Comments on the observations of Canada

Toussaint v. *Canada*

Communication No 2348/2014

Human Rights Committee

Submitted by Andrew Dekany and Bruce Porter

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TO: The Secretariat of the United Nations human rights treaty bodies

Re: Follow-up procedures concerning communication No. 2348/2014

We have the honour to respond to the Secretariat's request for comments dated 8 September 2026 as follows:

A. Procedural update and request to recognize substitute complainants

1. As previously reported to the Committee in the complainant's Letter to the Co-Rapporteur on Follow-up to Views, 20 February 2023, Nell Toussaint tragically died on 9 January 2023.[1] In that letter, Ann Toussaint, the author's mother, requested recognition as the substitute complainant for the purposes of follow-up to the Views, with Andrew Dekany and Bruce Porter as her authorized representatives.[2] The Committee has not yet responded to that request.

2. Sadly, we report that Ann Toussaint died on 25 August 2026. Two of Ann's children, Corlisha Castle-Vanterpool and her brother Jeremy Ferdinand, the author's siblings, now request to be recognized as the substitute complainants, with Andrew Dekany and Bruce Porter as their representatives in that capacity. Their written authorization is attached as Annex 1.

B. Canada's observations

3. Canada's observations of 9 September 2026 identify two central reasons for its ongoing refusal to implement the Committee's Views in this case, reaffirming the reasons communicated in Canada's response to the views in 2019.[3] First, it disagrees with the Committee's interpretation of obligations under articles 6 and 26 to include positive obligations to provide access to publicly funded health care for irregular migrants when there is a risk to life.[4] Second, it argues that it has acted in good faith by duly considering the Committee's Views, concluding that it does not agree with them and on that basis taking no further measures to implement them.[5]

4. Canada also argues in its observations that the Committee should refrain from issuing any commentary on issues arising from follow-up which could influence ongoing legal proceedings. It argues that the Committee should "allow states to manage their own legal systems without external influence" and that by requesting follow-up commentary from the Committee, the substitute complainant and the joint third parties Amnesty International

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[1] *Letter to the Co-Rapporteur on Follow-up to Views*, 20 February 2023, pp 2–3.

[2] Ibid.

[3] *Observations of the Government of Canada*, 9 September 2026, paras 4–7; *Response of the Government of Canada to the Committee's Views*, 29 January 2019.

[4] *Response of the Government of Canada to the Committee's Views*, 29 January 2019 paras 16–28.

[5] *Observations of the Government of Canada*, 9 September 2026, paras 4–7.

Canada and ESCR-Net - International Network for Economic, Social and Cultural Rights were improperly trying to "use the follow-up process to communications to assist them in ongoing domestic legal proceedings" without having exhausted domestic remedies as required in Article 5(2)(b) of the Optional Protocol.[6]

C. Comments on Canada's observations

i) The basis of Canada's disagreement with the Views has been called into question by developments in domestic courts and under international law

a) Implementation and follow-up engages the State party as a whole, including the judicial branch

5. Follow-up to the Views should not be restricted to reporting on the position taken by the federal executive but should consider the obligations of the State Party as a whole. General Comment No. 31 expressly distinguishes the executive representing the State internationally from the State itself whose responsibility encompasses every branch, including the judicial branch.[7]

6. As the Committee explains in General Comment 31, domestic courts play a central role in ensuring the State Party's compliance with the ICCPR.[8] In Canada, the executive's representative role has always included providing information to the Committee and engaging in dialogue about developments within the independent judicial branch relevant to ensuring access to effective legal remedies, as described in Canada's Core Document.[9]

7. This distinction is particularly important in the present case, where the central issue impeding implementation of the Views relates to the legal interpretation of Articles 6 and 26 of the Covenant and the standard of good faith under international law. As pointed out in the complainant's 2023 comments, in the Canadian system the federal executive exercises the Crown's prerogative power to sign and ratify treaties but the judicial branch has the authority to interpret and apply international law as it applies domestically.[10] As explained by international law scholar Gib Van Ert, "Canadian courts appear to regard international legal questions as just that—legal questions for determination by courts."[11]

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[6] *Observations of the Government of Canada*, 9 September 2026, paras 10–14.

[7] *General Comment No 31*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 4.

[8] Ibid; *Complainant's Comments on the State Party's Observations*, 23 March 2023, pp 3–4.

[9] Canada's Core Document UN Doc HRI/CORE/CAN/2019, paras 73–76; 88, 135–145, 167.

[10] Complainants Comments on the State Party's Observations, 2023 at p 3; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC), paras 20–22.

