

HUMAN RIGHTS COMMITTEE

Tadman et al v. Canada

Communication N° 816/1998

29 October 1999

CCPR/C/67/D/816/1998

ADMISSIBILITY

Submitted by: Grant Tadman et al (represented by Mr. Brian Forbes from Forbes Singer Smith Shouldice, a lawfirm in Ottawa, Ontario).

Alleged victim: The authors

State party: Canada

Date of communication: 11 April 1997

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

Meeting on 29 October 1999

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are Grant Tadman, Sandra Johnstone, Nick Krstanovic and Henry Beissel, all Canadian citizens residing in the province of Ontario. They claim to be victims of a violation of articles 26, and articles 2(1)(2) and (3) and 50 of the International Covenant on Civil and Political Rights. They are represented by Mr. Brian Forbes from Forbes Singer Smith Shouldice, a law firm in Ottawa, Ontario.

1.2 In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. The authors, however, belong to different religious denominations, i.e. United Church of Canada, Lutheran Church, Serbian Orthodox Church and Humanist. They all have children in the school going age and their children are being educated in the public school system.

The facts

2.1 The Ontario public school system offers a free education to all Ontario residents without discrimination on the basis of religion or on any other ground. Public schools may not engage in any religious indoctrination. Individuals enjoy the freedom to establish private schools and to send their children to these schools instead of the public schools. The only statutory requirement for opening a private school in Ontario is the submission of a "notice of intention to operate a private school". Ontario private schools are neither licensed nor do they require any prior Government approval. As of 30 September 1989, there were 64,699 students attending 494 private schools in Ontario. Enrolment in private schools represents 3.3 percent of the total day school enrolment in Ontario.

2.2 The province of Ontario's system of separate school funding originates with provisions in Canada's 1867 constitution. In 1867 Catholics represented 17% of the population of Ontario, while Protestants represented 82%. All other religions combined represented .2% of the population. At the time of Confederation it was a matter of concern that the new province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority. The solution was to guarantee their rights to denominational education, and to define those rights by referring to the state of the law at the time of Confederation.

2.3 As a consequence, the 1867 Canadian constitution contains explicit guarantees of denominational school rights in section 93. Section 93 of the Constitution Act, 1867 grants each province in Canada exclusive jurisdiction to enact laws regarding education, limited only by the denominational school rights granted in 1867. In Ontario, the section 93 power is exercised through the Education Act. Under the Education Act every separate school is entitled to full public funding. Separate schools are defined as Roman Catholic schools. The Education Act states: "1. (1) "separate school board" means a board that operates a school board for Roman Catholics;...122. (1) Every separate school shall share in the legislative grants in like manner as a public school". As a result, Roman Catholic schools are the only religious schools entitled to the same public funding as the public secular schools.

2.4 The Roman Catholic separate school system is not a private school system. Like the public school system it is funded through a publicly accountable, democratically elected board of education. Separate School Boards are elected by Roman Catholic ratepayers, and these school boards have the right to manage the denominational aspects of the separate schools. Unlike private schools, Roman Catholic separate schools are subject to all Ministry guidelines and regulations. According to counsel, the additional costs to maintain the separate system next to the public school system have been calculated as amounting to \$ 200 million a year for secondary schools alone. Neither s.93 of the Constitution Act 1867 nor the Education Act provide for public funding to Roman Catholic private/independent schools. Ten private/independent Roman Catholic schools operate in Ontario and these schools receive no direct public financial support.

2.5 Private religious schools in Ontario receive financial aid in the form of (1) exemption from property taxes on non-profit private schools; (2) income tax deductions for tuition

attributable to religious instruction; and (3) income tax deductions for charitable purposes. A 1985 report concluded that the level of public aid to Ontario private schools amounted to about one-sixth of the average total in cost per pupil enrolled in a private school. There is no province in Canada in which private schools receive funding on an equal basis to public schools. Direct funding of private schools ranges from 0% (Newfoundland, New Brunswick, Ontario) to 75% (Alberta).

