



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2034/2011*, **

<i>Communication submitted by:</i>	S.D.P.T., Y.F.R.T. and P.T. (represented by counsel, Monica Feria-Tinta)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	27 March 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 April 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	29 March 2019
<i>Subject matter:</i>	Risk of partial demolition of house for failure to obtain licence
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; failure to substantiate claims
<i>Substantive issues:</i>	Right to life; torture; cruel, inhuman or degrading treatment or punishment; human dignity; right to an effective remedy; right to equality before courts; right to equality and non-discrimination
<i>Articles of the Covenant:</i>	2 (3), 6, 7, 14, 17 and 26
<i>Articles of the Optional Protocol:</i>	1, 3 and 5 (2) (b)

1. The authors of the communication are S.D.P.T., born on 2 July 1937, and Y.F.R.T., born on 24 April 1943, who are a married couple and both Canadian nationals. They claim that the State party has violated their rights under articles 7, 14, 17 and 26 of the Covenant. The Optional Protocol entered into force for Canada on 19 August 1976. The authors are represented by counsel.

* Adopted by the Committee at its 125th session (4–29 March 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with article 90 of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.



The facts as submitted by the authors

2.1 The authors have lived in Canada since 1975. In June 2006, their children purchased a retirement house in Toronto for the authors, an elderly couple with several medical conditions. The house was a three-storey semi-detached house with a two-storey wooden auxiliary building at its rear and a wall shared with the neighbouring house. The authors decided to refurbish the house and replace the wooden auxiliary building at the rear with a masonry structure (referred to hereinafter as “the addition”), without a building permit having been issued.

2.2 The authors learned from an “order to comply”, issued by the municipal authorities, and posted on the front door of the house in September 2006, that a building permit was required for the addition. Hence, the authors hired an architectural and engineering firm to obtain a permit. The firm wrote to the city council on 18 September 2006. On 15 January 2007, the city council issued a notice of “zoning by-law compliance” in relation to the application filed by the architects on 7 December 2006. On 16 January 2007, the city council issued a notice of “zoning non-compliance” in relation to the same application. Despite the authors’ request to the city council for full disclosure of all relevant documents in the zoning review file, and the Ontario Municipal Board’s order for disclosure requiring the city council to produce all documents, the authors never obtained any documents from the city council.

2.3 On 19 February 2007, the authors’ daughter, as the authorized agent, submitted a minor variance application to the Committee of Adjustment seeking approval of the addition and permission to construct a rear fire escape. A hearing was scheduled for April 2007, but on the day of the hearing, and without prior notice being provided to the authors’ daughter, the Committee of Adjustment granted a request that the city council had made for a deferral, despite the objection of the applicant. The hearing was rescheduled for November 2007. The authors’ daughter then also made a written request for a deferral. The Committee of Adjustment denied it and proceeded to hear the matter in her absence, deciding on 27 November 2007 to reject the application.

2.4 The authors appealed before the Ontario Municipal Board. The appeal was scheduled to be heard in May 2008, and without notice being provided to the authors, the Board granted a request that the city council had made for a deferral. The matter was rescheduled for August 2008, for which the authors’ daughter sought a deferral on the basis of the city council’s incomplete disclosure of documents and requested an order for disclosure from the Ontario Municipal Board. The latter granted that request, making an order for disclosure, and rescheduled the appeal for December 2008. The Ontario Municipal Board issued its decision on 10 December 2008, after a hearing on the substance, carried out in the absence of the authors’ legal representative. It denied the appeal. The authors’ daughter asked for permission to raise concerns about a reasonable apprehension of bias and requested recusal by the sole adjudicator of the Board, which was denied.

2.5 According to the authors, the planning authorities did not consider their special needs in the determination of their right to make variances on account of their health and well-being. The Ontario Municipal Board’s error – misidentifying the minor variances requested – was acknowledged in its decision issued on 8 April 2009, at the ex parte request of the city council, without consulting the authors. However, this decision simply corrected an error in the original decision concerning the third requested variance, and in all other aspects the decision was not further amended. This amending decision was granted at the request of the city council, and in the absence of the authors. The Board gave no reasons for making the correction.

2.6 The authors filed a second motion seeking leave from the Divisional Court to appeal the Ontario Municipal Board’s amending decision. The motion was heard by a single judge of the Divisional Court, who found that the decision was legal and fair, and that there was no error of law casting doubt upon the correctness of the Ontario Municipal Board’s original decision as a whole, because it had given “multiple reasons” for its decision. The authors note that the Court did not take into account the provincial policy statement making it compulsory for authorities deciding on planning issues to meet the housing, health and well-being requirements of people with special needs such as the elderly and persons with

disabilities. This motion seeking leave was dismissed without consideration on the merits. The authors then sought relief from a panel of the Divisional Court to set aside or vary the decision of the single motions judge of the Divisional Court. The panel decided that the motions judge's decision had not constituted a decline of jurisdiction. The panel did not give any reasons for rejecting the authors' submissions in relation to the first motion. Moreover, the authors had submitted to the motions judge that there had arisen a reasonable apprehension of bias from the Board, considering the fact that visible minorities faced discrimination in Canada, as was recognized by the case law of the Court of Appeal for Ontario.