[11] 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.

8. The complainant therefore draws the Committee's attention to the following important developments in Canadian courts that have occurred since Canada's 2019 response to the Views. These indicate that the position communicated to the Committee on behalf of Canada in 2019 regarding the Committee's interpretation of the rights to life and non-discrimination has not been endorsed by Canadian courts and should be considered open to reconsideration in follow-up.

Developments concerning the right to life

9. Canada's disagreement with the Committee's interpretation of the right to life in the Views referenced Canada's previous disagreement with the Committee's General Comment No. 36, in which Canada stated that did not agree that the right to life should encompass socio-economic entitlements guaranteed under the ICESCR and did not agree that right to life obligations should be "overlayed onto international environmental obligations."[12] Canada similarly disagreed with the Committee's Views in the present case because they "conflate the right to life with an economic and social right" and "fail to distinguish between providing access to health care, and providing state-funded health care coverage."[13]

10. It is noteworthy that since Canada took that position in relation to General Comment 36 and the Views in this case, the federal government has advanced the same argument before domestic courts in relation to the right to life under s. 7 of the Canadian Charter, and courts have not endorsed their position.

11. In the 2022 decision of the Ontario Superior Court in response to a motion to strike the author's constitutional challenge to Canada's decision not to implement the Committee's Views, the Court criticized Canada's "mischaracterization" of Ms. Toussaint's claim as a right to receive "free health care" and as "a claim for a purely socio-economic right which is outside the guarantees of the Canadian *Charter of Rights and Freedoms*."[14] The Court found, as had the Committee in its Views, that "Ms. Toussaint's claim is not a claim for free health care but is a claim for public health care in circumstances where the claimant's right to life is demonstrably and not just theoretically at risk of being seriously impaired or extinguished."[15]

12. Similarly, in climate change litigation alleging that Canada's failure to meet its commitments under the Paris Agreement violate the rights to life and security of the person, the Federal Court of Appeal allowed in part the appeals from orders granting Canada's

[12] Canada's Comments on Draft General Comment 36 (23 October 2017) at para 20.

[13] *Response of the Government of Canada to the Committee's Views*, 29 January 2019, paras 19–21.

[14] *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747, para 134.

[15] *Toussaint v Canada (Attorney General)*, 2022 ONSC 47472022 ONSC 4747, para 138; *Toussaint v Canada*, UN Doc CCPR/C/123/D/2348/2014, paras 11.2–11.3.

motions to strike and granted leave to amend the claims alleging a violation of the right to life and security of the person under s. 7 of the Charter.[16] The Court affirmed that the door to recognizing positive obligations to protect the right to life under s. 7 remains open and that whether such obligations arise must be assessed in the circumstances of the particular case.[17]

13. Related developments in international human rights jurisprudence which Canadian courts consider "relevant and persuasive" also support reconsideration of Canada's disagreement with the Committee's Views. In its Written Statement of 20 March 2024 to the International Court of Justice in the climate change advisory proceedings, Canada stated that it "does not accept that the right to life creates positive obligations on States to protect against any foreseeable threat to the full enjoyment of this right, nor that international environmental obligations inform the scope of the right to life under international human rights law."[18] The Court did not accept this position, finding that protecting the right to life may depend on measures to protect the environment from greenhouse gas emissions and quoting from General Comment No. 36 to affirm that "[t]he obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant."[19]

14. Canada's disagreement with the Committee's understanding of positive obligations to protect life as described in General Comment 36 and in the Toussaint case was raised in the interactive dialogue during Canada's 2026 periodic review by the Committee. In its Concluding Observations, the Committee expressed concern "about the State Party's position according to which the right to life does not, or would not, create positive obligations."[20] The Committee stated that: "The State Party should take all necessary steps to implement all concluding observations and Views adopted by the Committee, through appropriate and effective mechanisms at the federal, provincial and territorial levels, and guarantee the right of victims to an effective remedy, including through national courts, in accordance with article 2 (2) and (3) of the Covenant."[21]

15. Canada has committed to following up on the Committee's recommendations through its *Protocol for Follow-up to Recommendations from International Human Rights Bodies*

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[16] *La Rose v Canada*, 2023 FCA 241, paras 38 and 135.

[17] *La Rose v Canada*, 2023 FCA 241, paras 96–99

[18] *Obligations of States in respect of Climate Change*, Written Statement of the Government of Canada (20 March 2024), para 27.

