Follow-up to the Committee's Views in *Toussaint v Canada*, Communication No. 2348/2014: Complainant's Comments on the State Party's Observations

Thank you for the opportunity to make submissions in response to Canada's updated follow-up observations with respect to the Committee's Views in the above communication.

As we have previously informed the Committee, the author tragically died on January 9, 2023 and her mother, Ms Ann Toussaint, has requested to be recognized by the Human Rights Committee as the complainant for the purposes of follow-up to the Views. These submissions are therefore made on behalf of Ms Ann Toussaint.

1. Overview

The complainant urges the Committee not to accede to Canada's request to close the file with respect to follow-up and implementation of the Views in this case. Contrary to Canada's report, the follow-up to the Views remains ongoing and is by no means resolved. As will be described below, ongoing follow-up includes an action in the Ontario Superior Court of Justice, in which the court is considering whether Canada's refusal to implement the Committee's Views may be inconsistent with the principle of good faith and other obligations under domestic law. The action is subject to mandatory mediation, during which Canada will be required to reconsider its decision not to implement the Views. The Committee's continued attention to and engagement with follow-up to its Views will be critically important to these ongoing processes.

Moreover, Canada's suggestion that the file simply be closed ignores the urgent matter of the continued violations of the right to life of irregular migrants in need of essential health care in Canada. In the complainant's submission, the plight of thousands of irregular migrants whose lives continue to be placed at risk because of Canada's disagreement with the Committee's Views demands the Committee's ongoing engagement and concern.

The ongoing systemic violation of the rights of those in similar circumstances to hers was the focus of Nell Toussaint's legal claims before domestic courts and of her subsequent communication filed with the Committee. Ann Toussaint is honouring her daughter's commitment to ensuring that what happened to her daughter not continue, affecting thousands of others. She is supported in pursuing this goal by a wide range of civil society organizations, human rights experts and migrants' rights groups, both in Canada and internationally. For the complainant and for those affected by ongoing violations of the right to life, what Canada refers to as a "file" will remain open until the Committee's Views are fully implemented and the rights to life and non-discrimination of migrants in Canada are recognized and protected in law and policy.

2. The Survivability of the Obligation to Ensure Effective Remedies

Treaty bodies, including the Human Rights Committee, have recognized that where a victim is deceased, a family member may be recognized as the author or complainant. Where a complainant acting for a victim has died, another family member has been recognized for the purposes of continuing the communication. The animating principle has been that human rights violations should not remain unremedied because of

the death of a victim. Human rights treaty bodies have therefore recognized that remedies may be provided to complainants who were not themselves victims. In *B.N. and S.R.* v. *Burundi*, the Committee Against Torture recognized that where an individual who is bringing a petition forward dies during the Committee's consideration of the petition, another person may be authorized to proceed with the petition[1] and may be awarded a remedy, including compensation.[2]

Regional jurisprudence supports the survivability of claims to both compensatory and systemic remedies of non-repetition after the death of a victim. In *X* v. *UK* the European Court of Human Rights accepted that in principle "just satisfaction vested in a deceased person may survive for the benefit of his estate…at least in respect of material damage and costs."[3,4] The Inter-American Court of Human Rights [ICtHR] has affirmed that compensation owed to deceased victims can be claimed by their heirs or estate. In *Aloeboetoe et al* v. *Suriname* the ICtHR held that the damages suffered by the victims up to the time of their death entitled the victims' heirs to compensation. "That right to compensation is transmitted to their heirs by succession."[5]

The UN Human Rights Committee has emphasized that victims have a right not only to compensation but also to a systemic remedy to ensure the non-repetition of violations. The remedy of non-repetition is particularly important in the present case. Accordingly, Ann Toussaint seeks recognition from the Committee as the complainant for the purposes of follow-up to both elements of the required remedy, the right to appropriate compensation and the right to all necessary measures to ensure the non-repetition of the violation of her daughter's rights to life and non-discrimination.

3. Canada's Apparent Misunderstanding of its Good Faith Obligations

Canada's report is based on what appears to be a serious misunderstanding of the obligation of good faith as it applies to State Parties to the Optional Protocol to the ICCPR (OP-ICCPR) and to the obligation to ensure access to effective remedies in follow-up to the Committee's Views. In paragraph 4 of its report, Canada states that it has considered the Committee's views "in good faith" but cannot agree with the Committee's reasoning or interpretation of articles 6 and 26 of the ICCPR and therefore refuses to take measures to give effect to the Views.

