United Nations CCPR/C/98/D/1747/2008

International Covenant on Civil and Political Rights

Distr.: Restricted*
12 May 2010
English
Original: French

Human Rights Committee
Ninety-eighth session
8–26 March 2010

Decision

Communication No. 1747/2008

Submitted by:	Ms. Mireille Boisvert (not represented by counsel)
Alleged victim:	Mr. Michael Bibaud (her husband)
State party:	Canada
Date of communication:	23 July 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 June 2008 (not issued in document form)
Date of adoption of decision:	19 March 2010
Subject matter:	Right to represent others in court
Procedural issues:	Exhaustion of domestic remedies; incompatibility with certain provisions of the Covenant
Substantive issues:	Right to a fair trial, non-discrimination; right to legal personality; right to redress
Articles of the Optional Protocol:	3 and 5, paragraph 2 (b)
Articles of the Covenant:	2; 5; 14, paragraph 1; 16 and 26

[Annex]

* Published by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-eighth session)

concerning

Communication No. 1747/2008*

Submitted by:	Ms. Mireille Boisvert (not represented by counsel)
Alleged victim:	Mr. Michel Bibaud (her husband)
State party:	Canada
Date of communication:	23 July 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 March 2010,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ms. Mireille Boisvert, a Canadian national born on 25 December 1966 in Montreal (Quebec). She considers that her husband, Mr. Michel Bibaud, is a victim of a violation by Canada of articles 2; 5; 14, paragraph 1; 16 and 26 of the Covenant. She is not represented by counsel. The Optional Protocol entered into force for Canada on 19 May 1976.

1.2 On 6 June 2008, the Special Rapporteur on new communications, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

The facts as submitted by the author

2.1 On 29 July 1999, Mr. Michel Bibaud, the author's husband, had a car accident. Since the accident, he has suffered from chronic back and leg pain. To ease the pain, and on medical advice, he consumes cannabis for therapeutic purposes.[1] Mr. Bibaud filed claims for compensation following his accident. In 2002, dissatisfied with the decisions handed down on his claims, he brought an action for damages against the Régie de l'assurance

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Hellen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Salvioli and Mr. Krister Thelin.

[1] He consumes up to four to six cigarettes per day, supplied by Santé-Canada.

maladie du Québec (the Quebec health insurance fund) and the Société de l'assurance automobile du Québec (a car insurance company). He filed this action himself, without the aid of a lawyer, as permitted under article 61 of the Code of Civil Procedure of Quebec, because of a previous bad experience with a member of the Bar and for financial reasons. He was not entitled to legal aid, which is only granted in Canada to defend oneself and not to institute legal proceedings. After filing the action, the author filed an application for voluntary intervention under article 208 of the Code of Civil Procedure. As part of this procedure, she asked to be allowed to represent her husband as, in her view, he would not be capable of representing himself due to his state of health. A note from the family doctor and a notarized power of attorney were submitted to the court.[2]

2.2 On 22 October 2002, the Superior Court of Canada dismissed her application to intervene as being inadmissible. According to this decision, the sole purpose of the application for voluntary intervention was to represent Mr. Bibaud, as a lawyer would do, and not to assert any personal interests, as specified in the provision. It was also argued that only lawyers could represent another person in court. On 8 November 2002, the Quebec Court of Appeal dismissed the appeal against the decision. On 10 June 2004, the Supreme Court of Canada dismissed the request for appeal. It considered that, pursuant to the provisions in force,[3] the application did not conform to the usual intervention circumstances provided for in the Code of Civil Procedure. The author gave as her sole purpose for intervening the representation of her husband's interests, meaning recognition of her right to represent him. The application had been considered not only incompatible with the legislative provisions but also with the protective supervision for incapable persons under Quebec civil law.[4] The author asked for a review of that decision, and it was dismissed by the Supreme Court on 28 October 2004.

2.3 The author has since submitted a brief to the Committee on Institutions for general consultation on the reform of the Code of Civil Procedure of Quebec, on the recommendation of the Associate Director-General of Legislative Affairs. However, the Government has changed and there is now no guarantee that the procedures will be followed up. She has also written to several eminent persons and organizations, including the Minister of Justice, the Office for Disability Issues and the Canadian Human Rights Commission. The author intervened in this action, pursuant to article 208 of the Code of Civil Procedure, to ask to be allowed to "aid, assist and represent" her husband.

