HUMAN RIGHTS COMMITTEE

Ballantyne, Davidson and McIntyre v. Canada

Communications Nos. 359/1989 and 385/1989 1/

11 April 1991

CCPR/C/41/D/359/1989 and 385/1989*

ADMISSIBILITY

Submitted by: John Ballantyne, Elizabeth Davidson and Gordon McIntyre

Alleged Victims: The authors

State party concerned: Canada

Date of communications: 10 April 1989 and 21 November 1989 (date of initial letters)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decisions, transmitted to the State party on 26 May 1989 and 29 January 1990 respectively (not issued in document form);
- CCPR/C/40?D/359/1989 and 385/1989 (decision to join)

Date of present decision: 11 April 1991

Decision on admissibility

1. The authors of the communications (initial submissions dated 10 April 1989 and 21 November 1989 and subsequent correspondence) are John Ballantyne, Elizabeth Davidson and Gordon McIntyre, Canadian citizens residing in the Province of Quebec. The authors, one a painter, the second a designer and the third an undertaker by profession, have their businesses in Sutton and Huntington, Quebec. Their mother tongue is English, as is that of many of their clients. They allege to be victims of violations of articles 2, 19, 26 and 27 of the International Covenant on Civil and Political Rights by the Federal Government of Canada and by the Province of Quebec, because they are forbidden to use English for purposes of advertising, e.g., on commercial signs outside the business premises, or in the name of the firm.

The facts as submitted by the authors

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell

clothes and paintings to a predominantly English-speaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the Commissioner-Enquirer of the "Commission de protection de la langue française" that following a "check-up" it had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

2.3 Mr. McIntyre's business was established over 100 years ago and in the 25 years under his management has always operated without language constraints. Now he is allegedly disadvantaged vis-à-vis French speaking competitors who are allowed to use their mother tongue without restriction. Of the seven funeral homes in the area, his is the only one operated by an English-speaking Canadian serving the English-speaking community. Out of a total population of 15,600 in the town (area) in question, some 5,600 inhabitants speak English. Bill No. 178, however, prevents him from indicating in his commercial sign in English, the service he provides. The author alleges a loss of business and a reduced impact on passers-by, who no longer identify his services by an external sign.

2.4 Mr. McIntyre also claims that since he has "taken on the Government" a certain "fear factor" discourages potential clients. It leads to hate calls, threats and ridicule in the press by suggestions that he is a "racist".

The complaint

3.1 The authors challenge sections 1, 6 and 10 of Bill No. 178 enacted by the Provincial Government of Quebec on 22 December 1988, with the purpose of modifying Bill No. 101, known as the Charter of the French Language (Charte de la langue française). The ratio legis of Bill No. 178, as stated explicitly by the Quebec legislature, was to override two judgements rendered by the Supreme Court of Canada on 15 December 1988, declaring several sections of the Charter unconstitutional. The official explanatory note preceding the text of the Charter states that only French may be used in public bill-posting and in commercial advertising outdoors. It stipulates that this rule shall also apply inside means of public transport and certain establishments, including shopping centres. The authors claim to be personally affected by the application of Bill No. 178.

3.2 The authors furthermore claim that the "notwithstanding" clause contained in section 10 of Bill No. 178 overrides the safeguards contained in the Canadian Charter of Human Rights and Freedoms (Canadian Charter) and the Quebec Charter of Human Rights and Freedoms (Quebec Charter). They point out that section 33 of the Canadian Charter, and its counterpart section 52 of the Quebec Charter, allow for the suspension of protection against human rights violations.

3.3 The authors claim that these provisions, whenever applied, violate Canada's obligations under the Covenant, in particular article 2. Exempting legislation from compliance with the provisions of the Canadian or Quebec Charters of Human Rights and Freedoms effectively denies a remedy to

citizens whose rights have been or are being violated by the legislation thus exempted.

Legislative provisions

4.1 The relevant original provisions of the Charter of the French language (Bill No. 101, S.Q. 1977, C-5) have been modified several times. In essence, however, they have remained substantially the same. In 1977, section 58 read as follows:
"Except as may be provided in this Act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

4.2 The original wording of section 58 was replaced in 1983 by section 1 of the Act to amend the Charter of the French Language (S.Q. 1983, C-56) which read:
"58. Public signs and posters and commercial advertising shall be solely in the official language.
"Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and another language or solely in another language..."

4.3 The initial language legislation was struck down by the Supreme Court in La Chaussure Brown's Inc. et al. v. the Attorney General of Quebec (1989) 90 N.R. 84. Following this, section 58 of the Charter was amended by section 1 of Bill No. 178. While certain modifications were made relating to signs and posters inside business premises, the compulsory use of French in signs and posters outside remained.

