

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA AND
MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN
ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,
HANIF AYUBI AND JUSTICE FOR CHILDREN AND YOUTH

Respondents

-and-

REGISTERED NURSES' ASSOCIATION OF ONTARIO,
CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES AND
AMNESTY INTERNATIONAL AND ESCR-NET ("THE COALITION")

Intervenors

**MEMORANDUM OF FACT AND LAW OF THE INTERVENERS,
AMNESTY INTERNATIONAL AND ESCR-NET ("THE COALITION")**

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TABLE OF CONTENTS

	PAGE
PART I – STATEMENT OF FACT AND OVERVIEW	1
PART II – QUESTIONS IN ISSUE	1
PART III – STATEMENT OF SUBMISSIONS	2
A. Ratified treaties are binding on Canada and relevant to <i>Charter</i> interpretation	2
B. Canada must afford a high degree of importance to its international human rights obligations and interpret the <i>Charter</i> to comply with them	4
C. The right to life in the <i>ICCPR</i> places a duty upon States Parties to guarantee necessities of life, including the right to health	5
D. Canada must protect its most vulnerable and marginalized groups and cannot discriminate in the fulfilment of its international treaty obligations	8
PART V – LIST OF AUTHORITIES	11

PART I – STATEMENT OF FACT AND OVERVIEW

1. This appeal raises important questions regarding the scope and content of rights under the *Canadian Charter of Rights and Freedoms* (“*Charter*”) to life, security of the person, and equality, and whether they require Canada to provide refugees and refugee claimants¹ with access to necessary health care. The Coalition accepts the factual findings made by Justice Mactavish, which include the determination that the 2012 Orders in Council (“OICs”) modifying the Interim Federal Health Program deliberately restricted access to health insurance coverage in order to deter refugee claimants from seeking protection in Canada, and that the denial of access to health care put refugees and refugee claimants at risk of illness, disability, and death.

2. The Coalition submits that the 2012 OICs resulted in violations of Canada’s treaty obligations to guarantee the rights to life, health, and equality. Once ratified, treaties become sources of binding obligations. Under international law, the right to life is inalienable from the right to health. Canada is required to guarantee the right to life by ensuring for all individuals within its territory or jurisdiction the basic necessities of life, including health care. Canada bears a responsibility to protect its most vulnerable and marginalized groups. Non-citizens, including refugees and refugee claimants, are recognized in international law as a marginalized class of persons protected from discrimination. Restricting the fundamental rights of these vulnerable individuals imposes a very high burden upon Canada to justify limiting their rights. As a result, targeting refugees and refugee claimants by withholding access to necessary health care as a means to deter them from coming to Canada violates Canada’s obligations to refrain from discrimination, and cannot, under any circumstances, justify restricting these individuals’ fundamental right to life.

PART II – QUESTIONS IN ISSUE

3. What is the effect and relevance of international treaties binding on Canada (other than those referred to in the Federal Court decision) to
- a. The interpretation of the right to life and security of the person under section 7 of the *Charter*; and
 - b. Whether the 2012 Orders in Council violate the right to equality guaranteed by section 15 of the *Charter*?

¹ When referring to refugees and refugee claimants, the Coalition includes individuals who are awaiting a determination on their refugee claims and those who remain in Canada but whose claims have failed.

PART III – STATEMENT OF SUBMISSIONS

A. Ratified treaties are binding on Canada and relevant to *Charter* interpretation

4. The right to life, health, and equality are fundamental human rights enshrined in treaties that Canada has ratified, including the *Charter of the United Nations* (“UN Charter”),² *International Covenant on Civil and Political Rights*³ (“ICCPR”), the *International Covenant on Economic, Social and Cultural Rights*⁴ (“ICESCR”), the *International Convention on the Elimination of All Forms of Racial Discrimination*⁵ (“ICERD”), the *Convention on the Elimination of All Forms of Discrimination against Women*⁶ (“CEDAW”), and the *Convention on the Rights of Persons with Disabilities*⁷ (“CRPD”). As specified by the *Vienna Convention on the Law of Treaties* – to which Canada is also a State Party – once states ratify a treaty, that treaty becomes binding on them and “must be performed by them in good faith.”⁸ According to legal scholar Ruth Sullivan, “since Canada [...] is a participant in the international community and supports international rule of law, it is appropriate to read domestic legislation in light of international law.”⁹ This approach has been followed by Canadian courts.¹⁰

