

Court File No.: A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

**ATTORNEY GENERAL OF CANADA and
MINISTER OF CITIZENSHIP AND IMMIGRATION**Appellants
(Respondents in the Federal Court)

and

**CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN
ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,
HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH**Respondents
(Applicants in the Federal Court)

and

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

Interveners

**APPELLANTS' REPLY TO AMNESTY INTERNATIONAL AND ESCR-
NET'S MEMORANDUM OF FACT AND LAW**

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PART I – FACTS

A. OVERVIEW

1. Sections 7 and 15 of the Charter, read in light of Canada's international law obligations, do not impose a positive obligation on the federal government to provide a certain level of federally-funded health insurance to refugees, refugee claimants, or rejected refugee claimants.

B. FACTS

2. The Appellants rely on the facts as set out in their Memoranda of Fact and Law in the appeal and cross-appeal.

PART II – POINTS IN ISSUE

3. The interveners improperly rely on evidence that the Court should ignore.

4. Sections 7 and 15 of the *Charter*, read in light of Canada's international law obligations, do not impose a positive obligation on the federal government to provide a certain level of federally-funded health insurance to refugees, refugee claimants, or rejected refugee claimants.

PART III – SUBMISSIONS

A. IMPROPER RELIANCE ON EVIDENCE

5. The interveners improperly seek to introduce evidence “in the guise of authorities”.¹ The order granting intervener status specified that the interveners were not to add to the evidentiary record.² This evidence is not admissible on the appeal, and was not before the Federal Court. In particular, the Appellants object to the interveners relying on international documents that are more in the nature of evidence than legal authority. These documents are relied on without providing the Court with the context in which they were prepared. The Court should therefore be wary of relying on their content without that context.³ The Court should ignore the documents set out at the interveners’ List of Authorities at nos. 51-55.

B. LIMITED USEFULNESS OF INTERNATIONAL LAW IN INTERPRETING SS. 7 AND 15

6. Canada is party to numerous international human rights treaties cited by the interveners.⁴ Canada is bound by these instruments in international law. Canada takes its obligations pursuant to these treaties very seriously, and meets these obligations through an array of legislative, and administrative measures, at the

¹ *Public School Boards’ Assn of Alberta v Alberta (Attorney General)*, [1999] 3 SCR 845 at para 3; *Forest Ethics Advocacy Association v the National Energy Board*, 2014 FCA 88 at para 14

² *Canada (AG v Canadian Doctors for Refugee Care, et al.*, (2 April 2015), Doc. No. A-407-14 (FCA) (Gauthier, JA)

³ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, at paras. 141, 147

⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47 (ICCPR); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 993 UNTS 3, Can TS 1976 No 46 (ICESCR); *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1993 No. 3. (CRC); *International Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (CEDAW); UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st Sess, UN Doc A/RES/61/106 (CRPD); and the *International Convention on the*

federal, provincial and territorial levels of government.⁵ Canada regularly reports to various treaty organizations on its level of compliance.⁶

7. These treaties are binding on Canada at international law, but they are not directly enforceable in Canadian law. This is because they have not been specifically incorporated into domestic law so as to found a cause of action in domestic courts.⁷

8. The *Charter* is an important means by which Canada implements its treaty obligations with respect to civil and political rights. The *Charter*, however, is not a primary means by which Canada meets its international obligations with respect to economic, social and cultural rights, including the right to health. Rather, the right to health as recognized in international law is implemented through a wide range of means: ordinary legislation, policies and programs, and by different levels of government.⁸ In the circumstances, the right to health, as protected in Article 12(1) of the *ICESCR* and in other treaties, is not a persuasive source of *Charter* interpretation.

Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, Can TS 1979 No. 28 (*ICEFRD*)

⁵ E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical", in O. Fitzgerald, ed. *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006)

⁶ For example, Canada reports on the "right to health" to the UN Committee on Economic, Social and Cultural Rights – see *United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) Sixth periodic reports of States parties due in 2010 – Canada, E/C.12/CAN/6 22 Apr 2014*

⁷ *JH Rayner Ltd v Department of Trade*, [1990] 2 AC 418 at 476-477, 481, 500; *AG Canada v AG Ontario*, [1937] AC 326 at 347-48, *Francis v The Queen*, [1956] SCR 618 at 621; *Bancroft v University of Toronto* (1986), 24 DLR (4th) 620 at 627 (Ont HC); *Re Vincem & Minister of Employment and Immigration* (1983), 148 DLR (3d) 385 (FCA) at 390

⁸ See, e.g., programs and policies listed in *UNCESCR Sixth periodic reports of States parties due in 2010 – Canada*, supra at footnote 6

9. The interveners argue that Canada's international law obligations require an interpretation of ss. 7 and 15 of the *Charter* that includes positive obligations with respect to funding health insurance. This argument ignores binding Canadian jurisprudence on the interplay between international law obligations and the scope of *Charter* provisions.

10. Canada's international law obligations can only be a relevant and persuasive source to elucidate the scope of a *Charter* right if there is congruence between the *Charter* right and the international right at issue. This congruence can take the form of either domestic incorporation of the right through legislation,⁹ or similarity between the "express words" of the *Charter* right and the international right at issue.¹⁰

11. The treaties at issue have not been specifically incorporated into domestic law through legislation. Congruence can only exist if the wording of the *Charter* and international right are similar.

12. In *Gosselin, for example*, the Supreme Court of Canada held that Article 11.1 of the *ICESCR* (which guarantees "an adequate standard of living") was not a relevant or persuasive source for interpreting the scope of ss. 7 and 15 of the *Charter*, due to differences in the wording of the provisions in issue. None of the judges of the

⁹ *Health Services and Support – Facilities Subsector Bargaining Assn. v. B.C.*, 2007 SCC 27 ("*Health Services*") at paras 58, 63, 65, 66

¹⁰ *R. v. Hape*, 2007 SCC 26 ("*Hape*") at para. 56

Court relied on Article 11.1 of the *ICESCR* or any other international instrument in interpreting the scope of ss. 7 and 15 of the *Charter*.¹¹

13. In this case, Article 12(1) of the *ICESCR* (which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”) bears no similarity to the language of ss. 7 and 15 of the *Charter*.

14. The interveners argue that the right to life under Article 6 of the *ICCPR* inherently includes positive measures to ensure access to health care. The right to life under s. 7 of the *Charter* is framed very differently than in Article 6 of the *ICCPR*. The s. 7 right to life and security of person is subject to certain parameters imposed by its language: the rights are qualified by the principles of fundamental justice;¹² there has to be a deprivation induced by state interference;¹³ s. 7 does not confer free standing rights, such as a right to healthcare.¹⁴

15. The right to life in Article 6(1) of the *ICCPR* does not impose a positive obligation on a State party to provide free health services to all persons in its territory.¹⁵ The non-binding views of the UN Human Rights Committee relied on by the interveners are distinguishable. In *Cabal and Bertran v. Australia*¹⁶, the complainant was detained pending extradition, and was not separated from other

¹¹ In contrast, three of the judges found the *ICESCR* to be relevant to the interpretation of s. 45 of the *Quebec Charter*, due to the similar wording between the provisions.

¹² *Re BC Motor Vehicle*, [1985] 2 SCR 486, para 23

¹³ *R. v. Morgentaler*, [1988] 1 SCR 30 p. 56

¹⁴ *Chaoulli v. Quebec*, [2005] 1 SCR 791, para 104

¹⁵ Sieghart, Paul (1983). *The International Law of Human Rights*. Oxford University Press. p. 25

¹⁶ UN Human Rights Committee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v Australia*, Communication No. 10201/2001, 78th Sess, UN Doc CCPR/C/78/D/1020/2001

detainees with communicable diseases. The UN Human Rights Committee expressed the view that "failure to separate detainees... could raise issues [under Article 6]" [emphasis added], but the Committee did not uphold the claim. Similarly, *Pavlovna Lantsova v. Russia*¹⁷ does not deal with health insurance, but rather with health services for a person in detention.

