CCPI

CHARTER COMMITTEE ON POVERTY ISSUES

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DENIALS OF ACCESS TO JUSTICE AND EFFECTIVE REMEDIES FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CANADA

A12 Acceptance of international norms

E1 Economic, social & cultural rights - general measures of implementation

B51 Right to an effective remedy

SUBMISSION OF THE CHARTER COMMITTEE ON POVERTY ISSUES (CCPI)

AND THE SOCIAL RIGHTS ADVOCACY CENTRE (SRAC)

FOR THE THIRD UNIVERSAL PERIODIC REVIEW OF CANADA

October 5, 2017

Contents

A. INTRODUCTION

i) Who we are:

The Charter Committee on Poverty Issues (CCPI) *is a national Committee (NGO) formed in 1988 which brings together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the Canadian Charter of Rights and Freedoms ("the Charter"), human rights legislation and other law in Canada. CCPI has appeared before many UN human rights treaty monitoring bodies, dating back to the 1993 review of Canada before the CESCR and has been granted leave to intervene in thirteen cases at the Supreme Court of Canada.*

The Social Rights Advocacy Centre (SRAC) *is a non-profit NGO formed in 2002 for the purpose of ensuring the equal enjoyment of economic, social and cultural rights through human rights research, public education and legal advocacy. SRAC produces extensive research and publications on social rights and initiates and co-ordinates test cases in Canada.*

ii) Overview of Submisssions: Access to justice for ESC rights claimants in Canada

1. A central issue in past Universal Periodic Reviews, and in the dialogue between Canada and the Committee on Economic, Social and Cultural Rights (CESCR) has been Canada's failure to ensure access to effective remedies for ESC rights. Governments in Canada continue to argue in domestic courts that there is no obligation to ensure effective legal remedies for ESC rights – that these rights can be treated as mere policy objectives or aspirations, without any domestic for claiming the rights or holding governments accountable. The result of this position is that ESC rights violations, particularly violations of the right to food and housing, are widespread in one of the richest countries in the world.

2. Under a previous government, Canada did not support the adoption of the Optional Protocol to the ICESCR (OP-ICESCR) and stated that it would not sign or ratify it. The current government articulates a stronger commitment to international human rights, but no significant change has been evident to date in relation to access to justice for claimants of ESC rights. Canadian courts have tended to continue to treat ESC rights as policy commitments immune from judicial review and accountability – usually at the urging of government lawyers. It is hoped that this issue will receive significant attention in the upcoming UPR and prompt a serious review of Canada's position on the justiciability of ESC rights. Recommendations need to highlight the obligations of all levels and branches of government, including provincial/territorial governments, municipal governments and the independent judiciary.

3. Canada is a dualist country and a constitutional democray. Access to justice for ESC rights in Canada does not rely on the direct incorporation of international human rights into domestic law. Rather, it relies on the interpretation and application of domestic law, particularly the Canadian Charter of Rights and Freedoms. With a common law heritage, legal culture in Canada values the role of decision-makers in interpreting law and exercising discretion in order to apply law to different circumstances. Broadly framed rights in the Canadian Charter of Rights and Freedoms, to life and security of the person (s. 7), and the equal benefit of the law (s.15) can and should be interpreted so as to provide effective remedies to a wide range of violations of ESC rights in various contexts and ensure access to justice for those living in poverty and homelessness. In an affluent country such as Canada, a denial of access to adequate food, water, sanitation or housing will also constitute a denial of substantive equality and the enjoyment of a dignified life. When courts and governments insist that ESC rights are non-justiciable, the result is that those who are homeless or live in poverty are deprived of the full benefit of protections of the right to life, security of the person and equality.

4. The Committee on Economic, Social and Cultural Rights (CESCR) has consistently expressed concern about Canadian governments and courts downgrading ESC rights to mere policy objectives rather than human rights subject to the requirement of access to justice and effective remedies. Canada has provided assurances before UN treaty monitoring bodies that the rights to life, liberty and security of the person in section 7 guarantee that people are not to be deprived of basic necessities such as food, clothing and housing and that the right to equality imposes obligations on governments to take positive measures to disadvantage and inequality. [1] Yet Canada has advanced the opposite position before domestic courts, urging that claims related to poverty or homelessness be dismissed as falling outside the scope of rights to life, security of the person and equality.