5. Rather than directly incorporating human rights treaties, Canada’s international treaty obligations are implemented by ensuring that domestic law conforms with international human rights law. According to the government of Canada,

² *Charter of the United Nations*, 24 October 1946, 1 UNTS XVI, art 1(3), Can TS 1945 No 7 [UN Charter].

³ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, arts 2(1), 4(1), 6, 20(2), 24(1), 26, Can TS 1976 No 47 [ICCPR].

⁴ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 arts 2(2), 12, Can TS 1976 No 46 [ICESCR].

⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 5(e)(iv), Can TS 1970 No 28 [ICERD].

⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 arts 11(1)(f), 12, Can TS 1982 No 31 [CEDAW].

⁷ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st Sess, UN Doc A/RES/61/106 (24 January 2007) [CRPD].

⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, preamble, art 26, Can TS 1980 No 37. See also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at paras 2-4 [General Comment 31]; *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 25 [Divito].

⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008) at 548.

¹⁰ *Divito*, supra note 8 at paras 22-27; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348-352, Dickson J. dissenting on other grounds [Reference re Public Service]; *R v Sharpe*, 2001 SCC 2 at paras 175-178 [Sharpe]; *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30-32 [Spraytech]; *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 69-74, 79 [Health Services]; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 62-70, 75 [Saskatchewan Federation].

[i]t is not the practice in Canada for one single piece of legislation to be enacted incorporating an entire convention on human rights into domestic law [...] Rather, many different federal, provincial and territorial laws and policies together serve to implement Canada's international human rights obligations.¹¹

The SCC has recognized that the “*Charter* is the primary vehicle through which international human rights achieve a domestic effect.”¹² The Canadian government has repeatedly represented to treaty bodies that the *Charter* is the primary domestic enactment of international human rights law and that it protects against deprivations of basic necessities of life.¹³

6. Therefore, treaties ratified by Canada are relevant and persuasive sources of interpretation of *Charter* rights.¹⁴ The SCC has held that the “*Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”¹⁵ Accordingly, it has “sought to ensure consistency between its interpretation of the *Charter* [...] and Canada's international obligations and relevant principles of international law[.]”¹⁶ International law principles “form part of the legal context in which legislation is enacted and read” and therefore “[i]n so far as possible [...] interpretations that reflect these values and principles are preferred.”¹⁷ *Charter* rights “cannot be considered in isolation from international norms which they reflect.”¹⁸ Indeed, this Court has recognized that “international instruments, wider human rights understandings and jurisprudence, and other contextual matters” may inform domestic legal interpretation.¹⁹

7. In interpreting *Charter* rights, Canadian courts draw not only upon the text of binding treaties, but also foreign jurisprudence interpreting them. Canadian courts also rely on the reports, decisions, general comments, and concluding observations of treaty bodies – such as the

¹¹ *Core document forming part of the reports of States parties: Canada*, UN Doc HRI/CORE/CAN/2013 (30 May 2013) at para 122.

¹² *R v Ewanchuck*, [1999] 1 SCR 330 at para 73.

¹³ *Victoria (City) v Adams*, 2008 BCSC 1363 at paras 98-99, 161-162; UN Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions Emited by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1)* (November 1998) at paras 1, 53; UN Human Rights Committee, *Initial reports of States parties due in 1977: Addendum – Canada*, UN Doc CCPR/C/1/Add.62 (15 September 1983) at 23 [*Canada report 1983*]; UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting*, 8th Sess, UN Doc E/C.12/1993/SR.5 (25 May 1993) at para 21.

¹⁴ *Reference re Public Service*, *supra* note 10 at 348-350; *Divito*, *supra* note 8 at paras 22-28; *Sharpe*, *supra* note 10 at paras 175, 178; *Spraytech*, *supra* note 10 at paras 30-32.