2.7 On 1 February 2011, the city council sent a letter to the authors, demanding that the addition be removed, since "the appeal rights respecting the addition's non-compliance with the zoning by-law have now been exhausted". In the same letter, the municipal authorities stated that if the removal had not been started before 25 February 2011, the city council would refer the matter to legal counsel to commence proceedings to seek a court order authorizing the city council to carry out the removal at the authors' expense. The city council intended to enforce a demolition of the addition (representing a substantial part of the authors' house) in the middle of winter in Canada. On 7 March 2011, the city council began proceedings to enforce partial demolition, by court order, at the authors' expense. The authors note that this is not a new procedure that could allow for further revision of the substantive decision and does not grant the authors further rights of appeal. Rather, it is just an application made by the municipal authorities to enforce a decision already made. It is simply about the methods and costs of enforcement.

The complaint

3.1 In their initial complaint, the authors submit that the State party has violated their rights under articles 7, 14, 17 and 26 of the Covenant.

3.2 The authors claim that the fact that they are non-Caucasians in a generally Caucasian neighbourhood explains why their minor variance applications were rejected, as evidenced by the testimony of S.D.P.T. in which he claimed that his neighbours had launched a "not in my back yard" type of campaign. The neighbours responsible for this campaign had opposed the authors' application in writing from the beginning, since they wrote to the Committee of Adjustment to oppose the granting of the minor variances and to seek demolition of the addition. This differential treatment afforded to the authors was not based on reasonable and objective criteria, resulting in discrimination.

3.3 The authors also allege a violation of their right to a fair trial, especially in regard to the reasonable apprehension of bias from the Ontario Municipal Board and the fact that its decision was based on the allegations of one party only, without further corroboration of the facts with the evidence available in the file.

3.4 Moreover, the authors claim that the State has violated their right to privacy, and the prohibition on arbitrary or unlawful interference with one's home, because they consider the inspection visits to their home to be intrusive and arbitrary.

3.5 Finally, the authors claim to have been subjected to inhuman treatment, since these visits and the proceedings in general have affected them physically and mentally. The treatment is also considered to be inhuman with regard to the fact that the demolition is supposed to take place during winter in Canada, when temperatures are extremely low.

Additional comments from the authors

4.1 In submissions dated 31 March 2011 and 17 May 2011, the authors insist that the State party has violated article 14 of the Covenant, by denying them access to all documents in the file held by the municipal authorities concerning their claims, in order to prepare and present their case on appeal, which, in contrast, were fully available to the other party. Moreover, they submit that they were arbitrarily denied the right to cross-examine the city council's zoning examiner whose expertise had been central to the assessment of their case, and who had been summoned to the hearing before the Ontario Municipal Board. The authors also submit that they were denied the right to file crucial evidence, such as an independent expert's report, which was central to the determination of

their case. The Ontario Municipal Board's decision was based on the single expert report of one party, violating its own rules of practice and procedure, which allow the adjudicator to grant all exceptions and measures that are required to ensure that the issues are "determined in a just manner". They further submit that their right to a fair hearing by an independent and impartial tribunal was violated, because, among other things, the sole adjudicator conducting the hearing before the Ontario Municipal Board did not disqualify herself despite the authors' perception of reasonable apprehension of bias or prejudice, and because this hearing was affected by outside influence, pressure, and intrusion. As an example of the latter, the authors submit that a group of neighbours and a local councillor wrote letters to oppose the application made by the authors. Moreover, one of the representatives of this group of neighbours directly interacted with the Ontario Municipal Board in a way that showed bias against the authors.¹

4.2 The authors also submit that the administrative proceedings were characterized by arbitrariness or manifest error, amounting to denial of justice, such as the issuance of two contradictory compliance orders or the unequal treatment compared with other variances sought by neighbours in the same area. Additionally, the authors submit that the Ontario Municipal Board's decision of 10 December 2008 applied the tests in the Planning Act for minor variances to manifestly wrong material facts.

4.3 The authors reiterate that the State party has violated the principle of non-discrimination, in detriment of their position as an elderly couple belonging to an ethnic minority group. They submit that the State party has failed to accommodate their special needs in the application and enforcement of the planning and building legislation, without considering their physical and mental condition. Furthermore, the State party has failed to guarantee the authors equal and effective protection against racial discrimination, as committed by the authors' neighbours and by public authorities, such as the local councillor or the adjudicator of the Ontario Municipal Board.

4.4 The authors also reiterate their claims under article 17 of the Covenant, because there have been 26 inspections, attempted inspections, searches, or site visits, carried out without the authors' consent, the proper statutory authorization or a judicial warrant, disrupting the authors' privacy, family and home. The authors also submit that a potential partial demolition of their dwelling would entail a further violation of article 17 of the Covenant.

State party's observations on admissibility and the merits

5.1 On 3 October 2011, the State party submitted its observations on the admissibility and the merits of the communication and requested that it should be declared inadmissible on the grounds of abuse of the right to petition, non-exhaustion of domestic remedies and failure to substantiate claims.

5.2 The State party notes that the authors continued and finished building the addition despite the initial "order to comply" issued on 6 December 2006. The authors applied for variances, despite the possibility that the Committee of Adjustment might reject the application. The city council's planning division prepared a report for the Committee of Adjustment recommending that the variance application be rejected because such variances were not minor, nor were they consistent with the general intent of the applicable by-law or the Official Plan. Within these proceedings, a hearing was originally scheduled for 11 April 2007, which was deferred at the request of the authors' agent, their daughter P.T. The hearing was rescheduled for 21 November 2007. Again, P.T. requested a deferral as she was out of the country. The Committee of Adjustment proceeded with the hearing and Y.F.R.T. gave evidence. On 27 November 2007, and by a unanimous decision, the Committee of Adjustment refused to grant the variances, because they did not meet any part of the four-part test included in section 45 of the Planning Act.