5. Soon after being elected in 2016, Prime Minister Trudeau stated in his mandate letter to the Minister of Justice that the new government was committed to reviewing the positions advanced in litigation to ensure that arguments advanced in court are consistent with Canada's fundamental values. The 2018 UPR is an opportunity to ensure that Canada follows through on this commitment and addresses longstanding concerns about exclusionary interpretations of the Canadian Charter that deny access to justice and effective remedies for people living in poverty or homelessness. The present submissions will provide information about a number of key cases in which governments have encouraged courts to deny access to justice for claimants who have suffered violations of ESC rights and make recommendations about what needs to be done to change this.

6. In addition to ensuring constitutional remedies for violations of ESC rights under the Canadian Charter by way of appropriate interpretations of the Charter, Canadian governments can also ensure access to justice and effective remedies for ESC rights by adopting and implementing through legislation rights-based strategies and policies for the realization of ESC rights. Despite repeated recommendations from treaty-monitoring bodies and special procedures mandates for rights-based strategies to eliminate poverty and homelessness and ensure food security, no legislation has yet been adopted which recognizes or provides access to justice for ESC rights. However, the federal government has recently

committed to implementing a national housing strategy; a national food security strategy, a national anti-poverty strategy and national legislation governing accessibility for persons with disabilities. Commitments have also been made to implement the UN Declaration of the Rights of Indigenous Persons. Canada's UPR provides a timely opportunity, therefor, for the government of Canada to commit to ensuring that all of these national strategies are rights-based and ensure access to justice.

B. Ensuring Access to Justice and Effective Remedies in Canadian Law

i. Protection of ESC Rights Through Inclusive Interpretations of Rights under the Canadian Charter of Rights and Freedoms

7. As the CESCR has recognized in General Comment 9, the requirement that domestic law be interpreted consistently with the international human rights law is of central importance to the domestic implementation of ESC rights. In Canada, the role of courts in interpreting constitutional rights is of particular importance, and the interpretive principle of consistency is central to the right to effective remedies.

8. As noted by Justice L'Heureux Dubé of the Supreme Court of Canada,

> Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; R. v. Keegstra, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity."[2]

9. In its 1986 decision in *Irwin Toy*[3] the Supreme Court found that "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" should not be excluded from the scope of section 7 at that early stage of Charter interpretation.[4] The issue was left open to be considered in future cases. In the 2003 *Gosselin* case, dealing with reduced social assistance rates for recipients not enrolled in workfare, an important dissenting judgment by Justice Louise Arbour (supported by Justice L'Heureux-Dubé) found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities. The majority of the Court, however, was not prepared to decide this issue on the basis of the evidence in that case and left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case.[5] Since the Gosselin case, the Supreme Court of Canada has not agreed to hear any cases in which this issue would be addressed. The question of the extent to which section 7 of the Charter may

encompass obligations to provide effective remedies to the ongoing violations of ESC rights in Canada still remains the central unresolved issue of Canadian Charter jurisprudence. The resolution of this question will largely determine the extent to which Canada complies with the obligation to ensure access to effective remedies to Covenant rights.

10. As will be seen below, positions have been advanced in recent cases which are diametrically opposed to Canada's obligations. Governments have argued that health care necessary for life can be denied on the basis of immigration status and that governments have no positive obligations to take measures to address homeless, even where, as the UN Human Rights Committee has found, "homelessness has led to serious health problems and even to death."[6] These positions have been justified by government lawyers on the basis that ESC rights and related issues of poverty and homelessness are beyond the proper role of courts.