¹⁵ *Health Service*, *supra* note 10 at para 69; *Divito*, *supra* note 8 at para 23, cited with approval in *Saskatchewan Federation*, *supra* note 10 at para 64; *Reference re Public Service*, *supra* note 10 at 349, cited with approval in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056 [*Slaight Communications*].

¹⁶ *R v Hape*, 2007 SCC 26 at para 55 [*Hape*].

¹⁷ *Spraytech*, *supra* note 14 at para 30.

¹⁸ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 59.

¹⁹ *Canada (Attorney General) v Pictou Landing First Nations*, 2014 FCA 21 at para 23.

UN Human Rights Committee (“HRC”) and the UN Committee on Economic, Social and Cultural Rights (“CESCR”) – that are charged with interpreting the scope of treaty rights and promoting their implementation around the world. They also rely on special mandate holders, who elaborate on the content of treaty rights and the nature of States Parties’ obligations to implement them.²⁰ Accordingly, all of these sources are relevant to explaining the scope and application of Canada’s binding treaty obligations in the present appeal.

B. Canada must afford a high degree of importance to its international human rights obligations and interpret the *Charter* to comply with them

8. As recognized by the SCC, “the fact that a value has the status of an international human right [...] under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.”²¹ Justice La Forest has noted that courts are absorbing international legal norms affecting the individual through our constitutional pores [...] Thus our courts – and many other national courts – are truly becoming international courts in many areas involving the rule of law. They will become more so and they continue to rely on and benefit from one another’s experience. Consequently, it is important that [...] national judges adopt an international perspective.²²

As will be discussed, the principle that the right to life imposes duties upon states to ensure for all individuals the basic necessities of life, including access to necessary health care, has been accepted worldwide by international treaty bodies, special mandate holders, and national courts. There is also global recognition that non-discrimination is “a basic and general principle relating to the protection of human rights.”²³

9. Binding treaty obligations extend to all branches of government, including the judiciary. Thus, courts play a critical role in ensuring Canada’s ongoing compliance with its international law by ensuring that the *Charter* is interpreted consistently with treaties binding on Canada. The CESCR cautions that “neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international

²⁰ See, e.g., *Reference re Public Service*, *supra* note 10 at 348; *Health Services*, *supra* note 10 at paras. 71,-74; *Divito*, *supra* note 8 at paras 22-28; *Lovelace v Ontario*, 2000 SCC 37 at para 69; *Gosselin v Quebec*, 2002 SCC 84 at para 147 [*Gosselin*]; *Saskatchewan Federation*, *supra* note 10 at para 154; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 192; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 33, 38, 186; *Schrieber v Canada (Attorney General)*, 2002 SCC 62 at para 36; *R v Keegstra*, [1990] 3 SCR 697 at 752; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2000] 2 FCR 592 at para 24; *Almrei v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 54.

²¹ *Slaight Communications*, *supra* note 15 at 1057.

²² Hon. Gérard La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 CYIL 89 at 98, 100-101.

²³ *Ibid* at para 7. See also UN Human Rights Committee, *General Comment 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) at para 1 [*General Comment 18*].

human rights obligations.”²⁴ The Coalition submits that given the widespread acceptance of the human rights norms presented, this Court should attach a high degree of importance to them, and interpret the *Charter* to comply with the standards and principles set out in this factum.

C. The right to life in the ICCPR places a duty upon States Parties to guarantee necessities of life, including the right to health

10. Article 6 of the *ICCPR* guarantees that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”²⁵ No derogation from the right to life is permitted.²⁶ The right to life in international law has evolved to extend obligations upon States Parties to the *ICCPR* “to the taking of steps to maintain an adequate standard of health.”²⁷ By ratifying the *ICCPR*, Canada undertook to take the “necessary steps [...] to adopt laws or other measures necessary to give effect” to the right to life.²⁸ The right to life requires measures which extend to vulnerable members of society access to the necessities of life, including health facilities, goods, and services.²⁹ HRC jurisprudence has established that although the *ICCPR* does not contain a “right to health” provision, Article 6 of the *ICCPR* engages issues of access to health care.³⁰ Canada has acknowledged that Article 6 of the *ICCPR* “requires Canada to take the necessary legislative measures to protect the right to life [which] may relate to the protection of the health and social well-being of individuals.”³¹

