HUMAN RIGHTS COMMITTEE

J. B. et al. v. Canada

Communication No. 118/1982

18 July 1986

ADMISSIBILITY

Submitted by: J. B., P. D., L. S., T. M., D. P., D. S. (names deleted) on 5 January 1982

Alleged victims:The authors

State party: Canada

Declared inadmissible: 18 July 1986 (twenty-eighth session)/*

Decision on Admissibility

1.1. The authors of the communication(initial letter dated 5 January 1982 and seven subsequent letters) are .1. B., P. D., L. S., T. M., D. P. and D. S., in their personal capacities and as members of the executive committee of the Alberta Union of Provincial Employees, Canada. They are represented by the Alberta Union of Provincial Employees through legal counsel.

1.2. The authors refer to the prohibition to strike or provincial public employees in the Province of Alberta under the Alberta Public Service Employee Relations Act of 1977 and claim that such prohibition constitutes a breach by Canada of article 22 of the International Covenant on Civil and Political Rights.

2.1. The facts of the claim have been described as follows. In 1977, the Legislature of the Province of Alberta, Canada, adopted the Public Service Employee Relations Act, mainly with a view to consolidating a number of existing legislative enactments covering provincial public employees. The Act, which entered into force on 22 September 1977, prohibits persons within its scope from striking and imposes penalties in cases of contravention (sections 93 and 95 of the Public Service Employee Relations Act, 1977). The 40,000 members of the Union are said to be adversely affected by these provisions.

2.2. In November 1977, the Canadian Labour Congress, on behalf of the Alberta Union of Public Employees, lodged a complaint with the Committee on Freedom of Association of the International Labour Organization (ILO) that the general prohibition of strikes for public

employees contained in the Alberta Public Service Employee Relations Act was not in harmony with article 10 of ILO Convention No. 87[1] ". . . since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members". The complaints added that "such a limitation is an impairment of articles 3 and 8 of Convention No. 87 ... ". In its report as approved by the ILO Governing Body in November 1978 (case No. 893), the Committee on Freedom of Association suggested that ... the Government [of Alberta] consider the possibility of introducing an amendment to the Public Service Employee Relations Act so that in cases where strikes are prohibited, this be confined to services which are essential.

2.3. In 1979, a second complaint was lodged with ILO by the same complainant, on behalf of the Union. In its observations, submitted by the Government of Canada, the Government of Alberta voiced disagreement with the ILO recommendation of 1978 arguing that ". . . although some services might to more essential than others, the public service generally provides to the people of Alberta services for which, in the main, there is no reasonable alternative . . .". In its second report the Committee on Freedom of Association repeated its recommendation contained in its first report, with the following reasoning: "The Committee has taken note of this information. Under article 3 of Convention No. 87, trade-union organizations, as organizations of workers for furthering and defending their occupational interests (art. 10), have the right to formulate their programmes and organize their activities. It is on the basis of the right which trade unions are thus recognized as possessing that the Committee has always considered their right to strike as a legitimate-and indeed essential-means by which workers may defend their occupational interests. The Committee has recognized that strikes may be restricted, and even prohibited, in the public service, essential service or a key centre of a country's economy because-and to the extent that-a work stoppage may cause serious harm to the national community. Accordingly, the Committee holds the view that it is inappropriate in the present case to place all public establishments covered by the Public Service Employee Relations Act of 1977 on the same footing as regards the prohibition of the right to strike. To take only the example quoted by the complainants, the Alberta Liquor Board is not a service in which strikes should be prohibited . . . ".

2.4. In 1980, a third complaint in the matter was submitted to the ILO Committee on Freedom of Association by the Canadian Labour Congress. The Committee on Freedom of Association again recommended to the Governing Body that it suggest to the Government of Canada that the Government of Alberta consider the possibility of introducing an amendment to the Public Service Employee Relations Act in order to confine the prohibition of strikes to services which are essential in the strict sense of the term.[2]

In 1983, as a result of this decision, the Public Service Employee Relations Act was amended to exclude from its ambit the Alberta Liquor Board, the only publicly owned undertaking to which express reference was *made* by the Committee on Freedom of Association in its examination of the above mentioned Act.[3]

2.5. The Union also commenced court action in Edmonton, Alberta, at an unspecified date, in 1979 or in the beginning of 1980. The Union filed an application with the Alberta Court

of the Queen's Bench, with a view to having certain sections of the Public Service Employee. Relations Act of 1977 held to be contrary to international law and to be thus void and of no effect. This application was introduced by way of an Originating Notice of Motion for the determination mainly of the following questions:

(a) Whether the Public Service Employee Relations Act S.A. 1977 was, in whole or in part, in violation of Canada's international legal obligations;

(b) Whether the Province of Alberta was empowered to legislate in violation of Canada's international legal obligations;

(c) Whether the Public Service Employee Relations Act was *ultra vires* the legislature of the Province of Alberta.