Recommendation Re: Positions Advanced in Litigation

1. **All governments in Canada should put in place special procedures to ensure that government lawyers promote interpretations of the Charter – in particular sections 7 and 15 – which are consistent with Canada's international human rights obligations and with the obligation to ensure access to justice and effective remedies for ESC rights.**

Recommendation Re: Promoting an Inclusive Human Rights Culture in Canada

2. **Governments in Canada should publicly promote inclusive interpretations of rights to life, security of the person and equality which provide equal protection to those who are deprived of access to basic necessities such as food, housing, adequate income and access to health care and ensure that affected groups and individuals are ensured access to justice.**

ii. Section 36 of the *Constitution Act*, 1982 and the Federal Framework

11. Section 36(1) of the *Constitution Act, 1982* recognizes a joint commitment of federal provincial and territorial governments to providing "essential public services of reasonable quality." In its *Core Document* Canada described section 36 as being "particularly relevant in regard to ... the protection of economic, social and cultural rights."[7] Unfortunately, section 36 has been largely ignored by courts and governments.

12. In the context of Canadian federalism the implementation of Covenant rights often relies on collaborative and co-operative action and a joint commitment by all levels of government as described in s.36. Canada's federal structure has sometimes been referred to as an obstacle to the implementation of Covenant rights but it can in fact function as a vehicle, as long as the responsibilities of various actors are made clear and governments are held accountable not only for singular obligations but also for joint obligations. Rights claimants must be able to invoke their governments' obligations to work collaboratively to address issues such as hunger, homelessness and poverty, where relevant programs and policies engage all levels of government.

Recommendation re Section 36 of the *Constitution Act, 1982*

3. The Government of Canada and provincial/territorial governments should promote and adopt interpretations of section 36 in courts and in inter-governmental negotiations that are consistent with the role that section 36 can play in implementing ESC rights. Access to justice for ESC rights should be enhanced by ensuring that section 36 is considered justiciable by governments and courts.

iii. A New Inter-Governmental Agreement or Social Charter

13. During the last round of constitutional negotiations in 1992, a social charter was proposed and endorsed by over forty national organizations as a means to provide enhanced accountability for ESC rights within the context of a renewed federalism. There has been little appetite for constitutional reform in Canada since that time and such reform is not on the agenda at present. However, a social charter could be enacted through inter-governmental agreements, without constitutional amendment, built on the joint constitutional commitments in section 36 of the Constitution Act 1982 and the obligations of all governments in Canada under the ICESCR and other international human rights law providing for a more transparent and accountable form of cooperative federalism built on a joint commitment to ESC rights.

Recommendation re a Social Charter

4. **Canada should consider adopting a social charter or similar mechanism for the protection, monitoring, adjudication and implementation of ESC rights within federal/provincial/territorial agreements and facilitating joint strategies for the realization of ESC rights.**

iv. Federal and Provincial/Territorial Human Rights Legislation

14. Human rights legislation has always been a cornerstone of human rights protections in Canada. The Canadian Charter of Rights and Freedoms does not generally apply to private actors, so horizontal protection of human rights relies to a large extent in Canada on human rights legislation.

15. Provinces and territories in Canada have key responsibilities for implementing ESC rights, so provincial territorial legislation is a critical source of protection of these rights. The only province to have included ESC rights in provincial human rights legislation is Quebec, and even there, the enforcement of these rights have not been put on an equal footing with other rights. The exclusion of ESC rights from the mandates and activities of human rights commissions has perpetuated the lack of accountability for and attention to systemic violations of ESC rights in Canada.

16. Under the current equality focused mandates of human rights commissions and tribunals in Canada there is still significant scope for providing effective remedies for violations of ESC rights. However, when such claims have been advanced, they have met with significant opposition from governments. A particularly concerning example is the response by the federal government to a complaint filed by the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations under the *Canadian Human Rights Act* alleging that the Government of Canada's inequitable provision of child welfare services to 163,000 First Nations children constituted prohibited discrimination on the grounds of race and national ethnic origin. By the time the final arguments were heard in 2014, the Government of Canada had made eight unsuccessful attempts to get the case dismissed as being outside the jurisdiction of the tribunal. On 26 January 2016, the Canadian Human Rights Tribunal released its ruling, upholding the complaint and ordering the Canadian Government to remedy the inequality of services.[8] The Canadian government has failed to comply with the order, and the tribunal has had to issue three compliance orders over the slow pace of its required changes. The Canadian government is now appealing the order.