5.3 The authors appealed against the decision of the Committee of Adjustment to the Ontario Municipal Board. Within these proceedings, a hearing was scheduled for 5 August 2008, but neither the authors nor their agent nor their expert land use planner were able to

¹ The authors provide a copy of the transcription of the hearing before the Ontario Municipal Board.

attend. The Ontario Municipal Board set a new date for a hearing, on 1 December 2008. Before that hearing, the Board had issued a procedural order, with the parties' consent, ordering the exchange of all evidence necessary for the hearing before 1 September 2008, in order to decide the applicability of the four-part test included in section 45 of the Planning Act. On 1 December 2008, the hearing took place before the Vice-Chair of the Ontario Municipal Board, but the authors were not able to call their expert witness, who again was not able to attend due to vacation. Moreover, the authors were not able to attach a planning report, as they had not complied with the deadline for the exchange of evidence. During the hearing, the authors' agent raised several procedural objections, related to the production of evidence and other formal requirements, which the Ontario Municipal Board found "irrelevant", "technical" and "very circular". In reaction to the Board's findings, the authors' agent asserted that the Vice-Chair of the Board was biased, and asked her to recuse herself, apparently based on her dissatisfaction with the procedural rulings. The Vice-Chair of the Municipal Board denied this request, because she thought she had dealt with the authors' allegations in a patient and fair manner. The authors and their agent then left the hearing, despite being informed that since the hearing was peremptory, it would proceed regardless of their continued participation. Subsequently, the Ontario Municipal Board heard evidence from the city council's expert planning witness. On 10 December 2008, the Ontario Municipal Board denied the variances sought by the authors, finding that the addition had been constructed without a building permit, was overbuilt, and extended unacceptably far into the back yard. In the decision, the Board also found that the addition was not consistent with the relevant policies of the city council's Official Plan or the zoning by-law, and did not represent appropriate land development.

5.4 On 8 April 2009, the Ontario Municipal Board amended the above-mentioned decision, correcting a technical error in the description of the third requested variance, which was not a key concern to the Board. On 29 December 2008, through a "notice of motion", the authors had sought leave to appeal the Ontario Municipal Board's decision before the Divisional Court, raising thirty grounds, most of which related to procedural deficiencies and included general reference to infringement of the Canadian Charter of Rights and Freedoms. In her oral argument, the authors' agent claimed that the Ontario Municipal Board had misapprehended the evidence, denied the authors a right to natural justice, and was biased against the authors. On 18 December 2009, the Divisional Court denied the motion for leave to appeal, basing its decision on the fact that the amending order, issued on 8 April 2009, had no impact in any material way on the outcome of the administrative proceedings. With respect to the allegations concerning bias against the authors, the Divisional Court found that they were not adequately and sufficiently substantiated. The authors then sought leave to appeal to the Court of Appeal for Ontario. On 24 March 2010, the Court of Appeal for Ontario transferred the proceeding back to the Divisional Court for reconsideration of the leave motion by a panel of three judges. On 7 January 2011, that panel dismissed the motion to vary the first decision of the Divisional Court, denying leave to appeal. The panel objected to the authors' accusations against public officials and challenges to their integrity without a minimum of substantiation, affecting the dignity and civility of these procedures. Overall, the panel concluded that the factual error in the description of the addition did not constitute a jurisdictional error or an error of law, that there had been no denial of procedural fairness and that there was no reasonable apprehension of bias. This judgment also awarded costs in the amount of Can\$7,500 to Toronto City Council, due to the unfounded allegations of misconduct against the council's planning witness and legal counsel. On 18 July 2011, the authors' attempt to appeal that decision to the Court of Appeal for Ontario was dismissed.

5.5 In November 2009, and after two orders to comply with the zoning by-law had been issued against the authors, Toronto City Council began municipal prosecution activities. On 23 March 2011, and in the face of divided case law in this area, the City Prosecutor exercised prosecutorial discretion to withdraw the charges. Subsequently, and after the two decisions of the Divisional Court that denied the authors leave to appeal, lawyers for the city council and the Acting Director of Toronto Building wrote letters demanding that the addition be removed. In light of the ongoing non-compliance with the demand letters, the city council issued a "notice of application" in the Ontario Superior Court of Justice, dated

3 March 2011, to seek a judicial order requiring the authors or the owners of the house to remove the addition.

5.6 Concerning potential violations of article 7 of the Covenant, the State party submits that the authors have failed to exhaust domestic remedies and that their allegations are manifestly ill-founded. Indeed, the authors did not raise any allegations of violations of sections 7 and 12 of the Canadian Charter of Rights and Freedoms in their claims before domestic adjudicatory bodies, which protect individuals against “serious State-imposed psychological stress” amounting to a violation of security of the person, and provides to everyone “the right not to be subjected to any cruel or unusual treatment or punishment”. Furthermore, the State party submits that these allegations are unsubstantiated, because the authors have not provided independent medical evidence to support their assertion that the visits caused the authors physical or mental harm. The serving of legally authorized notices of violations of municipal law, the prosecution of by-law offences (which at most could lead to the imposition of a fine), or the official activities for seeking the demolition of the non-compliant structure cannot in any way be understood to have caused or contributed to the type of severe suffering that has been found to fall within the scope of article 7 of the Covenant. Furthermore, any demolition of the structure must proceed with a valid court order that forces the property owner to comply with the judicial decisions, only after the other alternatives, such as letters of notice and other administrative steps have failed. In this judicial proceeding, the authors could participate and raise arguments as to why the order should not be issued and, additionally, could raise an appeal against the order authorizing an eventual demolition. The State party informs the Committee that no demolition has occurred to date, and that any eviction from the structure concerned would not mean that the authors would be evicted from the rest of the home, should the demolition be authorized by judicial order.