2.6. During hearings preceding the judgement, the representatives of the Union and of the Government of Alberta presented their arguments in the case. On 25 July 1980, judgement was rendered by the Learned Trial Judge of the Court of the Queen's Bench of Alberta in answer to the questions raised by the Originating Notice of Motion. It was determined by the Judge that the Public Service Employee Relation Act was neither in whole nor in part in violation of Canada's international obligations; that the Act was not *ultra vires* the legislature of the Province of Alberta; and that in view of the foregoing it was not necessary to answer the question whether Alberta was empowered to legislate in violation of Canada's international obligations. The Union appealed the decision of the Learned Trial Judge to the Alberta Court of Appeal. The appeal was dismissed on 21 September 1981. The Union then sought leave to appeal the decision of the Alberta Court Of Appeal to the Supreme Court of Canada. On 23 November 1981 the Supreme Court of Canada refused leave to appeal.

2.7. The Alberta Union of Provincial Employees maintained (at the time of the submission of the communication on 5 January 1982) that all available domestic remedies had been exhausted.

3. By its decision of 8 July 1983, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of admissibility of the communication.

4.1. Under cover of the note dated 6 August 1984, the State Party, *inter alia,* submitted that:

the Human Rights Committee must consider a communication inadmissible if:

(a) It is incompatible with the provisions of the Covenant;

(b) The same matter as that dealt with is being examined under another procedure of international investigation or settlement; or

(c) The communicant has not exhausted all available domestic remedies.

The Government of Canada, after consultation with the Government of the Province of Alberta, is of the view that the present communication fails to meet these requirements and should therefore be found inadmissible by the Committee.

4.2. With respect to the compatibility of the communication with the provisions of the Covenant, the State party argued:

Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights provides that the Human Rights Committee 11 shall consider inadmissible any communication under the present Protocol . . . which it considers . . . to be incompatible with the provisions of the Covenant". The Government of Canada is of the view that article 22, paragraph 1, of the International Covenant on Civil and Political Rights does not guarantee the right to strike and that as a result the present communication is inadmissible *ratione materiae.*

No mention of the right to strike is made in article 22, paragraph 1, of the International Covenant on Civil and Political Rights. The Government of Canada considers that this silence is of import, especially in light of article 8, paragraph I *(d),* of the International Covenant on Economic, Social and Cultural Rights which does recognize the right to strike. . . .

... Thus, so long as a State party meets its basic requirements under article 22, paragraph 1, of the Covenant, which is to permit and make possible trade-union action aimed at protecting the occupational interests of trade-union members, there is no breach of the Covenant. In giving effect to this obligation, a State party is free to choose the mean, which it considers appropriate. Therefore, if a State party meets it's basic obligations under article 22, paragraph 1, any communication which aims at forcing it to accept a given method of compliance in preference to another would clearly be incompatible with the Covenant.

In the present case. the communicant's sole argument is that the Public Service Employee Relations Act enacted by the legislature of the Province of Alberta violates article 22, paragraph 1, of the Covenant by forbidding strikes in the provincial public service. It makes no argument as to why, apart from prohibiting strikes, the Alberta scheme would fail adequately to safeguard the occupational interest of trade-union members. It is asking the Committee to recognize that article 22, paragraph 1, of the Covenant confers a right to strike and as a result it does away with the discretion which States possess to choose the means they consider the most appropriate to implement article 22, paragraph 1. In this respect, the communication is incompatible with the provisions of article 22, paragraph 1, of the Covenant. Not only does this article not recognize a right to strike, it allows a State party to choose how it will give effect to the "right [of everyone] to form and join a trade union for the protection of his interest". Therefore, the Government of Canada considers the present communication inadmissible on the basis of incompatibility with the Covenant.