Recommendations re Human Rights Legislation

5. **Canadian governments should not bring motions to dismiss systemic human rights claims such as the complaints filed by the First Nations Child and Family Caring Society of Canada. Positions advanced in such cases should be consistent with obligations to ensure access to justice and effective remedies for violations of all human rights, including ESC rights.**

6. **Canadian governments should promote interpretations of equality rights that ensure access to effective remedies for violations of ESC rights.**

7. **Canadian governments should consider adding ESC rights to human rights legislation and accord them equal status and enforceability.**

8. **All human rights institutions in Canada should be given an explicit mandate to review and report on compliance with international human rights, and where possible, receive completes and/or initiate inquiry procedures.**

v. Monitoring and Accountability for ESC Rights – The need for an independent Statutory Agency

17. The National Council on Welfare, an independent statutory body was established in 1969 to advise the federal government on issues relating to poverty. The NCW provided rigorous and independent assessments of the adequacy of social assistance rates in all provinces and territories. The information and analysis was relied by governments, civil society, courts and international human rights bodies to assess compliance with domestic and international human rights.

18. The federal government removed all funding for the NCW in 2013, forcing the Council to cease to operate.

Recommendation re Monitoring and Accountability for ESC Rights

9. **In light of the cancellation of funding for the National Council on Welfare in 2013, the federal government should establish and fund a new statutory agency mandated to analyse the adequacy of social assistance programs, assess progress in alleviating poverty, and monitor compliance with ESC rights and progress in meeting the 2030 Commitments for Sustainable Development. Such an agency could be established by legislation implementing a national rights-based strategy to reduce and eliminate poverty.**

C. Access to Justice Denied

i. Access to Civil Legal Aid

19. In *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, the Canadian Bar Association sought to challenge continued cuts to civil legal aid that resulted in unacceptable restrictions on access to justice by people living in poverty. The applicants cited Canada's international human rights obligations to ensure access to justice for poor people as a source for the interpretation of the right to security of the person and the right to equality under the *Canadian Charter*. The Government of British Columbia argued that international human rights law is not enforceable by courts and ought therefore to be ignored in this case. The BC Court of Appeal dismissed the claim as being non- justiciable.

Recommendations re Access to Justice and Legal Aid

10. **Canadian governments should desist from using Motion to Strike procedures to stop courts from hearing the evidence in important constitutional and human rights cases raising issues of compliance with international human rights.**

11. **Canadian governments should formally recognize access to adequate civil legal aid for cases involving fundamental human rights as a constitutional obligation.**

ii. Access to Administrative Justice

20. In the case of *Toussaint v. Canada* (AG) 2011 FCA 213), the applicant sought humanitarian and compassionate review of an application for permanent residency under the *Immigration and Refugee Protection Act*. She requested that the government waive the fee of $550 for the application because her poverty made it impossible to pay it. When the Government refused to consider the fee waiver, she challenged the denial as a violation of the constitutional principle of the rule of law and access to justice and as discriminatory on the ground of socio-economic status.[9] Canada argued, contrary to its international human rights obligations, that socio-economic status should not be recognized as a ground of discrimination and that the principle of access to justice and the rule of law does not apply to access to discretionary administrative decision-making. The Federal Court of Appeal found in favor of the Government of Canada on the rule of law and constitutional issues but found that the request for fee waiver had to be considered under the Immigration and Refugee Protection Act as it was then worded. The federal government subsequently amended the Act so as to continue to prevent low income applicants from seeking consideration of fee waiver on humanitarian and compassionate grounds.

