

**MIND THE GAP: *TOUSSAINT* AND THE RECEPTION OF INTERNATIONAL
HUMAN RIGHTS LAW IN CANADA**

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Abstract

This article explores the reception of international human rights law (“IHRL”) in Canada and the enforcement gap that may arise when legislation is not passed expressly implementing human rights treaties that Canada has ratified. Despite establishing a variety of interpretive methods that may result in Canada’s binding IHRL obligations having domestic effect even when they are not expressly implemented, Canadian courts have struggled to provide clear and consistent guidance on how IHRL applies in Canada. The selective approach in Canada to implementing legislatively IHRL obligations may give rise to an enforcement gap when rights individuals purportedly enjoy under international law are found to have no domestic effect.

To demonstrate this gap, this article focuses on litigation brought by the late Nell Toussaint, who lived in Canada and was denied federal health insurance coverage when facing life-threatening medical conditions due to her then-irregular migrant status. Exploring Ms. Toussaint’s unsuccessful domestic claim that her rights to health, life, and non-discrimination were violated by Canada and her advocates’ ongoing efforts to ensure that Canada abides by the subsequent determination of the United Nations Human Rights Committee that Canada violated her rights to life and non-discrimination under the International Covenant on Civil and Political Rights, this article demonstrates how not expressly implementing ratified human rights treaties can create a barrier to IHRL being effective domestically in Canada.

In some instances, an implementation gap may lead to an enforcement gap when, absent a clear domestic equivalent, rights individuals purportedly enjoy under international law are found

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to have no domestic effect. In other instances—as demonstrated by Ms. Toussaint’s litigation—despite interpretive methodologies providing otherwise, an enforcement gap may arise even when there is a right under the Canadian Charter of Rights and Freedoms to which at least a limited understanding of a related international right may be tied. In such instances, courts may default to basic reception law principles and summarily conclude that binding IHRL is not relevant to Charter claims. This article argues that such an outcome is contrary to the minimum protection approach for binding IHRL that has been consistently reaffirmed by Supreme Court of Canada. It also risks disregarding the right to an effective remedy, particularly when there is no avenue available to bring a claim internationally or when international remedies cannot be enforced domestically. Finally, Ms. Toussaint’s litigation and how Canada characterized her claims could illustrate the challenges litigants can face when arguing for an expansion of Charter rights.

Keywords: International human rights law; reception of international law; human rights implementation in Canada; right to a remedy.

Résumé

Cet article explore la réception du Droit international relatif aux droits de l'homme (« DIDH ») au Canada et les lacunes en matière d'application qui peuvent survenir lorsque la législation n'est pas adoptée pour mettre en œuvre expressément les traités relatifs aux droits de l'homme que le Canada a ratifiés. Malgré l'établissement d'une variété de méthodes d'interprétation qui peuvent aboutir à ce que les obligations contraignantes du Canada en matière de DIDH aient un effet national même lorsqu'elles ne sont pas expressément mises en œuvre, les tribunaux canadiens ont eu du mal à fournir des orientations claires et cohérentes sur la manière dont la DIDH s'applique au Canada. L'approche sélective adoptée par le Canada pour mettre en œuvre les obligations législatives de la DIDH peut donner lieu à un vide juridique lorsque les droits dont les individus sont censés jouir en vertu du droit international sont considérés comme n'ayant pas d'effet au niveau national.

Pour démontrer cette lacune, cet article se concentre sur le litige intenté par feu Nell Toussaint, qui vivait au Canada et s'est vue refuser la couverture de l'assurance maladie fédérale alors qu'elle était confrontée à des conditions médicales potentiellement mortelles en raison de son statut de migrante en situation irrégulière à l'époque. En explorant l'échec de la plainte

nationale de Mme Toussaint selon laquelle ses droits à la santé, à la vie et à la non-discrimination ont été violés par le Canada et les efforts actuels de ses défenseurs pour s'assurer que le Canada respecte la décision ultérieure du Comité des droits de l'homme des Nations Unies selon laquelle le Canada a violé ses droits à la vie et à la non-discrimination en vertu du Pacte international relatif aux droits civils et politiques, cet article démontre comment le fait de ne pas mettre en œuvre expressément les traités ratifiés en matière de droits de l'homme peut créer un obstacle à l'efficacité de la DIDH au niveau national au Canada. Dans certains cas, une lacune dans la mise en œuvre peut conduire à une lacune dans l'application lorsque, en l'absence d'un équivalent national clair, les droits dont les individus sont censés jouir en vertu du droit international sont considérés comme n'ayant pas d'effet au niveau national.

Dans d'autres cas – et comme le démontre le litige de Mme Toussaint – malgré les méthodologies d'interprétation qui prévoient le contraire, une lacune dans l'application peut survenir même lorsqu'il existe un droit en vertu de la Charte canadienne des droits et libertés auquel on peut lier au moins une compréhension limitée d'un droit international connexe. Dans de tels cas, les tribunaux – potentiellement peu familiarisés avec le droit international humanitaire et manquant d'orientations méthodologiques suffisamment claires sur la manière dont il s'applique au Canada – peuvent s'en remettre aux principes de base du droit d'accueil et conclure sommairement que le droit international humanitaire contraignant n'est pas pertinent pour les réclamations fondées sur la Charte. Cet article soutient qu'un tel résultat est contraire à l'approche de protection minimale de la DIDH contraignante qui a été constamment réaffirmée dans la jurisprudence de la Cour suprême du Canada. Elle ne tient pas compte non plus du droit à un recours effectif, en particulier lorsqu'il n'existe aucun moyen de déposer une plainte au niveau international ou lorsque les recours internationaux ne peuvent pas être mis en œuvre au niveau national.

Mots-clés : Droit international des droits de l'homme ; réception du droit international ; mise en œuvre des droits de l'homme au Canada ; droit à un recours.

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1. Introduction

Over 20 years ago, Canadian Senator Raynell Andreychuk acknowledged in a report for the Standing Senate Committee on Human Rights that, “one of the major issues needing to be addressed is the gap that has developed between [Canada’s] willingness to participate in human rights instruments at the international level and our commitment to ensuring that the obligations contained in these instruments are fully effective within this country.”¹ In her view, “the growing discrepancy between Canada’s international human rights obligations and the measures actually taken to implement them has the potential... to deny Canadians rights to which they are entitled.”² In this passage, Senator Andreychuk was expressing concern over what this article characterizes as an implementation gap leading to an enforcement gap, whereby rights that Canada has voluntarily assumed on the international level may not be legally effective for individuals on the domestic level because Canada has not implemented the rights legislatively.

As this article explores, this gap can arise due to how international law is received domestically, together with IHRL implementation practices in Canada: namely, the requirement for treaty-based international law to be implemented to have domestic effect and the general (albeit not universal³) practice of legislation not being passed to expressly implement the human rights treaties that Canada has ratified. Despite this practice, in some instances, an enforcement gap has been avoided through judicial interpretive methods. The most potent of these methods is what this

¹ R Andreychuk, “Chair’s Forward” in *Promises to Keep: Implementing Canada’s Human Rights Obligations* (Ottawa: Standing Senate Committee on Human Rights, 2001) at para 3.

² *Ibid.*

³ See e.g. *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; *National Housing Strategy Act*, SC 2019, c 29, s 313; Bill 29, *Interpretation Amendment Act, 2021*, 2nd Sess, 42nd Leg, British Columbia (assented to 25 November 2021) (amending *Interpretation Act*, RSBC 1996, c 238 to add, among other things, ss 8.1(3): “Every Act and regulation must be construed as being consistent with the Declaration”, s 1); *Refugee Protection Act*, SC 2001, c 27 (“The Act is to be construed and applied in a manner that... complies with international human rights instruments to which Canada is a signatory”, ss 3(3)(f)).

article refers to as the “minimum protection approach,” whereby the *Canadian Charter of Rights and Freedoms*⁴ is viewed as implementing a relevant international human right and then binding IHRL is presumed to provide a minimum standard for interpreting the corresponding *Charter* right.⁵ An enforcement gap may also be avoided or narrowed in non-*Charter* contexts when the “values and principles” of IHRL are considered relevant to statutory interpretation or judicial review.⁶

Despite these interpretive methods being well-established, uncertainty regarding to what extent Canada’s IHRL obligations apply domestically may persist—which may be explained, in part, by unclear jurisprudence lacking a clearly defined methodology and the potential unfamiliarity with international law leading some counsel to not advance and/or some judges to not fully consider arguments invoking IHRL.⁷ In the face of interpretive uncertainty, courts may default to basic reception law principles and summarily conclude that even binding IHRL simply has no domestic effect and is therefore not relevant to a *Charter* claim, statutory interpretation, or judicial review.⁸ In other instances, a gap may arise if *Charter* rights are interpreted more restrictively than IHRL provides or when international rights cannot be tied—even partially—to

⁴ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁵ See e.g. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [SFL].

⁶ See e.g. *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 (an enforcement gap may also be avoided or narrowed when the “values and principles” of IHRL are considered relevant to statutory interpretation or judicial review). See also *Canada (Citizenship and Immigration) v Vavilov* 2019 SCC 65 [Vavilov] at para 114.

⁷ See e.g. Elisabeth Eid & Hoori Hamboyan, “Implementation by Canada of Its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical” in Oonagh E Fitzgerald & Elisabeth Eid, eds, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) (noting, in a related context, that decisions on the reception of IHRL may reflect “the quality of the pleadings [the Court] receives” and, as a result, they “call upon those knowledgeable about international human rights law to better inform the legal community, which can in turn enlighten the judiciary” at 463); Hugh Kindred, “The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach” in Oonagh E Fitzgerald & Elisabeth Eid, eds, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) at 16 [Kindred, “International Legal Sources”].

⁸ See e.g. *Nova Scotia (Community Services) v VAH*, 2019 NSCA 72.

legislation or the *Charter*, which is particularly relevant for some socio-economic human rights because the *Charter* primarily codifies civil and political rights.⁹

An implementation gap leading to an enforcement gap is demonstrated by litigation brought by the now-late Nell Toussaint, who lived in Canada and was denied federal health insurance coverage due to her then-irregular migrant status.¹⁰ In Ms. Toussaint's litigation, an enforcement gap for the international rights to health and non-discrimination arose when Canadian courts summarily concluded that binding IHRL was of no domestic effect because it was not expressly implemented by legislation, which led to these courts not determining if their interpretation of sections 7 and 15 of the *Charter* was meeting Canada's minimum IHRL obligations. This potential gap was perpetuated by Canada's refusal to abide by the subsequent Views¹¹ of the United Nations Human Rights Committee ("HRC") that Canada violated Ms. Toussaint's rights to life and non-discrimination under the *International Covenant on Civil and Political Rights*.¹² When a request for reconsideration of the SCC's dismissal of Ms. Toussaint's application for leave to appeal was denied,¹³ a gap crystallized between the scope of Ms. Toussaint's rights to life and non-discrimination as interpreted by the HRC under the *ICCPR* and the scope of her corresponding rights to life and equality as interpreted by the Federal Courts under the *Charter*.¹⁴

Exploring Ms. Toussaint's unsuccessful domestic claim that her rights to health, life, and equality were violated by Canada;¹⁵ her successful international complaint that her rights to life

⁹ See e.g. *Toussaint v Canada (AG)*, 2010 FC 810 [*Toussaint FC*]; *Toussaint v Canada (AG)*, 2011 FCA 213 [*Toussaint FCA*].