[19] *Obligations of States in respect of Climate Change*, Advisory Opinion (23 July 2025), General List No 187 (ICJ), para 377; *General Comment No 36*, Article 6: right to life (2018), UN Doc CCPR/C/GC/36, para 62.

[20] *Concluding Observations: Canada CCPR/C/CAN/CO/7, 19 March 2026* at para 31.

[21] Ibid at para 6.

by "facilitating discussion within and between governments with respect to recommendations Canada receives from United Nations human rights bodies". Under the *Protocol,* members of the Continuing Committee of Officials on Human Rights are to "Identify and inform, within their respective governments, relevant departments responsible for the subject matter of the recommendations to facilitate their consideration."[22]

16. The issues relevant to the follow-up to the Views are therefore live issues related to the follow-up to the 2026 Concluding Observations as well as to the Committee's Views in the Toussaint case and should not be considered a closed file.

b) Developments concerning immigration status and non-discrimination

17. There have also been important developments in Canadian courts concerning recognition of immigration status as a prohibited ground which provide further support for reconsidering the basis on which Canada disagreed with the Views in 2019.

18. In its 2019 response, Canada explained its disagreement with the Committee's recognition of irregular immigration status as an "other status" under article 26 by applying factors considered by Canadian courts in assessing whether a characteristic should be recognized as an analogous (prohibited) ground of discrimination under s. 15 of the Canadian Charter. Canada argued that irregular immigration status is "not a characteristic inherent to the person," could "change with time", and is something states could legitimately expect individuals to change.[23]

19. Canada reiterated this argument before the Ontario Superior Court in *Toussaint v Canada (Attorney General)*, arguing that the Federal Court of Appeal's finding in Ms. Toussaint's previous Charter challenge, that irregular immigration status "is not immutable or changeable only at unacceptable cost to personal identity" and is "a characteristic that the government has a legitimate interest in expecting the person to change" is settled law. In its reasons, the Ontario Superior Court observed that the Federal Court of Appeal had only considered Canada's obligations under the ICCPR in the context of principles of fundamental justice under s.7 and that the Federal Court of Appeal's finding on immigration status had attracted academic criticism and "may be an unsettled issue."[24]

20. More recently, in *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7, the majority of the Supreme Court of Canada considered the issue of immigration status or refugee claimant status as an analogous ground and left the issue undecided, having found

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[22] Government of Canada, *Protocol for Follow-up to Recommendations from International Human Rights Bodies* (August 1, 2022)

[23] *Response of the Government of Canada to the Committee's Views*, 29 January 2019, para 27.

[24] *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747, para 18.

discrimination on the ground of sex, while expressly acknowledging that refugee claimants face stereotypes, historical disadvantage and distinct vulnerabilities in Canadian society.[25] In concurring reasons, the Chief Justice found that refugee claimant status should be recognized as an analogous ground. The Chief Justice found that refugee claimants status is "not within the control of the individual" and that its "transitory nature" does not prevent recognition as an "immutable characteristic". The Chief Justice cited General Comments of the CESCR and CERD which affirmed that differentiation based on immigration status, regardless of legal status, constitutes discrimination.[26]

21. Developments in international human rights law since 2019 should also encourage reconsideration of Canada's position on immigration status. In Joint General Recommendation No. 39/General Comment No. 8 (2025), CERD/C/GC/39–CMW/C/GC/8, the CERD and Migrant Workers Committees identify restrictions on health care based on migration status as discriminatory and recommend equal access to health care regardless of status.[27] The Inter-American Commission has also expressly recognized "migration or residence status" as a prohibited ground of discrimination and affirmed that "medical attention cannot be denied due to a person's migration status" (*Inter-American Principles*, Resolution 4/19, 7 December 2019, principles 12 and 35).[28]

22. It is one thing for Canada to disagree with the Committee's interpretation of ICCPR obligations if these were unique to the Views in a particular case. It is quite another for Canada to disagree in principle with an interpretation of fundamental rights to life and non-discrimination that have now been adopted by multiple UN human rights treaty bodies, the International Court of Justice and by regional human rights bodies.

ii) Ongoing domestic proceedings do not suspend follow-up

23. The complainant takes exception to Canada's suggestion that the requests in 2023 for guidance from the Committee on issues related to Canada's refusal to implement the Views appear "aimed, at least in part, at obtaining further views believed advantageous in the domestic proceeding."[29] When Canada is relying on its interpretation of Covenant obligations and its understanding of the international standard of good faith to justify a decision not to ensure access to essential health care to irregular migrants whose lives may

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[25] *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at paras 25–26.

