

Women With Precarious Immigration Status and Their Right to Medical Care in Quebec: Inspiration from International Law

January 19, 2023

Women With Precarious Immigration Status and Their Right to Medical Care in Quebec: Inspiration from International Law

Pearl Eliadis, Aude Exertier, Mirja Trilsch and Cory Verbauwhede[1]

Background

Obtaining health care for persons with precarious immigration status in Quebec has been a longstanding social struggle that has played out in several phases. Until 2021, for example, the government of Quebec refused public health insurance to thousands of children who were Canadian citizens but who had been excluded from Quebec's public health insurance plan because of their parents' precarious immigration status. In 2021, following a campaign by jurists and human rights defenders, "Bill 83" – now LQ 2021, c. 23 – *An Act respecting mainly the health insurance plan and prescription drug insurance plan eligibility of certain children whose parents' migratory status is precarious*, was adopted, coming into effect on September 22nd, 2021. As a result, all minor children under 18 years of age whose families intend to stay in Quebec for more than six months became eligible to be registered for the public health and prescription drug insurance plans administered by the Régie de l'assurance maladie du Quebec (RAMQ).

While this successful campaign marked an important milestone, a larger and long-standing problem was still unaddressed. Women who are undocumented migrants or whose immigration status is otherwise precarious ("migrant women with precarious immigration status") are still ineligible for coverage under Quebec's public health insurance. For many years, organizations like Doctors of the World (Médecins du monde) have been advocating for broader public health coverage for these groups of women, especially for those who are pregnant and require reproductive health services. Access to free and accessible minimum health care for people, regardless of migratory status, should be a basic principle in any society that promotes the human dignity of all people. It is noteworthy that this principle is respected in France (*Aide médicale de l'Etat*), Belgium (*Aide médicale urgente*), and Germany, where pregnant women, with or without papers, can benefit from free health care. Lastly, similar coverage is also available in Spain.

Doctors of the World leads international campaigns advocating for health services based on the right to health. In Quebec, since 2011, it has operated the only clinic exclusively for migrants with precarious status who are not covered by the RAMQ or the Interim Federal Health Program (IFHP) and who do not have private insurance or the financial means to access private health care.

On March 17th, 2022, Doctors of the World published a Brief urging RAMQ to expand access to health care to this clientele, based in part on international law principles. The Brief, *Santé Sexuelle et reproductive des femmes vivant au Québec. L'urgence d'agir pour garantir le bénéfice des régimes publics d'assurance pour toutes les femmes, peu importe leur statut migratoire.* ("*Sexual and Reproductive Health of Women Living in Quebec: An Urgent Need to Guarantee Public Insurance Plans for All Women, Regardless of their Migration Status*") was submitted to an interdepartmental committee of the Quebec government tasked with studying access to public medical and drug insurance plans for migrant women with precarious immigration status for perinatal care and services. The Brief recommended that the Quebec government extend coverage to migrant women with precarious immigration status for essential sexual and reproductive health services and care, with a particular focus on women who are pregnant.

To supplement the Brief, the authors of this article, who are jurists with expertise in international human rights law and in health law in Quebec, prepared a Legal Analysis entitled *Le droit des femmes migrantes à statut précaire de recevoir des soins et services de santé au Québec* ("*The Right of Migrant Women with Precarious Status to receive health care and services in Quebec*"), which was published on June 1st, 2022, to strengthen the legal foundations of the Brief and to introduce a stronger international law component to the argument. This article reviews the legal analysis, starting with the Canadian and Quebec legislative framework, including Quebec's *Act respecting health services and social services*, the *Canadian Charter of Rights and Freedoms* and Quebec's *Charter of Human Rights and Freedoms*.

We also review briefly decisions from the Federal Court of Canada, the Federal Court of Appeal, the UN Human Rights Committee, and the Ontario Superior Court of Justice in the *Toussaint* matter. Those cases have addressed the role of international human rights instruments and customary international law in the adjudication and justiciability of claims related to state responsibilities, including where restrictions in access to health services allegedly infringe the right to life.

Canada's legislative framework

1) *Canadian Charter of Rights and Freedoms*

The Canadian Charter does not protect the right to health explicitly, but several sections have direct implications to health rights, including:

- the right to life, liberty and security of the person (section 7)
- the right to not to be subjected to cruel and unusual treatment or punishment (section 12)
- the right to equality before and under the law, and to the equal protection and benefit of the law (section 15).

As will be seen below and in the section on international human rights law, Canadian courts are increasingly recognizing the relationships among these rights and access to health services.