5.7 Regarding the author’s allegations under article 17 of the Covenant, the State party submits that the State agents conducted visits to and not searches or inspections of the authors’ house. The vast majority of these visits were attempts to personally serve the “orders to comply”. Many of the visits were unsuccessful, and involved an official of Toronto City Council walking up to the front door, knocking and ringing the doorbell, and leaving a card. The other visits involved visual inspections of the outside of the illegal addition, which were carried out by a building inspector either standing on public property, or on adjacent property with the consent of the owner of that property. The argument of “arbitrary interferences” with the authors’ home or privacy was not raised in any domestic tribunal, to complain either about the legality or the reasonableness or the proportionality of the visits. Furthermore, the authors could have challenged the constitutional validity of the sections of the Planning Act and Building Code which authorize the attendances and inspections. Therefore, domestic remedies in this regard have not been exhausted.

5.8 As to the authors’ allegations under article 26 of the Covenant, the State party submits that the authors could have sought a constitutional remedy or raised a discrimination claim before any domestic adjudicatory venue, triggering public duties to take into consideration disability issues, such as those faced by the elderly. Moreover, at the time at which the communication was submitted, a hearing regarding the judicial review of the order to demolish the addition was still pending. Concerning the authors’ allegations of discrimination on the grounds of ethnicity, the State party submits that these issues were raised peripherally at the Divisional Court, but were found entirely lacking in factual foundation and hence were dismissed. Additionally, these allegations could have been raised in the judicial hearing scheduled for January 2012. The State party also submits that these allegations provide no new or additional information that could lead to a potential assessment of discrimination on the basis of disability, race or ethnic origin, so they fail to establish a prima facie case of violation of article 26 of the Covenant.

5.9 On the merits, the State party recalls that the decision of the Committee of Adjustment was subsequently confirmed in three independent processes held by the Divisional Court, the panel of three judges from the Divisional Court, and the Court of Appeal of Ontario, respectively. The State party recalls the Committee’s jurisprudence, according to which the availability of judicial review by an administrative superior instance

met the requirements of article 14 (1) of the Covenant.² Since Canadian domestic bodies have already dealt with the claims and evidence now before the Committee, the State party recalls that it is not the role of the Committee to re-evaluate the facts and evidence unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice.³ The authors have argued that their right to equality of arms at the Ontario Municipal Board was violated because they were denied disclosure, cross-examination of the city council's expert witness and the possibility of filing their own expert report. The State party submits that the Ontario Municipal Board quashed the summons of the city council's zoning examiner because the evidence that the authors sought to introduce related to non-binding rulings that were irrelevant. Moreover, the Ontario Municipal Board issued a "production order" that required each party to produce an "affidavit of documents" setting out the documents that each party intended to rely upon at the hearing. At the end, however, the authors failed to abide by their disclosure obligations, as they failed to provide the city council with their own expert report, failing also to comply with the procedural regulations before the Ontario Municipal Board.

5.10 Concerning the authors' allegations that they were denied the possibility of cross-examining the city council's expert witness, the State party challenges the representation of what actually occurred. Rather than cross-examine the city council's expert witness, the authors chose to leave the Ontario Municipal Board's hearing, waving their right to scrutinize the expert witness's statement. The State party submits that the Ontario Municipal Board treated the authors' application as it would treat the application of any other party who left a duly convened hearing without a sound reason and having failed to present any evidence.

5.11 The State party submits that domestic venues addressed the procedural issues raised by the authors in a fair and reasonable manner. Moreover, the Vice-Chair of the Ontario Municipal Board was not "openly hostile", but instead was patient, spending a whole hearing to consider the procedural requests that had been brought with no notice. Furthermore, the State party challenges the allegation that the Ontario Municipal Board's decision was affected by direct influence, pressure and intrusion from outside parties and by political interference. Indeed, the records of the Board's decision show that it was based on the merits and not on opposition by some neighbours and a city councillor to the variances, or because the city council sent lawyers to support the decision of the Committee of Adjustment, which is a regular occurrence. Overall, the allegations of discrimination or of particular animosity against the authors, as visibly belonging to an ethnic minority, were manifestly ill-founded, as confirmed by the decisions of the Divisional Court.