Recommendations re Administrative Fees

12. **Canada should review and revise the position it has taken in litigation with respect to access to justice before administrative decision-makers, recognize that the principle of access to justice must apply equally to administrative bodies, and ensure that administrative procedures for the adjudication of rights are accessible, affordable, timely and effective. Fees should never be permitted to act as a barrier to access to administrative justice for those living in poverty.**

iii. The Federal Court Challenges Programme

21. The Court Challenges Program was a unique program that provided funding for test case litigation under the Canadian Charter dealing with equality rights and minority language rights. The previous government cancelled funding in 2006. It subsequently agreed to reinstate the language rights component of the program but refused to reinstate the equality rights programme. This has meant that disadvantaged groups such as the Charter Committee on Poverty Issues have faced significant challenges in accessing courts to advance issues of equality for people living poverty.

22. The new government has announced that it will reinstate the Court Challenges Programme and extend it to cover additional sections of the Charter, including the section 7 guarantee of rights to life, liberty and security of the person.

Recommendations re Court Challenges Programme

13. **Canada's commitment to updating and reinstating the Court Challenges Programme is welcomed. It is recommended that program continue to focus on supporting rights claims advanced by marginalized and disadvantaged individuals and groups challenging systemic human rights violations, and that funding also be provided for case development and to seek remedies before international human rights bodies.**

iv. Access to utilities for poor households

23. In the case of *Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17, people living in poverty challenged as discriminatory a statute prohibiting utilities companies from charging lower rates to low income households in order to provide more affordable rates. Differential utilities rates are required in many U.S. states in order to ensure more affordable rates for low income household. The challenged legislation prevented such measures from being instituted in Nova Scotia. Claimants cited the recognition of socio-economic situation as a ground of discrimination under international human rights law. The Attorney General for Nova Scotia argued that poverty or socio-economic status should not be recognized by courts in Canada as a prohibited ground of discrimination because it is not an "immutable" personal characteristic. The Court of Appeal ignored international human rights law, held that discrimination on the ground of poverty is not prohibited under the Canadian Charter and found in favour of the Government. Leave to Appeal was denied by the Supreme Court of Canada.

Recommendations Re Discrimination on the Ground of Socio-Economic Situation

14. **All governments in Canada should encourage courts to recognize poverty (social condition or social and economic situation) as a prohibited ground of discrimination and courts should give full consideration of international human rights jurisprudence in this regard.**

15. **Necessary measures should be taken by all provinces and territories to ensure that utilities rates are affordable for low income households so as to ensure that all households have access to heat, electricity, water, sanitation and other services. Measures to ensure affordability and accessibility should be legally required of all service providers.**

v. Failure to Provide Community Based Housing for Persons with Disabilities

24. In The 'Emerald Hall' Case three individual complainants with disabilities and an NGO, the Nova Scotia-based 'Disability rights Coalition', filed a complaint under the Nova Scotia Human Rights Code alleging discrimination because of disability.

25. The three individual complainants have been institutionalized in a locked psychiatric ward for years—for no medical or legal reason. One of the complainants has been living in the locked psychiatric ward for over 15 years---solely because she has not been offered supportive housing in the community. Rather than acknowledging their obligation under article 19 of the CRPD, the Attorney General for Nova Scotia has argued that failing to provide housing in the community with supports does not constitute discrimination. The case is ongoing.

Recommendation Re Community-Based Housing for People with Disabilities

16. **The Province of Nova Scotia, as well as any other provinces or territories where this problem exists, should acknowledge that failure to ensure access to community based housing with supports, resulting in institutionalization of persons with disabilities, violates the rights of persons with disabilities.**

17. **Canada should ensure that all levels of government immediately cease the practice of housing people with disabilities in institutions and ensure that persons with disabilities have access to adequate housing and supports in the community. Access to justice and effective remedies in such cases should be ensured by courts and human rights institutions.**

vi. Challenges to anti-camping bylaws forced evictions of homeless from temporary shelter on public land

