

**E. H. P. v. Canada , Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984). \***

---

*Submitted by:* E. H. P. (name deleted) on her own behalf and, as chairperson of the Port Hope Environmental Group, on the behalf of the present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf, on 11 April 1980 *Alleged victim:* The author and others

*State party:* Canada

*Declared inadmissible:* 27 October 1982 (seventeenth session)

*Subject matter:* Storage of radioactive waste near residential areas-Nuclear waste

*Procedural issues:* Standing of author-Non-exhaustion of domestic remedies-Effective remedy unreasonably prolonged proceedings

*Substantive issues:* Right to life-Threat to life Environment

*Article of the Covenant:* 6 (1)

*Articles of the Optional Protocol:* 1, 2 and 5 (2) (b)

1. 1. The author of the communication (initial letter dated 11 April 1980, and further letter dated 4 February 1981) is a Canadian citizen. She submitted the communication on her own behalf and, as Chairman of the Port Hope Environmental Group, on behalf of present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf. The author describes the facts as follows.

1.2. During the years 1945 to 1952, the Eldorado Nuclear Ltd., a Federal Crown Corporation and Canada's only radium and uranium refinery, disposed of nuclear waste in dumpsites within the confines of Port Hope, Ontario, a town of 10,000 inhabitants, located in an area which is planned to become among those most densely populated in North America. In 1975, large-scale pollution of residences and other buildings was discovered (unsuspecting citizens had used material from the dumpsites as fill or building material for their houses). The Atomic Energy Control Board (AECB), a Federal Government licensing and regulating agency with all responsibility regarding nuclear matters in Canada, initiated a cleaning operation and, from 1976 to 1980, the excavated waste material from approximately 400 locations was removed and relocated elsewhere (at distances ranging from 6 miles to 200 miles away from Port Hope). These new dumpsites have now been closed for further removal of radio-active waste from Port Hope. The author claims that the reasons are political, that is, that no other constituency wishes to accept the waste and that the Federal Government is unwilling to come to grips with the problem. In the meantime, approximately 200,000 tons (AECB estimate) of radio-active waste remains in Port Hope and is being stored, in the continuing clean-up process, in eight "temporary" disposal sites in Port Hope, near or directly beside residences (one approximately 100 yards from the public swimming pool). The author

maintains that this temporary solution is unacceptable and points out that large "temporary" disposal sites still exist around town more than 30 years after they were licensed. The author claims that the Atomic Energy Control Board is hampered in its efforts on behalf of the inhabitants of Port Hope by the failure of the Federal Government to make alternative dumpsites available. Federal and provincial governments cannot be compelled by the AECSB to provide such sites.

1.3. The author claims that the current state of affairs is a threat to the life of present and future generations of Port Hope, considering that excessive exposure to radio-activity is known to cause cancer and genetic defects, and that present health hazards for Port Hope residents include alpha, beta and gamma emissions and radon gas emissions above the approved levels of safety, that is the safety levels approved by AECSB, based on the standards of safety set by the International Commission on Radiological Protection.

1.4. As regards the question of exhaustion of domestic remedies, the author states the following: Members of the Port Hope Environmental Group have drawn attention to the problem in person or through letters over a period of five years to AECSB officials, legislators and ministry officials. With regard to the possibility of suing the Federal Government, the author implies that such course of action would not constitute an effective remedy: firstly, only injury would be a ground for litigation and it would be most difficult to prove such injury, because of the long lead-time of injury caused by long-term exposure to low-level radioactivity. Secondly, even if litigation were to be pursued and even if the litigants were successful, the responsibility for providing alternate dumpsites would still rest with the Government, a responsibility of which it is aware today but which it nevertheless fails to assume. Thirdly, litigation would be impossible on behalf of future Generations, whose rights the Port Hope Environmental Group is seeking to protect. At any rate, litigation would be a long drawn out process, during which the radio-active waste would stay in place.

2. On the basis of the above, the author and the other signatories request the Human Rights Committee to consider the matter and to urge the Canadian Government to remove all radio-active waste from Port Hope to a permanent, properly managed, dumpsite away from human habitation.

3. By its decision of 21 July 1980, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The State party was also requested, if it contended that domestic remedies had not been exhausted, to give details of the effective remedies available in the particular circumstances of this case.

4.1. In its reply dated 8 December 1980, the State party objected to the admissibility of the communication on the ground that neither the author nor the persons she represents had exhausted all available domestic remedies as required by articles 2 and 5 (2) (b) of the Optional Protocol to the Covenant. In addition, the State party submitted that the communication, in so far as it related to "future generations", was inadmissible under article I of the Optional Protocol, which does not confer the right to submit a communication on behalf of future generations.