2.6 The issue of public funding for non-Catholic religious schools in Ontario has been the subject of domestic litigation since 1978. The first case, brought 8 February 1978, sought to make religious instruction mandatory in specific schools, thereby integrating existing Hebrew schools into public schools. On 3 April 1978, affirmed 9 April 1979, Ontario courts found that mandatory religious instruction in public schools was not permitted.

2.7 In 1982 Canada's constitution was amended to include a Charter of Rights and Freedoms which contained an equality rights provision. In 1985 the Ontario government decided to amend the Education Act to extend public funding of Roman Catholic schools to include grades 11 to 13. Roman Catholic schools had been fully funded from kindergarten to grade 10 since the mid 1800's. The issue of the constitutionality of this law (Bill 30) in view of the Canadian Charter of Rights and Freedoms, was referred by the Ontario government to the Ontario Court of Appeal in 1985.

2.8 On 25 June 1987 in the Bill 30 case the Supreme Court of Canada upheld the constitutionality of the legislation which extended full funding to Roman Catholic schools. The majority opinion reasoned that section 93 of the Constitution Act 1867 and all the rights and privileges it afforded were immune from Charter scrutiny. Madam Justice Wilson, writing the majority opinion, stated: "It was never intended ... that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

2.9 At the same time the Supreme Court of Canada, in the majority opinion of Wilson, J. affirmed: "These educational rights, granted specifically to ... Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario ..." In a concurring opinion in the Supreme Court, Estey J. conceded: "It is axiomatic (and many counsel before this court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of ss. 2(a) and 15 of the Charter of Rights."

2.10 In a further case, Adler v. Ontario, individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim, and Jewish faiths challenged the constitutionality of Ontario's Education Act, claiming a violation of the Charter's provisions on freedom of religion and equality. They argued that the Education Act, by requiring attendance at school, discriminated against those whose conscience or beliefs prevented them from sending their children to either the publicly funded secular or publicly funded Roman Catholic schools, because of the high costs associated with their children's religious education. A declaration was also sought stating that the applicants were entitled

to funding equivalent to that of public and Roman Catholic schools. The Ontario Court of Appeal determined that the crux of Adler was an attempt to revisit the issue which the Supreme Court of Canada had already disposed of in the Bill 30 case. Chief Justice Dubin stated that the Bill 30 case was "really quite decisive of the discrimination issue in these appeals." They also rejected the argument based on freedom of religion.

2.11 On appeal, the Supreme Court of Canada by judgement of 21 November 1996, confirmed that its decision in the Bill 30 case was determinative in the Adler litigation, and found that the funding of Roman Catholic separate schools could not give rise to an infringement of the Charter because the province of Ontario was constitutionally obligated to provide such funding.

The complaint

3.1 The authors argue that the fact that no religious denomination other than Roman Catholic has the right to government funding in the province of Ontario for the purposes of education constitutes a form of discrimination with reference to all other religious denominations, which are precluded from such specific government funding. In this context, counsel argues that the Human Rights Committee is not bound by the Canadian constitutional intricacies which led to the Supreme Court's conclusions.

3.2 Counsel further claims that the consequence of the Supreme Court of Canada judgments is that specific religious denominations have been deprived of a remedy in addressing the discriminatory and unequal provisions of the current Ontario Education Act.

3.3 According to counsel, two alternative solutions can be found to the existing discrimination. One, the Province of Ontario could extend government funding, on an equal basis, to all those religious/denominational groups with a substantial presence in Ontario. However, counsel considers that such a scheme would not be financially viable and would be socially divisive. He therefore proposes a second solution, that the province create a singular public system, open to all and without distinction, thereby eliminating the present inequality. In this connection, he argues that a singular public system would be highly beneficial to Ontario's pluralistic and diverse society.

State party's observations

4.1 By submission of 22 February 1999, the State party addresses both the admissibility and the merits of the authors' claim.