[2] Pursuant to a decision of the Supreme Court of Canada, the power of attorney has not been registered, as required under article 2166 of the Code of Civil Procedure of Quebec, and is therefore not enforceable.

[3] The Code of Civil Procedure and the Act respecting the *Barreau du Québec* govern the legal framework for the right to act. On the one hand, the law recognizes the right to represent oneself (article 61 of the Code of Civil Procedure) and, on the other hand, the law imposes the requirement to engage a lawyer to act for another person (article 62 of the Code and article 128 of the Act respecting the *Barreau du Québec*). Representation by spouses, relatives, persons connected by marriage or friends is only permitted for proceedings falling under the jurisdiction of the small claims division of the Court of Quebec (article 959 of the Code of Civil Procedure).

[4] In its judgement, the Supreme Court stressed that such protection is governed by a procedure that must formally recognize an adult person's incapacity. Such a decision is governed by the law and cannot be made in the course of judicial proceedings or arbitrarily decided by a judge. See the Supreme Court of Canada's judgement of 10 June 2004.

The complaint

3.1 The author maintains that the State party has violated articles 2, 5, 14, 16 and 26 of the Covenant.[5] She considers that, under Canadian law, persons may choose either to represent themselves or to be represented by a lawyer. However, persons who are mentally or physically incapable and who cannot represent themselves alone must be represented by a lawyer. According to the author, persons with disabilities who are incapable of representing themselves alone should not have their choices restricted and must have the same rights as any other person. Currently, if such persons cannot have access to legal representation by a lawyer because of their financial situation or personal choice, they must abstain from legal proceedings.

3.2 There are exceptions to this principle, with respect to small claims and immigration matters in the administrative courts. In such cases, it is not compulsory for a lawyer to represent another person. The Code of Civil Procedure provides that no one is obliged to be represented by a lawyer, with the exception of legal persons, trustees, collecting agents and persons acting on behalf of another person pursuant to Act 59 of the Code. This provision specifies that "A person cannot use the name of another to plead, except the State through authorized representatives." However, when several persons have a common interest in a legal action, one of them may institute legal proceedings on behalf of all the other persons if given authorization to do so. Tutors, curators and others representing persons who are not able to fully exercise their rights may appear in court in their own name and respective capacity. The same applies to trustees in administering all aspects of the property of another person and to proxies in executing the power of attorney granted to them by adult persons, who are making provision for when they become incapable of taking care of themselves or administering their own property. Thus, no persons wishing to represent an incapable person, by virtue of a notarized power of attorney or a mandate in case of incapacity (advance directive), may represent that person in their own name and is obliged to engage a lawyer.

3.3 The author also refers to article 208 of the Code of Civil Procedure, according to which "any person interested in an action to which he is not a party, or whose presence is necessary to authorize, assist or represent a party who is incapable, may intervene therein at any time before judgment". She considers that she has a clear interest in representing her husband. She therefore contends that, by not allowing her to represent her husband as would a lawyer, he is a victim of discrimination.

State party's observations on admissibility

4.1 On 3 June 2008, the State party challenged the admissibility of the communication on the grounds that it is incompatible with the provisions of the Covenant with respect to articles 2, 14 (1) and 26 of the Covenant, that there has been no prima facie violation of articles 5 and 16, and that domestic remedies have not been exhausted.

4.2 Recapitulating the facts, the State party explains that on 29 July 1999 Mr. Bibaud was a victim of a car accident, followed by an operation in 2002, which left him in an almost total state of incapacity, needing constant help. Given his state of health, on 30 May 2002 he signed a general power of attorney in favour of his spouse, Ms. Boisvert (the author), in front of a notary, empowering her, where the law allows, to institute any legal action, lawsuit or proceedings on his behalf. He also agreed to a power of attorney appointing her as a proxy should he become incapable. The State party notes in this respect

[5] Having listed the provisions of the Covenant that have allegedly been violated in this case, the author presents her argument without linking it to those provisions.

that, as the mandate in case of incapacity was never approved and his incapacity was never certified and declared by a court, its author is still legally presumed to be capable of representing himself.