¹⁰ *Ibid.*

¹¹ *Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 2348/2014*, UNHRC Dec 2348/2014, UN Doc CCPR/C/123/D/2348/2014, 2018 [*Toussaint UNHRC*].

¹² 999 UNTS 171 (19 December 1966, accession by Canada 19 May 1976) [*ICCPR*].

¹³ Letter from David Power, Deputy Registrar, Supreme Court of Canada to Andrew C Dekany (9 June 2020), online: pdf <www.socialrights.ca/2020/34446_Toussaint_Reconsideration.pdf> [perma.cc/XZ7G-P4JV].

¹⁴ *Charter*, *supra* note 4.

¹⁵ *Toussaint FC supra* note 9; *Toussaint FCA, supra* note 9.

and non-discrimination under the *ICCPR* were violated; and her advocates' on-going efforts to have Canada abide by the Views¹⁶ of the HRC, this article describes and explores the significance of the enforcement gap that can result when human rights treaties Canada has ratified are not legislatively implemented. It presumes an understanding of basic public international law¹⁷ and begins in part two with a brief overview of the reception of international law and the treaty-making process in Canada, focusing on the minimum protection approach when IHRL is invoked in *Charter* cases. Part three examines Ms. Toussaint's litigation in detail and part four concludes.

Ms. Toussaint's litigation is a compelling example of why the reception of IHRL in Canada demands attention. First, the litigation demonstrates questionable methodological treatment of IHRL by the Federal Court and Federal Court of Appeal because, among other things, the decisions did not consider the minimum protection approach when interpreting the scope of *Charter* rights. This resulted in the Courts not addressing whether the rights to life, health and, non-discrimination means irregular migrants are entitled to emergency or essential healthcare under IHRL. Second, the litigation is significant because it suggests that the interpretation of fundamental human rights in Canada could be falling below Canada's IHRL obligations. Third, the characterization and treatment of Ms. Toussaint's claims may lend weight to the argument that Canadian courts have, in some instances, treated more strictly sections 7 and 15 *Charter* claims when they have broader social justice implications,¹⁸ which is particularly relevant to this Volume's theme of "Law and Prejudice." Together, these matters underscore the overdue need for the jurisprudence on how IHRL applies in *Charter* cases to be clarified and for the minimum protection approach to be

¹⁶ *Toussaint* UNHRC, *supra* note 11.

¹⁷ See e.g. John H Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at ch 3 [Currie, *Public International Law*].

¹⁸ See e.g. Martha Jackman, "Health and Social Justice – Charter Rights and Charter Wrongs" (Health Law Seminar Series Lecture delivered at Health Law Institute, Schulich School of Law, Dalhousie University, 14 October 2022) [unpublished].

consistently applied so that the enforcement gap may be at least partially closed for rights that have a domestic equivalent within the *Charter*.¹⁹

2. The Reception of International Human Rights Law in Canada

a. Basic Reception Law Principles

The written Canadian constitution does not address how international law is received (i.e., is of domestic legal effect)²⁰ and since the matter has not been addressed through other legislation, it has developed judicially.²¹ The basic rules may be simply stated. Canada has a “hybrid” system with international law either applying directly or requiring implementation depending on the source: customary international law or treaty-based (i.e., “conventional”) international law.²² Canada is monist/adoptonist for customary international law, which results in customary international law being automatically adopted into Canadian law unless there is binding legislative authority to the contrary.²³ In contrast, Canada is dualist/incorporationist for conventional international law, with treaty-based obligations needing to be incorporated to have domestic effect,

¹⁹ See e.g. John H Currie, “International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment and Retreat – In No Particular Order” (2010) 50 SCLR 423 (QL) [Currie, “Supreme Court Jurisprudence”] at para 58. See also Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulations: The *Charter* at 25 in an International Perspective” (2007) 45:2 Osgoode Hall LJ 239 at 263 [perma.cc/VN23-SPHN].

²⁰ See e.g. Armand de Mestral and Evan Fox-Descent, “Implementation and Reception: The Congeniality of Canada's Legal Order to International Law” in Oonagh E Fitzgerald & Elisabeth Eid, eds, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) 85 (arguing that this matter could be addressed through, among other means, amendments to interpretation acts at the federal and provincial/territorial levels at 82).

²¹ See Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) [van Ert, *Using International Law*] at 74–75; Armand de Mestral and Evan Fox-Descent, *supra* note 20 (discussing various approaches taken by other States at 33). See also Gib van Ert, “The Domestic Application of International Law in Canada” in Curtis A Bradley, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 502.

²² Van Ert, *Using International Law*, *supra* note 21 at 5.

²³ Currie, *Public International Law*, *supra* note 17 (arguing at the time that there was potential doubt whether Canadian courts had firmly embraced an adoptionist for customary international law at 227–34). But see *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun Resources*] (any such doubt has likely since been dispelled: “customary international law is automatically adopted into domestic law without any need for legislative action... Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation... There is no doubt then, that customary international law is also the law of Canada” at paras 86, 90, 95 citations omitted).

which is usually achieved legislatively.²⁴ As the SCC noted in *Capital Cities Communications v CRTC*, “[t]here would be no domestic... consequences [of the *Inter-American Radio-communications Convention*] unless they arose from implementing legislation giving the Convention a legal effect within Canada.”²⁵ This requirement for implementation was reiterated by Abella J in *Nevsun Resources v Araya*.²⁶

The dualist approach for conventional international law avoids issues that could otherwise arise with separation and division of powers on account of the fact that: (i) the federal executive has sole authority over foreign affairs in Canada—including the authority to ratify treaties without Parliamentary oversight²⁷—and, (ii) the authority to pass legislation making treaties expressly effective within the domestic legal system falls on Parliament or provincial/territorial legislatures in accordance with the constitutional division of powers.²⁸ While separation and division of powers concerns provide seemingly compelling arguments against interpretive approaches that would close an implementation gap because dualism avoids the federal executive exercising an unconstitutional law-making function that could infringe on provincial and territorial jurisdiction, from a practical perspective the strength of these arguments may be overstated.²⁹ With respect to separation of powers, although, unlike in some other countries,³⁰ the federal executive has no legal obligation to consult Parliament prior to ratifying treaties, a policy has been in place since 2008

²⁴ See e.g. van Ert, *Using International Law*, *supra* note 21 at 5.

²⁵ [1978] 2 SCR 141 [*Capital Cities*] at 173. See also van Ert, *Using International Law*, *supra* note 21 at 236; *Canada (AG) v Ontario (AG)*, [1937] AC 326 at 347 (PC) [*Labour Conventions*] cited in van Ert *Using International Law*, *supra* note 21 at 235.

²⁶ *Nevsun Resources*, *supra* note 23 (“Some areas of international law, like treaties, require legislative action to become part of domestic law” at para 85 [citations omitted]).

²⁷ See van Ert, *Using International Law*, *supra* note 21 at 92–98.

²⁸ See *ibid* at 13–14.

²⁹ See e.g. John Mark Keys & Ruth Sullivan, “A Legislative Perspective on the Interaction of International and Domestic Law” in Fitzgerald & Eid, *supra* note 20 at 279.

³⁰ See Joanna Harrington, “The Role for Parliament in Treaty-making” in Fitzgerald & Eid, *supra* note 20.

for treaties being considered for ratification to be tabled in Parliament for comment.³¹ Ameliorating division of powers concerns, as a matter of practice, Canada does not enter into treaties until the federal government has: (i) obtained provincial and territorial support for ratification, and (ii) ensured that relevant laws and policies are consistent with the obligations that would be incurred under the treaties.³²

This practice of delaying ratification is not new. As Dickson CJ noted in *Reference Re Public Service Employee Relations Act (Alta)*, prior to acceding to the two major human rights treaties of general scope—the ICCPR³³ and the *International Covenant on Economic, Social and Cultural Rights*³⁴—“the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the Covenants in their respective jurisdictions.”³⁵ However, despite delaying ratification due to the professed objective of ensuring effective implementation,³⁶ the general practice is for legislation expressly implementing ratified

³¹ Since 2008, a policy has been in place for treaties under consideration for ratification by the Crown to be tabled in Parliament to allow members to comment on the treaties; see Global Affairs Canada, “Policy on Tabling of Treaties in Parliament” (modified 3 March 2014), online: <www.treaty-accord.gc.ca/procedures.aspx> [perma.cc/R328-M264]. This process has been criticized as not providing a meaningful opportunity for Parliament to oversee the treaty-making process, with some commentators calling for the creation of a formal system of oversight; see e.g. *ibid* at 199.

³² Library of Parliament, *Canada’s Approach to the Treaty-Making Process*, Background Paper No 2008-45-E (Ottawa: LOP, 24 November 2008, revised 1 April 2021), online:

<lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/2008-45-e.pdf> [perma.cc/EW77-7E9U] (“[w]here provincial or territorial legislation is implicated, as a matter of policy, the [federal] executive branch does not ratify the treaty until all Canadian jurisdictions have indicated that they support ratification” at 5). See also Oonah Fitzgerald, “Understanding the Question of Legitimacy in the Interplay between Domestic and International Law” in Fitzgerald & Eid, *supra* note 20 125 at 148–49.

³³ ICCPR, *supra* note 12.

³⁴ 993 UNTS 3 (19 December 1966, accession by Canada 19 May 1976) [ICESCR].

³⁵ [1987] 1 SCR 313, [1987] SCJ No 10 [PSERA] at para 61 (QI). See also Fitzgerald, *supra* note 20 at 148–49; Canada, “About Canada and the United Nations Human Rights System” (1 June 2018), online: *Canada and the United Nations Human Rights System* <www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/about.html> [perma.cc/5RC8-3F27].

³⁶ See Canada, Department of Justice, “International Human Rights Treaty Adherence Process in Canada”, (5 July 2021) online: *International Human Rights Treaty Adherence Process in Canada* <canada.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/ta-pa.html> [perma.cc/MKV8-AQM7] (stating that prior provincial and territorial support for ratification “is sought to ensure effective implementation of Canada’s international obligations” and that, “provincial and territorial governments conduct a... review of their legislation, regulations, policies and practices” before the federal executive decides whether Canada will become party to a human rights treaty).

human rights treaties to not be passed (federally or otherwise).³⁷ In line with basic reception law, therefore, an implementation gap may give rise to an enforcement gap whereby Canada's internationally-binding human rights obligations may be ineffective domestically because they arise from treaties that have not been legislatively implemented.