16. There is no support in any Canadian legislation or any Canadian jurisprudence for the proposition that a "right to life" or "right to health", as expressed in any of the treaties cited, translates into a *Charter* right to a certain level of federally funded health insurance. Similarly, Canadian courts have clearly found that immigration status is not an analogous ground of discrimination under s. 15(1) of the Charter. The non-binding views of treaty bodies should be of little interpretive value where they are contrary to the findings of domestic judicial authorities.

C. FOREIGN JURISPRUDENCE NOT BINDING

17. Where international norms are relevant to the interpretation of the *Charter*, such obligations may be considered a "relevant and persuasive" source of interpretation, although they are not directly binding on Canadian courts.¹⁸

18. Foreign jurisprudence can never be binding. Their persuasive value is also tempered when they are based on the provisions of that country's own

(2003)

¹⁷ UN Human Rights Committee, *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002)

¹⁸ See *Health Services*, supra at note 9 at paras. 69 & 78; *Hape*, supra at note 10. at paras. 55-56; *Ref. Re: Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 349.

constitutional documents. As the Supreme Court of Canada cautioned in *Lavigne* in considering the usefulness of foreign legal precedents:¹⁹

[...] the uniqueness of the Canadian Charter of Rights and Freedoms flows not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition.

D. NO DENIAL OF HEALTH CARE

19. The IFHP does not deny or limit access to health care for any of its beneficiaries. It does specify categories of beneficiaries, and reimburses health care providers for providing specific health services. Canada's International obligations do not create a right to a certain level of federally-funded health insurance

20. In the alternative, the Appellants submit that even if there is some incompatibility with international law, domestic law prevails over international law for the purposes interpreting the *Charter* in this case.²⁰ This Court should follow the long line of binding Canadian jurisprudence which has held that there is no *Charter* right to a minimum level of health insurance funding under s. 7, and that that immigration status, which includes refugee status, is not an analogous ground of discrimination for the purposes of s. 15.

¹⁹ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 at para 81

²⁰ *Hape*, supra at note 10 at para. 53; *Schreiber v. Canada (AG)*, [2002] 3 SCR 269 at para. 50; *Bouzari v. Islamic Republic of Iran* (2004), 71 OR (3d) 675 (CA) at para. 66; leave to appeal to SCC dismissed: [2004] SCCA. No. 410

E. NO *CHARTER* REQUIREMENT FOR THE REMEDY REQUESTED

21. None of the treaties relied on by the Appellants and Interveners require Canada to constitutionally entrench the rights recognized therein. For example, to accommodate diversity amongst States Parties, the *ICESCR* neither stipulates “the specific means by which it is implemented in the domestic legal order,”²¹ nor “that it be accorded any specific type of status in national law.”²² The *Charter* serves as only one tool, among the broad array of measures, and protects against *state* deprivation of life, liberty or security of the person and discrimination on the basis of prohibited grounds.

22. This flexibility also applies to the means by which access to effective domestic remedies are to be provided. To illustrate, obligations under the *ICESCR* may be met by means of both judicial and/or administrative remedies, the latter subject to judicial review.²³

23. The interveners argue that General Comments and Observations made by international bodies require this Court to order a specific remedy with respect to funding refugee health care. There is no legal authority for this argument. International treaties allow Canada great flexibility in determining how to meet its

²¹ United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* E/C.12/1998/24, at para. 5; the *ICESCR* entitles a State Party to progressively realize rights by taking “steps” and utilizing “all appropriate means, including particularly the adoption of legislative measures.” These “steps” and “means” have been interpreted to include “administrative, financial, educational, and social measures,” in addition to the enactment of legislation: United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, E/1991/23, (“General Comment 3”) at paras 6, 7