4.3 On 12 June 2002, the author signed a statement on behalf of her husband to file an action for damages in the Superior Court of Quebec against the Société de l'assurance automobile du Québec and the Régie de l'assurance maladie du Québec, alleging that certain acts by these bodies (false diagnoses, falsification of reports and withholding of information concerning the health of the author's husband) might have caused him prejudice. In October 2002, through a declaration of voluntary intervention made pursuant to article 208 of the Code of Civil Procedure, the author asked the Court for permission to represent her husband, alleging that he was incapable of representing himself physically or mentally, and that he did not wish to be represented by a lawyer. This provision allows a person who has an interest in an action to which he/she is not a party, or whose presence is necessary to authorize, assist or represent a party who is incapable, to intervene therein at any time before judgement. In the latter circumstance, the incapacity must be certified and declared by a court, which had not been done in Mr. Bibaud's case. The application for intervention was dismissed by the Superior Court, invoking in support of its decision the provisions of the Code of Civil Procedure of Quebec and the Act respecting the *Barreau du Québec*, reserving the right for lawyers to represent another person as counsel in the courts.

4.4 A request made by the author for permission to appeal to the Court of Appeal was dismissed on the grounds that the first instance judgement was well founded. In June 2003, the Supreme Court of Canada granted the author's request for permission to appeal and a lawyer was appointed by the Court to help her sort through the legal issues involved. After the hearing, and noting that the author's intervention was not to ensure a personal interest, separate from her husband's interest, but to act for him as would a lawyer, the Supreme Court dismissed the appeal on 10 June 2004. The Supreme Court recognized that Quebec had made a legislative choice in recognizing, on the one hand, the right of a physical person to represent himself while, on the other hand, imposing the requirement to engage a lawyer to represent another person. For the Court, the option of intervening in a case, pursuant to article 208, changes nothing since persons who represent another person must themselves be represented by a member of the Bar. The appeal was therefore dismissed by the Court, which concluded that the intervention requested did not conform to the usual circumstances for intervention set out by the Code of Civil Procedure. It was also incompatible with the legislative provisions governing representation in the Quebec civil courts. On 7 July 2004, Ms. Boisvert lodged an appeal with the Supreme Court for a new hearing, invoking articles 7 and 15 of the Canadian Charter of Rights and Freedoms and articles 47–50, 53 and 55 of the Charter of Human Rights and Freedoms of Quebec. On 28 October 2004, the Supreme Court dismissed the appeal.

4.5 The State party puts forward three grounds for inadmissibility. First, under article 3 of the Optional Protocol, the communication would be incompatible with the provisions of the Covenant. According to the State party, the Committee has already expressed the opinion that making it a requirement to be represented by a proxy in court does not constitute a violation of articles 14 and 26 of the Covenant. In this respect, it refers to general comment No. 18 and the Committee's Views and points out that article 26 recognizes the possibility, subject to certain criteria, of allowing for differentiation in applying equality before the law. Moreover, the Committee considered that imposing the requirement for legal representation in the highest court of Spain was based on objective and reasonable criteria and was therefore in conformity with articles 14 and 26 of the Covenant. The State party considers that the requirement in Quebec to be represented by a lawyer is based on objective and reasonable criteria and that the need to protect the public (see article 26 of the Professional Code of Quebec) is a pivotal argument that justifies making certain activities the exclusive domain of particular professions, such as making

representation of persons in court the exclusive preserve of lawyers. The Supreme Court in fact dismissed the author's appeal, considering that "the special rules governing the practice of the legal profession are justified by the importance of the acts that advocates engage in, the vulnerability of the litigants who entrust their rights to them, and the need to preserve the relationship of trust between advocates and their clients". The State party concludes that when persons have no wish to represent themselves, the requirement in Quebec to be represented by a lawyer is based on objective and reasonable criteria and does not constitute a violation of the Covenant.

4.6 The communication is incompatible with the Covenant insofar as the right that the author wishes to see enforced is not covered by the right to a fair trial provided for in article 14, paragraph 1; nor is it a right protected elsewhere in the Covenant. The author requests the Committee to recognize her right to be allowed to represent her husband freely in any court, regardless of whether or not she is authorized to act as a lawyer. The State party maintains that this right is not covered by article 14, paragraph 1, or any other provision of the Covenant. No violation can therefore arise.[6] In addition, article 2 does not confer a free-standing right to reparation. The State party refers to general comment No. 31 and to the Committee's case law in this respect and considers that this part of the communication is incompatible with the provisions of the Covenant.

4.7 The State party does not consider, moreover, that articles 5 and 16 are relevant to the issues raised in the communication. Moreover, there are no facts or evidence to substantiate or uphold the author's allegations concerning these articles.