While appearing rigid on its face, the effects of the dualist approach for conventional international law has been softened by the SCC recognizing that unimplemented human rights treaties may be relevant sources that may be considered when courts take a contextual approach to interpreting domestic law.³⁸ And, in the *Charter* context, a variety of interpretive methods have appeared that can narrow, or even close, the enforcement gap.³⁹ While this jurisprudence has once been characterized as “rais[ing] more questions about the proper role of international norms in Charter adjudication than it has answered”⁴⁰ and “chaotic,”⁴¹ a compelling argument can be made that the “Dickson Doctrine” can be distilled, according to which IHRL, as a whole, may be considered “relevant and persuasive” sources in *Charter* claims, with Canada's binding IHRL obligations setting a minimum floor for the interpretation of corresponding *Charter* rights.⁴² The following part explores the “minimum protection approach” due to its relevance to the discussion of Ms. Toussaint's litigation.

³⁷ But see *supra* note 3.

³⁸ See *Baker*, *supra* note 6.

³⁹ See van Ert, *Using International Law*, *supra* note 21 at 333; Currie, “Supreme Court Jurisprudence” *supra* note 19 (explaining the approaches as: (i) “constituting either the floor of human rights protection below which Charter interpretation should not drop”; (ii) “considerations that ‘should inform’ and ‘must be relevant and persuasive’ in Charter interpretation or by which Charter guarantees ‘are informed;’” and (iii) “mere context that ‘may inform’ Charter interpretation” at para 42, citations omitted).

⁴⁰ Van Ert, *Using International Law*, *supra* note 21 (finding “most remarkable... the hesitance of the Supreme Court of Canada to apply the presumption of conformity with international law to the Charter” at 332).

⁴¹ Currie, “Supreme Court Jurisprudence”, *supra* note 19.

⁴² See *ibid.*

b. International Human Rights Law and Charter Litigation: The Minimum Protection Approach

As William Schabas has noted, “[t]he most frequent resort to international law by the Supreme Court of Canada has been in [*Charter*] interpretation.”⁴³ This is likely due to the fact that, as van Ert asserts, “[t]he most significant expansion of international law since... the Second World War has been in the area of human rights,” while the *Charter*, as a bill of rights, is “[t]he most obvious portal through which international human rights might enter Canadian law.”⁴⁴ As L’Heureux-Dubé J recognized for the SCC in *R v Ewanchuk*, “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect.”⁴⁵

Taking into account Canada’s treaty-based IHRL obligations when deciding *Charter* cases is consistent with the dualist approach if the *Charter* is seen as implementing Canada’s relevant IHRL obligations and is supported by the fact that IHRL—particularly the *ICCPR*⁴⁶—provided “inspiration and guidance” for the drafting of the *Charter*.⁴⁷ As La Forest J has explained, “[t]he protection of human rights is not a uniquely Canadian concept and just as the drafters of the *Charter* drew on the experience and successes of the international human rights movement, so too would it be necessary for Canadian courts to look abroad.”⁴⁸ In addition to being relevant to the interpretation of substantive *Charter* rights, international law—including IHRL—may assist with

⁴³ William A Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 Can B Rev 174 at 185.

⁴⁴ Van Ert, *Using International Law*, *supra* note 22 at 323, 332.

⁴⁵ [1999] 1 SCR 330 at para 73.

⁴⁶ *ICCPR*, *supra* note 12.

⁴⁷ Van Ert, *Using International Law*, *supra* note 21 at 333. See also, Canadian Human Rights Commission, “Human Rights in Canada”, online: *About Human Rights* <www.chrc-ccdpc.gc.ca/en/about-human-rights/human-rights-canada> [perma.cc/PW42-BZHK].

⁴⁸ Gérard La Forest, “The Use of International and Foreign Materials in the Supreme Court of Canada” in *Proceedings of the 1988 Conference of the Canadian Council on International Law: Canada and Europe: An Evolving Relationship* (Ottawa: Canadian Council on International Law, 1988) at 232, cited in Louis LeBel and Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 SCLR 23 (QL) at 10.

identifying principles of fundamental justice under section 7 and informing what constitutes reasonable limitations to *Charter* rights under section 1.⁴⁹

As noted above, some commentators—particularly public international law experts—have expressed dissatisfaction with the SCC’s jurisprudence when IHRL is invoked in *Charter* cases.⁵⁰ Despite a lack of clarity and inconsistency, the SCC has repeatedly endorsed the first elaboration of minimum protection approach by Dickson CJ in *PSERA*⁵¹ (which was adopted for the majority in *Slaight Communications Inc v Davidson*⁵²) that the *Charter* should be interpreted so it provides as much protection as Canada’s binding IHRL obligations (i.e., IHRL arising from customary international law and treaties Canada has ratified).⁵³

A notable example is *Health Services and Support-Facilities Subsector Bargaining Ass’n v British Columbia*,⁵⁴ which was decided two years prior to the decision of the Federal Court in

⁴⁹ See van Ert, *Using International Law*, *supra* note 22 at 351–56; Gib van Ert, “Domestic Reception of International Law” in Phillip M Saunders and Robert J Currie, eds, *Kindred’s International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Edmonds, 2019) [Saunders & Currie, *Kindred’s International Law*] 209 at 250–66 [van Ert, *Kindred’s International Law*].

⁵⁰ See e.g. Van Ert, *Using International Law*, *supra* note 21 at 332; Currie, “Supreme Court Jurisprudence,” *supra* note 19.

⁵¹ *PSERA*, *supra* note 35 (stating that:

The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—*must... be* relevant and persuasive sources for interpretation of the *Charter*’s provisions....

Furthermore, Canada is a party to... international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation *require that these international obligations be a relevant and persuasive factor in Charter interpretation*.... The content of Canada’s international human right obligations is... an important indicia of the meaning of ‘the full benefit of the *Charter*’s protection.’ *I believe the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified*’ at para 60 [emphasis added].)

⁵² [1989] 1 SCR 1038 [*Slaight*] (QL) at para 20.

⁵³ See e.g. Currie, “Supreme Court Jurisprudence,” *supra* note 19 at para 8. See also *Health Services and Support-Facilities Subsector Bargaining Ass’n v British Columbia*, 2007 SCC 27 [*Health Services*] at para 70; *Divito v Canada (Public Safety and Emergency Preparedness)* 2013 SCC 47 at paras 22–23 [*Divito*]; *India v Badesha* 2017 SCC 444 at para 38 [*Badesha*]; *Vavilov*, *supra* note 6 at paras 114, 182; *Németh v Canada (Justice)*, 2010 SCC 56 at para 137; *Baker*, *supra* note 6 at para 70; *Schreiber v Canada (Attorney General)*, [2002] 3 SCR 269 at para 50; *R v Appulonappa*, 2015 SCC 59 at para 40; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 108; *Nevsun Resources*, *supra* note 23 at paras 86, 90; *Nevsun Resources*, *supra* note 23, Brown and Rowe JJ, dissenting in part, at para 170; *R v McGregor*, 2023 SCC 4 at para 75, Karakatsanis and Martin JJ dissenting in part.

⁵⁴ *Health Services*, *supra* note 53.

Ms. Toussaint’s litigation. When interpreting section 2(d) of the *Charter* in *Health Services* to determine whether freedom of association protects the right to collective bargaining, McLachlin CJ and LeBel J, writing for the majority, stated that, “Canada’s adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the *Charter*.... *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.*”⁵⁵ Having found support in treaties that Canada had ratified for expanding the scope of freedom of assembly to include the right to collective bargaining, the majority considered non-binding international legal materials to be relevant and persuasive sources to assist with interpreting the scope of section 2(d).⁵⁶ In van Ert’s view, this decision “signalled a new commitment to the presumption of minimum protection” after a period of inconsistency.⁵⁷

Despite the SCC’s repeated endorsement of minimum protection approach, it was not considered in Ms. Toussaint’s litigation, resulting in a missed opportunity for the Court to assess Ms. Toussaint’s *Charter* claims in light of Canada’s IHRL obligations. The litigation therefore provides an historical example supporting the argument that the reception of IHRL needs to be clarified and the minimum protection approach consistently applied. The *Toussaint* litigation is of continued relevance because it is ongoing and because the minimum protection approach continues to be overlooked in some cases⁵⁸ despite its repeated recognition by the SCC after Ms. Toussaint’s first round of domestic litigation concluded.⁵⁹

⁵⁵ *Ibid* at para 70 [emphasis added].

⁵⁶ *Ibid* at para 76.

⁵⁷ Van Ert, *Kindred’s International Law*, *supra* note 49 at 246. But see Currie, “Supreme Court Jurisprudence” *supra* note 19; John H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007) 96 CYIL 45.

⁵⁸ See e.g. *BOLOH 1(a) v Canada*, 2023 FCA 120.

⁵⁹ See e.g. *Divito*, *supra* note 53 at paras 22-23; *Badesha*, *supra* note 53 at para 38; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 65; *SFL*, *supra* note 5; *Quebec (AG) v 9147-0732 Québec Inc.*, 2020 SCC 32 at para 31.

3. The Implementation and Enforcement Gaps: Toussaint and the Right to Health in Canada

a. Tying International Human Rights to Domestic Legislation

As the foregoing discussion makes clear, the potential for courts concluding that individuals cannot invoke their international rights because they have not been expressly implemented by legislation may be reduced where the international right has a domestic equivalent or can be tied to a related right in the *Charter*. In some cases, rights found in the *ICESCR* (and other IHRL sources) that do not expressly appear in the *Charter* have been made domestically effective through an expanded interpretation of related *Charter* rights. In *Saskatchewan Federation of Labour v Saskatchewan*, for example, the SCC overturned prior jurisprudence and relied on the *ICESCR* and other international human rights materials to recognize that the right to strike exists as part of freedom of association under section 2(d) of the *Charter*, despite the fact that the *ICESCR* has not been implemented legislatively.⁶⁰ Similarly, as discussed above, in *Health Services* the right to collective bargaining was recognized under section 2(d).⁶¹

When, however, a sufficient link to domestic legislation or the *Charter* is not recognized, courts may conclude that litigants are unable to advance claims that an international right has been violated because the treaty codifying the right has not been expressly implemented. And, even though it contradicts the minimum protection approach for binding IHRL, in some instances, even when a persuasive link *could* be made that ought to protect at least a limited understanding of an international right—particularly through section 7 and its protection of life, liberty, and security

⁶⁰ 2015 SCC 4 [*SFL*] (overturning the “Labour Trilogy” of *PSERA*, *supra* note 35, *PSAC v Canada*, [1987] 1 SCR 424, and *RWDSU v Saskatchewan*, [1987] 1 SCR 460).