4.3. With respect to the issue of *lis pendens, the* State party argued:

Article 5, paragraph 2 *(a),* of the Optional Protocol to the International Covenant on Civil

and Political Rights provides that "the Committee shall not consider any communication from an individual unless it has ascertained that ... the same matter is not being examined under another procedure of international investigation or settlement". The Government of Canada considers that the proceedings initiated on behalf of the Alberta Union of Pubic Employees before the Committee on Freedom of Association of the International Labour Organization result in *lis pendens* since proceedings before that Committee imply the use of another procedure of international complaint or settlement and since the matter dealt with by the Committee is the same as that on which the Human Rights Committee is asked to express its views. . .

For article 5, paragraph 2 *(a),* of the Optional Protocol to apply a communication to the Committee on Freedom of Association of the International Labour Organization must be considered to be another procedure of international investigation or settlement. In the view of the Government of Canada, the special machinery for the protection of freedom of association established by the International Labour Organization (or ILO) in 1950 following an agreement with the United Nations Economic and Social Council is such a procedure ...

This procedure. like that under which the Human Rights Committee operates, implies that complaints are received, investigations made and recommendations issued. There are differences between the two systems out these do not affect the nature of the International Labour Organization's special procedure.

Even if proceedings are being carried on before two international investigative bodies. a communication is only inadmissible under article 5, paragraph 2 *(a),* of the Optional Protocol if these two bodies are examining the same matter. It is the view of the Government of Canada that this is the situation in the present case. . . .

In its complaint now before the Committee on Freedom of Association [see para. 5.2 below), the communicant is alleging that the Public Service Employee Relations Act in force in the Province of Alberta fails to set up an impartial conciliation and arbitration procedure as an alternative to strikes and that as a consequence the Government of Canada is in breach of the obligations under Convention No. 87. In its communication in respect to article 22, paragraph I, of the Covenant, it seeks a recognition that this article confers a right to strike and that therefore the Public Service Employee Relations Act is in breach of Canada's international obligations. The aims of these two communications are identical. In both cases. the communicant seeks a recognition of the right to strike although in one case, its method is direct and in the other indirect. . . .

In the view of the Government of Canada. if the issue raised by the communicant were debated before the Human Rights Committee . it would in fact be dealing with the same matter as is currently before the Committee on Freedom of Association. As previously indicated, it is the view of the Government of Canada that the Covenant does not recognize the right to strike. If the Committee did not dismiss the present communication on the ground of incompatibility with the Covenant. the communicant would have to show why and how the Public Service Employee Relations Act contravened article 22, paragraph 1, of the Covenant. To do this, it would almost inevitably have to resort to the same arguments it is

invoking in the other forum. For this reason, the Government of Canada, after consultation with the Government of the Province of Alberta, considers that there is in this case *lis pendens* and that the communication should be found in admissible under article 5. paragraph 2 *(a),* of the Optional Protocol.

4.4. With respect to the issue of exhaustion of domestic remedies, the State party argued:

The communicant, before it made the present communication, had challenged the constitutional validity of the no-strike provisions of the Public Service Employee Relations Act of the Province of Alberta before the Court of the Queen's Bench of the Province of Alberta.[4] A reading of the decision of Sinclair C.J.Q.B. in *Re Alberta Union of Provincial Employees* et al., *and the Crown in Right of Alberta shows* that this challenge was based on the notion of division of powers between the federal and provincial levels of government within the Canadian federation. Basically, the plaintiff was arguing that international law recognized to all persons employed in the public service save (hose employees engaged in essential services the right to strike and that under the Canadian Constitution only the Federal Government could legislate in breach of international law.[5] No mention is made of the provision of the Alberta Bill of Rights which protects freedom of association. . . .

When the communicant sought leave to appeal to the Supreme Court of Canada the decision of the Court of Appeal. it should be noted that it did invoke the freedom of association provisions of the Alberta Bill of Rights as one of the grounds of appeal. It argued that the Alberta Bill of Rights ought to be interpreted in light of Canada's international obligations which. in its view, recognized to employees of nonessential publicly-owned, undertakings the right to strike. It did not argue that freedom of association as recognized in the Bill conferred by itself the right to Strike.[6] Further. in its pleadings. the communicant also narrowed the focus of its appeal. It no longer challenged the no-strike provisions of the Public Service Employee Relations Act as they applied to the entire Public service. but rather it limited its challenge to their application to the non-essential employees of the Crown-owned undertakings.[7] Clearly when the communicant made its communication it had not exhausted local remedies....

