



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

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

Note No.: GENEV-640

Référence: HRCComm – 2348/2014 Ms. Nell Toussaint – Canada's submission on
admissibility and merits

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to submit to the Human Rights Committee the Government of Canada's observations on the admissibility and merits of Communication 2348/2014 Ms. Nell Toussaint.

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

Geneva, 14 August 2014.



**REQUEST FOR AN EXTENSION OF TIME FOR FILING AND
SUBMISSION OF THE GOVERNMENT OF CANADA
ON THE ADMISSIBILITY OF THE COMMUNICATION
TO THE HUMAN RIGHTS COMMITTEE OF
NELL TOUSSAINT**

COMMUNICATION NO. 2348/2014

August 14, 2014

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EXECUTIVE SUMMARY

This communication concerns access to federal funding for health care in Canada by what the author terms “undocumented migrants”. The author of this communication, Nell Toussaint, is a citizen of Grenada who resided in Canada unlawfully for more than a decade. When she became ill in 2008, she sought access to government funding to pay for her health care needs. Although the author was granted provincial social assistance, she was found to be ineligible to receive funding under the Interim Federal Health Program (IFHP), a benefits scheme designed to provide temporary health care funding to protected persons, such as refugees. The author’s health care needs have been funded under the Ontario Health Insurance Plan (OHIP) since 2013, when her application to become a permanent resident in Canada was approved. Therefore, the author does not seek health care funding on her own behalf. Rather, she seeks compensation for an alleged violation of her rights flowing from her ineligibility to receive IFHP funding between 2009 and 2013. In addition, on behalf of other potential illegal immigrants who may also wish to seek access to this particular funding scheme in the future, the author contends that the exclusion of “undocumented migrants” from accessing IFHP funding amounts to a violation of Articles 2(1), 2(3)(a), 6, 7, 9(1) and 26 of the *International Covenant on Civil and Political Rights*.

Canada submits that this communication is inadmissible on the grounds that the author is not a victim of a violation by Canada, nor a representative of such a person. Further, the author now receives OHIP funding: any claim regarding her access to funding to meet her health care needs is therefore moot. Whereas the author had unsuccessfully challenged the constitutionality of an earlier formulation of the IFHP, at no time has she claimed a right to monetary compensation in Canadian courts. Her request that this committee recommend that she be awarded compensation is therefore inadmissible for non-exhaustion of domestic remedies. Likewise, to the extent that she seeks to challenge the scope of IFHP coverage on behalf of other potential claimants, Canada submits that this too is a claim which is inadmissible for non-exhaustion of domestic remedies. The current IFHP is the subject of ongoing litigation in Canadian courts.

Given that the Federal Court has now released its judgment in *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651, a case concerning the IFHP, and that that decision may be appealed to the Federal Court of Appeal, Canada requests an extension of time to file this submission on admissibility. In the special circumstances of the case, Canada further requests, pursuant to Rule 115(3) of the Committee’s Rules of Procedure, that the Committee or the Rapporteur on new complaints and interim measures agree to consider the admissibility of the communication separately from the merits. Canada further requests that the time for filing its

3 submission on the merits of the communication be extended until the Committee has considered the question of admissibility and until a reasonable time after a final determination by Canadian courts of the constitutional issues surrounding the IFHP scheme.

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I. INTRODUCTION

1. By letter dated February 14, 2014, the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) forwarded to Canada Communication No. 2348/2014 of Nell Toussaint (the “author”) dated December 28, 2013, which had been submitted to the Human Rights Committee (the “Committee”) for consideration under the *Optional Protocol to the International Covenant on Civil and Political Rights* (the “Optional Protocol”).
2. The author is a Grenadian citizen who resided and worked in Canada unlawfully for more than a decade. When she became ill in 2008, she submitted an application for permanent residence in Canada and, shortly thereafter, applied to the Ontario provincial government for health care coverage. When the author was informed of her ineligibility to receive provincial coverage, she applied to the federal government for funding under the Interim Federal Health Program (the “IFHP”). The IFHP is a funding scheme designed to assist certain groups of protected persons in need, such as refugees. As the author is not a member of such an eligible group, her application for funding under that program was denied.
3. In her communication, the author claims that by denying her access to funding for health care under the IFHP between 2009 and 2013, Canada violated its obligations under the *International Covenant on Civil and Political Rights* (the “Covenant”).¹ Specifically, she argues that Canada violated: the obligation to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the *Covenant* (Art. 2(1)); the obligation to ensure access to an effective remedy for violations of rights recognized by the *Covenant* (Art. 2(3)(a)); the right to life (Art. 6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7); the right to security of the person (Art. 9(1)); and the right to be equal before the law and to the equal protection of the law without discrimination (Art. 26).
4. As the author became a Canadian permanent resident in receipt of provincial health care coverage in 2013, she concedes that she is no longer in need of funding and therefore does not seek access to funding under the IFHP. Rather, the author asks that the Committee:
 - (a) Recommend that Canada pay monetary compensation to the author for the “severe psychological stress, indignity and exposure to risk to life and to long term negative health consequences she suffered as result of the violation of her rights”; and
 - (b) Call on Canada to provide access to IFHP coverage for necessary health care to individuals with irregular immigration status.²
5. In Canada’s submission, this communication is inadmissible for lack of standing, mootness and non-exhaustion of domestic remedies.

¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

² *Toussaint v. Canada*, HRC Communication No. 2348/2014 [*Toussaint HRC*] at para. 176.

II. SUMMARY OF FACTS AND DOMESTIC PROCEEDINGS

Request for Personal Compensation

6. The author is a Grenadian citizen who entered Canada as a visitor on December 11, 1999. Following the expiration of her six-month visitor's visa, she remained in Canada without status and worked as an undocumented migrant until 2008, when she became ill.
7. The author did not take any formal steps to regularise her immigration status in Canada until September 12, 2008, when she submitted an application for permanent residence status based on humanitarian and compassionate ("H&C") grounds. H&C applications allow individuals who would not normally be eligible for permanent residence status to be considered for such status based on exceptional circumstances. A successful application would entitle an applicant to lawfully remain in Canada and to receive provincial health care benefits.
8. In March 2009, the author also applied for a Temporary Resident Permit (TRP) in an effort to gain access to provincial health care benefits.
9. In April 2009, the author was notified that she qualified for social assistance in Ontario because she was in the process of applying for permanent residence from within Canada based on H&C grounds. She was also deemed eligible for social assistance from the Ontario Disability Support Program. Certain medications, but not medical services, were covered by the social assistance benefits granted to the author.
10. The author had applied for a waiver of fees for both the H&C application and the TRP application. The fee waiver requests were denied and her applications for judicial review of those denials were dismissed by the Federal Court. As the author abandoned her applications without paying the processing fees, ultimately, her applications for permanent residence status and for a TRP were not considered.³
11. On May 6, 2009, the author applied for medical coverage under the IFHP. The IFHP began in 1946 when Canada created a discretionary *ex gratia* program to accept persons in "refugee-like circumstances". While it has expanded over the past six decades to fund coverage for more categories of "protected persons", its purpose is to provide certain time-limited health care benefits to eligible beneficiaries until they are eligible for provincial or territorial health care plans. The IFHP scheme that was in place at the time of the author's funding application had been established pursuant to a 1957 Order in Council (the "1957 IFHP").⁴ The 1957 IFHP provided time-limited emergency and essential health care coverage to individuals with demonstrated financial need who do not qualify for private or public health coverage and who are: refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection Act (IRPA)*⁵, or

³ The waiver request was denied by the Minister. The Minister's decision was upheld on judicial review by the Federal Court in *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] FCR 452.

⁴ Order Respecting the Interim Federal Health Program, 1957, 1957-11/848.

⁵ *Immigration and Refugee Protection Act* (S.C. 2001, c. 27).

victims of trafficking in persons. Moreover, the IFHP is designed as a temporary bridge to meet the needs of certain “protected persons” before they become eligible for coverage under provincial plans. It is not a general health insurance plan for non-citizens.