⁶¹ *Health Services*, *supra* note 53.

of the person and/or section 15 and its guarantee of equal treatment—claims may still be denied on the basis that human rights treaties have not been legislatively implemented. *Toussaint v Canada (Attorney General)*, exemplifies this gap and is the focus of the remaining discussion.⁶²

A detailed summary of the facts underlying Ms. Toussaint’s claim follows (which are primarily based on the affidavits and pleadings filed in the litigation) to provide context. Understanding the background to the case is important because it may raise questions regarding Canada’s characterization of Ms. Toussaint and the nature of her claim and how international law arguments were treated in the litigation. This characterization and the treatment of Ms. Toussaint’s claims—by Canada and judicially—could lend weight to the argument that Canadian courts have, in some instances, treated more strictly sections 7 and 15 *Charter* claims when they have social justice implications and would provide for more generous interpretations of rights.⁶³

b. Toussaint and the Rights to Health, Life, and Equality for Undocumented/Illegal Migrants in Canada

i. Facts (As Submitted)

Originally from Grenada, Ms. Toussaint had been living and working in Canada since 1999 with no legal immigration status after overstaying a six-month visitor’s visa. She worked a variety of jobs over the years—including labouring in factories, cleaning, and babysitting. In 2005, after being offered a permanent full-time factory labourer position for which authorization to work was required, Ms. Toussaint engaged an immigration consultant (whom she initially understood to be a lawyer) to assist with regularizing her status; however, after paying \$1,000 to have an affidavit

⁶² *Toussaint FCA*, *supra* note 9; *Toussaint FC*, *supra* note 9.

⁶³ See e.g. Jackman, *supra* note 18.

drafted, she did not pursue the application because she was unable to pay an additional \$1,000 subsequently quoted to finish it.⁶⁴ In 2006, Ms. Toussaint experienced deteriorating health due to multiple serious health issues that eventually rendered her unable to work. In 2008, she attempted to regularize her status by applying for permanent residency from within Canada on humanitarian and compassionate grounds (with the cost of preparing the application paid by Legal Aid Ontario) and requested a waiver of the \$550 application fee (which was not covered by Legal Aid Ontario) because she was unable to afford it; however, her request for the fee waiver was denied, which she subsequently challenged.⁶⁵

As an irregular migrant, Ms. Toussaint was not entitled to provincial health insurance coverage. When she was working, she had paid for her medical care. However, without health insurance coverage and being unable to pay in advance for medical care after she could not work due to her medical issues, she was denied medical treatment in some instances—including when seeking an ultrasound ordered by a physician after presenting at an emergency department with symptoms of deep venous thrombosis. After she was turned away without the ultrasound (which presumably could have led to preventative treatment), her condition progressed to a life-threatening pulmonary embolism for which she was subsequently hospitalized.⁶⁶ In other instances, Ms. Toussaint received medical care and/or medication for which she was either billed after the fact (including \$9,385 for a hospitalization in November 2008 and \$9,027.50 for a hospitalization in October 2009), had costs fully or partially covered by a community support group, or had fees waived on an ad hoc basis on compassionate grounds.⁶⁷

⁶⁴ *Toussaint FC*, *supra* note 9 (Supplementary Affidavit of Nell Toussaint sworn 3 January 2010) [Toussaint Supplementary Affidavit] at paras 5–6 [perma.cc/PUZ3-6V6U].

⁶⁵ *Toussaint FC*, *supra* note 9 (Affidavit of Nell Toussaint sworn 23 August 2009) [Toussaint Affidavit August 2009] [perma.cc/6ANU-G9GH].

⁶⁶ *Ibid* at paras 13–14.

⁶⁷ See *ibid*; Toussaint Supplementary Affidavit, *supra* note 64.

After her claim for provincial coverage was denied, in 2009, Ms. Toussaint sought medical coverage under a federal plan, the Interim Federal Health Program (“IFHP”). The IFHP had been instituted in 1957 pursuant to an Order in Council authorizing federal authorities to pay the medical care costs of “a person who... is subject to Immigration jurisdiction” and unable to pay medical costs, among others.⁶⁸ In internal policy documents, the Order in Council was later described as being available to “certain migrants who are unable to pay for expenses related to urgent and essential [healthcare] services” and as having “been put in place for humanitarian reasons to allow refugee claimants, Convention refugees, humanitarian classes and others under immigration control to receive essential health care.”⁶⁹ Subsequent policies expanded the description of IFHP eligibility to include victims of human trafficking, among others.⁷⁰ Ms. Toussaint’s claim for IFHP coverage was denied and she challenged this denial at the Federal Court with the assistance of Legal Aid Ontario.⁷¹

ii. Toussaint (Federal Court): The Parties’ Submissions

Before the Federal Court, Ms. Toussaint argued that she was entitled to IFHP coverage because she was within the immigration jurisdiction of Canada due to having applied for permanent residency for which her challenge of the denial of the fee waiver was ongoing, and claimed that the denial of IFHP coverage violated, among other things, her rights to life and equality under sections 7 and 15 of the *Charter*, as well as Canada’s IHRL obligations.⁷² She argued that the right to health under the *ICESCR* provides a right to necessary healthcare for undocumented migrants

⁶⁸ *Toussaint FC*, *supra* note 9 (Applicant’s Memorandum of Argument) at paras 78 [*Toussaint FC*, Applicant’s Memorandum of Argument] [perma.cc/3AB4-UYZB]; *Toussaint FC*, *supra* note 9 (Respondent’s Memorandum of Argument) at para 10 [*Toussaint FC*, Respondent’s Memorandum of Argument] [perma.cc/6KBQ-QKGR].

⁶⁹ *Toussaint FC*, Respondent’s Memorandum of Argument, *supra* note 68 at para 14.

⁷⁰ *Ibid* at paras 14–15.

⁷¹ *Toussaint Affidavit August 2009*, *supra* note 65 at para 1.

⁷² *Ibid*.

and that the *International Convention on the Elimination of All Forms of Racial Discrimination*⁷³ prohibited discrimination in healthcare based on immigration status and citizenship. Invoking IHRL as a relevant and persuasive source of law,⁷⁴ Ms. Toussaint argued that Canada's international right-to-health and non-discrimination obligations "should inform the interpretation and application of... the [*Charter*]" in her claim.⁷⁵

To support her position, Ms. Toussaint relied on the *ICESCR* and an interpretation of the right to health provided by the United Nations Committee on Economic, Social and Cultural Rights ("CESCR")—a body of independent experts responsible for overseeing implementation of the *ICESCR*—which explained that, "states parties to the Covenant are under an obligation 'to respect the right to health by refraining from denying or limiting equal access for all persons, including... asylum seekers and illegal immigrants, to preventative, curative and palliative services.'"⁷⁶ She further relied upon the CESCR's interpretation that the *ICESCR*'s non-discrimination obligation mandates that, "[t]he ground of nationality should not bar access to Covenant rights" and that, "Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of the legal status and documentation."⁷⁷

Ms. Toussaint also submitted that the *ICERD* prohibits discrimination in healthcare based on "race, colour or national or ethnic origin," with the *ICERD*'s monitoring body—the Committee on the Elimination of Racial Discrimination ("CERD")—having explained its view that States

⁷³ 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada 14 October 1970) [*ICERD*].

⁷⁴ *Toussaint FC*, Applicant's Memorandum of Argument, *supra* note 68 (citing Baker, *supra* note 6 and *Slaight*, *supra* note 52 at paras 71–72).

⁷⁵ *Ibid* at para 76; *Toussaint FC*, *supra* note 9 at para 64.

⁷⁶ *Toussaint FC*, *supra* note 9 at para 73, citing UNCESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc E/C.12/2000/4 (2000) [*General Comment No. 14*], at para 11.

⁷⁷ *Toussaint FC*, *supra* note 9 at para 74, citing UN CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20 (2009) at para 30.

parties to the *ICERD* are obliged to “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 preventative, curative and palliative health services.”⁷⁸ Ms. Toussaint’s affidavits submitted to support her claims described in detail the economic and social disadvantages she faced as a woman of colour and an undocumented migrant living in poverty; the fear she felt about the risk of being denied life-saving medical treatment; the uncertainty, concern, and stress triggered by receiving medical bills that she knew she would be never be able to pay; and the anxiety, stress, and fear of prejudicial treatment she felt when seeking medical care while always needing to explain—often in crowded waiting rooms—that she was an undocumented migrant who could not afford to pay for the care she required.⁷⁹

Canada’s written submissions strongly defended the decision to deny Ms. Toussaint coverage under the IFHP. The submissions repeatedly underscored that Ms. Toussaint was living in Canada illegally;⁸⁰ denied that she was an even an immigrant to Canada—taking umbrage with the “euphemistic[.]” and “preferred phraseology” used by her lawyers in her submissions describing her “and the many thousands of others like her living in Canada illegally in clear violation of Canada’s immigration laws... as ‘immigrants without status;’”⁸¹ hinted that Ms. Toussaint may have mischaracterized her immigration status to be successful in an application to receive social assistance in Ontario (which does not provide medical coverage);⁸² asserted that Ms. Toussaint’s attempts to regularize her status were made solely to access Canada’s healthcare

⁷⁸ *Toussaint FC*, Applicant’s Memorandum of Argument, *supra* note 68 at para 75; UNCERD, *General Recommendation No. 30 on discrimination against non-citizens*, UN Doc A/59/18 (2004) at para 36.

⁷⁹ See e.g. *Toussaint Affidavit August 2009*, *supra* note 65; *Toussaint Supplementary Affidavit*, *supra* note 64.

⁸⁰ *Toussaint FC*, Respondent’s Memorandum of Argument, *supra* note 68 at paras 2, 3, 6, 19, 26.

⁸¹ *Ibid* at paras 2, 6.

⁸² *Ibid* (“She has worked here without legal authorization to do so in the past, but is currently unemployed and collecting social assistance from the province of Ontario because she told the Social Services Division in Toronto, she was ‘...in the process of applying for permanent residence in Canada’ at para 2, citation omitted).

system—despite Ms. Toussaint’s sworn affidavits to the contrary;⁸³ and implied that there was a disconnect between Ms. Toussaint having “chose *not* to pay the required \$550 application fee” for her permanent residency application to be processed, “asking to be relieved of that legal obligation [to pay the application fee], claiming she lacked the resources to pay the fee” and then subsequently “successfully access[ing] the resources required to challenge [the] decision [denying the fee waiver request] in Federal Court”⁸⁴—despite it being readily apparent from Ms. Toussaint’s pleadings that Legal Aid Ontario was funding her litigation but would not pay her application fee.

Canada summarized Ms. Toussaint’s submissions as: “I am living in Canada, I require healthcare, I cannot afford healthcare, and therefore I am entitled to free access to healthcare in Canada.”⁸⁵ Reading an *obiter dicta* statement from the SCC widely, Canada submitted that it was under no obligation to provide healthcare to anyone⁸⁶—let alone someone in Canada illegally—and characterized Ms. Toussaint as the author of her own misfortune:

The Applicant asks this Court to believe she is being denied healthcare in Canada, [*sic*] because she is a disadvantaged woman of colour with few economic resources. The reality is she is not entitled to healthcare in Canada because of the choices she had independently made since her arrival in this country; which country accepted her *only* as a short-term temporary visitor 10 years ago. The Applicant has no right to attempt to camouflage her own choices, [*sic*] as invidious societal or governmental discrimination against her, [*sic*] in alleged violations of sections 7 and 15 of our Charter.⁸⁷

Canada further submitted that Ms. Toussaint “had 10 years within which to choose to seek and obtain legal status in Canada” and asserted that, “[i]nstead, she decided to live and work in Canada

⁸³ See e.g. Toussaint Affidavit August 2009, *supra* note 65; Toussaint Supplementary Affidavit, *supra* note 64.