The Government of Canada has indicated that the communicant is currently proceeding with a challenge against the no-strike provisions of the Public Service Employee Relations Act under subsection 2 *(d)* of the Canadian Charter of Rights and Freedoms [see para. 5.3 below). This provision reads as follows:

"2. Everyone has the following fundamental freedoms:

". . .

"(d) Freedom of association."[8]

The issue of whether freedom of association confers to trade unions and their members a right to strike is a matter which was not litigated before the Supreme Court of Canada and which does not appear to have been dealt with by lower courts under the Canadian Bill of

Rights or the Alberta Bill of Rights. However. under the Charter the relationship between freedom of association and the right to strike is a question which has been submitted to the courts for adjudication at both the federal and provincial levels.[9] Because of the importance of the matter and of conflicting judicial interpretation, it is likely that the Supreme Court of Canada, which is in the Canadian federation the court of last resort for both the federal and provincial jurisdictions, will be given an opportunity to render judgement on this question.

Since the Alberta Union of Public Employees failed to exhaust domestic remedies before it submitted a communication to the Human Rights Committee and since it is currently pursuing proceedings before the Alberta Court of Queen's Bench on the same matter, the Government of Canada considers that its- communication should be found inadmissible under article 5, paragraph 2 *(b), of* the Optional Protocol to the International Covenant on Civil and Political Rights.

In their comments under rule 91, dated 2 June 1986, the authors address the three main objections of the State party with regard to the admissibility of the communication. First, they submit that the communication is indeed compatible with the provisions of the Covenant, and refer to the relevance of article 22, paragraph 3, which provides that "Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (Convention No. 871 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention". It is implied, they argue, that a denial of the right to strike would prejudice the guarantees of ILO Convention No. 87. Moreover, an interpretation of article 22, paragraph 1, of the Covenant would also have to take into consideration other international instruments, including ILO Convention No. 87, which is an elaboration of the principles of freedom of association in international law. It is submitted that in a series of decisions the Committee on Freedom of Association of ILO has determined that the right to trike derives from article 3 of ILO Convention No. 87 and that it is an essential means by which workers can promote and defend their occupational interests. In particular, the authors point out that, in four cases, the Committee on Freedom of Association has considered the provisions of the Alberta Public Service Employee Relations Act and has found that the statute does not comply with the guarantee of freedom of association contained in Convention No. 87. The Committee on Freedom of Association has accordingly requested the Canadian Government "to re-examine the provisions in question in order to confine the ban on strikes to services which are essential in the strict sense of the term". The ILO Committee of Experts on the Application of Conventions and Recommendations it is argued, has also reaffirmed the importance of the right to strike in the non-essential public service.

5.2. With regard to the State party's objection that the matter is being examined under another procedure of international investigation or settlement (para. 4.3 above), the authors submit that the complaint submitted by the Canadian Labour Congress, on behalf of the Alberta Union of Provincial Employees, to ILO is no longer under examination since the ILO investigation was concluded in 1985 and recommendations for resolving the differences have been made by the Committee on Freedom of Association and affirmed by the Governing Body of the International Labour Office. These recommendations, the authors

add, have been ignored by the Government of the Province of Alberta.

5.3. With regard to the question of exhaustion of domestic remedies, the authors submit that all available domestic remedies have indeed been exhausted. In particular, the authors dispute the relevance of the State party's contention (para. 4.4 above) that their argument before the Canadian courts was narrower than that before the Human Rights Committee, explaining that "since the Canadian courts decided that there was no right to strike [for public employees in the Province of Albert], the question of the entitlement of persons like the complainants was never reached". With regard to the State party's contention that the Alberta Union of Provincial Employees is pursuing this matter under the Canadian Charter of Rights and Freedoms, the authors point out that, at the time of submission of the present communication to the Human Rights Committee on 5 January 1982, the Charter of Rights and Freedoms had not come into force. After the Charter was proclaimed on 17 April 1982, the Alberta Union of Provincial Employees, however, commenced an action in the Court of Queen's Bench of Alberta for a declaration that certain provisions of the Public Service Employee Relations Act, including the strike prohibition, were contrary to the guarantee of freedom of association contained in section 2 (d) of the Charter. On 29 February 1984, the Province of Alberta referred certain questions to the Court of Appeal of Alberta for an advisory opinion and obtained a stay of the proceedings that had been launched by the Alberta Union. On 17 December 1984, the Court of Appeal of Alberta certified its opinion on a number of points, while declining to issue an opinion on the question here in dispute. The Alberta Union therefore appealed to the Supreme Court of Canada, which heard argument on the appeal on 28 and 29 June 1985. After argument, the Supreme Court of Canada reserved judgement on the appeal and to date has not rendered judgement. The authors conclude that, "while the Human Rights Committee may wish to postpone further consideration of this complaint until the Supreme Court of Canada has made its decision, it is respectfully submitted that the complaint should not be ruled inadmissible for the reason that some domestic remedy has not been exhausted".