12. In June 2009, the author inquired about coverage under the Ontario Health Insurance Plan (OHIP), but was told that she was not eligible.⁶ The author did not seek a formal decision regarding her eligibility or seek judicial review of that response.
13. On July 10, 2009, Citizenship and Immigration Canada determined that the author did not qualify for medical coverage under the 1957 IFHP because she was not a member of any of the above-described groups who are eligible to receive coverage under that scheme.
14. On August 10, 2009, the author applied to the Federal Court for leave to seek judicial review of that decision. The author argued before the Federal Court that she was eligible for medical coverage or that, in the alternative, her exclusion from medical coverage infringed her rights 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, and to non-discrimination under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”).⁷ On August 6, 2010, the Federal Court dismissed the author’s application for judicial review.⁸
15. The author appealed that decision to the Federal Court of Appeal. The appeal was dismissed on June 27, 2011.⁹
16. The author sought leave to appeal that decision to the Supreme Court of Canada. Leave to appeal was denied on April 5, 2012.¹⁰
17. On June 28, 2012, the author applied for permanent residence status based on spousal sponsorship. On January 30, 2013, the author’s application was approved in principle. As a result, she became eligible to receive provincial health care coverage. She has been receiving public funding for her health care needs through the OHIP since April 30, 2013.¹¹ On October 7, 2013, the author became a permanent resident of Canada. The author concedes that she continues to receive public health care funding sufficient to meet all of her medical needs.¹²

Request regarding IFHP eligibility of other potential “undocumented migrants”

18. On April 25, 2012, the IFHP funding scheme was modified by an Order in Council.¹³ The IFHP scheme that has been in place since that time (the “2012 IFHP”) is the subject of an ongoing challenge in domestic courts. That challenge has been brought by two

⁶ See section 1.4 of Regulation 550, R.R.O. 1990 to the Health Insurance Act, R.S.O. 1990, c. H.6.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁸ *Toussaint v. Canada (Attorney General)*, 2010 FC 810, [2011] 4 F.C.R. 367, Tab 1.

⁹ *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, [2013] 1 F.C.R. 374 [*Toussaint FCA*], Tab 2.

¹⁰ *Toussaint v. Canada (Attorney General)*, [2011] S.C.C.A. No. 412.

¹¹ See Ontario Ministry of Health and Long-term Care, Ontario Health Insurance Plan (OHIP), available online at <<http://www.health.gov.on.ca/en/public/programs/ohip/>>.

¹² *Toussaint HRC*, *supra* note 2, para. 2.

¹³ Order Respecting the Interim Federal Health Program, 2012, SI/2012-26.

failed refugee claimants who are directly affected by the IFHP eligibility criteria as well as by the following organisations that have been granted public interest standing based upon having a genuine interest in and a real engagement with the issues raised by the IFHP scheme: Canadian Doctors for Refugee Care, a group of physicians specializing in refugee health issues; Canadian Association of Refugee Lawyers, an association of lawyers and academics with an interest in legal issues related to refugees, asylum seekers and the rights of migrants; and Justice for Children and Youth, a legal aid clinic with a focus on children's rights and experience working with child refugees. Unlike the author, these individuals and organisations have proper standing to challenge the current scheme.

19. On July 4, 2014, the Federal Court found that the Orders in Council which established the 2012 IFHP are inconsistent with sections 12 and 15 of the *Canadian Charter*, which deal with the prohibition against cruel and unusual treatment or punishment, and with the right to equal protection and equal benefit of the law without discrimination, respectively. This decision of the Federal Court was released after the two month deadline for challenging the inadmissibility of the present communication had passed.

III. INADMISSIBILITY OF THE AUTHOR'S COMMUNICATION

- A. The author is not a victim of a violation by the State Party, nor the representative of such a person

20. Articles 1 and 2 of the Optional Protocol make clear that a communication alleging a violation of the rights contained in the *Covenant* may only be brought by an individual who claims to be a victim.¹⁴ Rule 96(b) of the Committee's Rules of Procedure further provides that a communication must be submitted by a victim of a violation by a State party on their own behalf or by that individual's representative.

Request for Personal Compensation

21. As noted above, the author concedes that, with the approval of her first complete application for permanent residence, she has been in receipt of provincial health care coverage sufficient to meet all of her medical needs since April 2013.¹⁵ Prior to 2013, the author was unlawfully present in Canada and relied on *pro bono* health care. The author's rights have not been violated due to her ineligibility to receive funding through a specialized federal program targeted to the needs of protected persons whose applications to remain in Canada are being processed. The author has suffered no damage that is in any way connected to that program. As was found by the Federal Court of Appeal, by choosing not to attempt to regularise her immigration status during the decade that the author was in Canada prior to being ill, the risk that she faced to her life and health was as a result of her own conduct.¹⁶ The author now receives full public health care funding. At no time has she been a victim of a violation by Canada. There is therefore no basis upon which the author would be entitled to personal compensation.