^{3.} *Toussaint* FC, Respondent’s Memorandum of Argument, *supra* note 68 (“[o]nly when the Applicant’s health problems recently required serious medical attention, did the Applicant take any steps to attempt to legalize her illegal status in this country, in order to facilitate her access to the Canadian healthcare system” at para 3).

⁸⁴ *Ibid* at para 4.

⁸⁵ *Toussaint* FC, Respondent’s Memorandum of Argument, *supra* note 68 at para 18.

⁸⁶ *Ibid* at para 20, citing *Chaoulli v Quebec (AG)* 2005 SCC 35, McLachlin CJ & Major J, joint concurring reasons [*Chaoulli*] at para 104.

⁸⁷ *Toussaint* FC, Respondent’s Memorandum of Argument, *supra* note 68 at para 20 (emphasis in original).

illegally.”⁸⁸ It argued that Ms. Toussaint was, “highly selective, in terms of the laws which she chooses to ignore and which laws she chooses to invoke” by now “claim[ing] that Canadian and international law gives her an entitlement to free access to Canadian healthcare.”⁸⁹ Canada argued that, “as unfortunate and sympathetic” Ms. Toussaint’s situation, she was to blame because of her choice to remain in Canada; invoking the SCC’s refusal in *R v Lyons* to review a voluntary plea bargain that a convicted offender subsequently considered dissatisfactory,⁹⁰ Canada asserted that the SCC has “confirmed that people must bear the consequences of the choices they make, even when they don’t like the outcomes of their choices.”⁹¹

Canada warned that a slippery slope would result if Ms. Toussaint’s claim were accepted. Disregarding the fact that Ms. Toussaint’s claim was for coverage under IFHP (which, as noted above, provides coverage for only urgent and essential healthcare services), Canada argued that, “no country, including Canada, has the infinite resources required to provide free healthcare to everyone able to enter and set up residence in that country” and that, “Canada has the right to choose to make her healthcare benefits available only to those persons who have legal status in this country.”⁹² Overall, Canada’s submissions rested on restrictive readings of sections 7 and 15 whereby they would not impose positive obligations on the state—which it supported with *obiter dicta* from prior cases suggesting that there is no right to healthcare in Canada—and framed Ms. Toussaint’s claim expansively. The submissions did not address the minimum protection approach nor the role for Canada’s internationally binding human rights obligations or the values and principles underlying IHRL to influence the interpretation of the *Charter*. In fact, the submissions

⁸⁸ *Ibid* at para 19.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at para 27, citing *R v Lyons*, [1987] 2 SCR 309 at para 88.

⁹¹ *Toussaint* FC, Respondent’s Memorandum of Argument, *supra* note 68 at para 29.

⁹² *Ibid* at para 19.

did not address international law at all.

iii. *Toussaint* (Federal Court)

As noted above, the issues before Justice Zinn at the Federal Court included, among others, whether “denying [Ms. Toussaint] coverage under the IFHP violated principles of international law, including international conventions to which Canada is signatory” and whether Ms. Toussaint’s rights under sections 7 and 15 of the *Charter* were violated.⁹³

The decision demonstrates questionable treatment of Ms. Toussaint’s IHRL claims and reflects a lack of clarity in *Charter* jurisprudence when IHRL is invoked. Although, as discussed above, the minimum protection approach had been endorsed by the SCC repeatedly,⁹⁴ the principle was not considered in *Toussaint* FC. Rather, Zinn J summarily rejected Ms. Toussaint’s arguments based on the *ICESCR* and *ICERD* because these treaties—although ratified by Canada and imposing internationally binding obligations upon it—have not been expressly implemented through legislation.⁹⁵ Before doing so, Zinn J treated questionably some international human rights materials Ms. Toussaint had invoked.

While Zinn J noted that, “there is an international right to health,” he asserted that, “[d]efining the content of a right to health is a formidable challenge” before briefly touching upon its “contested scope”⁹⁶ in a manner that raises questions about whether an appropriate methodology was followed. As noted above, Ms. Toussaint had relied upon General Comments of the CESCR and a General Recommendation of the CERD laying out the Committees’ views on the scope of the obligations imposed by the *ICESCR* and the *ICERD*. The CESCR and CERD are composed of

⁹³ *Toussaint* FC, *supra* note 9 at para 20.

⁹⁴ See *Health Services*, *supra* note 53.

⁹⁵ *Toussaint* FC, *supra* note 9 at para 70.

⁹⁶ *Ibid* at paras 67, 70.

independent human rights experts who oversee the implementation of the *ICESCR* and *ICERD*. While these materials are not, of course, sources of international law, the interpretive commentary of such bodies on the obligations arising from the treaties they oversee may, in some instances, be afforded interpretive weight and persuasive value.⁹⁷ As Zinn J correctly explained, “[s]uch commentaries are persuasive but not binding on the Court,” and he took note of the CESCR’s view that right-to-health entitlements are not dependent on immigration status and that States parties to the *ICESCR* have an obligation to “refrain[] from denying or limiting equal access for all persons, including... illegal immigrants, to preventative, curative and palliative health services.”⁹⁸ However—presumably to support the conclusion that the scope of the right to health for irregular migrants is highly contested—Zinn J then identified what he considered a conflicting interpretation, as he “contrast[ed]” the CESCR’s interpretation of the scope of the right to health with a Fact Sheet on the right to health published by the Office of the United Nations High Commissioner for Human Rights (“UNHCHR”) and the World Health Organization (“WHO”).⁹⁹ When these materials are read in their entirety, however, they do not present conflicting views on the scope of the right to health.

Discussing the right to health for migrants, the Fact Sheet describes the reluctance of some States to provide *non-essential* healthcare to non-citizens *and warns that denying health services to migrants may be discriminatory*—a conclusion upon which Zinn J did not comment, despite its relevance to the proceedings and having reproduced in his decision the following provision of the Fact Sheet:

States have explicitly stated before international human rights bodies or in

⁹⁷ See e.g. Roseanne van Alebeek & André Nollkaemper, “The Legal Status of Decisions by Human Rights Treaty Bodies in National Law” in Keller & Ulfstein, eds, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012) 356; *Suresh v Canada (Citizenship and Immigration)*, [2002] 1 SCR 3 at para 67; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, Abella J, dissenting at para 224.

⁹⁸ *Toussaint FC*, *supra* note 9 at para 68, citing UNCESCR, *General Comment No. 14*, *supra* note 76 at para 34.

⁹⁹ *Ibid.*

national legislation that they cannot or do not wish to provide the same level of protection to migrants as to their own citizens. *Accordingly, most countries have defined their health obligations towards non-citizens in terms of 'essential care' or 'emergency health care' only.* Since these concepts mean different things in different countries, their interpretation is often left to individual health-care staff. *Practices and laws may therefore be discriminatory.*¹⁰⁰

Although he used the Fact Sheet to suggest that it conflicted with Ms. Toussaint's submissions, Justice Zinn did not discuss in his reasons other aspects of the Fact Sheet that explicitly *support* her position, including where the Fact Sheet: (i) lays out the same view of the CERD and CESCRC regarding the scope of the right to health with respect to irregular migrants that were invoked by Ms. Toussaint; (ii) notes that the United Nations Special Rapporteur on Health has "also stressed that sick asylum-seekers or undocumented persons, as some of the most vulnerable persons within a population, *should not be denied their human right to medical care;*" (iii) explains that the same interpretations advanced by the CERD and CESCRC that Ms. Toussaint had relied upon are "authoritative and detailed interpretation of the provisions found in the treaties;"¹⁰¹ and (iv) underscores potentially wide-ranging positive obligations on *ICESCR* States parties to protect the right to health of migrants going well beyond what Ms. Toussaint was claiming:

migrants' right to health is closely related to and dependent on their working and living conditions and legal status. In order to comprehensively address migrants' health issues, States should also take steps to realize their rights to, among other things, adequate housing, safe and healthy working conditions, an adequate standard of living, food, information, liberty and security of the person, due process, and freedom from slavery and compulsory labour.¹⁰²

Reading the Fact Sheet as a whole, it does not "contrast[]" with the interpretations of the right to health provided by the CESCRC and the CERD upon which Ms. Toussaint sought to rely. Rather, the interpretations of the UNHCHR and the WHO laid out in the Fact Sheet support her

¹⁰⁰ *Ibid*, citing UNHCHR & World Health Organization, *The Right to Health: Fact Sheet No 31* (2008) at 19 [*Right to Health Fact Sheet*].

¹⁰¹ *Right to Health Fact Sheet*, *supra* note 100 at 10.

¹⁰² *Ibid* at 20.

interpretation. At best, the Fact Sheet’s description of some States being “reluctant” to extend non-essential healthcare services to non-citizens that was cited by the Court could be considered evidence that some States parties do not interpret the *ICESCR* or *ICERD* as imposing this obligation. This, in turn, could have been contrasted with the uncontested expert evidence adduced at trial—and not discussed in *Toussaint FC*—that there is a trend with a growing number of States providing healthcare services to irregular migrants.¹⁰³

The questionable treatment of international legal sources continued in *Toussaint FC* as the Court—without exploring *why* Canada has not ratified it—considered it, “notable that Canada has not signed the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,” which recognizes, among many other things, the right of migrant workers (including irregular migrants) and their families to urgent medical care.¹⁰⁴ Although it is common for States to agree upon more specific human rights treaties for particularly vulnerable groups that, in part, reiterate rights already codified in more general treaties¹⁰⁵ and it is a fundamental principle of international law that pre-existing treaty obligations are generally *not* displaced by successive treaties relating to the same subject matter,¹⁰⁶ Zinn J used this provision to call into question the CESCR’s interpretation of the scope of the right to health under the *ICESCR*: “If the right to health is as wide in scope as the above United Nations supervisory organizations advocate there would be little need for further protection of migrant workers such as

¹⁰³ *Toussaint FC*, *supra* note 9 (Affidavit of Dr. Manuel Carballo) (discussing in detail the approaches taken in Italy, Spain, the Netherlands, Belgium, France, Portugal, and Switzerland at paras 24–42) [Dr. Carballo Affidavit] [perma.cc/BU2F-L7UH].

¹⁰⁴ 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), art 28.

¹⁰⁵ See e.g. *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratification by Canada 13 December 1991), *Convention and the Elimination of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratification by Canada 10 December 1981); *ICERD*, *supra* note 73.