6.1. Before considering any claim contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its provisional rules of procedure, decide whether the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2. The question before the Committee is whether the right to strike is guaranteed by article 22 of the International Covenant on Civil and Political Rights. Article 22, paragraph 1, provides:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Since the right to strike is not *expressis verbis* included in article 22, the Committee must interpret whether the right to freedom of association necessarily implies the right to strike, as contended by the authors of the communication. The authors have argued that such a conclusion is supported by decisions of organs of the International Labour Organization in interpreting the scope and the meaning of labour law treaties enacted under the auspices of

ILO. The Human Rights Committee has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned. However, each international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions.

6.3. In interpreting the scope of article 22, the Committee has given attention to the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (article 31 of the Vienna Convention on the Law of Treaties).[10] The Committee has also had recourse to supplementary means of interpretation (article 32 of the Vienna Convention on the Law of Treaties) and perused the *travaux preparatoires* of the Covenant on Civil and Political Rights, in particular the discussions in the Commission on Human Rights and in the Third Committee of the General Assembly. The Committee notes that in the course of drafting the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Commission on Human Rights based itself on the Universal Declaration of Human Rights. The Universal Declaration, however, does not refer to the right to strike. At its seventh session in 1951, the Commission adopted the text of a single "draft covenant on human rights" comprising 73 articles (E/1992, annex). The 7. in the light of the above, the Human Rights relevant draft articles 16 ("the right of association")and 27 ("the right of everyone, in conformity with article 16, to form and join local, national and international trade unions") did not provide for the right to strike. In the course of the discussions of these articles at the Commission's eighth session in 1952, article 27 was dealt with first. An amendment to article 27 providing for the inclusion of the right to strike was rejected by 11 votes to 6, with I abstention. Three weeks later, the Commission discussed article 16 and adopted it with minor amendments, without, however, any proposal or amendment being tabled with a view to including the right to strike in that article. Pursuant to General Assembly resolution A/543 (VI), the single draft covenant on human rights was split into a draft covenant on civil and political rights and a draft covenant on economic, social and cultural rights. Article 16 was assigned to the draft covenant on civil and political rights, eventually being renumbered as article 22. Article 27, on the other hand, was assigned to the draft covenant on economic, social and cultural rights, eventually being renumbered as article 8. Five years after the adoption of draft articles 16 and 27 by the Commission on Human Rights, the Third Committee of the General Assembly again discussed the draft covenants. Whereas an amendment to the new draft article 8 of the Covenant on Economic, Social and Cultural Rights was adopted, including "the right to strike, provided that it is exercised in conformity with the laws of the particular country", no similar amendment was introduced or discussed with respect to the draft covenant on civil and political rights. Thus the Committee cannot deduce from the *travaux preparatoires* that the drafters of the Covenant on Civil and Political Rights intended to guarantee the right to strike.

6.4. The conclusions to be drawn from the drafting history are corroborated by a comparative analysis of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 8, paragraph I *(d),* of the International Covenant on Economic, Social and Cultural Rights recognizes the right to strike, in addition to the right of everyone to form and join trade unions for the promotion

and protection of his economic and social interests, thereby making it clear that the right to strike cannot be considered as an implicit component of the right to form and join trade unions. Consequently, the fact that the International Covenant on Civil and Political Rights does not similarly provide expressly for the right to strike in article 22, paragraph 1, shows that this right is not included in the scope of this article, while it enjoys protection under the procedures and mechanisms of the International Covenant on Economic, Social and Cultural Rights subject to the specific restrictions mentioned in article 8 of that instrument.