11. States Parties to the *ICESCR* also have an obligation to take measures to guarantee the rights to life and health.³² The right to health is also recognized in the *CRPD*,³³ *CEDAW*,³⁴ and

²⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 19th Sess, UN Doc E/C.12/1998/24 (3 December 1998) at para 14.

²⁵ *ICCPR*, *supra* note 3, art 6.

²⁶ *Ibid* art 4.

²⁷ Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political rights: cases, materials, and commentary* (Oxford: Oxford University Press: 2004) at 183.

²⁸ *ICCPR*, *supra* note 3, art 2(2).

²⁹ UN Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th Sess (30 April 1982) at para 5; UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 65th Sess, UN Doc CCPR/C/79/Add.105 (7 April 1999) at para 12; See also UN Human Rights Committee, *Ms. Yekaterina Pavlovna Lantsova v The Russian Federation*, *Communication No 763/1997*, UN Doc CCPR/C/74/D/173/1997 (2002) at para 9.2.

³⁰ UN Human Rights Committee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v Australia*, *Communication No. 1020/2001*, 78th Sess, UN Doc CCPR/C/78/D/1020/2001 (2003) at para 7.7.

³¹ *Canada report 1983*, *supra* note 13 at 23.

³² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) at paras 1, 3, 12-13, 30-31, 33-37, 43-45 [*General Comment 14*]. UN Committee on Economic, Social and Cultural Rights, *General Comment No 2: International Technical Assistance Measures*, 4th Sess, UN Doc E/1990/23 (2 February 1990) at para 6. See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, 5th Sess, UN Doc E/1991/23 (14 December 1990) at para 10.

ICERD.³⁵ The CESCR has stressed that “[h]ealth is a fundamental human right indispensable for the exercise of other human rights”, especially the right to a dignified life.³⁶ The Special Rapporteur on the right health adds that access to health care is *required* for the full enjoyment of the right to life.³⁷ The *ICESCR* requires Canada to recognize and realize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[.]”³⁸ Underfunding health care, resulting “in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable and marginalized” constitutes a violation of this obligation.³⁹

12. A number of foreign jurisdictions such as Argentina,⁴⁰ Brazil,⁴¹ Bangladesh,⁴² Colombia,⁴³ Ecuador,⁴⁴ El Salvador,⁴⁵ India,⁴⁶ Kenya,⁴⁷ Mexico,⁴⁸ Pakistan,⁴⁹ South Africa,⁵⁰ the

³³ *CRPD*, *supra* note 7, art 25.

³⁴ *CEDAW*, *supra* note 6, art 12.

³⁵ *ICERD*, *supra* note 5, art 5(iv).

³⁶ *General Comment 14*, *supra* note 32 at para 1.

³⁷ UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 2 [Special Rapporteur on Health].

³⁸ *ICESCR*, *supra* note 4, art 12.

³⁹ *General Comment 14* *supra* note 32 at para 52.

⁴⁰ *Reynoso, Nilda Noemí c/INSSJP/amparo*, May 16, 2006 (Supreme Court of Argentina) online: <http://www.revistarap.com.ar/Derecho/constitucional_e_internacional/accion_de_amparo/reynoso_nilda_noemi_c_inssjp_s_amparo.html>. See also *Campodonico de Beviaacqua, Ana Carina v. Ministerio de Salud y Banco de Drogas Neoplasicas*, Supreme Court of Argentina, 24 October 2000, as discussed in Christian Courtis, “Argentina: Some Promising Signs” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 163 at 172.

⁴¹ *Viera v Porto Alegre* (RE 271286 AgR/RS) (2000), as discussed in Flavia Piovesan, “Impact and Challenges of Social Rights in the Courts” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 182 at 185-187.