5.12 Furthermore, the State party submits that the administrative proceedings were based on appropriate factual foundations and did not amount to a manifest error. It challenges the alleged contradiction between the notices to comply of 15 and 16 January 2007. While the first notice may have contained some administrative errors, it did not amount to a violation of article 14 (1). The second notice was complete and was designed to assist the applicants in determining what steps to take in respect of their building project, which at that time was under construction. Moreover, the authors have alleged that the Ontario Municipal Board's decision was arbitrary, on the basis that the Board has approved other larger variances. The State party submits that every application for a variance is considered on its own unique facts. Indeed, according to a review of the records of Toronto City Council going back to 1954, no approval has ever been given in the Harbord Village Heritage Conservation district to build an addition as large as the one built by the authors. The city council's expert planner explained that the depth of the houses on the block in question is generally uniform, and that none of the houses (with additions included) extends as deep as the authors' house. Finally, the State party submits that even if the Ontario Municipal Board made a mistake regarding the description of one of the variances sought by the authors, which was later amended at the request of Toronto City Council, this error would not have affected the outcome, as confirmed by the decision of the Divisional Court. The State party also recalls the jurisprudence of the Committee, according to which it is for the courts of

² Human Rights Committee, *Y.L. v. Canada*, communication No. 112/1981.

³ *Van Den Hemel v. Netherlands* (CCPR/C/84/D/1185/2003), para. 6.5.

the State to review the facts and evidence, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.⁴

5.13 Regarding the authors' allegations under article 17 of the Covenant, the State party submits that none of the visits carried out by public officers involved entry into the authors' home for purposes of inspection. The authors' privacy and home were not interfered with in any material way, and every visit was duly authorized by law and was proportionate to the end sought by the Toronto City Council regulatory framework.

5.14 Regarding the authors' allegations under article 26 of the Covenant, the State party argues that there is no evidence that the size of the property that the authors bought in 2006 (including the addition which existed at the time) was insufficient to meet their needs, or that they could not have built a somewhat smaller addition that would have met their needs while also complying with the applicable zoning requirements. The State party recalls that there is no evidence that other variances requested in the same neighbourhood as the authors, as they submitted, were requested by "Caucasians". Additionally, in the allegedly similar cases referred to by the authors, the issue at stake was different, such as the maintenance of an existing wooden staircase at the rear of one building that had been built before the current zoning by-law was passed, the approval of an addition that was much smaller than the authors' addition, or approval for parking spaces. These cases show that each zoning application is considered individually by a quasi-judicial body based on its unique facts, and complying with a zoning regulation which must be implemented in line with the Planning Act, as well as the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms. Finally, the State party emphasizes that the authors' allegations about their differential treatment were based on incorrect descriptions of the facts of the communication, in order to give the impression that the variances they were seeking were more minor than they actually were. For example, they suggest that one of the key variances they were requesting was of only 45 centimetres over and above the depth of the previous addition on the house, but in fact their own expert stated that the depth of the house after the addition (23.8 metres) exceeded the allowance under the by-law by 9.8 metres. Their own expert also stated that the depth of the house after the addition extended over 2 metres (not 45 centimetres as claimed) beyond the depth of the original wooden structure, for which a variance was never obtained. Overall, the State party submits that the information provided in this case does not in any way support any distinction based on race, let alone racial discrimination.

Author's comments on the State party's observations on admissibility and the merits

6.1 On 23 January 2012, the authors submitted that the State party had acknowledged that a two-storey structure was a pre-existing feature of the house that they bought, and that many of the houses in the neighbourhood had undergone significant renovations over the years. Moreover, they provided evidence, including an architectural drawing, which supports their claim that the new addition replacing the old addition is exactly 51 centimetres longer and that the State has misquoted the dimensions.

6.2 The authors note the numerous errors that affected the outcome and the merits of the administrative decisions against them. They also note that in their case there was never a full hearing before a higher court after the decision of the Ontario Municipal Board, impeding a full revision of the legality of the administrative procedures, in violation of article 14 of the Covenant.

6.3 The authors claim that the national legal proceedings have prevented them from raising any substantive issues beyond the narrow four-test rule of section 45 of the Planning Act, so the State party never addressed whether the variances sought by the authors were necessary to accommodate their special needs as an elderly couple. The authors submit that, by failing to hear or address their allegations, the State party failed to ensure due process, to

⁴ See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26.

fulfil its duty of care in respect of elderly people from a racially distinct origin (whose first language is Chinese), with special needs, to allow them the opportunity to present their case. The authors allege arbitrariness in the application of zoning by-laws and in the enforcement of the law on building permits.⁵ This arbitrariness is informed by a discriminatory motive, relating to their status as non-Caucasians in a neighbourhood that has no other visible minority. The family names of the neighbours who have been remonstrating about them are all of Caucasian origin, which further reinforces this argument.

6.4 The authors reiterate their allegations based on article 7 of the Covenant and provide medical evidence that supports the assertion that the visits by building inspectors have caused them physical and mental suffering that escalated into a heart condition and a transient ischemic attack.⁶ These medical conditions are not merely a collateral effect of suffering, but are directly attributable to the State party's conduct. Finally, the inhuman treatment is exacerbated by the potential for demolition of the addition, which would effectively leave the authors homeless, as they would have to be evicted from the house in order for this to be carried out. Moreover, it would affect the entire structure of the house, and it would release asbestos which would make the rest of the house inhabitable.

6.5 Finally, concerning the exhaustion of domestic remedies, the authors submit that there were no remedies available allowing them to raise their allegations of human rights violations, as the main proceedings were administrative in nature and were focused on a specific request for a building permit. Moreover, they submit that additional human rights remedies are not available to normal citizens, according to the standards of access to justice in the practice of Canadian constitutional law.

