca/t/5212v">http://canlii.ca/t/5212v</a> .
<i>Annex 8</i>	Citizenship and Immigration Canada, <a href="#">Designated Countries of Origin</a> (17 June, 2013), online <a href="http://www.cic.gc.ca/english/refugees/reform-safe.asp">http://www.cic.gc.ca/english/refugees/reform-safe.asp</a> .
<i>Annex 9</i>	Government of Canada, Citizenship and Immigration Canada, <a href="#">Information Sheet for Interim Federal Health Program Beneficiaries</a> , online <a href="http://www.cic.gc.ca/english/refugees/outside/ifhp-info-sheet.asp">http://www.cic.gc.ca/english/refugees/outside/ifhp-info-sheet.asp</a> .
<i>Annex 10</i>	<a href="#">Affidavit of Nell Toussaint sworn on August 23, 2009</a> , online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint.pdf</a> .
<i>Annex 11</i>	<a href="#">Supplementary Affidavit of Nell Toussaint sworn January 3, 2010</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint%20sworn%20January%203,%202010%20in%20Imm-3761-09.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint%20sworn%20January%203,%202010%20in%20Imm-3761-09.pdf</a> .
<i>Annex 12</i>	<a href="#">Letter from Ministry of Health and Long Term Care to Macdonald Scott, March 11, 2013</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/OHIP%20confirm.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/OHIP%20confirm.pdf</a> .
<i>Annex 13</i>	<a href="#">Affidavit of Ilene Hyman sworn August 25, 2009</a> online <a href="http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Ilene%20Hyman%20sworn%20August%2025,%202009.pdf">http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Ilene%20Hyman%20sworn%20August%2025,%202009.pdf</a> .
<i>Annex 14</i>	<a href="#">Affidavit of Manuel Carballo sworn on February 2, 2010</a> online <a href="http://www.socialrights.ca/documents/Carballo%20AFFADAVIT%20final.pdf">http://www.socialrights.ca/documents/Carballo%20AFFADAVIT%20final.pdf</a> .
<i>Annex 15</i>	<i>Toussaint v Canada (Attorney General)</i> , (FC), ( <a href="#">Application for Reconsideration - Applicant's Written Representations in Support of Motion</a> ).
<i>Annex 16</i>	<a href="#">Toussaint v Canada (Minister of Citizenship and Immigration) (FCA) (Memorandum of Fact and Law of the Intervenor, The Canadian Civil Liberties Association)</a> online <a href="http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Cdn%20Civil%20Liberties%20Assn%20Intervener%20Memorandum.pdf">http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Cdn%20Civil%20Liberties%20Assn%20Intervener%20Memorandum.pdf</a> .
<i>Annex 17</i>	Author's <a href="#">Memorandum of Argument for Leave to the Supreme Court</a> , online <a href="http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Applicants%20memorandum%20of%20argument%20for%20leave%20SCC.pdf">http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Applicants%20memorandum%20of%20argument%20for%20leave%20SCC.pdf</a>
<i>Annex 18</i>	<a href="#">Applicant's Memorandum of Argument</a> (Federal Court) online <a href="http://www.socialrights.ca/documents/Toussaint%20M%20o%20A.pdf">http://www.socialrights.ca/documents/Toussaint%20M%20o%20A.pdf</a> .

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Annex 20	<a href="http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf">Letter from Craig Mokhiber, Office of the High Commissioner on Human Rights</a> , September 21, 2011 online <a href="http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf">http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf</a> .
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AUTHORIZATION OF NELL TOUSSAINT

I, Nell Toussaint, authorize Andrew Dekany and Bruce Porter to represent me in filing a petition to the United Nations Human Rights Committee, alleging violations of my rights under the International Covenant on Civil and Political Rights by Canada, arising out of the denial of coverage for health care under the Interim Federal Health Program.

In the event that I, Nell Toussaint, should be deceased prior to the resolution of the communication, I designate my mother, Ann Toussaint, to file and pursue a communication on my behalf, represented by Messrs. Dekany and Porter.

Dated at Toronto, Ontario, Canada on November 27, 2013

*Nell Toussaint*  
.....

Nell Toussaint

*Barna Mihaly Robert*  
.....

Barna Mihaly Robert

(Witness)