4.8 Lastly, the State party argues that the rights that the author wishes the Committee to enforce could have been the subject of an appeal under article 24 of the Canadian Charter of Rights and Freedoms and article 74 of the Charter of Rights and Freedoms of Quebec, by reference to the rights in those two instruments that correspond with those of the Covenant. Unfortunately, they were never invoked by the author. She did try to bring her case once more before the Supreme Court, and specifically referred to the rights provided for by the Canadian Charter of Rights and Freedoms, but this request was dismissed as the Court had already handed down its decision and thus could not grant the author's request. The State party recalls the Committee's case law that requires the author to raise the substantive issues submitted to the Committee in the domestic courts. Similarly, the Committee decided that the rule on exhaustion of domestic remedies includes, in addition to traditional remedies, complaints of a constitutional nature (such as those provided for in the Canadian Charter of Rights and Freedoms) when fundamental rights are in question.[7] These remedies were available to the author, but she did not avail herself of them.

Author's comments on the State party's observations

5.1 In her comments of 31 July 2008, the author first remarks on the facts summed up by the State party, which, in her view, omit certain important information. The State party did not state that one of the reasons why Mr. Bibaud is unable to represent himself in court is connected to his substantial consumption of cannabis, which is for medicinal purposes and exempt from prosecution under federal law. The author also points out that although Mr. Bibaud would have liked to receive legal aid, it was refused over the telephone, with no official confirmation.[8] Mr. Bibaud therefore had the choice of either representing himself,

[6] The State party refers to communication No. 419/1990, *O.J. v. Finland*, a view of inadmissibility *ratione materiae* on the right to property.

[7] The State party cites communication No. 1188/2003, *Riedl-Riedenstein v. Germany*.

[8] He was refused an official response in writing.

while under the effects of cannabis and in chronic pain, or being represented by a lawyer, whom he could not afford.

5.2 The author adds that there are some exceptions to the requirement for representation by a lawyer. In fact, it is not compulsory for a person to have a lawyer in the small claims court for sums not exceeding Can$ 7,000, for matters relating to immigration in the Administrative Tribunal of Quebec or before the Commission de la santé et de la sécurité du travail du Québec (occupational health and safety commission). However, when the interests of persons with disabilities are involved, as in this case, there are no exceptions to this rule. For the author, this amounts to flagrant discrimination.

5.3 The author also recalls that, despite the State party's claim to the contrary, she has proved a personal interest before the Supreme Court, by stating that the outcome of the trial would have an indisputable direct bearing on the family's wealth. She therefore clearly has an interest. As for the lawyer who, according to the State party, is supposed to have been involved in the proceedings in order to assist Mr. Bibaud and the author, she says that this amicus curiae called her only once, to talk about general matters.

5.4 The author does not agree with the State party's challenge to the admissibility of the communication on grounds of incompatibility with the Covenant's provisions since, in her view, everyone is not treated equally in the courts. Equality is broken between healthy persons who are able to represent themselves, without having to pay for a lawyer in court, and persons with disabilities, who must engage a lawyer to represent them. This situation violates both article 14, paragraph 1, and article 26. As for article 16, which guarantees everyone's right to a legal personality, the author notes that persons with disabilities are not recognized as legal persons since their right to represent themselves is not guaranteed. Concerning article 5, the fact that a person with disabilities is denied the same rights as a healthy person violates a fundamental right that should not be obstructed. Lastly, article 2, paragraph 1, specifies that the State must respect the Covenant without distinction of any kind. In this case, the State party is making a distinction, as it does not accord everyone the same rights and access to justice.

5.5 Contrary to the comments made by the State party on the lack of facts and evidence establishing the prima facie violation of articles 5 and 16, the author maintains that the Quebec authorities were well aware of the allegations and that, despite the many letters sent to the various ministers concerned, they did nothing to remedy the situation.

5.6 With regard to the exhaustion of domestic remedies, the author says that she cited the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms of Quebec during the Supreme Court hearing. The latter did not hand down a ruling on these points. In addition, in letters addressed to various authorities, including to the Minister of Justice, the author asked for the issue of representation to be debated in Parliament. Despite the numerous attempts to contact them, it was clear that they had no desire to follow up on this case. The author recalls that there are exceptions to the requirement to exhaust domestic remedies when there is little chance of success or when additional remedies would cause unreasonable delays. Despite all her efforts, the author has received only unsatisfactory answers on this case. Consequently, any other appeal would have been pointless.