In *R v Morgentaler,* the Supreme Court of Canada decided in 1988 that the physical and psychological harm related to criminal prohibitions against abortion constituted a violation of security of the person. We argue by extension that a similar principle should apply to state interventions that increase the likelihood of complications and risks to health. When governments adopt measures that restrict access to necessary health services or that result in other forms of harm in relation to health, there can also be a violation of the right to security of the person and even the right to life. That case, together with *Chaoulli v. Canada*, *Canada (AG) v. PHS Community Services Society*, and *Carter v. Canada (Attorney General)*, establish precedents regarding the justiciability and constitutionality of state actions that constitute interference with access to medical treatment. In cases where the interference generates a sufficient risk of harm, the right to security of the person may be engaged, state interference with a person's access to medical treatment in such circumstances would thus constitute

a deprivation of security of the person.

2) Quebec's *Charter of human rights and freedoms*

The Quebec *Charter* protects a range of rights that are directly relevant to the matter at hand. They include the right to life, liberty and security of the person (section 1), the right to dignity (section 4), the right to equality in the protection of rights and freedoms and the right to non-discrimination (section 10), the right to be free from harassment (section 10.1), the right to financial assistance and to social measures for an adequate standard of living (section 45), and the right to fair and reasonable conditions of employment, with proper regard for health safety and physical well-being (section 46).

In the 2005 *Chaoulli* decision, the Supreme Court decided that a measure that would restrict access to timely health services (for those who can pay for it) was a violation of Article 7 of the *Canadian Charter of Rights and Freedoms*. As well, a plurality of the Court decided that the Quebec *Charter* had also been infringed.

3) Act respecting health services and social services

Quebec's Act respecting health services and social services (the "Act") forms the legislative and policy backbone of the province's health care network. The Act's policy objectives include reducing mortality, protecting public health and attaining comparable standards of health and welfare in the various strata of the population (section 1). As well, section 5 provides that:

S. 5. *Every person* is entitled to receive, with continuity and in a personalized manner, health services and social services which are scientifically, humanly and socially appropriate. (Emphasis added).

This general principle set out in section 5 of the Act is not restricted by a person's migration status or otherwise. The *Hospital Insurance Act* and the *Health Insurance Act*, among others, set out eligibility criteria for the public health system, and as is the case with all social programs involving government spending, the Act is subject to legislative, operational and financial constraints (section 13 of the Act). However, section 7 of the Act provides that:

S. 7. *Every person* whose life or bodily integrity is endangered is entitled to receive the care required by his condition. Every institution shall, where requested, ensure that such care is provided. (Emphasis added).

It should be noted that section 7 is not subject to the operational or other limitations set out in section 13 of the Act, and it makes emergency care immediately available. Under section 7, the entitlement to services occurs at the level of the hospital to which the request for treatment is made, at the time the request is made, rather than at the level of the system as a whole. In short, eligibility for access to public health insurance (and thus free access) and the entitlement to receive services under section 7 are distinct concepts in law, as has been pointed out in caselaw from the Quebec Court of Appeal.

Even if free access is not granted, as explained in the following section, we argue that Canada's obligations under international instruments to which the Government of Quebec has declared itself bound, should mean that Canadian law is to be interpreted in a manner so that essential health services and care are made available to migrant women with precarious status without economic barriers, consistent with the entitlement to access services.

International Human Rights Law

1) International Covenant on Economic, Social and Cultural Rights

Canada's and Quebec's international commitments include minimum norms that should be respected in the field of health, especially when it comes to vulnerable populations, including migrant women. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is legally binding on State parties. Canada has been a State party since 1976.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) creates an obligation of full realization of the right to the highest attainable standard of physical and mental health (article 12.1 and article 12.2) with respect to, among other areas, the reduction of the "creation of conditions which would assure to all medical service and medical attention in the event of sickness" (article 12.2(d)).

Quebec's Act respecting health services and social services should be interpreted to give effect to these international law obligations. This is consistent with the approach taken in the Supreme Court of Canada's 2019 decision in *Canada v Vavilov* case, where the court stated:

We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

In its General Comment nº 14, on the Right to the Highest Attainable Standard of Health, the ICESCR Committee has emphasized the importance of non-discrimination so that health facilities, goods and services are accessible to all, especially the most vulnerable or marginalized sections of the population, and the realization of women's right to health which requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. The General Comment specifies that measures are required to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre-

and post-natal care, emergency obstetric services and access to information, as well as the resources necessary to act on that information. Paragraph 34 of the General Comment says that States should refrain from denying or limiting equal access for all persons, including asylum-seekers and illegal immigrants.

The ICESCR Committee has made similar observations in its General Comment no 19 about the right to social security under article 9 with respect to equal treatment of refugees, stateless persons and asylum-seekers, among others, to social security schemes, including reasonable access to health care (para 38).