⁴² *Rabia Bhuiyan v. Ministry of Local Government, Rural Development*, 59 DLR (AD) 176 (2007) online: <<http://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-2007-Rabia-Bhuiyan-v.-LGRD.pdf>>. See also *Dr. Mohiuddin Farooque v. Bangladesh* 48 DLR (1996) 438 (both cases discussed in Iain Byrne and Sara Hossein, “South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 125 at 127, 134, 136.)

⁴³ *Sala Segunda de Revisión, Sentencia T-760* (2008) (Colombia). “Judgment T-760/08 (July 31, 2008) online: <http://www.globalhealthrights.org/wp-content/uploads/2013/08/English_summary_T-760.pdf>.

⁴⁴ *Mendoza & Ors v. Ministry of Public Health Resolution No. 0749-2003-RA* (28 Jan 2004) (Constitutional Court of Ecuador).

⁴⁵ *Mr Jorge Odir Miranda Cortez vs la Directora del instituto Salvadoreño del Seguro Social*, File No. 348-99 (4 April 2001) Constitutional Court of El Salvador, as discussed in Hans V. Hogerzeil, Melania Samson and Jaume Vidal Casanova, “Ruling for Access: Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health” (World Health Organization Department of Essential Drugs and Medicines Policy, November 2004) online: <http://www.who.int/medicines/areas/human_rights/Details_on_20_court_cases.pdf>.

⁴⁶ *Laxmi Mandal v Deen Dayal Harinagar Hospital and Others*, WP(C) 8853/2008, Judgment of 4 June 2010, High Court of Delhi at paras 20-21 [*Laxmi Mandal*]; *Francis Coralie Mullin v The Administrator, Union*, (1981) 1981 AIR 746 at para 6.

United Kingdom,⁵¹ and Venezuela⁵² have interpreted the right to health in light of the right to life. In the majority of these countries, courts have relied on or referred to Article 12 of the *ICESCR* to find that the right to necessary health care is inseparable from the right to life. For instance, in India, courts have recognized that the right to health under Article 12 forms “an inalienable component of the right to life” “which would include the right to access government (public) health facilities and receive a minimum standard of treatment and care.”⁵³

13. In the same vein, section 7 of the *Charter* should be understood to impose obligations on Canada to take measures to protect and sustain the right to life and security of the person by ensuring basic necessities for life.⁵⁴ As Louise Arbour stated during her tenure as UN High Commissioner for Human Rights, access to publicly funded health care is both “a cornerstone of Canadian values, a way of honouring our fundamental commitment to each other” and “a matter of obligation at law owing to a duty which goes to the core of the protection and promotion of human dignity.”⁵⁵ The Coalition submits that given Canada’s treaty obligations, comparative jurisprudence implementing those treaties, and the values that lie at the heart of the *Charter*, these obligations should encompass the provision of necessary health care services.

14. In circumstances – such as in this appeal – where measures taken by a State Party to the *ICCPR* and the *ICESCR* are found to cause “illness, disability, and death[,]”⁵⁶ the State Party is failing in its obligation to guarantee the right to life and health care, which are inextricably connected and to which all individuals within the state’s territory and jurisdiction are entitled.

⁴⁷ *Patricia Asero Ochieng and 2 Others v the Attorney General & Another*, Petition No. 409 of 2009, High Court of Kenya at Nairobi, online: < <http://www.esccr-net.org/sites/default/files/Judgment-Petition-No-409-of-2009%20Anti%20counterfeit%20case.pdf> >.

⁴⁸ Case “*Special Care Unit 13*” (*Pabellón 13*) regarding patients with HIV-AIDS brought against the National Institute of Respiratory Diseases (INER) and other authorities (AR 378/2014).

⁴⁹ See *Ibid* at 136.

⁵⁰ *Minister of Health and Others v Treatment Action Campaign and Others*, (No 2), [2002] ZACC 15 at paras 26, 28.

⁵¹ *Burke, R (on the application of) v General Medical Council and Ors*, [2005] EWCA Civ 1003 at paras 39, 53.