This apparent misunderstanding of good faith obligations has been evident in Canada's response to follow-up measures initiated by the victim and by civil society organizations. Canada has consistently argued that because it considers the Committee's Views to be non-binding, it is free to disagree with the Committee's interpretation and on this basis may, "in good faith", continue to deny access to essential health care to irregular migrants. When Canada made this argument before the Ontario Superior Court, the judge asked counsel for the Attorney General of Canada for clarification as to whether Canada's position is that

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[1] *B.N. and S.R.* v. *Burundi*, UN Human Rights Committee Communication No. 858/2018, CAT/C/71/D/858/2018 (2021), at para 1.2.
[2] *Ibid* at para 6.11, 9.
[3] *X* v. *United Kingdom* (1982), 55 ECHR (Ser A) 19, at para 7 ["*X* v. *UK*"].
[4] *Ibid* at para 12.
[5] Inter-American Court of Human Rights, *Aloeboetoe et al.* v. *Suriname*, Judgment of September 10, 1993 (Reparations and Costs), at para 54.

because the Views are not binding, Canada may refuse to implement them for any reason whatsoever and that there is no reviewable standard that must be met. Counsel for the Attorney General indicated that this is Canada's understanding.

It would be helpful, therefore, if the Committee could clarify for Canada whether the Committee considers that a refusal to implement its Views because of a disagreement about the correct interpretation of the provisions of the ICCPR meets the standard of good faith. In the complainant's submission, it does not. As Martin Scheinin has noted, to "simply replace the Committee's position with its own interpretation" is inconsistent with the nature of the adjudicative procedure to which States Parties to the OP-ICCPR have acceded, and with the recognition of the competence of the Committee to consider individual communications.[6]

4. Clarification of the Roles of Different Branches of Government

It would also be helpful for the Committee to follow-up with Canada regarding the roles of different branches of government with regard to the interpretation of Canada's obligations under international human rights treaties. After the executive branch reported to the Human Rights Committee that it is unable to agree with the Committee's findings, Nell Toussaint sought a judicial review of the executive's decision not to give effect to the Views. Canada sought to have this action dismissed, arguing that the decision of the executive branch is essentially immune from judicial scrutiny or review. The Attorney General stated that: "The views of the UNHRC are not binding in international law or domestic law. Canada is within its rights to disagree with the Committee's views, and to choose not to implement the Committee's recommendations."[7]

In the complainant's submission, it is important for the executive branch, which reports to and communicates with the Committee on behalf of all branches and parts of government, to be clear about which branch of government is "unable to agree with the Committee's interpretation of the Covenant." At this point, it appears to be only the federal executive branch that has made that determination. Yet, as the international human rights scholar, Gib Van Ert has explained: "Canadian law recognizes no doctrine by which courts defer to governmental interpretations of international legal questions, including the meaning of treaties. Rather, Canadian courts appear to regard international legal questions as just that—legal questions for determination by courts."[8]

It is puzzling, therefore, that the Government of Canada would seek to prevent the courts from considering the nature of Canada's obligations under the ICCPR and insist that its own interpretation of the ICCPR cannot be reviewed by domestic courts. Canadian courts routinely consider the Committee's Views to

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[6] Martin Scheinin, "The Work of the Human Rights Committee" in Raija Hanski & Martin Scheinin, *Leading Cases of the Human Rights Committee*, 2nd ed (Turku: Abo Akademi University, 2007) at 23.
[7] Factum of the Attorney General of Canada, *Toussaint* v. *Canada* OSCJ CV-20-00649404-0000, at para 70.
[8] Gib Van Ert "Dubious Dualism: The Reception of International Law in Canada" *Valparaiso University Law Review* Volume 44 Number 3 Spring 2010 pp.927-934, at 930; S. Beaulac and J.H. Currie, 'Canada' in D. Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (OUP 2011) 132, cited in Julian Arato,. "Deference to the Executive: The US Debate in Global Perspective" in Helmut Philipp Aust & Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts*., Oxford University Press, 2016) p. 206.

assist in understanding Canada's obligations under international law and commensurate obligations under the *Canadian Charter of Rights and Freedoms*. It would be helpful, therefore, if Canada could clarify the respective roles of the different branches of government in considering the correctness of the Committee's Views.