26. In the case of *Victoria (City) v. Adams* 2008 BCSC 136, a group of homeless people living in a park challenged city bylaws that prevented them from erecting temporary shelter of cardboard or plastic to protect themselves from the weather as violations of their rights under under section 7 of the *Canadian Charter*. As aids to the interpretation of the scope of the right to security of the person under section 7 of the Charter, the applicants relied on the right to adequate housing under the ICESCR, on the Committee's concluding observations on Canada and on Canada's statements before the CESCR explaining that section 7 should be interpreted as guaranteeing access to basic necessities. The City of Victoria, supported by the Attorney General for British Columbia (AGBC) as an intervener, argued that the claim was not within the scope of section 7 of the Charter. The AGBC argued that the ICESR did not assist in this case, because "international agreements do not have a normative effect."[10]

27. The trial court rejected the AGBC submissions, citing Canada's international human rights commitments to the right to housing, and concluded that the impugned bylaws were contrary to section 7 of the *Charter*. On appeal, the British Columbia Court of Appeal upheld the trial decision with only minor changes.[11]

28. In 2015, in *Abbotsford (City) v Shantz*[12] the Supreme Court of B.C. held that similar anti-camping bylaws in Abbotsford, British Columbia violated the rights to liberty and security of the person of affected homeless persons. In that case the City of Abbotsford was also found to have used chicken manure, bear spray and the destruction of tents to displace homeless people.

Recommendation re Discrimination Against Homeless Persons

18. **Governments in Canada should affirm that the right to life and security of the person in section 7 of the Canadian Charter protects homeless people from forced eviction from encampments and that discrimination against homeless people violates the right to equality under section 15 of the Charter.**

19. **The recognition by British Columbia courts that section 7 should be interpreted consistently with the right to adequate housing under international human rights law is welcomed but protection should extend beyond the right of homeless people to erect temporary shelter to encompass the right to adequate housing with security of tenure.**

vii. Failure to implement a national housing strategy to address homelessness.

29. In the historic case of *Tanudjaja et al v. Canada* (Attorney General) 2014 ONCA 852, homeless people challenged Canada's and Ontario's failure to implement housing strategies to address the crisis of homelessness, as urgently recommended by the CESCR in its concluding observations of 1993, 1998 and 2006, by the Special Rapporteur on Adequate Housing following a 2007 mission to Canada, by the UN Human Rights Committee (1999) and in UPRs of Canada. This was the first case under the Canadian Charter to consider the constitutionality of governments' failure to effectively address the crisis of homelessness, which has resulted in hundreds of deaths. Applicants argued that the failure to implement an effective housing strategy and to address homelessness violated their rights to life and security of the person, and constituted discrimination against groups that are the most vulnerable to homelessness, including persons with disabilities, Indigenous Peoples, women and racial groups as well as constituting discrimination on the ground of the social condition of homelessness.

30. The claimants worked with volunteer experts and community organizations, to assemble a 16-volume record, totalling nearly 10,000 pages, containing 19 affidavits, 13 of which were from experts, (including the former Special Rapporteur on Adequate Housing). After all of the evidence was filed the governments of Canada and Ontario brought a motion to dismiss the case without a hearing so that the court would be prevented from considering any of the evidence that had been prepared.

31. The two central arguments advanced by the governments in support of the motion to strike were i) that governments have no positive obligation to address homelessness, even where life and personal security is at stake; and ii) that the right to adequate housing is non-justiciable.

32. These arguments were accepted both by the Ontario Superior Court and by two of three judges on the Ontario Court of Appeal. The majority of the Ontario Court of Appeal held that the claim was non-justiciable because homelessness is caused by a wide range of policies and laws beyond the competence of courts. The majority of the Court of Appeal held that "To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity."[13]

Recommendations re *Obligation to Address Homelessness and Implement Rights Based Housing Strategies*

20. **Canada should review the arguments it advanced in the Tanudjaja case for consistency with international human rights obligations..**

21. **The government of Canada and provincial governments should ensure that in future, they do not advance arguments that are inconsistent with international human rights and the obligation to ensure access to justice and effective remedies for the right to housing.**

22. **Canada and each province should adopt rights-based strategies that ensure access justice and provide for clear goals and timelines, with adequate resources allocated to ensure access to adequate housing for all at least by 2030, in line with the 2030 Agenda for Sustainable Development target 11.1.**

viii. Access to Health Care

33. The case of *Toussaint v. Canada (Attorney General) 2011 FCA 213* raised for the first time the question of whether undocumented migrants in Canada can be denied access to health care necessary for the protection of their lives solely on the grounds of immigration/citizenship status; and whether denying access to health care necessary for life is a permissible means of encouraging compliance with Canada's immigration laws.

