SUPPLEMENTARY SUBMISSION OF THE GOVERNMENT OF CANADA TO THE HUMAN RIGHTS COMMITTEE ON THE ADMISSIBILITY AND MERITS OF THE COMMUNICATION OF MS. NELL TOUSSAINT

COMMUNICATION NO. 2348/2014

March 30, 2016

INTRODUCTION

1. By letter dated October 5, 2015, the Secretary General of the United Nations (High Commissioner for Human Rights) forwarded to Canada the author's comments dated August 22, 2015 on Canada's admissibility and merit submissions concerning communication No. 2348/2014, presented to the Human Rights Committee ("the Committee") for consideration under the *Optional Protocol* to the *International Covenant on Civil and Political Rights* ("the *Covenant*") on behalf of Ms. Nell Toussaint.

2. Canada continues to rely on its August 14, 2014 and April 2, 2015 submissions on the admissibility and merits of the communication.

3. Canada makes the following additional observations in reply to the author's comments. Canada will demonstrate that the communication is inadmissible by reason of non-exhaustion of domestic remedies, mootness, *actio popularis*, and incompatibility with the provisions of the *Covenant*. In the alternative, Canada submits that the author's claims are wholly without merit. The *Covenant* does not create an obligation to provide publicly-funded health care to undocumented migrants.

THE COMMUNICATION IS INADMISSIBLE

a) *The author failed to exhaust domestic remedies*

4. The author challenges the alleged under-inclusiveness of publicly-funded health care in Canada. This has a bearing on the exhaustion of domestic remedies. Canada has a federal system of government. In Canada, the administration and delivery of health care services is the responsibility of each provincial or territorial government, guided by the provisions of the *Canada Health Act.*[1] The provinces and territories fund these services, through public health insurance programs, with assistance from the federal government in the form of fiscal transfers. Health care services include insured primary health care and care in hospitals. The

[1] *Canada Health Act*, RSC 1985, c C-6, online: http://laws.justice.gc.ca/eng/acts/C-6/

provinces and territories also provide some groups with supplementary health benefits not covered by the *Canada Health Act*, such as prescription drug coverage.[2]

5. A division of responsibility among different orders of government is a legitimate choice and one which must be respected by the Committee. Canada assures the Committee that all orders of government take seriously their obligations under the *Covenant* and share a strong commitment to work together to protect and advance human rights in Canada. Canada's cooperative approach to the implementation of rights allows provincial and territorial governments to realize the public policy solutions most suitable to their local contexts, and to implement democratic decisions about the distribution of public funds in the manner most responsive to local needs and socio-economic priorities.

6. Public health care is administered and funded in Ontario through the Ontario Health Insurance Program (OHIP). The author inquired about her coverage under OHIP in June 2009, but was told she did not qualify under Ontario's *Health Insurance Act* as she was not lawfully a resident of Ontario at that time.[3] Under the *Health Insurance Act*, individuals must have a citizenship or immigration status that renders them eligible for publicly-funded health care. Many such statuses are recognized, including permanent residents, applicants deemed eligible for permanent residency, protected persons, and persons with valid work permits issued under the *Immigration and Refugee Protection Act (IRPA*).[4] Foreign nationals, without legal status in Canada, are not eligible for publicly-funded health care.

7. The author did not seek a formal decision regarding her eligibility for OHIP nor seek judicial review of Ontario's response.[5] She has also failed to challenge the constitutionality of the OHIP regime in Canadian courts.[6] Such an application would not unduly prolong the domestic steps required of the author, but rather ensure that the issue is effectively considered and analyzed within Canada's federal system of government. It is the provinces that have the responsibility to determine eligibility for publicly-funded health care within Canada's federal system, and thus it is against this level of government that the author should have sought a domestic remedy.

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[2] Government of Canada, "Provincial/Territorial Role in Health," online: http://healthycanadians.gc.ca/health-system-systeme-sante/cards-cartes/health-role-sante-eng.php; see also *Toussaint v. Canada*, 2011 FCA 213 at para. 69, online: http://canlii.ca/t/fm4v6 .