5. Follow-up Measures in Domestic Courts

Canada's report on follow-up to the Views omits important information about follow-up to the Views in Canadian courts. This is a serious omission, since the judicial branch plays an important role in ensuring compliance with Canada's obligation to ensure effective remedies to violations of the ICCPR and may therefore play a central role in ensuring effective follow-up to the Committee's Views.

Canada has informed the Committee in periodic reports that within Canada's dualist system of law, if Covenant provisions have not been directly incorporated into domestic law, access to effective remedies for violations of Covenant rights is ensured by courts interpreting and applying Canadian law and policy consistently with the requirements of the ICCPR.[9] Canada has noted that the *Canadian Charter of Rights and Freedoms* [the *Charter*] is particularly important in this regard because it contains most of the rights in the ICCPR, including the rights to life and non-discrimination at issue in the follow-up to the Committee's Views in this case. The Supreme Court has affirmed on multiple occasions that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[10]

The Committee's jurisprudence has been considered "persuasive authority" for the interpretation of Canada's obligations under the *ICCPR* and therefore, under the *Charter*.[11] The Supreme Court of Canada has affirmed that "similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies …"[12] It is critical, therefore, that subsequent to the issuance of Views, victims have access to Canadian courts to remedies under domestic law, interpreted in light of the Views.

That is precisely what Nell Toussaint sought in the present case. She initiated a claim before the Ontario Superior Court of Justice asking the court to consider, in light of the Committee's Views, the scope of the rights to life and non-discrimination of people with irregular migration status under the *Charter*. She also argued that the obligation to perform international treaty obligations in good faith is customary law, *jus cogens*, and a universally recognized general principle of international law that is justiciable in Canadian courts. She sought a determination by the Court as to whether the executive's refusal to implement the Views met this standard.[13]

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[9] CCPR/C/51/Add.1 3 November 1989 paras 2 – 5; CCPR/C/103/Add.5 paras 8 – 15
[10] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at p. 1056.
[11] See, for example, *Quebec (Attorney General)* v. *9147-0732 Québec Inc*., 2020 SCC 32; *Nevsun Resources Ltd.* v. *Araya*, 2020 .CC 5; *R.* v. *Poulin*, 2019 SCC 47.
[12] *Quebec (Attorney General)* v. *9147-0732 Québec Inc.*, 2020 SCC 32 at para. 30, citing Dickson C.J. in dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 58.
[13] *Toussaint* v. *Canada (Attorney General)*, 2022 ONSC 4747, 17 August 2022.

The issues raised by Nell Toussaint's claim would allow the Canadian courts to consider what follow-up measures to the Views may be required under Canadian law. Rather than allowing the claim to proceed to trial and adjudication, however, the Attorney General of Canada moved to have the claim struck. The government's aggressive litigation strategy was described by the Superior Court of Justice as a "land, sea, air, submarine, and celestial procedural attack on Ms Toussaint's pleadings … ."[14] The Court found that Canada "pejoratively mischaracterizes Ms. Toussaint's human rights claim|, … as a right to receive free health care anywhere in the world, regardless of one's lack of status." The court found that this mischaracterization "reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system." Although the Ontario Superior Court eventually dismissed Canada's Motion to Strike, so that the action may proceed to mandatory mediation and a trial on the evidence, Nell Toussaint's tragic death means that she was, in effect, denied access to justice and an effective remedy during her lifetime.

UN treaty bodies have raised repeated concerns about litigation strategies advanced by governments in Canada that are incompatible with the obligation to ensure access to justice and effective remedies to violations of international human rights.[15] While recognizing that the Canadian legal system is an adversarial system, they have emphasized that litigation strategies should be consistent with Canada's obligation to ensure that victims have access to justice and that courts are able to consider the effect of international human rights on the interpretation of the *Charter* and other domestic law. Domestic courts must be afforded the opportunity to give due consideration to the Committee's Views and to victims' claims to effective remedies. Any clarification that the Committee could provide with respect to those obligations would be helpful in the ongoing follow-up to the Views. C

All of which is respectfully submitted by

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[14] *Ibid*, at para 11.
[15] See, for example, CESCR, Concluding Observations on Canada, E/C.12/CAN/CO/6 (23 March 2016) at para 9.