Additional observations

From the State party

7.1 In its observations of 28 June 2012, the State party informed the Committee of two new events reinforcing its allegations. In the first place, P.T., the new property owner of the house where the authors live, consented, on 16 January 2012, to an order contained in a judgment of the Ontario Supreme Court of Justice requiring the demolition of the addition. The State party informed the Committee that, pursuant to that judgment, the demolition would not be executed until P.T. had had a further opportunity to make an application for variances. Within this judicial proceeding, P.T. had the opportunity to present her evidence and cross-examine the other party's witness, and prepared and served legal materials in opposition to the relief sought by the city council. Although she raised the issue of her parents' health and age as an equitable consideration, no human rights claims were made in this proceeding or in any other domestic proceedings, despite the opportunity to do so. In exchange for P.T.'s consent to the relief sought by Toronto City Council, this judgment orders that the removal of the illegal addition must not be executed until P.T. has had a second opportunity to apply to the Committee of Adjustment to seek approval for the variances. Moreover, if the second application for variances is not granted by this committee, the judgment to which P.T. consented preserves her right to appeal to the Ontario Municipal Board and, eventually, to seek a second leave to appeal to the Ontario Superior Court. Furthermore, the State party informs the Committee that, on 8 February 2012, P.T. initiated a new proceeding for approval of the requested variances, albeit essentially the same requests formerly made by the authors. These requests do not match the consent given by P.T. in the above-mentioned judgment, where she represented her intention to seek variances either to legalize some portion of the addition built at the rear of the house (with the remaining portion not legalized to be removed), or alternatively, to authorize some new structure. Hence, P.T. has chosen to relitigate in regard to the same structure that is already in place and that was the subject of the previous administrative

⁵ The authors include, with their submission, mention of other cases of properties in the same street that were allowed "grosser" variances than those requested for their addition, and note that some of those variances were requested by the very neighbours who opposed the authors' application.

⁶ Medical report issued by Dr. Michael Ho on 10 October 2011; hospital records – "general internal medicine discharge summary", dated 26 January 2011; medical report issued by the Mayo Clinic on 31 August 2011; and neurologist's report dated 16 December 2011.

proceedings. Contrary to the authors' statements, there is a significant difference in size between the previous addition and the one that is the subject of the present communication. Specifically, there is a difference in built depth of about 2.4 metres (not 51 centimetres as alleged), which is readily apparent from the photos available in the records. These developments reinforce the arguments that the communication is inadmissible both for non-substantiation and for non-exhaustion of domestic remedies. Domestic remedies should be pursued with due diligence, as stated by the Committee.⁷ Additionally, the State party recalls that the authors have not exhausted domestic remedies, as should be clear from this new information, given that the illegal addition is still standing and is once again back at the initial stages of the land use planning process and subject to review before the administrative and ordinary justice systems.

7.2 According to the new information provided, the present communication should be found an abuse of the right of submission. According to the State party, the authors have provided wrong information to the Committee, attempting to understate the depth of the addition in question relative to the previous structure, and have failed to inform the Committee of key developments, including the consent order agreed to just before the authors' supplemental submission on 17 January 2012. P.T.'s consent to the order of removal described above strongly suggests that the present communication does not disclose any serious claims of violations under any of the articles of the Covenant, and the new opportunities for access to justice suggest that the authors do not in fact have any serious concerns about the fairness of the process.

7.3 Regarding the merits of the communication, the State party submits that the authors have chosen to demolish the old addition to their house and build a new one, losing the benefit of the "legal non-conforming use" applicable to cases where structures are in place prior to the zoning by-law coming into force. In the present case, even with an addition the same size as the old one, the home would have exceeded the maximum depth permissible under the zoning by-law by 60 per cent. If the city council's planning division were to acquiesce to the proposal of new structures simply because they were the same size as structures that had been there previously, this would perpetuate non-compliance with the zoning by-law. The State party reiterates its initial submission to the effect that while property owners may be able to obtain minor variances in some cases through administrative procedures, these are based on an individualized consideration of the facts of each case which takes into account whether the proposed addition is consistent with the intent behind the applicable zoning by-law.

From the authors

8.1 On 24 August 2012, the authors submitted additional comments, informing the Committee that they were no longer represented by counsel.

8.2 On 12 January 2015, the authors submitted that, on 16 December 2013, they had finally obtained a zoning approval and a building permit. However, they claim that the State party is attempting to inspect the addition, and has filed several requests for judicial orders to enter the house and inspect the two-storey addition to ensure that the construction and use of the building are in conformity with the building permit issued. The authors also inform the Committee that these judicial orders are currently under appeal.

8.3 The authors provided a copy of the judgment of the Ontario Superior Court of Justice, dated 7 August 2015, concluding that Toronto City Council is entitled to carry out an inspection of the property in order to satisfy itself that construction has been carried out in compliance with the Building Code and the permit plan. Moreover, the judgment ordered the authors to provide the permit plan, to describe the construction performed, and in the event of non-compliance with the previous orders, to authorize the city council to uncover such portions of the construction that are relevant for the pertinent inspection.