34. After a number of years working as an undocumented migrant, and while in the process of seeking to obtain legal residency status, Nell Toussaint became ill with life-threatening medical conditions. She applied for coverage under the federal government's program to provide health care to immigrants - the Interim Federal Health Benefit Program (IFHP) but was denied on the basis of her immigration status.

35. 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 which put her life at risk and had long term health consequences.

36. The Federal Court found that the evidence established a deprivation of Ms. Toussaint's right to life and security of the person that was caused by the denial of access to health care under the IFHP. However, the Federal Court found that denying health care to persons who have chosen to enter or remain in Canada illegally is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws.

37. The Federal Court of Appeal upheld the finding of the Federal Court and 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 *Canadian Charter*.

38. Ms. Toussaint sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, including as an exhibit a letter from the Office of the High Commissioner for Human Rights affirming the importance of the issues raised in relation to Canada's compliance with its international human rights treaty obligations. The application for leave to appeal was denied in 2012. Ms Toussaint has filed a petition under the Optional Protocol to the ICCPR.

39. As soon as leave to appeal the to the Supreme Court of Canada was denied in the *Toussaint* case above, the previous federal government brought in changes to the Interim Federal Health Program to exclude additional classes of migrants, including refugees from designated countries and failed refugee claimants. These changes were the subject of a constitutional challenge in the case of Canadian Doctors for Refugee Care v. Canada (Attorney general), 2014 FC 651 (CanLII).

40. The Federal Court found the decision to deny access to healthcare to particular classes of refugees constituted cruel and unusual treatment under s. 12 of the Canadian Charter and that the targeting of refugees from particular countries constituted discrimination on the basis of place of origin. However, the Federal Court was persuaded by Canada's submissions, that "the Charter does not impose positive obligations on governments to provide social benefits programs such as health insurance in order to secure their life, liberty or security of persons*."*[14]

41. The newly elected government withdrew the appeal to the Federal Court of Appeal that had been filed by the previous government and reinstated eligibility for health services for refugees. However, the government of Canada continues to deny health care to undocumented migrants, despite concerns expressed by the UN Human Rights Committee, the CESCR and the Committee on the Elimination of All Forms of Racial Discrimination.

Recommendations re access to health care

23. Canada should reject any rationale for denying the right to life of irregular migrants and recognize access to health care as a requirement of the right to life.

24. Immigration status, regardless of documentation, should be recognized as a prohibited ground of discrimination under the Canadian Charter.

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[1]CESCR Concluding Observations on Canada (1993) paras 3, 21; Government of Canada, Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights HR/CESCR/NONE/98/8 1998: questions 16 and 53.

[2] *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at para. 73.

[3] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

[4] *Ibid*. pp. 1003-4.

[5] *Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84* at paras 82-83.

[6] *Concluding observations of the Human Rights Committee: Canada* (1999), CCPR/C/79/Add105 at para 12.

[7] HRI/CORE/CAN/2013 at para 169.

[8] *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*, 2010 CHRT 16 (CanLII).

[9] *Toussaint v. Canada (AG)* 2011 FCA 213

[10] *Victoria (City) v. Adams* 2008 BCSC 136 at para 93.

[11] *Victoria (City) v. Adams*, 2009 BCCA 563.

[12] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909.

[13] *Tanudjaja et al v. Canada* (Attorney General) 2014 ONCA 852 at para 34.

[14] *Canadian Doctors For Refugee Care v. Canada (Attorney general)*, 2014 FC 651, at para 511.