[3] *Health Insurance Act*, R.S.O. 1990, c. H6, online: http://www.canlii.org/en/on/laws/stat/rso-1990-c-h6/latest/rso-1990-c-h6.html?resultIndex=1

[4] *General*, RRO 1990, Reg 552, ss 1.3, 1.4, online: http://www.canlii.org/en/on/laws/regu/rro-1990-reg-552/latest/rro-1990-reg-552.html

[5] As noted in Canada's April 2, 2015 submission at its fn 13, the author did make an ill-founded discrimination complaint under the *Ontario Human Rights Code*, alleging that her ineligibility for OHIP constituted impermissible discrimination on the basis of her citizenship status (specifically, her status as a non-citizen without legal status, as opposed to non-citizens with legal status). This complaint was dismissed: see *Toussaint v. Ontario (Health and Long Term Care)*, 2010 HRTO 2102, online: http://canlii.ca/t/2d03; *Toussaint v. Ontario (Health and Long-Term Care)*, 2011 HRTO 760, online: http://canlii.ca/t/fl3dk.

[6] See *Toussaint v. Canada (A.G.)*, 2011 FCA 213, *supra* note 2, at para. 71.

8. In seeking coverage under the Interim Federal Health Program (IFHP), the author applied to a program that is not intended to address her circumstances. The IFHP provides temporary health-care funding to refugees, refugee claimants, rejected refugee claimants, immigration detainees, and certain other protected persons in Canada. The provision of public health care funding to those without lawful status in Canada simply falls outside its scope. The author's communication concerns her alleged right to publicly-funded health care. The allocation of responsibilities within Canada's federal system requires this issue to be litigated vis-à-vis the provincial regime, as it is the provinces who have the jurisdictional competence to determine eligibility for these services. By failing to challenge her exclusion from OHIP, the author has failed to exhaust the pertinent domestic remedy. As such, the author's communication is inadmissible pursuant to Article 5(2)(b) of the *Optional Protocol* and Rule 78(c) of the *Rules of Procedure of the Human Rights Committee.*

b) The communication is moot and the author is not a victim within the meaning of Article 1 of the Optional Protocol

9. As previously discussed in Canada's submissions, the author received approval-in-principle of her application for permanent residency on January 30, 2013, and thus began to receive publicly-funded health care in accordance with the *Health Insurance Act* on April 30, 2013. The author is now a permanent resident of Canada (since October 7, 2013), and concedes that she receives comprehensive public health insurance sufficient to meet all her medical needs.[7] The author does not allege a continuing violation of her rights under the *Covenant*. Rather, the regularization of her status in Canada has provided her with comprehensive and publicly-funded health care. The Committee recognized in *Dranichnikov v. Australia* that the granting of a civil status sufficient to provide the author with protection (in that instance, a protection visa) rendered the claim moot and inadmissible on this basis under article 1 of the *Optional Protocol*.[8] Similarly, the author's communication is moot, and is inadmissible on this basis.

10. Moreover, the author began to receive publicly-funded health care on April 30, 2013, some 8 months before she filed her communication with the Committee (24 December 2013). In keeping with the Committee's views in *A.P.L.-V.D.M. v. The Netherlands,* the author "cannot, at the time of submitting the complaint, claim to be a victim of a violation of the *Covenant*."[9] The communication is therefore inadmissible under article 1 of the *Optional Protocol*.[10]

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[7] *Toussaint v. Canada*, HRC Communication No. 2348/2014 at para 2 of the Author's December 28, 2013 submissions ("the author now has access to the health care she needs for the treatment of her serious health problems through provincial health insurance").

[8] *Dranichnikov v. Australia*, HRC Communication No. 1291/2004, U.N. Doc. CCPR/C/88/D/1291/2004 (2007), views adopted on 20 October 2006, para. 6.3.

[9] *A.P.L. v. d.M. v. The Netherlands,* HRC Communication No. 478/1991, U.N. Doc. CCPR/C/48/D/478/1991 (1993), views adopted on 26 July 1993, para. 6.3.