Additional submission by the State party on the author's comments

6.1 On 18 November 2008, the State party submitted additional observations in response to the author's comments. On the issue of allowing representation by a non-lawyer in certain courts, it explains that such cases are an exception to the generally applicable rule of representation by a lawyer. In the small claims court, no one is allowed to be represented by a lawyer, even legal persons. The purpose of this measure is to eliminate formalities, reduce

costs and expedite treatment of cases. The judge at the hearing is responsible for directing discussions, questioning witnesses and listening to the parties. A physical person may, however, authorize a relative to represent him or her in such proceedings. In exceptional circumstances, when a complex question is raised on a point of law in a case, the judge may allow parties to be represented by a lawyer. The fees are paid by the Ministry of Justice. Representation by another person in the Administrative Tribunal of Quebec is restricted to particular domains mentioned in the law, such as appeals submitted pursuant to the law on industrial accidents or compensation for asbestos victims.

6.2 As for the non-exhaustion of domestic remedies pursuant to the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms of Quebec, the State party contends that the author raised these issues for the first time when requesting a new hearing in the Supreme Court. This request was dismissed by the Court on 28 October 2004. Such a hearing is an exceptional measure at the discretion of the Court and has no bearing on the merits of a case. The State party recalls that under Canadian law, courts do not take up constitutional questions on their own initiative. Because of the contradictory nature of the judicial process, it is the parties to a legal action who must initiate a constitutional challenge. These issues must normally be raised at the court of first instance. Raising such issues on appeal is allowed only in exceptional circumstances. In this case, the late stage at which these arguments were introduced would have prevented the Attorney General from presenting counter arguments. Prior notice must be given to the Attorney General when the constitutionality of a law is called into question, but the author never gave such notice. This rule is justified by the fact that constitutional issues affect more than just the parties concerned and have an impact on the public interest. The State, represented by the Attorney General, should have enough time to enable it to defend its legislative choices. A judgement of unconstitutionality is a serious outcome, and a certain procedure must be followed. Judicial review is always accompanied by procedural rules, including the requirement to formulate new claims within a set time limit. Moreover, the right to be heard and to present the arguments in their defence is a fundamental principle that must be guaranteed for both parties. On this basis, the State party continues to maintain that the communication is inadmissible.

6.3 Regarding the incapacity of Mr. Bibaud, the author's husband, the State party stresses that Quebec does not underestimate his condition. However, as his incapacity has never been certified or recognized by a court in compliance with the provisions of the Civil Code of Quebec, the author has never been legally empowered to represent him as a tutor or curator, which from the outset caused a major legal problem. This issue was addressed by the Supreme Court of Canada, which agreed with the reasoning of the Superior Court. The latter could not have granted this request, as it would have placed Mr. Bibaud in a situation where his legal capacity would have been compromised if he did not comply with the "legal requirements regarding verification of the existence of the incapacity, the degree thereof and the choice of appropriate measures". The State party concludes that this too is an argument in favour of the inadmissibility of the communication.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee ascertained, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not already being examined under any other international procedure of investigation or settlement.

7.3 The Committee notes the argument of the State party whereby the author has not exhausted domestic remedies for the purposes of admissibility of the communication. It

recalls its established case law, whereby, in addition to ordinary judicial and administrative appeals, the authors must also avail themselves of all other judicial remedies, including constitutional appeals, insofar as such remedies would appear to be useful in this case and are in fact available to the author.[9] The Committee notes that the author did not take the opportunity, in respect of the rules of procedure established in domestic law, to challenge the constitutionality of the legal provisions in question. This constitutional remedy would have provided an appropriate approach in this case to highlight possible inconsistencies in the law or non-compliance with the fundamental principles that the author wished to defend for herself and her husband. The Committee cannot pre-empt the outcome of such a constitutional procedure as, according to information supplied by the parties, there are no similar judgements of unconstitutionality on this issue. The Committee therefore concludes that the author has not exhausted all available domestic remedies. Having arrived at this conclusion, the Committee does not consider it necessary to rule on the other grounds for inadmissibility put forward by the State party.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

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

[Adopted in French, English and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[9] See communication No. 433/1990, *A.P.A. v. Spain*, decision on admissibility adopted on 25 March 1994, para. 6.2; communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, para. 6.5; communication No. 1188/2003, *Riedl-Riedenstein v. Germany*, decision on admissibility adopted on 2 November 2004, para. 7.2.