4.2. The State party further submitted that in her communication the author admitted that neither she nor the persons she represented had exhausted all available domestic remedies. It

was pointed out that numerous recourses in tort were available to persons who contended that the presence of radio-active materials in various sites in Port Hope constituted a danger to the health of Port Hope residents.

#### 4.3. The State party argued in this context that the

Atomic Energy Control Board is not in law duty-bound to clean up radiation contamination and that existing recourses are against the owners of the eight remaining sites in Port Hope containing contaminated soil (seven of these being owned by private persons and one by Eldorado Nuclear Ltd., an agent of the Crown) who under Canadian law are responsible for tortious damages resulting from the use or employment of their property.

4.4. The State party contended that the fact that the Federal Government, of its own initiative, embarked upon a clean-up operation, does not relieve the owners of the eight sites from their obligations in law. It maintained that if the author of the communication was of the view that the clean-up operation was not proceeding quickly enough or did not deal with sites which she considered to constitute a threat to the life of present or future generations, she must institute proceedings against the owners of these sites. Then, if she proved that the levels of radiation found on these sites constituted a threat to the life of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessary to give effect to the injunction.

4.5. The State party admitted that such legal proceedings could be lengthy, particularly if one or more parties exercised its right of appeal. However, it was the State party's position that it could not be said that "the application of the (domestic) remedies was unreasonably prolonged" since no legal proceedings had been instituted by the author. The length of proceedings should not, in the submission of the State party, be confused with "undue prolongation". Whether, in a given case, proceedings would be unduly prolonged is a question of fact, not speculation. Only after having examined the particular circumstances of a case should the Committee pronounce itself on whether or not the application of domestic remedies has been unduly prolonged.

5. On 4 February 1981 the author forwarded her comments in reply to the State party's submission of 8 December 1980. She argued that the legal remedies referred to by the State party would not be effective to achieve the removal of the waste and that the length of any legal proceedings would unreasonably prolong the application of a remedy. There were grounds to believe, she concluded, that lives may be saved by the speedy remedy action sought and that any delay in the application of such remedy would be unreasonable.

6. By a decision dated 9 April 1982, the Human Rights Committee decided to seek further clarification from the State party on the grounds on which it contended that available domestic remedies had not been exhausted. Specific questions were submitted to the State party in this regard.

7. In its additional observations dated 21 July 1982, the State party replied to the Committee's questions as follows:

*Question 1:* In its submission of 8 December 1980, the State party indicated that if the author proved "that the levels of radiation found @0. n the dumpsites) constituted a threat to the life

of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessary to give effect to the injunction". If such an injunction heaving been obtained, the owners of the sites were unable to deal with the situation without the assistance of the Federal Government or the Atomic Energy Control Board, is the Federal Government in a position to assure the Committee that the necessary assistance will be given?

*Response:* In its response to the communication of the author, the Government of Canada pointed out that steps were being taken, through the Atomic Energy Control Board, to remedy the situation which exists on the eight sites mentioned in the communication. Resolving the problem is a matter which necessarily involves delay due to certain practical and technical considerations. If the author of the communication is unwilling to accept the delay inherent in resolving the problem, the Government of Canada has indicated that the author could seek injunctive relief against the owners of these sites. Should Court proceedings prove successful and an injunction be issued against the owners of these sites, governmental assistance might be required. The] requirement for and the nature and extent of governmental assistance to the owners of the sites could only be ascertained in light of the precise nature of the relief granted by the Courts.

In its 8 December 1980 response to the author's communication, the Government of Canada indicated, on pages 10 and II, that:

". . . the federal government, even though it does not consider that the radiation level found in the eight sites mentioned in the author's communication are a hazard to the life of present or future generations, has undertaken to clean them up and to that effect has taken steps to locate a disposal site."

If the Courts were to order the removal of contaminated soil from one or more contaminated sites, the Government of Canada would offer these persons every possible assistance to facilitate compliance with the order of the Court. However, the Courts might decide t h,, t these persons are only required to take steps to reduce access to their property, for example by erecting better fencing. In such a case, little or no assistance would be required. But to the extent that technical or similar assistance available only from government sources was necessary to the fulfilment of the Court order, the Government of Canada would provide the requisite assistance. The question is, however, abstract and it is therefore impossible to give an unqualified undertaking that assistance would be given in all circumstances.