2) International Covenant on Civil and Political Rights and the Toussaint case

The United Nations International Covenant on Civil and Political Rights (ICCPR) is also legally binding on states parties. The ICCPR has been in force since 1976 and Canada became a State party that same year.

In 2018, the UN Human Rights Committee issued its views in the Canadian *Toussaint* case, deciding that Canada had violated article 6 (right to life) and article 26 (the right to equality before the law) of the ICCPR. In that case, Ms Toussaint had remained in Canada after the expiration of her visa during which time she had attempted to regularize her status. She sought access to the Interim Federal Health Program, but was refused and judicial review applications to the Federal Court and the Federal Court of Appeal both failed. Both courts decided that even if Ms Toussaint's life had been in danger, the government's refusal was nonetheless justified. That is because providing access to anyone on Canadian territory to healthcare did not constitute a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* and therefore did not confer a distinct constitutional right to health.

In 2013, Ms. Toussaint filed a communication before the UN Human Rights Committee, which concluded that Canada had a positive obligation to protect Ms. Toussaint's right to life and to receive essential health services. Relying on article 6 of the ICCPR, the Committee expressed the view that Canada was obliged to ensure access to existing health services that are reasonably available and accessible in circumstances where the absence of such services would expose a person to a reasonably foreseeable risk of loss of life (para 11.3).

According to the UN Human Rights Committee in its 2018 views, every person who is present on the territory of a State party has an inherent right to positive measures to ensure the safeguard of their lives, regardless of immigration status. The Committee was of the view that Ms. Toussaint should be provided a remedy.

However, the government declined to provide that remedy, and on the strength of the Human Rights Committee's 2018 views, Ms Toussaint sued the government before the Ontario courts in 2020 for $1.2 m for violations of, among other things, her right to life, liberty and security of the person and her equality rights under the *Canadian Charter of Rights and Freedoms*. Importantly, the case also raised

novel questions of:

(a) the application of the human rights guarantees of the Canadian Charter of Rights and Freedoms;

(b) the enforcement of human rights obligations under Canada's treaty obligations; and

(c) the enforcement of human rights obligations under customary international law.

Ms Toussaint also demanded that irregular migrants be granted access to essential health care.

Government lawyers attempted to have the case thrown out on a summary basis as disclosing no reasonable cause of action, on the basis that section 7 of the Charter did not impose any positive obligations upon the government. But on August 17, 2022, Mr. Justice Perell ruled that Ms. Toussaint's Charter rights under sections 7 and 15 of the Canadian Charter and rights in international customary law and under the International Covenant on Civil and Political Rights provided a sufficient basis to proceed in the lawsuit. The Court also noted that the government's arguments with respect to the likelihood that undocumented migrants will come to Canada if health care services are made more widely available reflected "dog whistle" arguments and prejudicial stereotypes on the part of the government (para 134). No decision was rendered on the merits of the case, and the case was supposed to proceed to trial, but an appeal court decided to grant a motion to stay the lawsuit, pending the appeal hearing. A coalition of groups are seeking leave to intervene in the appeal. After years of battling debilitating illness and disability, Nell Toussaint passed away in January 2023.

3) The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly in 1989 and ratified by Canada in 1991. It is legally binding on States parties.

Article 24 of the CRC provides that States parties are required to ensure the full realization of children's rights relating to the reduction of mortality, and to ensure prenatal care to mothers, as well as appropriate postnatal care and services related to family planning (art. 24). The UN CRC Committee in its General Comment n^{o} 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) (2013) noted that lack of material means should not provide an obstacle to access to services or medication, and that the State should not impose user fees in a manner that is discriminatory against women and children who are incapable of paying. The Committee further noted that healthcare services are needed before, during, and after pregnancy, and have a significant impact on the health and development of their children. Universal access, especially related to sexual and reproductive health, should be provided by States parties.

4) Convention on the Elimination of All Forms of Discrimination against Women

Canada has been a State party to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) since 1981. CEDAW is legally binding on Canada.

CEDAW provides special protections to mothers during a reasonable period before and after the birth of their children. Article 12 provides that States parties shall ensure appropriate health services in connection with pregnancy, childbirth and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation (art 12.2). These services should be provided, notably, to women migrant workers, irrespective of immigration status (General Comment nº 26 , 2008).

The Quebec government's response

RAMQ responded on June 28, 2022 to the Brief and, indirectly, to longstanding demands by advocates for broader public health services for migrant women with precarious immigration status. In its report entitled *Portrait des femmes enceintes sans couverture : Santé au Quebec* , RAMQ acknowledges briefly the existence of international law standards, but does not apply them or consider them to be binding in its analysis. Instead, the report focuses almost exclusively on formal eligibility and operational requirements, rather than on access to healthcare or the related human rights framework discussed in this article. RAMQ argues, for example, that insurance principles make it impossible to single out individual beneficiaries based on their healthcare status or particular medical conditions. RAMQ also emphasizes concerns about "birth tourism", reminiscent of similar "dogwhistle" arguments raised by the Canadian government in the *Toussaint* case discussed earlier.