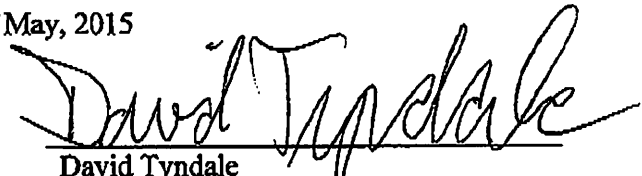
²² *Ibid.*

international obligations, and Canada does so through an extensive array of federal, provincial and municipal legislation, policies and practices. Neither “General Comments” nor “Concluding Observations” are legally binding on States Parties.²⁴

24. Finally, a court cannot order the federal government to adopt a certain level of funding for health insurance for refugees, refugee claimants, or rejected refugee claimants. The *ICESCR* has been interpreted as not requiring that the domestic legal orders of States Parties be changed to implement its provisions.²⁵

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 4th day of May, 2015


David Tyndale
Of Counsel for the Appellants

²³ *Ibid.*, at para 9; see also *UNCESCR Sixth periodic reports of States parties due in 2010 – Canada*, *supra* at footnote 6

²⁴ While General Comments are considered to be more in the nature of legal authority than of evidence, these documents are still not considered to be binding on States Parties. “Concluding Observations” can be more in the nature of evidence, and are also considered non-binding. See Michael O’Flaherty, “The Concluding Observations of United National Human Rights Treaty Bodies”, (2006) 6 *Human Rights Law Review* 6:1 (2006), pp. 27-52 at 33 and 36.

²⁵ General Comment No. 9, *supra* at note 21, paras 1, 5

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PART IV – LIST OF AUTHORITIES

1. *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, [1999] 3 SCR 845
2. *Forest Ethics Advocacy Association v the National Energy Board*, 2014 FCA
3. Canada (AG v Canadian Doctors for Refugee Care, et al., (2 April 2015), Doc. No. A-407-14 (FCA) (Gauthier, JA)
4. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62
5. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47 (ICCPR)
6. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 993 UNTS 3, Can TS 1976 No 46 (ICESCR)
7. *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1993 No. 3. (CRC)
8. *International Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (CEDAW)
9. UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st Sess, UN Doc A/RES/61/106 (CRPD)
10. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, Can TS 1979 No. 28 (ICEFRD)
11. E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical", in O. Fitzgerald, ed. *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006)
12. *UNCESCR Sixth periodic reports of States parties due in 2010 – Canada*, E/C.12/CAN/6 22 Apr 2014
13. *JH Rayner Ltd v Department of Trade*, [1990] 2 AC 418
14. *AG Canada v AG Ontario*, [1937] AC 326

15. *Francis v The Queen*, [1956] SCR 618
16. *Bancroft v University of Toronto* (1986), 24 DLR (4th) 620
17. *Re Vincent & Minister of Employment and Immigration* (1983), 148 DLR (3d) 385 (FCA)
18. *Health Services and Support – Facilities Subsector Bargaining Assn. v. BC*, 2007 SCC 27
19. *R. v. Hape*, 2007 SCC 26
20. *Re B.C. Motor Vehicle*, [1985] 2 SCR 486
21. *R. v. Morgentaler*, [1988] 1 SCR 30
22. *Chaoulli v. Quebec*, [2005] 1 SCR 791
23. Sieghart, Paul (1983). *The International Law of Human Rights*. Oxford University Press
24. UN Human Rights Committee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v Australia*, Communication No. 102012001, 78th Sess, UN Doc CCPR/C/78/D/1020/2001 (2003)
25. UN Human Rights Committee, *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002)
26. *Ref. Re: Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313
27. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211
28. *Schreiber v. Canada (AG)*, [2002] 3 SCR 269
29. *Bouzari v. Islamic Republic of Iran* (2004), 71 OR (3d) 675 (CA)
30. United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, E/1991/23, (“General Comment 3”)
31. United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* (“General Comment No. 9”) E/C.12/1998/24

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