¹⁰⁶ See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980, ratification by Canada 14 October 1970), art 30 [VCLT].

those found in... the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.”¹⁰⁷

Without exploring whether and how the minimum protection approach applied to Ms. Toussaint’s claim and the potential for Canada’s obligations under the *ICESCR* and *ICERD* to affect the interpretation of sections 7 and 15 of the *Charter*—which would require a meaningful effort to identify the scope of relevant obligations under the *ICESCR* and *ICERD*—the Court summarily concluded that the right to health (and, with it, even the potential of a limited right to emergency or essential healthcare without discrimination based on immigration status) had no place in resolving Ms. Toussaint’s claim because the *ICESCR* and *ICERD* have not been legislatively implemented:

Given the applicant’s predominant reliance on the *Charter*, and the fact that Canada has not expressly implemented either the *ICESCR* or the *ICERD* in domestic legislation, it is not necessary to pronounce on the contested scope of the international legal right to health. This application cannot succeed on the basis of the alleged international law obligations of Canada because Canada has not expressly implemented them.¹⁰⁸

Assessing Ms. Toussaint’s claims based solely on domestic law, Zinn J found that her section 15 rights had not been violated, holding that she was not discriminated against on the basis of a disability or lack of Canadian citizenship but due to her “illegal status in Canada.”¹⁰⁹ While noting in a footnote that the SCC has “[left] open the possibility that ‘immigration status’ may be considered an analogous ground” in section 15 claims,¹¹⁰ Zinn J did not address whether immigration status could be considered an analogous ground because he concluded Ms. Toussaint

¹⁰⁷ *Toussaint FC*, *supra* note 9 at para 69.

¹⁰⁸ *Ibid* at para 70.

¹⁰⁹ *Ibid* at para 81.

¹¹⁰ *Ibid* (after citing *Corbiere v Canada (Indian and Northern Affairs)*, [1999] 2 SCR 203, stating that, “[i]t may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one’s illegal migrant status, might support an argument that such a characteristic is an analogous ground” at footnote 3).

did not argue it and, since “[i]t is not for the Court in *Charter* cases to construct arguments for the parties or advance them on their behalf,” he determined that her section 15 claim “must fail.”¹¹¹ (Since Ms. Toussaint had argued that her section 15 rights were violated due to discrimination on the basis of citizenship—and arguably, by necessary extension, immigration status—in addition to disability,¹¹² this finding prompted Ms. Toussaint to file an unsuccessful Application for Reconsideration.¹¹³)

Justice Zinn also held that the violation of Ms. Toussaint’s section 7 rights was justified. He recognized that she “established a deprivation of her rights to life, liberty and security of the person that was caused by her exclusion from the IFHP” because it “exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences” and acknowledged that she may not have been able to access the health care services she needed in Grenada.¹¹⁴ However, he concluded that her exclusion from IFHP was not arbitrary and was therefore in accordance with the principles of fundamental justice as required by section 7 due to Canada’s desire to disincentivize illegal migration.¹¹⁵

Notably, there was uncontested expert evidence adduced by Ms. Toussaint at trial that migrants are generally not motivated to relocate to access healthcare, in addition to expert evidence that undocumented migrants often live in precarious circumstances and are subject to prejudice, stereotype, and political powerlessness, which can contribute to them experiencing health issues after relocating.¹¹⁶ However, Zinn J did not mention this evidence when accepting Canada’s argument that denying healthcare coverage to illegal migrants was not arbitrary because it would

¹¹¹ *Toussaint FC*, *supra* note 9 at paras 80–83.

¹¹² *Toussaint FC*, Respondent’s Memorandum of Argument, *supra* note 68 at paras 43, 60–66.

¹¹³ *Toussaint v Canada (Attorney General)*, 2010 FC 926.

¹¹⁴ *Toussaint FC*, *supra* note 9 at paras 91, 90, 93–94.

¹¹⁵ *Ibid* at para 94.

¹¹⁶ Dr. Carballo Affidavit, *supra* note 103.

avoid Canada descending a slippery slope into a “health-care safe haven:”

There is a principled reason why a victim of trafficking is entitled to health coverage for medical treatment if needed but other illegal migrants are not. The former is here through deception and manipulation by others; the latter is here by choice.

I do not accept the applicant’s submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. I see nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safe-haven for all who require health care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.¹¹⁷

Potentially demonstrating how Canada’s confused jurisprudence on IHRL provides little guidance to courts and litigants, despite this being a *Charter* case to which the minimum protection approach ought to have applied, Zinn J did not consider the potential interplay between the right to health and non-discrimination under IHRL and the rights to life and equal treatment under the *Charter*. Instead, he rejected arguments based on the right to health because the *ICESCR* and *ICERD* have not been expressly implemented through domestic legislation. In doing so, the decision led to the adoption of interpretations of sections 7 and 15 that, as discussed below, may fall below how the rights to life and non-discrimination are interpreted internationally.

iv. *Toussaint* (Federal Court of Appeal)

Ms. Toussaint unsuccessfully appealed the Federal Court’s decision.¹¹⁸ Before the Federal Court of Appeal, she invoked, among other things, the right to life under the *ICCPR* and the right to health under the *ICESCR* and *ICERD*, arguing that Zinn J erred by not taking into account Canada’s IHRL obligations when assessing whether the violation of Ms. Toussaint’s section 7

¹¹⁷ *Toussaint* FC, *supra* note 9 at paras 93–94.

¹¹⁸ *Toussaint* FCA, *supra* note 9.

rights was in accordance with the principles of fundamental justice.¹¹⁹ Intervening in the appeal, the Canadian Civil Liberties Association submitted, among other things, that, “[i]t has been well established that domestic law, as well as the principles of fundamental justice, must be interpreted in light of the values and obligations expressed in the international instruments by which Canada is bound.”¹²⁰

In response, Canada’s written submissions to the Federal Court of Appeal briefly addressed international law. Canada argued that Zinn J, “correctly noted that while Canada acceded to and ratified international treaties... which speak about rights to health and medical care, such agreements are not part of Canadian law unless and until they have been implemented by domestic statutes.”¹²¹ Again submitting an overly-expansive characterization of Ms. Toussaint’s position, Canada argued that the right to health, “does not equate, in either international or domestic law, to an unlimited right to all available health services by everyone in Canada, at government expense.”¹²² Canada again made no written submissions on the minimum protection approach nor whether the *Charter* implements a limited scope of the right to health under sections 7 and 15. It also made no submissions on the CESCR and CERD’s interpretations of the right to health nor State practice with respect to providing healthcare to irregular migrants. However, it did argue that Canada had decided to “grant access to her public healthcare system on a strictly designed and much more limited basis... to those present in Canada who meet the defined eligibility criteria as set out in her domestic laws” (despite, as explained above, the classes of persons considered eligible for IFHP having been set out in internal policy documents and not legislation). To support

¹¹⁹ *Toussaint* FCA, *supra* note 9 (Appellant’s Memorandum of Fact and Law) at paras 54–62 [Appellant’s Memorandum] [perma.cc/5PP9-4R6B].

¹²⁰ *Toussaint* FCA, *supra* note 9 (Memorandum of Fact and Law of the Intervenor, the Canadian Civil Liberties Association) at paras 36–37 [perma.cc/QHS7-TA6T].

¹²¹ *Toussaint* FCA, *supra* note 9 (Respondent’s Memorandum of Fact and Law) at para 34 [Respondent’s Memorandum] [perma.cc/FPY6-8QFA].

¹²² *Ibid* at para 35.

Ms. Toussaint's exclusion from IFHP, Canada invoked the presumption of conformity—which applies in non-*Charter* litigation—noting that, “[w]here a nation’s domestic law is incompatible with international law, domestic statutes prevail... for the purposes of Canadian law.”¹²³

In dismissing the appeal, Stratas JA, writing for the unanimous Federal Court of Appeal, went further than the Federal Court. Although the Federal Court held that Ms. Toussaint had been exposed to serious health risks that infringed her section 7 rights to life and security of the person, the Federal Court of Appeal concluded that the denial of IFHP coverage had not infringed Ms. Toussaint's section 7 rights because any harm she suffered was not due to state action; rather, Ms. Toussaint was to blame:

... most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan.... In my view, the appellant has not met her burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person under section 7 of the *Charter*.¹²⁴

Although he found no violation of section 7, Stratas JA went on to consider—and reject—whether the denial of coverage was contrary to the principles of fundamental justice:

At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the *Charter* require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.¹²⁵

In support of its decision, the Federal Court of Appeal considered the fact that section 7 had previously been described in *obiter dicta* by a concurring minority of the SCC as not “confer[ing]

¹²³ *Ibid* at para 36.

¹²⁴ *Toussaint* FCA, *supra* note 9 at paras 72–73.

¹²⁵ *Ibid* at para 76.

a freestanding constitutional right to health care,”¹²⁶ and cited with approval Linden JA’s statement in *Covarrubias v Canada (Citizenship and Immigration)* that, “a freestanding right to health care for all of the people of the world who happen to be [subject to a removal order]... in Canada would not likely be contemplated by the Supreme Court.”¹²⁷ (Notably in light of the decision from the HRC to follow, the Federal Court of Appeal left unaddressed the fact the SCC has explicitly left open the possibility that section 7 could give rise to positive obligations on the state to take steps to protect the rights to life, liberty, and security of the person, rather than merely imposing a negative obligation to refrain from infringing these rights.)

As Stratas JA noted, Ms. Toussaint was arguing that, “the principles of fundamental justice must also take into account Canada’s obligations under various sources of international human rights law such as the right to life under... the [ICCPR] and rights to health under... the [ICESCR] and... the [ICERD].”¹²⁸ While he acknowledged that, “in appropriate cases, courts can be assisted by these sources when defining the precise content of certain principles of fundamental justice under section 7,” he concluded that the Federal Court of Appeal did not need to consider international legal sources because Ms. Toussaint had failed to establish that the principles of fundamental justice require Canada to provide emergency healthcare to an irregular migrant.¹²⁹

Justice Stratas addressed Ms. Toussaint’s section 15 claim in more detail than the Federal Court and found that her section 15 rights were not violated for four reasons. First, the Court

¹²⁶ *Ibid* at paras 77–78, citing *Chaoulli*, *supra* note 86, McLachlin CJ and Major J, joint concurring reasons at para 104; *Auton v British Columbia (AG)*, 2004 SCC 78; *Ali v Canada*, 2008 FCA 190; *Wynberg v Ontario* (2006), 82 OR (3d) 561, 2006 CanLII 22919 (CA); *Eliopoulos v Ontario* (2006), 82 OR (3d) 321, 2006 CanLII 37121 (CA); *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538.

¹²⁷ *Ibid* at para 77, citing *Covarrubias v Canada (Citizenship and Immigration)*, 2006 FCA 365 at para 36.

¹²⁸ *Toussaint* FCA, *supra* note 9 at para 87.