¹⁴ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁵ *Toussaint* HRC, *supra* note 2, para 2.

¹⁶ *Toussaint* FCA, *supra* note 9, para. 72.

Request regarding IFHP eligibility of other potential "undocumented migrants"

22. The author states that she has submitted this communication "in the hope of preventing the recurrence of these violations of rights with respect to other victims".¹⁷ She does not claim to have the authority to represent any such persons. According to this Committee's constant views, "no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant."¹⁸ Moreover, "[t]he Committee considers that in the absence of specific claimants who can be individually identified, [an] author's communication amounts to an *actio popularis* and is therefore inadmissible under article 1 of the Optional Protocol".¹⁹
23. As the author is not a victim of a violation by Canada nor the representative of such a person, Canada submits that this communication is inadmissible pursuant to Articles 1 and 2 of the Optional Protocol and Rule 96(b) of the Rules of Procedure.

B. The author's communication is moot

24. In addition and in the alternative, to the extent that the author's claim is based upon her ineligibility to receive funding for health care under the 1957 IFHP, Canada submits that this communication is moot.
25. The author's communication is moot for two reasons. First, the scheme that she challenges before the Committee no longer exists. The 1957 IFHP was replaced by the 2012 IFHP, which was declared invalid, effective November 4, 2014, by order of the Federal Court in *Canadian Doctors for Refugee Care, supra*. Going forward, the federal government's approach to temporary funding of this nature has yet to be determined and may be impacted by the present litigation in that matter. Thus, the 1957 IFHP challenged by the author is no longer in place and any such scheme that may be available after November 2012 has yet to be determined. As the subject matter of this communication no longer exists, any challenge to it is therefore moot.
26. Second, any need that the author may have had for funding no longer exists. Since April 2013, the author has been in receipt of funding for health care. She concedes that her medical needs have been addressed. As all of the facts that the author has put forward in

¹⁷ *Toussaint* HRC, *supra* note 2, para 2.

¹⁸ HRC Communication No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), views adopted on 9 April 1981, para. 9.2; HRC communication No. 318/1988, *E.P. et al. v. Colombia*, U.N. Doc. CCPR/C/39/D/318/1988 (1990), views on inadmissibility adopted 25 July 1990, para. 8.2; HRC Communication No. 1632/2007, *Raymond-Jacques Picq v France*, views adopted on 30 October 2008, para. 6.2.

¹⁹ HRC Communication No. 1379/2005, *Peter Michael Queenan v. Canada*, U.N. Doc. CCPR/C/84/D/1379/2005 (2005), views adopted on 26 July 2005, para. 4.2. See also the Individual opinion by Committee member Ms. Ruth Wedgwood, appended to the Committee's views, in which she elaborated on this principle in the following manner:

"Under the complaint procedure of the First Optional Protocol of the International Covenant on Civil and Political Rights, the Human Rights Committee is empowered to receive communications from particular individuals who have suffered violations of the Covenant through state action. But, even in compelling circumstances, the Committee's procedural rules have not permitted the Committee to engage in a declaratory judgment, or to accept petitions on behalf of a general class of individuals. Unlike some other human rights procedures, such petitions are considered to be *actio popularis* that fall outside the limited terms of the Optional Protocol. See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edition 2005), at pp. 829-837."

support of her allegations have ceased to exist, Canada submits that this communication is moot.

27. The Committee has frequently expressed the view that communications which have become moot are inadmissible.²⁰ If any alleged inconsistency with the *Covenant* has been remedied by the State, an individual can no longer establish that he or she is a victim of a violation of the *Covenant*, and the communication is therefore inadmissible under Article 1 of the Optional Protocol. Since the scheme being challenged is no longer in effect and the author receives funding for health care, her communication is moot and should be determined to be inadmissible.

C. The author has not exhausted domestic remedies

28. According to Article 5(2) of the Optional Protocol, “[t]he Committee shall not consider any communication from an individual unless it has ascertained that ... (b) [t]he individual has exhausted all available domestic remedies.” Rule 96(f) of the Rules of Procedure also establishes exhaustion of all available domestic remedies as a condition for admissibility of complaints.
29. The requirement of exhaustion of domestic remedies allows a State party to remedy an alleged violation before the issue is raised before the Committee; it obliges the author of a communication to have raised the substance of the issues submitted to the Committee before domestic courts and to have pursued all domestic avenues for seeking a remedy.