8.4 On 28 and 29 July 2016, the authors claimed that Toronto City Council had taken action, since 27 July 2016, to carry out the enforcement orders for forced inspections and

⁷ Human Rights Committee, *A.P.A. v. Spain*, communication No. 433/1990, para. 6.2; and *Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.

uncovering of the completed construction, entailing a forced eviction of their home for five to six days, a forced partial home demolition, and a confiscation of their home, all at the cost of the authors. They further claim that these activities by the State party entail a risk to them of serious injury and imminent death. Overall, these would constitute a violation of their rights to life and to be free from torture and ill-treatment, recognized in articles 6 and 7 of the Covenant and in article 1 of the Second Optional Protocol to the Covenant. The authors also claim that Toronto City Council has received reports of their health status, and has carried on with the enforcement orders, taking no action to stop or prevent alleged torture and ill-treatment.

8.5 The authors also request that their daughter P.T., born on 4 October 1970 and a Canadian national, be included as an author of the communication. She alleges, for herself, a violation of her right to be free from inhuman treatment, and on behalf of her parents, a violation of their rights enshrined in articles 2 (3), 6, 7 and 14 of the Covenant.

8.6 The authors claim that they have exhausted domestic remedies, even if the enforcement of the inspection orders sought by Toronto City Council are under appeal, because there is no automatic stay or suspension of the enforcement actions during the appeal. Moreover, they claim that domestic remedies are ineffective because they have satisfied their obligation to alert domestic authorities of alleged breaches of their right not to be tortured, and of their right to life, without the State party providing them with legal aid in relation to their allegations.⁸ Toronto City Council has retaliated against the authors' allegations by issuing enforcement orders, and setting impossible-to-meet construction standards to disguise retaliation and intimidation against them. The authors also claim that there is no basis for Toronto City Council to reject as inadequate the authors' independent and impartial reports of construction sufficiency, because the fire safety and electrical safety letters are from the State party's authorities, and the letter of construction sufficiency is from an independent professional engineer. Furthermore, Toronto City Council has also previously stated that if the authors obtained a building permit as well as approval for a minor zoning variance for their home addition, they would not have to go through a five-to-six-day forced partial home eviction. The authors submit that there is no genuine construction sufficiency issue, and no genuine issue with the adequacy of the authors' documentation of construction sufficiency.

Further observations

From the State party

9.1 In its observations of 3 August 2017, the State party reiterates its previous inadmissibility arguments. The State party also submits that given the authors' propensity to make baseless and unreasonable allegations, and failure to produce the requested documents and provide credible evidence to support their allegations, the Committee should consider the communication as it now stands and not allow any further submissions.

9.2 The State party emphasizes that, on 18 July 2013, the Ontario Municipal Board determined that the authors' two requested zoning variances met the criteria of the Planning Act, as they were "desirable for the appropriate development and use of the land" and were "minor variances". However, in the same decision it was found that the authors' allegations concerning violations of the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms were without merit. In particular, the Ontario Municipal Board dismissed the medical evidence presented by the authors, which was unhelpful and gave little weight to the authors' allegations.

⁸ The authors attach several medical reports that document irreversible injuries to them caused by actions by Toronto City Council public officials since 2006, such as the small stroke suffered by S.D.P.T. after an unauthorized inspection visit on 14 January 2011. They also attach an affidavit (medical report) that shows several irreparable injuries caused by torture, prepared by a medical expert, Dr. Barry H. Roth. The latter document concludes that the medical findings are fully consistent with torture being the primary cause for the worsening health conditions of S.D.P.T. and Y.F.R.T., whose lives are now in danger.

9.3 The State party also recalls that the authors obtained a building permit on 16 December 2013. However, in cases where the construction has begun without an inspection, the inspectors may require the permit holders to provide an engineer's (or other qualified individual's) report certifying that the construction complies with the Building Code Act and the approved permit plan. Although it is the permit holder's responsibility to contact the city council in this regard, the city council's Deputy Chief Building Official sent several letters to the authors in order to arrange inspection under section 10.2 of the Building Code Act. After a fourth letter, the authors finally responded, on 21 February 2014, without addressing the engineer's report, or the request to arrange for an inspection, and instead accusing the Deputy Chief Building Official of acts of torture and inhuman or other degrading treatment. After another round of letters, the authors filed an appeal with the Ontario Superior Court of Justice against Toronto City Council's inspection order, basing their arguments on several human rights allegations. On 7 August 2015, the Ontario Superior Court of Justice determined that Toronto City Council was entitled to inspect the two-storey addition, and directed the authors to provide the report of the construction and to arrange for inspection. It was highlighted in the judgment that the inspection would be carried out in a manner that would protect the health and safety of S.D.P.T. and Y.F.R.T. On 22 June 2016, the same court held a hearing to determine Toronto City Council's entitlement to costs as the successful party, and determined that the authors must pay \$20,000 in legal costs, recalling that the authors had "unnecessarily lengthened the proceedings", failed to comply with procedural timetables and duties, provided arguments with no support in authority, "and forced Toronto to involve new counsel by making an unwarranted complaint as to the conduct of previous counsel". The authors appealed against that judgment before a panel of three members of the Divisional Court of the Ontario Superior Court of Justice, which found that the authors had principally renewed the arguments previously made, that the authors' claim concerning arbitrariness and a lack of natural justice was without foundation, and that the allegations regarding violations of human rights or of constitutional rights were "completely devoid of merit", ordering the authors to pay additional costs of \$1,000. Later, the authors sought leave to appeal, which was dismissed.