¹²⁹ *Ibid* at paras 87, 74–88. See also *ibid* (in doing so, the Federal Court of Appeal could be seen as implying that binding IHRL obligations will not affect the interpretation of principles of fundamental justice because they are not a “legal principle’ that is ‘vital or fundamental to our societal notion of criminal justice,’ nor is there ‘a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate’” as required by past SCC jurisprudence, which may raises questions about the role for IHRL in defining principles of fundamental justice for section 7 claims at para 80).

concluded that “immigration status” does not qualify as an analogous ground since it is not “immutable or changeable only at an unacceptable cost to personal identity,” while the immigration status of being in Canada illegally “is a characteristic that the government has a ‘legitimate interest in expecting [the person] to change.’”¹³⁰ Second, the Court found that Ms. Toussaint had “failed to establish that the Order in Council relies upon, perpetuates or promotes prejudice or stereotyping.”¹³¹ Without exploring how the exclusion relies upon a stereotype that irregular migrants would migrate to take advantage of healthcare; the marginalizing effects Ms. Toussaint had experienced and how she could be made to feel less capable and less worthy of recognition or value as a human being by being denied coverage for essential healthcare; or the prejudice and stereotype that may be perpetuated and promoted and to which Ms. Toussaint could be exposed each time she had to explain to healthcare providers that she was an irregular migrant who could not afford to pay for the essential healthcare she was seeking, the Court of Appeal reasoned that Ms. Toussaint was being treated the same as Canadian citizens since Canadian citizens do not qualify for coverage under the IFHP. As Stratas JA explained,

In imposing... eligibility criteria, the Order in Council does not suggest that the appellant and others like her are less capable or less worthy of recognition or value as human beings. The Order in Council does not single out, stigmatize or expose the appellant and others like her to prejudice and stereotyping, nor does it perpetuate any pre-existing prejudice and stereotyping. Indeed, the Order in Council, with its eligibility criteria, denies medical coverage to the vast majority of us, and not just the appellant and others like her. The Order in Council treats the appellant—a non-citizen who has remained in Canada contrary to Canadian immigration law—in the same way as all Canadian citizens, rich or poor, healthy or sick.¹³²

Third, the Court rejected Ms. Toussaint’s section 15 argument that IFHP coverage was a benefit conferred in a discriminatory manner.¹³³ Finally, the section 15 claim was considered, in any event,

¹³⁰ *Ibid* at para 99 (citation omitted).

¹³¹ *Ibid* at para 103.

¹³² *Ibid* at para 104.

¹³³ *Ibid* at paras 105–109.

bound to fail since, as noted above, the Federal Court of Appeal concluded that Ms. Toussaint—and not the denial of coverage under the IFHP—was the “operative cause” of the “disadvantage [she] was encountering.”¹³⁴

Justice Stratas went on to consider whether a violation would have been justifiable under section 1 of the *Charter* as a reasonable limit prescribed by law in a free and democratic society. Like the Federal Court, he concluded that denying health coverage to individuals unlawfully residing in Canada was not arbitrary due to Canada’s interests “in defending its immigration laws” and ensuring that it would not become a “health care safe haven,” underscoring the potential for dire consequences if Ms. Toussaint claim were successful:

In any analysis of justification under section 1 of the *Charter* in this case, the interests of the state in defending its immigration laws would deserve weight. If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada’s immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could become a health care safe haven, its immigration laws undermined. Many, desperate to reach that safe haven, might fall into the grasp of human smugglers, embarking upon a voyage of destitution and danger, with some never making it to our shores. In the end, the Order in Council – originally envisaged as a humanitarian program to assist a limited class of persons falling within its terms – might have to be scrapped.¹³⁵

Like Zinn J, in determining that denying IFHP coverage to irregular migrants was not arbitrary due to Canada’s interest in disincentivizing illegal migration, the Federal Court of Appeal did not address the uncontradicted expert evidence submitted at trial—and invoked in the appeal¹³⁶—that irregular migrants have proven to *not* pose an undue burden on health systems where they have been provided with healthcare coverage.¹³⁷ The failure of the Federal Courts to consider Ms. Toussaint’s evidence is inconsistent with guidance provided in *Chauoilli*—a case

¹³⁴ *Ibid* at para 110.

¹³⁵ *Ibid* at paras 112–13.

¹³⁶ Appellant’s Memorandum, *supra* note 119 at paras 40–44.

¹³⁷ See Dr. Carballo Affidavit, *supra* note 103.

challenging legislation in Quebec prohibiting private health insurance—that, “[t]he task of the courts, on s. 7 issues... is to evaluate the issue in the light, not just of common sense or theory, but of the evidence.”¹³⁸ In *Chauoilli*, a concurring minority found that, “evidence [adduced at trial] on the experience of other western democracies with public health care systems that permit access to private health care refute[d] the government’s theory that a prohibition on private health insurance is connected to maintaining quality public health care.”¹³⁹ However, in Ms. Toussaint’s litigation, despite *Chauoilli*’s reminder that section 7 claims should be decided on evidence and not assertions of common sense, both Zinn J and Stratas JA did not assess whether the evidence submitted by Ms. Toussaint of other western democracies providing health coverage to illegal migrants refuted the government’s argument—perhaps “common sense” to some or reflecting prejudicial stereotypes to others—that Canada would become a safe haven for illegal migrants desperate to obtain medical care.

v. *Toussaint* (United Nations Human Rights Committee)

After the SCC denied Ms. Toussaint leave to appeal,¹⁴⁰ she filed a communication with the HRC—the body of independent experts responsible for overseeing the implementation of the *ICCPR*—arguing that Canada had violated her rights to life and non-discrimination under the *ICCPR* by denying her IFHP coverage.¹⁴¹ Ms. Toussaint argued at the HRC that Canada violated her rights to life and non-discrimination by refusing to provide her with emergency and essential healthcare due to her immigration status, which rendered the complaint admissible.¹⁴² Even if she had wanted to, Ms. Toussaint was unable to advance a right-to-health complaint to the CESCRC under the

¹³⁸ *Chauoilli*, *supra* note 86 at para 150.

¹³⁹ *Ibid* at paras 149, 139–49.

¹⁴⁰ *Toussaint* FCA, *supra* note 9 leave to appeal to SCC refused, 34446 (5 April 2012) [*Toussaint* Leave to Appeal].

¹⁴¹ *Toussaint* UNHRC, *supra* note 16.

¹⁴² *Ibid* at para 10.9.

ICESCR because Canada has not ratified the *Optional Protocol to the ICESCR* providing the CDESCR with the competence to hear individual communications regarding compliance with the *ICESCR*.¹⁴³ However, recourse to the HRC was available because Ms. Toussaint had exhausted her domestic legal remedies and Canada has ratified the first *Optional Protocol to the ICCPR* providing for individual complaints regarding the *ICCPR*.¹⁴⁴

In its consideration of Ms. Toussaint’s complaint, the Committee found that the right to life under the *ICCPR* imposes positive obligations on States parties and extends beyond an “entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”¹⁴⁵ The Committee also recognized that, “the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life” and that, “States parties may be in violation of article 6 [protecting the right to life] even if such threats and situations do not result in loss of life.”¹⁴⁶

Examining whether the right to life imposes a duty to provide healthcare services, the Committee explained that, “as a minimum States parties have the obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.”¹⁴⁷ This finding is particularly relevant because it indicates that Canada’s positions in *Toussaint* on the scope of the right to life under section 7—in particular, that there is no right to healthcare under the *Charter* and that section 7 does not impose positive obligations—are

¹⁴³ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UN Doc A/Res/63/117 (entered into force 5 May 2013) [*ICESCR Optional Protocol*].

¹⁴⁴ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR Optional Protocol*].

¹⁴⁵ *Toussaint* UNHRC, *supra* note 16 at para 11.3.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

inconsistent with the Committee's interpretation of the right to life, which raises the potential for section 7 rights to fall below the minimum standard of IHRL,¹⁴⁸ should the HRC's interpretation be considered reflective of how the right is interpreted internationally.

Having established that there is an obligation on States parties to provide existing and reasonably available healthcare services to individuals who are facing a risk to their life, it was not surprising that the Committee concluded that Canada had violated Ms. Toussaint's right to life under the *ICCPR*, as Canada did not contest that Ms. Toussaint had serious medical issues and had been denied medical care in some instances due to a lack of health insurance coverage. In a potentially implicit acknowledgement that its interpretation of section 15 falls short of non-discrimination requirements under IHRL, Canada did not challenge the admissibility of Ms. Toussaint's communication under article 26 that she had been subjected to discriminatory treatment in violation of the *ICCPR*.¹⁴⁹ Rather, Canada "justified its decision to deny health care coverage to undocumented migrants on the basis of the desire to encourage compliance with federal immigration laws."¹⁵⁰

The Committee found that Canada had violated Ms. Toussaint's rights to life and non-discrimination under articles 6 and 26 of the *ICCPR* on the basis that, "States... cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants" and, "where the right to life is implicated, a distinction based on immigration status is not reasonable and objective as required under the Covenant."¹⁵¹ The Committee's

¹⁴⁸ See e.g. UNHRC, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Visit to Canada: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 41 Sess, UN Doc A/HRC/41/34/Add.2 (2019) ("[t]he argument that the Charter imposes no positive obligations to protect the health-related elements of the rights to life, security of the person and equality contravenes the international obligations of Canada" at para 25).

¹⁴⁹ *Toussaint* UNHRC, *supra* note 16 at para 10.11.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* at paras 11.5, 11.7–11.9

findings were in marked contrast to those of the Federal Court and Federal Court of Appeal, where the Courts considered the denial of health coverage to individuals unlawfully residing in Canada to not be arbitrary due to Canada's interests "in defending its immigration laws" and ensuring that it would not become a "health care safe haven."¹⁵²

Nine years after she was denied essential healthcare coverage under the IFHP and five years after she filed her communication with the HRC, the Committee concluded that Canada was obliged to provide Ms. Toussaint with an effective remedy and full reparation for violating her rights to life and non-discrimination under the *ICCPR*, including by paying her "adequate compensation" and "tak[ing] all steps necessary to prevent similar violations [for others] in the future," such as "reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."¹⁵³ The Committee requested that Canada inform it within 180 days of "the measures taken to give effect to the Committee's Views."¹⁵⁴

Even though, by ratifying the *ICCPR Optional Protocol*, Canada accepted the Committee's competence to hear Ms. Toussaint's complaint, the federal government refused to comply with the Committee's Views. Rather, as summarized by the HRC's Deputy Special Rapporteur for follow-up to Views, Canada "rejected the Committee's assessment of the case," "refused to take any further measures to give effect to the Views," and "seemed mistakenly to view the [Committee's] follow-up procedure as an opportunity to reargue the case."¹⁵⁵ Ms. Toussaint's requests for Canada to comply with the Committee's Views were ignored for two years until they were denied.¹⁵⁶

¹⁵² See *supra* note 135 and accompanying text.

¹⁵³ *Toussaint* UNHRC, *supra* note 16 at para 13.

¹⁵⁴ *Ibid* at para 14.

¹⁵⁵ UNHRC, *Summary record of the second part (public) of the 3723rd meeting*, 129th Sess, 3723rd Mtg, UN Doc CCPR/C/SR.3723/Add.1 at paras 6–7.