Nonetheless, RAMQ offers four options for the way forward, ranging from maintaining the status quo, to eliminating the 200% surcharges that are currently imposed on migrant women with precarious immigration status, to legal and/or administrative expansions of access to Quebec's public health system.

Because Quebec's interdepartmental committee did not have the mandate to make specific recommendations, it recommended that feasibility studies for all these options be undertaken.

Conclusion

The justiciability of restricted access to health services that jeopardizes the right to life, liberty and security of the person, and equality rights, has become increasingly visible as an issue before courts in Canada, and before administrative bodies, like RAMQ, that are responsible for regulating access to healthcare and eligibility for public health care insurance schemes. It is notable that the Ontario Superior Court of Justice in the *Toussaint* matter relied on jurisprudence from the Supreme Court of Canada in *Nevsun Resources Ltd. v Araya* to reiterate the potential for customary international law to inform novel arguments for domestic legal remedies, a topic which has been extensively discussed elsewhere in the PKI Global Justice Journal,

Although Canada has not recognized a full right to free health care, Quebec does have legal standards regarding the ability to access care in cases involving severe risk to health, even when the person concerned is not eligible for registration in the public health system. The particular risks

experienced by the underserved population of migrant women with precarious immigration status in Quebec merits further examination to address potential violations of human rights law in Canada and international law. This approach would be consistent with international law principles that provide for the interdependence and interrelatedness of rights, giving rise to novel causes of action which will have significant implications for people with precarious immigration status. The feasibility study of the options identified in the RAMQ report should be addressed as a matter of urgency.

We argue that reforming Quebec's public health system to include migrant women with precarious immigration status would significantly increase compliance with international law standards and respond to ethical and humanitarian principles. It would guarantee better access to care by reducing the number of refusals of care due to the associated costs. In recent years, case law has been steadily strengthening the role of international customary law in Canadian jurisprudence, and more arguments are being made before the courts about the relationship between international human rights law and Canadian legal norms that affect access to healthcare. Obtaining health care for persons with precarious immigration status in Quebec in particular remains a social justice struggle, especially with respect to the justiciability of progressive realization of the right to healthcare by leveraging the right to security of person.

Footnote:

[1] The analysis contained in this article reflects the views of the authors and does not necessarily reflect the views of Doctors of the World (Canada).

Suggested citation: Pearl Eliadis, Aude Exertier, Mirja Trilsch, Cory Verbauwhede, "Women With Precarious Immigration Status and Their Right to Medical Care in Quebec: Inspiration from International Law" (2023) 7 PKI Global Justice Journal 1

About the Authors

Pearle EliadisPearl Eliadis is a senior human rights lawyer, who has led complex global projects for the UN and other multilateral organizations, and national projects in Canada and eight countries in Africa and Asia. She is a member of the Law Society of Ontario and is past President of the Quebec Bar Association's Human Rights Committee, where she is currently serves on its Expert Group on Human Rights. Pearl is also Associate Professor (Professional) at McGill University, teaching public policy and law. She works on minority rights and health rights, and in 2022, was appointed to the Committee of Experts of the Court Challenges Program (Official Languages).

Aude ExertierAude Exertier has been a triage lawyer for the Medical Legal Partnership between Justice Pro Bono and the Montreal Children's Hospital since it began in January 2017. She studied

law in both France (Paris Bar) and Québec. M^{e} Exertier is a graduate of McGill University. Since her admission to the Québec Bar in 2008, she has focused her practice on social issues like humanitarian immigration/asylum seekers, housing, social welfare, etc. at Ouellet, Nadon et Associé.e.s law firm. She joined Justice Pro Bono in 2014.

Mira TrilschMirja Trilsch is a professor at the Department of Law at the University of Quebec in Montreal (UQAM) where she teaches Constitutional Law and International Human Rights Law. Since 2011, she has served as Director of UQAM's International Clinic for the Defence of Human Rights (*Clinique internationale de défense des droits humains de l'UQAM*). Her research focuses on issues of social justice under both Constitutional and International Human Rights Law. She has published on the enforcement of Economic, Social and Cultural Rights in several jurisdictions.

Cory VCory Verbauwhede is a public-interest class action lawyer in Montreal and a sessional lecturer in health care and social services law at the École nationale d'administration publique. He is a doctoral student in history at Université du Québec à Montréal.