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

"58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French,
"1. Inside commercial centres and their access ways, except inside the establishments located there;
"2. Inside any public means of transport and its access ways;
"3. Inside establishments of business firms contemplated in section 136;
"4. Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public."

"The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph".

"The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1."

4.5 Section 6 of Bill No. 178 modified section 68 of the Charter, which now reads:

"68. Except as otherwise provided in this section, only the French version of a firm name may be used in Quebec. A firm name may be accompanied with a version in another language for use outside. That version may be in another language for use outside of Quebec. That version may be used together with the French version of the firm name in the inscriptions referred to in section 51, if the products in question are offered both in and outside of Quebec".

"In printed documents, and in documents contemplated in section 57 if they are both in French and in another language, a version of the French firm name in another language may be used in conjunction with the French firm name".

"When texts or documents are drawn up in a language other than French, the firm name may appear in the other language without its French version

"On public signs and posters and in commercial advertising,
"1. A firm name may be accompanied with a version in another language, if they are both in French and in another language;
"2. A firm name may appear solely in its version in another language, if they are solely in a language other than French."

4.6 Section 10 of Bill No. 178 contains a so-called "notwithstanding" clause, which provides that:

"The provisions of section 58 and of the first paragraph of section 68, brought into effect under sections 1 and 6 respectively of the present Bill, shall operate irrespective of the provisions of section 2, paragraph (b), and section 15 of the Constitutional Act of 1982 ... and shall apply notwithstanding articles 3 and 10 of the Charter of Human Rights and Freedoms."

4.7 Another "notwithstanding" provision is incorporated into section 33 of the Canadian Charter of Human Rights and Freedoms, which reads:

"1. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter

"2. An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

"3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

"4. Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

"5. Subsection (3) applies in respect of a re-enactment made under subsection (4)."

<u>The State party's observations</u>

5.1 The communications were transmitted to the State party under rule 91 of the rules of procedure on 26 May 1989 and 29 January 1990. The deadlines for observations was set for 26 July 1989 and 29 March 1990, respectively. On several occasions, the State party requested an extension of time to make its submission, explaining that it needed more time as the issues involved were factually and legally complex and concerned both federal and provincial areas of legislative competence.

5.2 In its submission of 28 December 1990, the State party objects to the admissibility of the communications under article 5, paragraph 2(b), of the Optional Protocol to the International Covenant on Civil and Political Rights. It argues that domestic remedies have not been exhausted, since the authors have made no attempt to challenge Bill No. 178 and to "seek redress from the Canadian courts or other bodies that may be competent to resolve the issue pursuant to Canadian law".

5.3 The State party also states that in at least two legal proceedings before the courts of Quebec, litigants are challenging this legislation. K.N., charged on 30 January 1990 on two counts of contravening the Charter of the French Language, was scheduled to appear before the Court of Quebec on 19 December 1990, when the trial date was to have been set. In another case pending before the Court of Quebec, H.S. was charged in June 1990 on two counts of contravening the Charter by displaying a welcome sign outside his bakery in 35 languages. The respondent was scheduled to appear in court on 28 February 1991.

5.4 The State party further submits that Quebec law provides the possibility for the authors to test the constitutional validity or application of Bill No. 178 through the use of an application for a declaratory judgement and refers to national jurisprudence in which certain provisions of the Charter of the French Language were declared to be of no force or effect.

5.5 The State party also points to the availability of the Federal Court Challenges Programme, which alleviates the financial hardship associated with the conduct of such litigation and states that the legal issues raised would be within the scope of the programme and the authors could, therefore, seek funding from the programme for the purpose of contesting the restrictions imposed by the provincial law.

Exhaustion of Domestic Remedies

6.1 With respect to the requirement of exhaustion of domestic remedies, the authors maintain that following the enactment of Bill No. 178 there are no effective remedies which they could pursue. They refer to the relevant judgements of the Superior Court to the District of Montreal, the Appeal Court and the Supreme Court of Canada.

6.2 In particular, the authors of the first communication claim that because Bill 178 applies in spite of Canadian human rights laws and because the notwithstanding clauses of the Canadian and Quebec Charters, when invoked, suspend human rights as guaranteed, inter alia, by international human rights norms, they are denied an effective remedy within the meaning of article 2, paragraph 3, of the Covenant.