¹⁵⁶ *Toussaint v Canada (AG)*, Toronto, ON CA CV-20-00649404-0000 [*Toussaint* Sup Ct Proceedings] (Amended)

Underscoring the importance of Ms. Toussaint's complaint to the HRC, Canada's refusal to act pursuant to the Views of the Committee remains a matter of concern for the HRC, which is demonstrated by it appearing in the first issue in the Committee's *List of Issues Prior to Reporting* submitted to Canada in advance of its seventh periodic report on its implementation of the *ICCPR*.¹⁵⁷

vi. *Toussaint* (Ontario Superior Court of Justice)

After the HRC's Views were issued, Ms. Toussaint requested the SCC reconsider her application for leave to appeal due to "the exceedingly rare circumstance of a subsequent conflicting decision of the UN Human Rights Committee."¹⁵⁸ A year after making this request, the Registrar denied it.¹⁵⁹ While this formally ended Ms. Toussaint's initial *Charter* litigation, her effort to seek a remedy for the violation of her rights under the *ICCPR* continued. In 2021, she filed a claim at the Ontario Superior Court of Justice seeking an order that Canada abide by the Views of the HRC and provide her with compensation.¹⁶⁰ The claim invokes, among other things, customary international law principles mandating Canada to undertake its international law and treaty obligations in good faith, and the right to an effective remedy for violations of IHRL.

Canada moved unsuccessfully to have Ms. Toussaint's pleadings struck for, among other things, disclosing no cause of action and being outside of the limitations period.¹⁶¹ In dismissing

Amended Statement of Claim) at paras 31, 33 [*Toussaint* Sup Ct Proceedings, Statement of Claim] [perma.cc/G467-NAAE]; *Toussaint v Canada (AG)*, Toronto, ON CA CV-20-00649404-0000 (Factum of the Defendant on Motion to Strike) at paras 27, 29 [perma.cc/69PR-YWRF].

¹⁵⁷ UNHRC, *List of issues prior to submission of the seventh periodic report of Canada*, UN Doc CCPR/C/CAN/QPR/7 (2021) ("Please indicate which procedures are in place for the implementation of the Committee's Views under the Optional Protocol and provide information on measures taken to ensure full compliance with each of the Views adopted in respect of the State party, in particular the Committee's Views in *Toussaint v. Canada*" at para 1).

¹⁵⁸ *Toussaint* Leave to Appeal, *supra* note 140 (Memorandum of Argument on Request for Reconsideration) [perma.cc/G2FJ-KQ47].

¹⁵⁹ See Letter from Deputy Registrar, *supra* note 13.

¹⁶⁰ *Toussaint* Sup Ct Proceedings, *supra* note 156.

¹⁶¹ *Toussaint* Sup Ct, *supra* note 156 (Motion to Strike).

the motion, Perell J noted that, “[g]iven the land, sea, air, submarine, and celestial procedural attack that Canada makes against Ms. Toussaint’s pleading, there are many factual and legal issues to address in this pleadings motion in what is a complex factual and legal matrix that may affect others by the precedent set by Ms. Toussaint’s sad case.”¹⁶²

Justice Perell’s reasons may be read as showing substantial sympathy toward Ms. Toussaint, including in the concise summary of the “serious irreversible health consequences” that Ms. Toussaint had suffered: “She had one leg amputated above the knee. She became blind. Her kidneys failed. She had a stroke. She had an anoxic brain injury due to heart failure. She currently lives with those irreversible sicknesses.”¹⁶³ Justice Perell also struck a profoundly critical tone (which has since been described as “gratuitous” by the unanimous Court of Appeal for Ontario¹⁶⁴) on how Canada characterized Ms. Toussaint’s immigration status and her claim:

it pains me to have to say that Canada’s argument that it is plain and obvious that Ms. Toussaint’s claim is doomed to fail does it no pride, because Canada pejoratively mischaracterizes Ms. Toussaint’s human rights claim and thus its rhetorical and largely conclusory argument misfires and is also unfair.

[...]

In a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system, Canada mischaracterizes Ms. Toussaint’s *Charter* claim as a right to receive free health care anywhere in the world, regardless of one’s lack of status[] or as a right to receive[] an optimum level of health insurance and as a claim for a purely socio-economic right which is outside the guarantees of the *Canadian Charter of Rights and Freedoms*.

Since Ms. Toussaint’s claim does not assert a right to free health care anywhere in the world regardless of one’s lack of status, Canada’s argument is a fallacious straw man argument that might successfully knock down claims that are not being asserted.¹⁶⁵

¹⁶² *Toussaint v Canada (AG)*, (17 August 2022), Toronto, ON CA CV-20-00649404-0000 (interlocutory judgment), 2022 ONSC 4747 at para 11 [*Toussaint* Sup Ct Motion to Strike (Sup Ct)].

¹⁶³ *Ibid* at para 57.

¹⁶⁴ *Toussaint v Canada (Attorney General)*, 2023 ONCA 117 at paras 7–8 [*Toussaint* Sup Ct Motion to Strike (Ont CA)].

¹⁶⁵ *Toussaint* Sup Ct Motion to Strike (Sup Ct), *supra* note 162 at paras 133–36.

Canada successfully appealed portions of Perell J's order; however, the determination that the matter is within the jurisdiction of the courts of Ontario stands.¹⁶⁶ At the time of writing, the trial on the claim's merits at the Superior Court of Justice is pending. However, Ms. Toussaint—who had received permanent resident status in 2013¹⁶⁷ and had therefore brought and was continuing her litigation, in part, for its precedential value for others in her former situation¹⁶⁸—passed away on January 9, 2023, while the decision from the Court of Appeal for Ontario regarding Perell J's order was reserved. While it remains to be seen whether Ms. Toussaint's current claim, which is being continued by her mother following her death, will be successful, the case raises important legal issues that could narrow the IHRL enforcement gap in Canada, including by potentially determining whether there is a domestic right to an effective remedy for violations of IHRL based on customary international law, whether Canada has an obligation to implement—or a reviewable obligation to consider before deciding to not implement—the Views of the HRC, and how Canada's international obligation to abide by its treaty commitments in good faith¹⁶⁹ operates domestically (if at all) in the context of individual claims.

Notably, although Ms. Toussaint's litigation could eventually be successful in obtaining for her estate a posthumous recognition in Canada of the violation of her rights to life and non-discrimination under international law and a remedy for such violations, it does not reopen Ms. Toussaint's original *Charter* claims. With Ms. Toussaint's requests for leave to appeal and reconsideration denied, the finding that Canada's *ICESCR* obligations (i.e., the right-to-life and non-discrimination aspects of the right to health) could not be invoked to support her *Charter*

¹⁶⁶ *Toussaint* Sup Ct Motion to Strike (Ont CA) at paras 2, 17–20.

¹⁶⁷ See e.g. *Toussaint* Sup Ct Motion to Strike (Sup Ct), *supra* note 162 at para 58.

¹⁶⁸ See Bruce Porter, "Some Reflections on Nell Toussaint, July 14, 1969 – January 9, 2023: The Person Behind the Historic Human Rights Case" online (pdf): <www.socialrights.ca/2023/Reflections%20on%20Nell%20Toussaint.pdf> at 2 [perma.cc/T5PF-VMHD].

¹⁶⁹ See *VCLT*, *supra* note 106, art 26. See also International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" (1966) 2 Yearbook of the International Law Commission 187 at 210–11.

claims because the *ICESCR* has not been expressly implemented by legislation will remain unchallenged directly. As such, an arguable implementation gap for even a limited understanding of the right to health—that is, a right to emergency or essential healthcare for an irregular migrant whose life is at risk—will persist unless a more expanded interpretation of section 7 and 15 *Charter* rights is recognized in Canada through future litigation.

Additionally, it should be noted that, even if a future claim is successful in having the arguable right-to-life and non-discrimination aspects of the right to health influence the interpretation of section 7 of the *Charter*, Canada's obligations under the *ICESCR* go beyond instances where an individual's right to life at risk, which cannot be tied to sections 7 or 15. As such, the full scope of the right to health is likely to remain non-justiciable in Canada due to the dualist approach for conventional international law, with no recourse available internationally because Canada has not ratified—and has no intention to ratify¹⁷⁰—the *ICESCR*'s *Optional Protocol*. As Ms. Toussaint's litigation therefore illustrates, Canadian practices can create and perpetuate gaps whereby obligations owed to individuals that are binding internationally remain legally ineffective domestically. This begs the question, for future consideration, of whether such a gap justifiable. If it is not simply a normative gap that must be tolerated by those who would have Canada's domestic human rights obligations reflect, at a minimum, the international obligations Canada has voluntarily assumed, what role, if any, is there for Canadian courts to fill this gap?

¹⁷⁰ See Canada, *Information Related to Canada's Response to Recommendations: Third Universal Periodic Review* (Ottawa: Department of Heritage, 2019) at 38.

4. Conclusion: Bridging the International Human Rights Law Implementation and Enforcement Gaps

Despite seemingly simple rules for Canadian reception law—monist for customary international law and dualist for conventional international law—there is persistent uncertainty regarding how Canadian courts will treat claims invoking IHRL. As this article has argued, this uncertainty can be traced to Canadian reception law, the general practice in Canada of legislation not being passed to expressly implement the human rights treaties that Canada has ratified, and a lack of clarity in existing jurisprudence regarding how IHRL applies in Canada. Although interpretive methods have been adopted that may, if applied, narrow the gap between rights that Canada has committed itself internationally and rights that are legally effective domestically, an implementation gap may give rise to an enforcement gap for international rights that cannot be tied to the *Charter* or other legislation, or when interpretive methods are not applied consistently.

The claims brought by Ms. Toussaint regarding her rights to health, life, and non-discrimination demonstrate how Canada's practice of not implementing legislatively the human rights treaties it has ratified can give rise to an enforcement gap. Further, it shows how, despite interpretive methodologies providing otherwise, such a gap may arise even where a limited understanding of a right under binding IHRL can be tied to a right under the *Charter*. In such instances, courts may default to basic reception law principles and summarily conclude that binding IHRL is not relevant to *Charter* claims because the treaty being invoked before the court has not been expressly implemented by legislation, contrary to the minimum protection approach. Ms. Toussaint's litigation provides a compelling example of questionable treatment of IHRL. Although the minimum protection approach had been reaffirmed in *Charter* jurisprudence, it was not considered by (or presumably argued before) the Federal Court or the Federal Court of Appeal,

which may have contributed to a reading of sections 7 and 15 that falls below how Canada's obligations have been interpreted by the HRC.

Whether and to what extent gaps exist between the international interpretation and domestic interpretation of the rights to life, health, and non-discrimination/equal treatment in Canada—and how to address such gaps, if at all—will remain to be resolved. While Ms. Toussaint's litigation may be credited one day with helping to clarify how IHRL applies in Canada, and perhaps assist with bridging the IHRL implementation and enforcement gap, it illustrates how, in the absence of action by the legislative branch of government, this matter will be left to the judicial branch to resolve. If the implementation and enforcement gaps discussed in this article continue to persist, questions may continue to be asked regarding Canada's commitment to realizing in good faith the full promise of its binding IHRL obligations and whether sufficient meaning has been given in Canada to the principle that, "where there is a right, there must be a remedy for its violation."¹⁷¹

¹⁷¹ *Nesun Resources*, *supra* note 23 at para 120.