6.5. As to the importance which the authors appear to attach to article 22, paragraph 3 (para. 5.1 above), of the Covenant on Civil and Political Rights, the Committee observes that the State party has in no way claimed that article 22 authorizes it to take legislative measures or to apply the law to the detriment of the guarantees provided for in ILO Convention No. 87.

7. In the light of the above, the Human Rights Committee concludes that the communication is incompatible with the provisions of the Covenant and thus inadmissible *rations* materiae under article 3 of the Optional Protocol. In the circumstances, the Committee does not have to examine further the question of the admissibility of the communication under article 5, paragraph 2 *(a)* and (b), of the Optional Protocol, or the question whether an alleged breach of a collective right, such as the right to strike, can be the subject of a claim submitted by individuals pursuant to articles I and 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

That the communication is inadmissible.

Notes:

*/ The text of an individual opinion submitted by, five Committee members is appended to the present decision.

1/ International Labour Organization, international Conventions and Recommendations, 1919-1981 (Geneva, 1982).

2/ International Labour Office; "Complaint presented by the Canadian Labour Congress against the Government of Canada (Alberta): Case No. 893" in Reports of the- Governing Body Committee on Freedom of Association (203rd, 204th and 205th) (1980) LXIII Official Bulletin, Series B, No. 3, p. 28, para. 134 (b).

3/ Public Service Employee Relations Act, Schedule, section 6 as added by the Labour Statutes Amendment Act, 1983, S.A. 1983, c. 34, subsect. 5 (13).

4/ When this challenge was initiated, there existed no constitutional protection of freedom of association in Canada. Such a protection came into existence only on 17 April 1982 with the coming into force of the Canadian Charter of Rights and Freedoms. However. the

Alberta Bill of Rights. R.S.A. 1980, c. A-16, did protect various basic rights and freedoms including freedom of association. The Bill was. however. not constitutionalized.

5/ The Alberta Union of Provincial Employees et al.. and the Crown in Right of Alberta. 120 Dominion Law Reports, pp. 592-622. See, in particular, P. 592 for a summary of the matters in litigation, P. 609 for the employees covered by the plaintiffs arguments and pp. 621-622 for the conclusion of Sinclair C.J.Q.B.

6/ The Alberta Union of Provincial Employee et al., v. The Crown in Right of Alberta: Motion for leave to appeal, 25 November 1981, pp. 10, 20 and 21.

7/ Ibid., pp. 10 and 21.

8/ Rights protected by the Canadian Charter of Rights and Freedoms are not absolute. Section I provides that the rights and freedoms set out in the Charter are guaranteed subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

9/ Apart from the proceedings initiated by the communicant, mention ought to be made of Re Service Employees' International Union, Local 204. and Broadway Manor Nursing Home et al., and two other applications(1984), 44 O.R. 392 (Ontario High Court of Justice, Divisional Court), Public Service Alliance of Canada v. The Queen cc al.. Federal Court of Canada. Trial Division, 21 March 1984 (unreported) and Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union. Local 580 et al., 5 March 1984 (unreported). All of the decisions have been appealed. the last one to the Supreme Court of Canada.

10/ Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969 (United Nations publication, Sales No. E.70.V.5), p. 287.

Appendix

INDIVIDUAL OPINION

Submitted by Ms. Rosalyn Higgins and Messrs. Rajsoom Lallah, Andreas Mavrommatis, Torkel Opsahl and S. Amos Wako concerning the admissibility of communication No. 118/1982, J. B *et al.* v. Canada

1. In its decision the Committee states that the issue before it is whether the right to strike is guaranteed by article 22 of the International Covenant on Civil and Political Rights; and, finding that it is not, it declares the communication inadmissible.

2. We regret that we cannot share this approach to the issues in this case. We note that in Canada, as in many other countries, there exists, in principle, a right to strike, and that the complaint of the authors concerns the general prohibition of the exercise of such right for

public employees in the Alberta Public Service Employee Relations Act. We believe that the question that the Committee is required to answer at this stage is whether article 22 alone or in conjunction with other provisions of the Covenant necessarily excludes, in the relevant circumstances, an entitlement to strike.