6.3 With regard to steps taken to assert their rights, the authors refer to numerous letters addressed

to various provincial and federal authorities by individuals and lobby groups with no effect. As to judicial remedies, the authors explain that the Supreme Court's decision in La Chaussure Brown's et al., which supports their plea, has no effect in view of the subsequent Quebec legislation which makes any further challenge of section of Bill No. 178 futile.

6.4 As to the possibility of initiating proceedings for a declaratory judgement, the authors contend that the very existence of the notwithstanding clause renders Bill No. 178 immune to challenge.

6.5 The author of the second communication states that he has written to the Prime Minister of Canada, the leaders of the Opposition, members of the Senate of Canada and the premiers of all provinces, only to receive a number of replies that express various forms of support and indicate that Bill No. 178 indeed violates the right to freedom of expression and runs contrary to both the Canadian and Quebec Charters of Human Rights. As a member of the Chateauguay Valley English Speaking People's Association, he helped to organize a demonstration in Ottawa and to circulate a petition, which gathered some 10,000 signatures and was subsequently sent to the Secretary-General of the United Nations.

6.6 In a case submitted by other complainants, the Superior Court held, on 28 December 1984, that section 58 of the Charter of the French Language, in so far as it prescribed that public signs and posters and commercial advertising shall be solely in French, was inoperative from 1 February 1984.

6.7 The Court of Appeal upheld the judgement and allowed an appeal declaring Section 68 of the Charter, in so far as it prescribed that only the French version of a firm name is to be used, to be inoperative from 1 January 1986 by reason of the Quebec Charter of Human Rights and Freedoms and from 17 April 1982 by reason of the Canadian Charter of Rights and Freedoms.

6.8 The authors argue that both the Quebec and federal courts have thoroughly considered the implications of the challenged provisions and that they have found them in violation of relevant constitutional provisions. The authors stress that while recognizing that there are reasonable limits to the exercise of human rights, the courts have held that the prohibition of the use of any other language than French in commercial signs was neither an appropriate nor a justifiable remedy against threats to the French culture. In particular, they found that the obligation to use only French on commercial signs and in advertising violated the right of freedom of expression and constituted discrimination based on language.

6.9 The authors argue that the Supreme Court's judgement in the La Chaussure Brown's et al. case directly applies to their situation. Bill No. 178, however, overrides the Court's judgement and operates notwithstanding section 2(b) (freedom of expression) and section 15 (equality) of the Canadian Charter. The authors contend that it would be futile to go to the courts in view of the certain application of the "withstanding" clauses of the Canadian or Quebec Charters.

6.10 In addition, the authors complain that the Federal Government of Canada has not yet used its constitutional authority under section 90 of the Constitution Act, 1867, to disallow or set aside a Bill of a provincial government allowing fundamental human rights to be disregarded.

Issues and proceedings before the Committee

7.1 On 18 October 1990, the Human Rights Committee, acting through its Working Group, decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with both communications.

7.2 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.3 While taking note of the State party's argument that the authors have not exhausted domestic remedies, the Committee is unable to accept the State party's suggestion that there are effective domestic remedies that remain available in the specific circumstances of these communications.

7.4 The Committee has noted that while some of the original statutory provisions protecting visage linguistique of Quebec have been modified several times, also after they were found to be unconstitutional and declared inoperative successively by the Superior, Appeal and Supreme Courts, the only effect this has had was that the relevant provisions were replaced by ones that are the same in substance to the ones they replaced but reinforced by the "notwithstanding" clause of section 10 of Bill No. 178. The net result has been that there has been a continued ban on the use of any other language than French since 1978, in circumstances that are at issue in the present communications, and that it is a criminal offence to disregard the ban.

7.5 The State party contends that Bill No. 178, which modified certain sections of the Charter of the French Language, can be and is being challenged by others before the courts in Quebec. However, the situation is that certain persons have been charged with criminal offences for violating provisions of the Charter of the French Language, including provisions of section 205, which are not affected by the "notwithstanding" clause in section 10 of Bill No. 178. These persons raise, in defence, issues as to whether Bill No. 178 creates a civil or penal liability and as to whether a particular sign infringed the law. These concrete issues are not before the Human Rights Committee and cannot bear upon whether the authors of the communications now under examination by the Committee still have local remedies which they must pursue. The Committee further notes that, even were it to be held by the Quebec courts that section 205 of the Charter of the French Language violates the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms, the "notwithstanding" clause still remains applicable to section 58, which is the clause at issue in the communications that the Committee has before it. The Committee is unable to find from the submission of the State party, that an effective remedy is available in respect to this claim.

7.6 The Committee, moreover, is satisfied that the authors have made a reasonable effort to substantiate sufficiently their allegations, for purposes of admissibility, and finds that the communications should be examined on the merits.