[10] *A.P.L. v. d.M. v. The Netherlands, supra* note 9 at paras 6.3, 7(a)*;* see also *J.H.W. v. Netherlands*, HRC Communication No. 501/1992, U.N. Doc. CCPR/C/48/D/501/1992 (1993), views adopted on 16 July 1993, paras. 5.2 and 6(a).

c) *Actio Popularis: the author purports to represent other 'undocumented migrants'*

11. In addition to her individual claim, the author also seeks to "ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP coverage for [necessary] health care."[11] This portion of the claim relates not to the author, but to other undocumented migrants who may seek access to the IFHP to fund their health care needs. Such an allegation lies outside the scope of the *Optional Protocol*. The Committee has consistently recognized that "to the extent [an] author argues that [a] scheme as a whole is in breach of the *Covenant*, [the] claim amounts to an *actio popularis* reaching beyond the circumstances of the author's own case."[12] This aspect of the communication is inadmissible under article 1 of the *Optional Protocol*.

12. Moreover, ministerial discretion within the IFHP ensures that undocumented migrants may access publicly-funded health care in Canada where circumstances warrant. Under the IFHP, the Minister may grant access to IFHP benefits for those without lawful status in Canada. This ensures that other individuals may be treated in accordance with the facts of their own case. Beneficiaries of the IFHP receive health care services provided by hospitals and physicians, including preventive and rehabilitative services, medication benefits (prescription drugs and immunizations), and supplementary benefits (vision and urgent dental care).[13] The Minister has exercised his discretion twice since 2012, granting IFHP benefits to two undocumented migrants: a child abandoned by her parents in Canada, and a Cuban national excluded from refugee status due to his protected person status in the United States, but living in Canada. The focus of the IHFP remains on the provision of publicly-funded health care to lawfully-admitted refugees and asylum seekers; specially designated groups receiving resettlement assistance (e.g. Afghan interpreters from 2009 to 2013); victims of human trafficking; and detainees under the *IRPA.* The Minister's discretion is an effective means, however, by which undocumented migrants may access publicly-funded health care in Canada, where circumstances warrant. As such, the systemic aspect of the author's claim must be recognized as inadmissible, relating as it does to possible, future actions by the State party in respect of third parties.[14] Such proceedings fall outside the scope of article 1 of the *Optional Protocol*, and are inadmissible before the Committee.

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[11] *Toussaint v. Canada, supra* note 7 at para. 17 of the author's executive summary in her December 28, 2013 submissions.

[12] See *Jazairi v. Canada*, HRC Communication No. 958/2000, U.N. Doc. CCPR/C/82/D/958/2000, views adopted on 11 November 2004, para. 7.6; see also *Kavanagh v. Ireland*, HRC Communication No. 1114/2002, UN. Doc. CCPR/C/76/D/1114/2002, views adopted on 30 October 2002, at para. 4.3.

[13] As of April 1, 2016, the IFHP will provide this comprehensive health-care coverage to all eligible beneficiaries (eliminating the six categories of coverage introduced in November 2014). This restoration of full IFHP benefits is consistent with the Government of Canada's decision not to pursue its appeal of the Federal Court decision in *Canadian Doctors for Refugee Care,* discussed at paras. 28-35 of Canada's April 2015 submissions.

[14] See esp. *Kavanagh, supra* note 12 at para. 4.3.

d) The Covenant does not include a right to publicly-funded, primary health care

13. The author states that Articles 6, 7 and 9 of the *Covenant* include a right to publicly-funded primary health care. This is outside the scope of the rights protected by the *Covenant*. Canada suggests that the alleged violations may conveniently be considered together. In these reply submissions, Canada focusses, as does the author, on the right to life secured by Article 6 of the *Covenant*.

14. The Committee's views and international human rights law agree that the *Covenant* does not secure a right to publicly-funded primary or preventative health care. The Committee's *Draft General Comment No. 36* recalls that "[d]eprivation of life involves a deliberate or otherwise foreseeable and preventable infliction of life-terminating harm or injury that goes beyond mere damage to health, body integrity or standard of living."[15] Canada acknowledges the Federal Court's assessment that the author's health would be at risk if she did not receive "timely and appropriate health care and medications."[16] Canada observes, however, that the author was provided with sufficient publicly-funded health care to safeguard her life. Ontario's *Public Hospitals Act* secures emergency health care to everyone, regardless of civil status or residency, where refusal of admission would endanger the person's life.[17] This universal availability of emergency and essential health care fulfills Canada's obligations related to the protection of life under Article 6(1) of the *Covenant*.