4.2 First, the State party argues that the communication is inadmissible because the authors are no victims of a violation of the Covenant. According to the State party this is illustrated by the remedy they are seeking: removal of public funding for Roman Catholic separate schools. In this context, the State party also notes that the authors have failed to provide specific information about their children, and how the current system violates their rights. Moreover, the authors' children already have access to the publicly funded school system, which is what they seek as a remedy. There is no evidence that they cannot be

accommodated within the existing system, and it has not been shown how they are victimized or personally affected by Ontario's constitutional obligation to provide funding to Roman Catholic separate schools. If the authors claim that the separate school system is unnecessary costly and that by eliminating it more funds would become available for students in the public system, the State party argues that this is by no means certain and that in any event, an absence of possible additional funds being invested generally in the public system is not in itself sufficient to make the authors, or their children, victims of a violation as defined under the Optional Protocol.

4.3 As to the authors' allegation under article 2 of the Covenant, the State party recalls that article 2 does not establish an independent right but is a general undertaking by States and cannot be invoked by individuals under the Optional Protocol without reference to other specific articles of the Covenant.

4.4 Alternatively, the State party rejects a violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to a distinction or discrimination within the meaning of article 2 of the Covenant. For substantive arguments concerning the issue of discrimination, it refers to its arguments relating to the alleged violation of article 26 (see below).

4.5 With regard to the alleged violation of article 26, the State party contends the communication is inadmissible *ratione materiae*, or, in the alternative, does not constitute a violation. The State party recalls that a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. The State party notes that the authors themselves argue that the extension of public funding to more denominational schools would not be a proper solution, because of budget constraints and because such a scheme would be socially divisive. In the State party's opinion, the authors' acknowledgement of a fiscal and social justification serves to underscore some of the reasonable grounds for concluding that the absence of full and direct funding to all religious groups does not violate article 26.

4.6 According to the State party, the establishment of secular public institutions is consistent with the values of article 26 of the Covenant. Secular institutions do not discriminate against religion, they are a legitimate form of Government neutrality. According to the State party, a secular system is a tool which assists in preventing discrimination among citizens on the basis of their religious faiths. Public schools build social cohesion, tolerance and understanding, and the extension of public funding to all denominational schools would undermine this ability. The State party makes no distinctions among different religious groups in its public education and does not limit any religious group's ability to establish private schools.

4.7 The State party submits that there are reasonable and objective grounds for not eliminating funding to Roman Catholic separate schools in Ontario. The elimination would be perceived as undoing the bargain made at Confederation to protect the interests of a vulnerable minority in the province and would be met with outrage and resistance by the Roman Catholic community. It would also result in a certain degree of economic turmoil,

including claims for compensation of facilities or lands provided for Roman Catholic schools. Further, the protection of minority rights, including minority religion and education rights, is a principle underlying the Canadian constitutional order and militates against elimination of funding for the Roman Catholic separate schools. Elimination of funding for separate schools in Ontario would further lead to pressure on other Canadian provinces to eliminate their protections for minorities within their border.

Counsel's comments

5.1 In his comments on the State party's submission, counsel submits that the State party has admitted the discrimination, which it justifies only on the basis of its constitution. Counsel submits that the Human Rights Committee is not bound by the constitution of Canada, and that the public funding of only Roman Catholic schools, to the exclusion of all other denominational schools, constitutes a violation of article 26. In this context, counsel states that the multicultural fabric of current Canadian society strongly suggests that no longer any rationale exists for the form of flagrant discrimination in the educational laws of the Province of Ontario vis à vis one religious denomination over all other denominations.

5.2 Counsel refers to recent constitutional changes in Quebec and Newfoundland concerning educational laws. Especially, with regard to Quebec, counsel argues that its constitutional revision opens the way for constitutional change in Ontario as well. Counsel notes that the changes in Quebec did not create social tension and discord. With regard to the use by Quebec of the notwithstanding clause in the Charter in order to continue limited denominational schooling, counsel submits that this implicitly recognizes that any form of denominational schooling is effectively discriminatory. Counsel rejects the State party's claim of possible social disruption as a consequence of removing public funding for Roman Catholic separate schools, as unsubstantiated, based on Canada's history as a civilized nation. Moreover, counsel argues that economic and social factors are irrelevant for the determination of discrimination.