Request for Personal Compensation

30. In her communication, the author claims a right to monetary compensation for the stress and exposure to health risks that she experienced, presumably between 2009, when she sought IFHP funding, and 2013, when she began to receive OHIP coverage.
31. Canada submits that if the author had a genuine claim to compensation, which is expressly denied, her failure to seek monetary compensation in domestic courts results in this communication being inadmissible for non-exhaustion of domestic remedies. The author challenged the constitutional validity of the decision denying her request to access funding under the IFHP. No violation of the author’s rights was found and, as noted above, the Federal Court of Appeal stated that, most fundamentally, the author “by her own conduct – not the federal government by its Order in Council – has endangered her life and health.”²¹ At no time has the author sought monetary compensation for any alleged stress or risk to her health.
32. Canada submits that the author’s claim for compensation is inadmissible for non-exhaustion of domestic remedies.

²⁰ HRC Communication No. 478/1991, *A.P.L. v. d.M. v. The Netherlands*, U.N. Doc. CCPR/C/48/D/478/1991 (1993), views adopted on 26 July 1993, paras. 6.3 and 7(a); HRC Communication No. 501/1992, *J.H.W. v. Netherlands*, U.N. Doc. CCPR/C/48/D/501/1992 (1993), views adopted on 16 July 1993, paras. 5.2 and 6(a); HRC Communication No. 1291/2004, *Dranichnikov v. Australia*, U.N. Doc. CCPR/C/88/D/1291/2004 (2007), views adopted on 20 October 2006, para. 6.3.

²¹ *Toussaint FCA*, *supra* note 9.

Request regarding IFHP eligibility of other potential “undocumented migrants”

33. The author also asks that the Committee request that Canada reform the suite of benefits provided to protected persons under the IFHP in order to extend access to health care funding to individuals who are unlawfully residing in Canada and therefore have irregular immigration status. At para. 47 of her communication the author elaborates on her argument that it is the denial of IFHP funding to a “subcategory of non-citizens”, namely “undocumented migrants”, which she claims is discriminatory.
34. The scope of the IFHP and the coverage afforded to foreign nationals under that program is an issue that is currently before domestic courts in Canada. As indicated above, on July 4, 2014, the Federal Court found that the Orders in Council which established the IFHP 2012 are inconsistent with sections 12 and 15 of the *Charter*. That decision may be appealed to the Federal Court of Appeal. The author’s communication is therefore inadmissible for non-exhaustion of domestic remedies as the scheme that the author is challenging before this Committee is currently the subject of ongoing domestic litigation.
35. Canada requests, therefore, that this Committee determine that this communication is wholly inadmissible for non-exhaustion of domestic remedies, pursuant to Articles 2 and 5(2)(b) of the Optional Protocol and Rule 96(f) of the Rules of Procedure.

IV. CONCLUSION

36. On the basis of this submission, Canada respectfully requests the following:
 - (a) That this communication be declared to be inadmissible, pursuant to Articles 1 and 2 of the Optional Protocol and Rule 96(b) of the Rules of Procedure, because the author is not a victim of a violation by the State Party, nor a representative of any such person;
 - (b) That this communication be declared to be inadmissible, pursuant to Article 1 of the Optional Protocol, on the basis that it is moot as the author is in receipt of health care funding; and
 - (c) That this communication be declared to be inadmissible pursuant to Articles 2 and 5(2)(b) of the Optional Protocol and Rule 96(f) of the Rules of Procedure, due to non-exhaustion of domestic remedies. The very substance of the author’s communication, eligibility for funding under the IFHP, is subject to ongoing litigation before domestic courts. Further, the author’s request for compensation is not one that has been raised previously in domestic fora. Each aspect of this communication is therefore inadmissible for non-exhaustion of domestic remedies.
37. In the special circumstances of the case, and following upon the Federal Court decision in *Canadian Doctors for Refugee Care, supra*, Canada further requests, pursuant to Rule 97(3) of the Rules of Procedure, that the Committee, a working group established under Rule 95(1), or the Special Rapporteur designated under Rule 95(3) decide to consider the admissibility of this communication at this point in time separately from the merits. Finally,

Canada requests that the time for submission on the merits of the Communication be extended until the Committee has considered the question of admissibility and until a reasonable time after a final determination of these issues in Canadian courts.

Ottawa, Canada
August 14, 2014