15. Moreover, Canada has not sought to prevent the author from obtaining health care services at community health centers (CHCs) or elsewhere on a *pro bono* basis. CHCs are non-profit organizations that provide primary health and health promotion programs to individuals in the community.[18] The Federal Court of Appeal noted there is some evidence the author had access to medical assistance at these CHCs, after her medical needs surpassed her ability to pay.[19] An important distinction must be drawn between the universal availability of emergency health care services, and the public funding of primary health care sufficient to meet all of an individual's medical needs. The interpretation of the scope of the right to life cannot extend so far as to impose a positive obligation on States to provide an optimal level of state-funded medical insurance to undocumented migrants. In this regard, Canada relies on this Committee's views in *Linder v. Finland* that "the right to health, as such, is not protected by the provisions of the *Covenant*."[20] The *Covenant* does not create an obligation to fund primary or preventative health care. Accordingly, the communication is incompatible with the provisions of the *Covenant* and is inadmissible under article 3 of the *Optional Protocol*.

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[15] Doc. CCPR/C/GC/R.36/Rev.2, draft date: 2 September 2015, at para. 5.
[16] *Toussaint v. Canada (Attorney General)*, 2010 FC 810, at para. 91.
[17] *Public Hospitals Act*, RSO 1990, c. P.40, s. 21, online: http://www.canlii.org/en/on/laws/stat/rso-1990-c-p40/latest/rso-1990-c-p40.html?resultIndex=1.
[18] CHC, http://www.health.gov.on.ca/en/common/system/services/chc/default.aspx
[19] *Toussaint v. Canada*, 2011 FCA 213, *supra* note 2 at para. 63.
[20] *Linder v. Finland*, HRC Communication No. 1420/2005, U.N. Doc. CCPR/C/85/D/1420/2005, views adopted on 28 October 2005, at para. 4.3.

e) Article 26: requiring lawful residency is an objective and reasonable basis on which to determine eligibility for publicly-funded primary health care services

16. The author argues that her ineligibility for the public funding of her health care costs in Canada violates her right to non-discrimination under Article 26 of the *Covenant*. To the contrary, in allocating public health care funding, Canada may reasonably differentiate between those with lawful status in the country (whether citizens, permanent residents, asylum seekers, or immigrants, *inter alia*) and foreign nationals who have not been lawfully admitted to Canada. Indeed, the Committee has consistently expressed its view that "[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26."[21]

17. The requirement that a person have lawful residence in Canada before benefiting from publicly-funded primary health care is a neutral, objective requirement that is not related to race, colour, sex, language, religion or any of the grounds enumerated in Article 26. Specifically, lawfulness of residence is not a prohibited ground of discrimination in determining an individual's eligibility for publicly-funded health care.[22] Such a differentiation is not intended to stigmatize, nor does it have this effect. Rather it recognizes public health insurance as a reciprocal scheme: beneficiaries make contributions to the insurance scheme from which they then seek a benefit on a prepaid basis, and on uniform terms and conditions.[23] The equal application of such common rules in the allocation of benefits does not constitute discrimination, and does not violate Canada's obligations under Article 26 of the *Covenant*.[24]

18. As was recognized in the individual opinion of members Herndl, Müllerson, N'Diaye and Sadi in *Oulajin & Kaiss*, in seeking to achieve aims of social justice, social security legislation must frequently make distinctions.[25] Canada's requirement that foreign nationals be lawfully present within Canada before accessing publicly-funded primary health care is both an objective and reasonable criterion, and one which respects the principles of non-discrimination and equality before the law found in Article 26 of the *Covenant*.[26]