9.4 As to the additional allegations made by the authors regarding violation of article 2 (3) of the Covenant, the State party submits that on 7 August 2015, the Ontario Superior Court of Justice addressed the authors' allegation of Toronto City Council's alleged torture and inhuman or other degrading treatment. Moreover, the State party submits that the authors provide no evidence of being deprived of an effective legal remedy. Indeed, the authors' numerous legal proceedings provide evidence to the contrary.

9.5 Concerning the authors' allegations of potential violations of article 6 (1), (2) and (5), the State party submits that article 6 (5) does not apply to the authors, as they are neither 18 years of age or younger, nor they are pregnant; moreover, the State party submits that paragraph 222 (5) (d) of the Criminal Code (on homicide) and section 142 of the Court of Justice Act (on enforcement in good faith of court orders), which ground the authors' arguments around "domestic impunity legislation", do not apply to the authors. The State party recalls that both the Ontario Superior Court of Justice and its Divisional Court suggested to the authors that if the presence of an inspector would disturb them, they should briefly vacate the property at the time of inspection. Moreover, the State party submits that Toronto City Council's safety concerns are legitimate and that the authors' view of the inspection as equivalent to a mock execution from waterboarding or a capital punishment execution from lethal gas is unsupported.

9.6 Regarding the authors' allegations on violations of article 7 of the Covenant, the State party questions the medical report made by Dr. Roth, on the grounds that the report had already been addressed by the Ontario Municipal Board, which had challenged the impartiality, veracity and relevance of it. For example, it questions whether Dr. Roth was licensed to practise medicine in Ontario, and whether P.T., who is a party in the present communication, had acted as an interpreter of her parents' statements for Dr. Roth's report. Moreover, the authors later submitted another medical report, made by Dr. Ho, which gave findings that were inconsistent with those of the previous report. Finally, regarding the imposition of judicial fees by the Ontario Superior Court of Justice, the State party submits

that the authors have mischaracterized the judicial proceedings and misinformed the Committee about the actual legal costs.

9.7 Regarding the authors' allegations of violations of article 14 of the Covenant, the State party submits that the authors were not denied legal aid, but were self-represented in some proceedings, and were represented by over ten different lawyers throughout their numerous complaints; moreover, regarding the authors' presumed allegations of violations of article 14 (3), the State party submits that this section does not apply to the authors, as the present communication deals with civil matters; and overall, the State party submits that the authors' communication is an attempt to appeal the negative decisions handed down in their domestic proceedings by asking the Committee to be a tribunal of fourth instance.

9.8 The State party also challenges the authors' allegation concerning potential violations of article 1 of the Second Optional Protocol to the Covenant, because this provision is not applicable to the authors, because the death penalty has been abolished in Canada since 1976, and, moreover, because there is no reasonable basis for the authors' claim.

From the authors

10. On 19 May 2017, the authors submitted further comments, reiterating their previous arguments.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

11.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

11.3 The Committee notes the State party's arguments that the communication is inadmissible for non-exhaustion of domestic remedies. According to the State party, the non-exhaustion is evidenced by the fact that the authors were pursuing domestic remedies while the communication was pending before the Committee, remedies that ultimately led to their obtaining a building permit on 16 December 2013. After that date, the authors continued to challenge the legality of the State party's decision to make an inspection of the house and enforce compliance with the approved building permit. The Committee also notes the State party's uncontested argument that the authors have never brought their claims based on articles 6, 7, 17 and 26 of the Covenant before national courts through the appropriate legal remedies. Although many of these allegations have been raised as ancillary claims to the authors' main cause of action, that is, approval of the building permit for the addition, the Committee notes the availability of several constitutional, fundamental or human rights remedies that could have been triggered for these purposes.

11.4 In light of all the above, the Committee considers that, in failing to raise their claims based on articles 6, 7, 17 and 26 of the Covenant at the national level, the authors failed to exhaust domestic remedies, and declares these claims inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

11.5 With regard to the authors' claims under article 14 of the Covenant concerning the assessment of evidence by the Ontario Municipal Board and the Board's alleged lack of independence, the Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of a case, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.⁹ In the present case, the

⁹ See, among other communications, *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.3; *B.L. v. Australia* (CCPR/C/112/D/2053/2011) para. 7.3; and *Z v. Australia* (CCPR/C/111/D/2049/2011), para 9.3.

Committee notes the State party's uncontested arguments that the authors' expert witness was not able to attend the hearing; and that the authors chose to leave the Board's hearing, waiving their right to cross-examine the city council expert. The Committee further notes that the authors have failed to justify their allegation that the Board was biased against them. In light of all the above, the Committee concludes that the authors have failed to sufficiently substantiate their claim based on article 14 (1) of the Covenant and declares it inadmissible pursuant to article 2 of the Optional Protocol.

11.6 Having found the authors' claims based on articles 6, 7, 14, 17 and 26 inadmissible, the Committee is precluded under article 1 of the Optional Protocol from separately examining the authors' claims based on article 2 (3) of the Covenant, and declares those claims inadmissible pursuant to articles 1 and 3 of the Optional Protocol.¹⁰

12. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 3 and 5 (2) (b) of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the authors.

¹⁰ See, among other communications, *Ch.H.O. v. Republic of Korea* (CCPR/C/118/D/2195/2012), para. 9.4; and *X v. Czech Republic* (CCPR/C/113/D/1961/2010), para. 6.6.