[26] *Kanyinda*, Wagner CJ, concurring, para 222; 226–227.

[27] *Joint General Recommendation No 39 and General Comment No 8*, Thematic guidelines for eradicating xenophobia towards migrants and others perceived as such (2025), UN Doc CERD/C/GC/39–CMW/C/GC/8, paras 81–82; 84–85.

[28] *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking*, IACHR Resolution 4/19 (7 December 2019), *principle 12*; 35.

[29] *Observations of the Government of Canada*, 9 September 2026, paras 10–14.

be at risk, it is entirely appropriate for the complainant to encourage ongoing dialogue regarding Canada's reasons for refusing to implement the Views in order to encourage an effective resolution.

24. Moreover, Canada's assertion that "it would not be appropriate for the Committee to express further views on issues that are actively being considered in Canada's domestic courts" would impose an unprecedented and unreasonable restriction on the Committee's established role in monitoring States' compliance with the Covenant, including obligations to ensure effective domestic remedies for violations of Covenant rights through follow-up procedures.

25. The Committee regularly engages in dialogue with Canada and other State Parties and makes recommendations on obligations under the ICCPR when related issues are being considered by domestic courts in ongoing proceedings.[30] Recommendations addressing the State Party's "management of its own judicial system" are routinely made while cases engaging these issues are before courts. The suggestion that the Committee should refrain from commenting on Canada's obligations under the Covenant where comments might influence ongoing legal proceedings in domestic courts would make commentary virtually impossible.

26. Ongoing engagement with Canada about the management of its judicial system is particularly appropriate in follow-up where the central issue is access to an effective remedy. In its recent concluding observations on Canada, the Committee expressed concern about Canada's reluctance to give full effect to its Views, including the lack of full implementation of *Toussaint v. Canada* (art. 2) and recommended that Canada "should also consider recognizing the right of authors of communications to whom the Committee has granted any measure of reparation to demand before the national courts the implementation of such measures."[31] These recommendations must be subject to good faith consideration and follow-up by Canada.

27. Canada's reliance on article 5(2)(b) in paragraph 12 of its Observations is misplaced: the exhaustion rule governs consideration of a communication, whereas the present procedure concerns follow-up to Views already adopted and implementation of the remedy

[30] For example, during Canada's 2026 periodic review, the Committee requested information from Canada on convictions and penalties imposed by courts in domestic violence cases. List of Issues CCPR/C/CAN/QPR/7 (2021) at para 8. After interactive dialogue the Committee recommended in its Concluding Observations that Canada ensure that perpetrators are prosecuted and, if convicted, punished with penalties commensurate with the gravity of the offence; ensure that all victims have adequate access to effective remedies and legal support; and increase targeted and compulsory training for public officials, including judges, lawyers, prosecutors and law enforcement officials. *Concluding observations on the seventh periodic report of Canada*, UN Doc CCPR/C/CAN/CO/7 (19 March 2026), para 22(a)–(b), (e)

[31] *Concluding observations on the seventh periodic report of Canada*, UN Doc CCPR/C/CAN/CO/7 (19 March 2026), paras 5–6.

already identified. An attempt to secure that remedy under domestic legal processes does not transform follow-up into a new communication requiring exhaustion of remedies. The suggestion that further commentary from the Committee in follow-up dialogue would constitute inappropriate interference with the management of the judicial system is entirely without merit.

D. Request for continued follow-up

28. The complainant respectfully asks the Committee to recognize follow-up with Canada regarding its reasons for refusing to implement the Views as "ongoing with a view to implementation" in this case, as outlined in General Comment No. 33 at paragraph 18.

29. We further ask the Committee to request a substantive account of implementation by Canada as a whole, including follow-up within the judicial branch. That account should identify measures contemplated to address delays in the complainant's legal challenge, the obligation to prevent repetition and to provide appropriate compensation, and measures to ensure that the author's claim to effective remedies and state accountability is not extinguished by her own or her mother's death.[32]

30. The complainant also requests that the Committee clarify that the complainant's pursuit of a domestic remedy does not suspend dialogue about the obligations already established in its Views. The continuing effort to secure that remedy is a reason for the Committee's continued follow-up, not for closing its file.

Respectfully submitted by Andrew Dekany (counsel) and Bruce Porter (representative).

[32] *Toussaint v Canada*, UN Doc CCPR/C/123/D/2348/2014, paras 13–14; *General Comment No 33*, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc CCPR/C/GC/33 (25 June 2009), paras 13–15; *General Comment No 31*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras 15–17.