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[21] *Danning v. The Netherlands*, HRC Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2, views adopted on 9 April 1987, at para. 13.
[22] See also *Shergill v. Canada*, HRC Communication 1506/2006, U.N. Doc CCPR/C/94/D/1506/2006, views adopted on 18 November 2008, para.7.6 (the Committee considered that differentiating in the allocation of Old Age Security pension benefits based on the *duration* of an individual's residence in Canada did not constitute discrimination under Article 26).
[23] Health Canada, "Canada Health Act – Frequently Asked Questions," online: http://hc-sc.gc.ca/hcs-sss/medi-assur/faq-eng.php (The *Canada Health Act* affords provinces and territories discretion in determining how to finance health insurance plans. Financing can be through the payment of premiums, payroll taxes, sales taxes, other provincial or territorial revenues, or by a combination of methods. Provinces/territories that levy premiums also offer financial assistance based on income so that low-income residents can have their payment reduced or be entirely exempted from the cost).
[24] See esp. *Oulajin & Kaiss v. The Netherlands*, HRC Communications Nos. 406/1990 and 426/1990, UN. Doc. CCPR/C/46/D/406/1990 and 426/1990, views adopted on 5 November 1992 at para. 7.5.
[25] *Oulajin & Kaiss, supra* note 24 at para. 3 of the Appendix.
[26] *Oulajin & Kaiss, supra* note 24 at para 7.3.

THE COMMUNICATION IS WHOLLY WITHOUT MERIT

19. In the alternative, if the Committee is of the view that aspects of the communication are admissible, Canada requests that the Committee view the author's communication to be wholly without merit. Articles 6, 7 and 9(1) of the *Covenant* protect against the intentional infliction of harm, but do not impose positive obligations to provide state-funded health insurance to undocumented migrants, sufficient to cover all their medical needs. The author received publicly-funded emergency health care services, essential to the preservation of her life, and was not prevented from obtaining primary health care from various community organizations, on a *pro bono* basis, or on the basis of private health insurance. Importantly, the author was not prevented from coming forward to regularize her immigration status. Any lacunas in coverage were the author's responsibility and are not attributable to Canada. The facts do not support a conclusion that there has been any violation of Article 6, 7 or 9(1).

20. Moreover, in allocating public health insurance, Canada may legitimately differentiate between those with lawful status in the country, and foreign nationals who have not been lawfully admitted to Canada and who would not have contributed to the benefit scheme. The distinction does not stigmatize in purpose or effect, nor is it punitive. Rather, requiring individuals to have lawful residence in Canada before receiving comprehensive public health insurance recognizes the reciprocal nature of public health insurance, and is a distinction drawn on reasonable and objective criteria. As such, it does not constitute discrimination within the meaning of Article 26 of the *Covenant*.[27] Canada has respected the principles of non-discrimination and of equality before the law, and has fully met its obligations under Article 26 of the *Covenant.*

CONCLUSION

21. In conclusion, Canada renews its requests that the Committee view the author's communication as inadmissible on the grounds that the author:

- has not exhausted domestic remedies, as she has not challenged the constitutionality of the provincially-administered health insurance plans in Canadian courts;

- is not a victim of a violation of rights, as she has benefitted from comprehensive, public health insurance since April 30, 2013;

- makes a claim in the nature of an *actio popularis,* beyond the scope of Article 1 of the *Optional Protocol*; and

- alleges violations incompatible with the provisions of the *Covenant*, which does not include a right to publicly-funded primary health care, nor include a positive obligation to

[27] See e.g. *Danning v. The Netherlands, supra* note 21 and *Oulajin & Kaiss v. The Netherlands, supra* note 24.

provide comprehensive health insurance coverage to foreign nationals unlawfully present in the territory of a State.

22. Relying on its August 14, 2014 and April 2, 2015 submissions on the admissibility and merits of the author's communication, Canada also renews its request that the author's claim for financial compensation be viewed as inadmissible on the grounds that the author has not sought financial compensation in domestic courts.

23. Finally, in the event the Committee considers aspects of the communication to be admissible, Canada asks that the Committee view the author's communication to be wholly without merit. The facts disclose no violation of Articles 2(1), 2(3)(a), 6, 7, 9 or 26 of the *Covenant*.

Ottawa, Canada
March 30, 2016