7.7 Finally, the Committee is well aware that the State party annexed to its submission under rule 91 of the Committee's rules of procedure the observations made by the Provincial Government of Quebec, which mainly concern the merits of the cases before it. At this stage the Committee must, however, limit itself to the procedural requirement of deciding on the admissibility of the communication. Should the State party wish to make a further submission on the merits of the cases, it should do so within six months of the transmittal to it of the present decision. The authors of the communications will be given an opportunity to comment thereon. If no further explanations or

statements are received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee will proceed to adopt its views in the light of the written information already submitted.

8. The Human Rights Committee therefore decides:

(a) That the communications are admissible;

(b) That any further explanations which the State party may wish to submit to clarify the matter and the measures taken by it, should, in accordance with article 4, paragraph 2, of the Optional Protocol, reach the Human Rights Committee within six months of the date of transmittal to it of this decision. Should the State party not intend to make a further submission in the case, it is requested to so inform the Committee as soon as possible to permit an early disposition of the matter;

(c) That any further explanations or statements received from the State party shall be communicated by the Secretary-General, under rule 93, paragraph 3, of the Committee's rules of procedure, to the authors, with the request that any comments that they may wish to submit thereon should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

(d) That this decision be communicated to the State party and to the authors.

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*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ The text of an individual opinion by Ms. Christine Chanet is reproduced in the appendix.

Appendix

Individual opinion by Christine Chanet on the Committee's decision concerning the admissibility of communications 359/1989 and 385/1989

At its 41st session the Human Rights Committee found Communications Nos. 359/1989 and 385/1989 admissible.

From my point of view this decision is arguable.

When the Committee considers the admissibility of a communication, it must consider the communication in the light of the requirements of the Optional Protocol, notably articles 1 to 3 and article 5, paragraph 2.

In order to make this point, the two communications must be taken separately.

1. As regards Communication No. 359/1989, the allegations made by the authors relate only to the law itself. The authors do not complain of any action against them by the administration.

The question is thus whether the authors can be considered to be victims within the meaning of the Optional Protocol of a violation of any of the rights set forth in the Covenant.

The notion of victim has gradually been expanded thanks to decisions by the Committee. Nevertheless, the Committee has hitherto refrained from allowing actio popularis. On the contrary, taking the same position as the Commission and the European Court of Human Rights,* the Committee stated in Communication No. 35/1978, Aumeeruddy-Cziffra et al v. Mauritius, that "no individual can in the abstract by way of an actio popularis, challenge a law or practice claimed to be contrary to the Covenant [...] if the law or practice has not already been concretely applied to the detriment of that individual." In the same case, the Committee agreed to allow a challenge to the national law provided that it was "applicable in such a way that the alleged victim's risk of being affected [was] more than a theoretical possibility."

In the current case it should have been up to the authors, in the absence of any action against them by the administration, to show that the application of the law affected them directly, personally and constantly and was thus likely to constitute a violation of one of their civil and political rights guaranteed by the Covenant.

The difficulties which Bill No. 178 might pose for the authors in their professional activities in attracting a particular kind of clientele are not, in my judgement, sufficiently substantiated to justify the finding that the individuals concerned might, simply through the application of the law, suffer a violation by Canada of any of the rights guaranteed by the Covenant.

2. As regards Communication No. 385/1989, the situation is different in as much as the author was requested by the administration to comply with Bill No. 178. The beginning of enforcement here permits the conclusion that the risk was not just theoretical. The basic question regarding the admissibility of this communication concerns article 5, paragraph 2, of the Optional Protocol and the rule on the exhaustion of domestic remedies. In order to answer this question the Committee should have considered not only the opportunities for domestic remedy, as it did, but also the likelihood that the author of the communications could have obtained from the administration a waiver as authorized by section 58.2 of Bill No. 178, which reads: "Public signs and posters and commercial advertising may be both in French and in another language or solely in another language in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française."

What regulations has the Office de la langue française issued in this respect? How are they applied? Who can benefit from such a waiver?

When the author of a communication asserts that the remedies available in the State concerned are not effective, it is up to the author to provide evidence of the fact.

Hence it was not, in my view, up to the State to demonstrate the effectiveness of the remedies available in this particular case, but up to the author to indicate why he did not try to obtain a waiver

from the administration under section 58, paragraph 2, of Law No. 178.

Christine Chanet

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*/ See Commission XC Ireland petition No. 290/57
European Court Klass 6.9.78
European Court Marckx 15.6.79
European Court Bruggeman et Streuten.