3. Article 22 provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The right to form and join trade unions is thus an example of the more general right to freedom of association. It is further specified that the right to join trade unions is for the purpose of protection of one's interests. In this context we note that there is no comma after "trade unions", and as a matter of grammar "for the protection of his interests" pertains to "the right to form and join trade unions" and not to freedom of association as a whole. It is, of course, manifest that there is no mention of the right to strike in article 22, just as there is no mention of the various other activities, such as holding meetings, or collective bargaining, that a trade-unionist may engage in to protect his interests. We do not find that surprising, because it is the broad right of freedom of association which is guaranteed by article 22. However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes. To us, this is an inherent aspect of the right granted by article 22, paragraph 1. Which activities are essential to the exercise of this right cannot be listed *a priori* and must be examined in their social context in the light of the other paragraphs of this article.

4. The drafting history clearly shows that the right of association was dealt with separately from the right to form and join trade unions. *The travaux prdparatoires* indicate that in 1952 the right to strike was proposed only for the draft article on trade unions. This is what we would have expected. It was at that time rejected. They show also that in 1957, when the right to strike (subject to certain limitations) was accepted as an amendment to the draft article on the right to form and join trade unions, such an amendment was neither introduced nor discussed with respect to the draft covenant on civil and political rights. The reason seems to us both clear and correct-namely, that because what is now article 22 of the Covenant on Civil and Political Rights deals with the right of association as a whole, concerning clubs an-d societies as well as trade unions, mentioning particular activities such as strike action would have been inappropriate.

5. We therefore find that the *travaux proparatoires* are not determinative of the issue before the Committee. Where the intentions of the drafters are not absolutely clear in relation to the point at hand, article 31 of the Vienna Convention also directs us to the object and purpose of the treaty. This seems to us especially important in a treaty for the promotion of human rights, where limitation of the exercise or rights, or upon the competence of the Committee to review a prohibition by a State of a given activity, are not readily to be presumed.

6. We note that article 8 of the International Covenant on Economic, Social and Cultural Rights, having spoken of the right of everyone to form trade unions and join the union of his choice, goes on to Speak of "the right to strike, provided that it is exercised in conformity with the laws of the particular country". While this latter phrase gives rise to some complex legal issues, it suffices for our present purpose that the specific aspect of freedom of

association which is touched on as an individual right in article 22 of the Covenant on Civil and Political Rights, but dealt with as a set of distinctive rights in article 8, does not necessarily exclude the right to strike in all circumstances. We see no reason for interpreting this common matter differently in the two Covenants.

7. We are also aware that the ILO Committee on Freedom of Association, a body singularly well placed to pronounce authoritatively on such matters, has held that the general prohibition of strikes for public employees contained in the Alberta Public Service Employee Relations Act was not in harmony with article 10 of ILO Convention No. 87 ". . . since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members." While we do not at this stage purport to comment on the merits, we cannot fail to notice that the ILO finding is based on the furtherance and defence of interests of trade-union members; and article 22 also requires us to consider that the purpose of joining trade union is to protect one's interests. Again, we see no reason to interpret article 22 in a manner different from ILO when addressing a Comparable consideration. in this regard we note that article 22, paragraph 3, provides that nothing in that article authorizes a State party to ILO Convention No. 87 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

8. We cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights.

9. Whereas article 22, paragraph 1, deals with the right of freedom of association as such, paragraph 2 deals with the extent of the exercise of the right which necessarily includes the means which may be resorted to by a member of a trade union for the protection of his interests.

10. Whether the right to strike is a necessary element in the protection of the interests of the authors, and if so whether it has been unduly restricted, is a question on the merits, that is to say, whether the restriction imposed in Canada are or are not justifiable under article 22, paragraph 2. But we do not find the communication inadmissible on this ground.

11. It is therefore necessary for us to see whether the communication is rendered inadmissible on other grounds. With regard to the State party's objection that the matter is being examined under another procedure of international investigation or settlement (see para. 4.3 of the Committee's decision), we note that the ILO investigation is concluded. Without pronouncing upon whether reference to the ILO Committee on Freedom of Association and to its Governing Body constitutes examination under another procedure of international investigation or settlement within the terms of article 5, paragraph 2(a), of the Optional Protocol, we note that the terms of article 5, paragraph 2(a), cannot be applicable to the facts before us.

12. With regard to the issue of exhaustion of local remedies, we find that all relevant local remedies, we find that all relevant local remedies available to the authors at the time of the

submission of the present communication have been exhausted.

13. We would therefore consider the communication admissible.