*Question 2:* In its submission, the State party also suggests that the author could seek to obtain an injunction or a writ of mandamus to force the Atomic Energy Control Board to clean up the contamination. Does the Federal Government contend that this is a remedy which it is incumbent on the author or the persons she represents to exhaust, in the sense that it constitutes an effective remedy in the particular circumstances of the case?

*Response:* The Government of Canada does not share the author's view that the Atomic Energy Control Board has a legal duty under section 21 of the Atomic Energy Control Regulations, C.R.C. 1978, C.365 to clean up the eight contaminated sites mentioned in her communication. The matter being disputed, the author could seek a writ of mandamus or an injunction to ascertain the exactitude of h@r assertions. However, to the knowledge of the Government of Canada, she has initiated no legal proceedings to this effect. If she were to

institute legal proceedings and if those proceedings upheld her view, there is no reason to think that the Court would be unable to grant an effectual remedy.

*Question 3:* Are there any other remedies against the Federal Government or the Atomic Energy Control Board which, in the view of the State party, it is incumbent on the author or the persons she represents to exhaust?

*Response:* In its response, the Government of Canada indicated that the author could seek injunctive relief against Eldorado Nuclear Ltd. an agent of Her Majesty in Right of Canada. Canadian law recognizes an action for nuisance, and in an appropriate case, a mandatory injunction can be awarded against the owner or occupant of the property from which the nuisance emanates.

Although it is customary that corporate entities which are agents of Her Majesty in Right of Canada are sued in their corporate name, the author might also sue the Crown in lieu of or in addition to Eldorado Nuclear Ltd. Under paragraph 3 (1) (b) of the *Crown Liability Act*, R.S.C. 1970, c. C-38, the Crown may be held liable in tort in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Further, since Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. The Charter applies to the Parliament and Government of Canada in respect to all matters within the authority of Parliament (subparagraph 32 (1) (a)). Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice". Therefore, anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply, under subsection 24 (1) of the Charter, to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation.

In the present case, the Government of Canada reaffirms the views expressed in its original response that the failure of the complainant to take any proceedings constitutes a failure to exhaust domestic remedies as required by Article 2 of the Optional Protocol to the Covenant and that as a consequence the communication submitted by the author is inadmissible under Article 5 (2) (b) of the Optional Protocol.

8. The Committee observes that the present communication raises serious issues, with regard to the obligation of States parties to protect human life (article 6 (1)). Nonetheless, before considering the merits of the case, the Committee has to determine, (a) whether the author of the communication has the standing to submit the communication and (b) whether the communication fulfils other admissibility criteria under the Optional Protocol, in particular the condition relating to exhaustion of domestic remedies set out in article 5 (2) (b) of the Optional Protocol:

*(a) The standing of the author*

The Committee considers that the author of the communication has the standing to submit the communication both on her own behalf and also on behalf of those residents of Port Hope

who have specifically authorized her to do so. Consequently, the question as to whether a communication can be submitted on behalf of "future generations" does not have to be resolved in the circumstances of the present case. The Committee will treat the author's reference to "future generations" as an expression of concern purporting to put into due perspective the importance of the matter raised in the communication.

*(b) Exhaustion of domestic remedies*

In the light of the State party's additional observations as to the availability of domestic remedies in order to obtain the removal of the contaminated soil from the eight dumpsites, the Committee concludes that,

(i) as to the seven privately owned dumpsites, the author could sue the owners of these sites and seek a mandatory injunction; the Committee has noted that the Government of Canada would then offer the owners every possible assistance to facilitate compliance with the court order;

(ii) as to the dumpsite owned by Eldorado Nuclear Ltd., an agent of Her Majesty in Right of Canada, the author could bring suit for compensation and a mandatory injunction either against that agency, Or the Crown under the Crown Liability Act 1970, or both; as to any legal duty of the Atomic Energy Control Board under the *Atomic Energy Control Regulations*, the author could seek a writ of mandamus or a declaration and an injunction to determine such duty.

Accordingly, all available domestic remedies have not been exhausted, as required under article 5 (2) (b) of the Optional Protocol. The Committee cannot conclude that these remedies, if pursued, would be unreasonably prolonged within the meaning of article 5 (2) (b) of the Optional Protocol. As to the effectiveness of domestic remedies, the Committee notes that the author could now also invoke the Canadian Charter of Human Rights and Freedoms which explicitly (section 7) protects the right to life.

9. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the author and to the State party.