⁵² *Cruz del Valle Bermúdez y otros v MSAS s/amparo. Expediente N° 15.789. Sentencia N° 196*, Supreme Court of Venezuela (May 15, 1999) online <http://www.esccr-net.org/caselaw/caselaw_show.htm?doc_id=406005&focus=13991>.

⁵³ *Laxmi Mandal supra* note 46 at paras 20-21.

⁵⁴ See Martha Jackman and Bruce Porter, “Canada: Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 209 at 211-213. See also *Gosselin, supra* note 20 at para 83.

⁵⁵ Louise Arbour, “‘Freedom from want’: from charity to entitlement” (LaFontaine-Baldwin lecture 2005).

⁵⁶ *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 1049 [*Canadian Doctors*].

D. Canada must protect its most vulnerable and marginalized groups and cannot discriminate in the fulfilment of its international treaty obligations

15. Canada's obligations to guarantee all human rights without discrimination are laid out in every human rights instrument it has ratified, including the *UN Charter*,⁵⁷ the *ICESCR*,⁵⁸ the *ICCPR*,⁵⁹ the *ICERD*,⁶⁰ the *CRPD*,⁶¹ and the *CEDAW*.⁶² For instance, by ratifying the *ICCPR*, Canada undertook to "respect and ensure to all individuals within its territory and subject to its jurisdiction" the right to life "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁶³

Similarly, Canada has committed to "take steps" to ensure the full realization of the right to health in the *ICESCR* without discrimination on the basis of the categories listed above.⁶⁴

16. While non-citizens – including refugees and refugee claimants – are not specifically enumerated as a group protected from discrimination in the treaties, it is well-recognized in international law (and also acknowledged by the SCC⁶⁵) that non-citizens fall within the "other status" category of the non-discrimination provisions of those same treaties. According to the CESCR, "[t]hese grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation."⁶⁶

17. Parliament has recognized the vulnerability of refugees and refugee claimants, affirming that Canada's "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted[.]"⁶⁷ The HRC has stressed that States Parties have the duty to protect the inherent right to life and security of the person of non-citizens, including refugees and refugee claimants, who must "receive the benefit of the general requirement of non-discrimination".⁶⁸ The CESCR has established that the right of access to affordable health care

⁵⁷ *Supra* note 2, arts 1(3), 55.

⁵⁸ *Supra* note 4, art 2(2).

⁵⁹ *Supra* note 3, arts 2(1), 4(1), 20(2), 24(1), 26.

⁶⁰ *Supra* note 5.

⁶¹ *Supra* note 7, preamble, arts 3, 4.

⁶² *Supra* note 6.

⁶³ *ICCPR*, *supra* note 3, art 2(2).

⁶⁴ *ICESCR*, *supra* note 4, art 2(1)-(2).

⁶⁵ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

⁶⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009) at para 27 [*General Comment 20*].

⁶⁷ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(2)(a).

⁶⁸ UN Human Rights Committee, *General Comment No 15: The position of aliens under the Covenant*, 27th Sess (30 September 1986) at paras 2, 7. See also *General Comment 31*, *supra* note 8 at para 10.

applies “to everyone including non-nationals, such as refugees [and] refugee claimants[.]”⁶⁹ Similarly, the Committee on the Elimination of Racial Discrimination, pointing out that “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism[.]”⁷⁰ has stated that States Parties to the *ICERD* must “respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to [...] health services.”⁷¹

18. Health care “must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination[.]”⁷² Discrimination against refugees and refugee claimants can be compounded by factors such as disability, age, and sex, which also form distinct prohibited grounds of discrimination. Refugee children are entitled to special protection under Article 24 of the *ICCPR*,⁷³ which includes sustaining a dignified life⁷⁴ by, *inter alia*, guaranteeing access to necessary health care.⁷⁵ Refugee women are likewise entitled to necessary health care under the *CEDAW*⁷⁶ and the *ICESCR*,⁷⁷ and “States parties bear the primary responsibility for ensuring that asylum-seeking women [and] refugee women [...] are not exposed to violations” of this right during the entire refugee determination process.⁷⁸

19. The obligation to not discriminate is “immediate and cross-cutting[.]”⁷⁹ Under international law, discrimination constitutes

[a]ny distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁸⁰

20. Where restrictions are made to international human rights,

⁶⁹ *General Comment 20*, *supra* note 66 at para 30.