5.3 With regard to the State party's argument that the authors are no victims within the meaning of the Optional Protocol, counsel recalls that the authors represent individuals who are members of specific religious denominations who receive no government funding from the Province of Ontario to educate their children in accordance with their religious beliefs. Counsel rejects the State party's suggestion that they are no victims because they seek as remedy a singular public system open to all without discrimination. He recalls that in the communication two solutions were proposed, one being the extension of funding to all denominations, the other being the elimination of the present inequality by creating a singular public system. Even though the authors prefer the second solution, counsel points out that it is within the jurisdiction of the Human Rights Committee to determine the remedy for the discrimination. The authors of the communication are victims because they are being denied parallel government funding to educate their children in accordance with their religious beliefs.

5.4 Counsel states that the figures of the financial implications of separate schooling, to which he referred in his communication, originate from public reports of the Ministry of

Education, and that there can be no doubt about it that the separate system creates an extra financial burden.

5.5 Counsel takes issue with the State party referring to the Roman Catholic community as a minority. He points out that the Catholic religious group is the largest in the Province of Ontario, being approximately two and a half times larger than the next faith, the United Church of Canada. In this context, counsel recalls that there is no Protestant Church or organization to parallel the Roman Catholic structure, since the denomination generally called Protestant consists of many small denominations which each have their own structure. Counsel submits therefore that the publicly funded separate schools for Roman Catholic citizens in Ontario represent in real terms a privilege to the largest religious organization in Ontario.

5.6 As regards the freedom to establish a private religious school, counsel argues that this is a hollow right unless one is comparatively wealthy and is prepared to pay taxes under the educational levy while at the same time paying for one's own children from one's own pocket. In practical terms, it is also often impossible to attend a private school, since other faith groups are far fewer in number than Roman Catholics and have their private schools only in large cities where there are sufficient students.

5.7 With regard to the claim under article 2 of the Covenant, counsel submits that the authors have claimed a violation of this article together with article 26 of the Covenant. He reiterates his position that the State party has failed to satisfy the legal obligations under article 2 to remove the discrimination. In this context, he underlines that pursuant to article 2(2) the Covenant contemplates that 'constitutional processes' may be undertaken in order to give effect to the rights recognized in the Covenant and in remedying the violation in question.

5.8 Counsel contests the State party's argument that the differentiation in treatment between Roman Catholic schools and other denominational schools is based on reasonable and objective grounds. He reiterates that the current demographic and ethno-cultural makeup of Ontario does not support the discriminatory treatment of all other religious denominations, save and except the Roman Catholic denomination. What may have been a reasonable and objective ground in 1867 is no longer applicable in current society.

Issues and proceedings before the Committee

6.1 Before considering any claim 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.

6.2 The State party has challenged the admissibility of the communication on the basis that the authors cannot claim to be victims of a violation of the Covenant. In this context, the Committee notes that the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors' personal situation in respect of funding for religious education would not be

improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely. In the circumstances, the Committee considers that they cannot claim to be victims of the alleged discrimination, within the meaning of article 1 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

- a) that the communication is inadmissible under article 1 of the Optional Protocol;
- b) that this decision shall be communicated to the State party, the authors and their counsel.

*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanut, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Mr. M. Yalden did not participate in the examination of the case.

**The text of one individual opinion signed by four Committee members is appended to the present document.

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

Appendix

Individual opinion of Committee members P. Bhagwati, E. Evatt,

L. Henkin and C. Medina Quiroga

I am unable to agree with the view of the Committee that this case is inadmissible. The situation is that the Province of Ontario provides a benefit to the Catholic community by incorporating their religious schools into the public school system and funding them in full. This benefit is discriminatory in nature as it prefers one group in the community on the ground of religion. Those whose religious schools are not funded in this way are clearly victims of this discrimination (as in the Waldman case).

But that does not exhaust the scope of those who may claim to be victims. Parents who desire religious education for their children and are not provided with it within the school

system and who have to meet the cost of such education themselves may also be considered as victims. The applicants in this case include such persons, and the claims of at least those persons should, in my view, be considered admissible.

P. Bhagwati (signed) E. Evatt (signed)

L. Henkin (signed) C. Medina Quiroga (signed)

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