⁷⁰ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 on discrimination against non-citizens*, 65th Sess (19 August 2004), preamble.

⁷¹ *Ibid* at para 36.

⁷² *General Comment 14*, *supra* note 32 at para 12(b), see also paras 43(a), 43(f) [emphasis added].

⁷³ *ICCPR*, *supra* note 3, art 24.

⁷⁴ UN Human Rights Committee, *General Comment No. 17: Article 24 (Rights of the child)*, 35th Sess (29 September 1989) at para 3.

⁷⁵ *General Comment 14*, *supra* note 32 at para 22-24; See also, generally: Dr. Aoife Nolan, “The Child’s Right to Health & the Courts” in Maria Stuttaford and John Harrington, *Global Health and Human Rights: Legal and Philosophical Perspectives* (Hoboken Taylor & Francis, 2010) 135.

⁷⁶ *CEDAW*, *supra* note 6, art 12.

⁷⁷ *General Comment 14*, *supra* note 32 at para 21.

⁷⁸ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, UN Doc CEDAW/C/GC/32 (5 November 2014) at paras 7, 14, 24, 33, 34, 48.

⁷⁹ *General Comment 20*, *supra* note 66 at para 7.

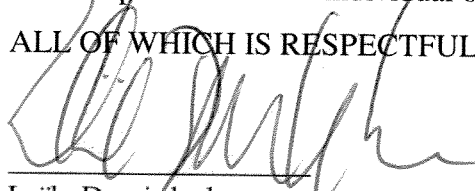
⁸⁰ *General Comment 18*, *supra* note 23 at para 7.

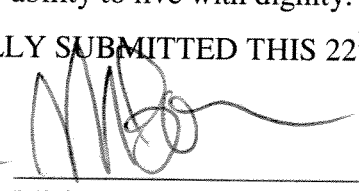
States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.⁸¹

Under the *ICERD*, “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation [...] are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”⁸² The more disproportionate the harm and the more vulnerable the group affected, the greater the burden of justification for limiting human rights.⁸³ Canada’s unwillingness to provide refugees and refugee claimants access to health care without discrimination because of national origin and immigration status constitutes a breach of its obligations under the *ICESCR*, *ICCPR*, *ICERD*, *CRPD*, and *CEDAW*. Non-compliance with this non-derogable, core obligation “cannot, under any circumstances whatsoever” be justified.⁸⁴

21. The prohibition against discrimination in international law would certainly apply to the restrictions introduced through the 2012 OICs whose purpose was the intentional targeting of “an admittedly poor, vulnerable and disadvantaged group for adverse treatment[.]”⁸⁵ This is the epitome of discrimination under treaties binding on Canada. As stated by the CESCR, “the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health” is a violation of the *ICESCR*.⁸⁶ For Canada to restrict access to health care to a vulnerable group for purposes which are manifestly discriminatory can under no circumstances meet the high burden of justification required from States Parties when limiting the human rights to life and health, which are indispensable to an “individual’s ability to live with dignity.”⁸⁷

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF APRIL 2015, BY:


Laïla Demirdache


Michael Bossin


Vanessa Gruben

⁸¹ *General Comment 31*, *supra* note 8 at para 6.

⁸² *General Recommendation 30*, *supra* note 70 at para 4.

⁸³ *R v Ministry of Defence ex parte Smith*, [1995] EWCA Civ 22.

⁸⁴ *General Comment 14*, *supra* note 32 at paras 43, 47.

⁸⁵ *Canadian Doctors*, *supra* note 56 at para 9.

⁸⁶ *General Comment 14*, *supra* note 32 at para 48.

⁸⁷ *Special Rapporteur on Health*, *supra* note 37 at para 71.

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