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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1220/2003

Submitted by:	Walter Hoffman and Gwen Simpson (represented by counsel, Brent D. Tyler)
Alleged victim:	The authors
State party:	Canada
Date of communication:	5 October 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 November 2003 (not issued in document form)
Date of decision:	25 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Whether statutory requirement for "marked predominance" of French for public signage in Québec is consistent with the Covenant

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Discrimination on the basis of language – freedom of expression – minority rights - fair trial – effective remedy

Articles of the Covenant: article 2, paragraphs 1, 2 and 3; article 14; article 19, paragraph 2; article 26 and article 27.

Articles of the Optional Protocol: article 5, paragraph 2(b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

concerning

Communication No. 1220/2003*

Submitted by:	Walter Hoffman and Gwen Simpson (represented by counsel, Brent D. Tyler)
Alleged victim:	The authors
State party:	Canada
Date of communication:	5 October 2003 (initial submission)

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

Meeting on 25 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The authors of the communication, initially dated 4 October 2003, are Walter Hoffman and Gwen Simpson, born 24 March 1935 and 2 February 1945, respectively. They claim to be victims of violations by Canada of article 2, paragraphs 1, 2 and 3; article 14; article 19, paragraph 2; article 26 and article 27. They are represented by counsel.

1.2 On 26 April 2004, the Committee's (then) Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual Background

2.1 The authors, English speakers, are the two shareholders and directors of a corporation registered as "Les Enterprises W.F.H. Ltée", doing business in Ville de Lac Brome, Quebéc, under the firm names 'The Lyon and the Walrus' and 'La Lionne et Le Morse'. On July 10 1997, the authors displayed a sign outside their business.

One side of the sign read:	And on the other side:
"LA LIONNE ET LE MORSE	**"LYON AND THE WALRUS**
Antiquités	Antiquities
Hot Tubs & Saunas	Hot Tubs & Saunas
Encadrement Gifts"	Cadeaux"

The sign was thus bilingual, except for the words "Hot Tubs" found on both sides. All the other words covered the same amount of space in each language and had equal size letters.

2.2 The authors' corporation was charged with non-compliance with sections 58[1] and 205[2] of the Charter of the French Language, which require the "marked predominance" of French on outdoor signs. Although admitting the facts constituting the offence, the authors claimed in their defence that these provisions were invalid, because they infringed their right to freedom of commercial expression and right to equality both under the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms.

2.3 On 20 October 1999, the Court of Québec acquitted the authors' corporation, accepting their defense that the relevant provisions of the Charter of the French Language were invalid. The Court considered that the provisions violated the right to freedom of expression protected both in the Canadian Charter of Rights and Freedoms (section 2(b)) and the Québec Charter of Rights and Freedoms (section 3), and that the Attorney-General of Québec had not demonstrated the restrictions to be reasonable.

2.4 On appeal, the Superior Court of the District of Bedford, on 13 April 2000, reversed the decision of the lower court. Through counsel, the authors' corporation, believing that the burden of justification lay with the Attorney-General, declined the Court's invitation to provide

[1] Section 58 provides: "Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only."

[2] Section 205 provides: "Every person who contravenes a provision of this Act or the regulations adopted by the Government thereunder commits an offence and is liable:

a) for each offence, to a fine of $250 to $700 in the case of a natural person, and to $500 to $1,400 in the case of an artificial person;

b) for any subsequent conviction, to a fine of $500 to $700 in the case of a natural person, and of $1,000 to $7,000 in the case of an artificial person.

comprehensive evidence of why the restrictions of section 58 were not justified. The Superior Court considered, on its view of relevant Supreme Court precedent of 1988,[3] that it was up to the challenging party to demonstrate that section 58's limitations on freedom of expression were not justified. Specifically, it would have to be shown that the factors shown by the Supreme Court in the 1988 cases to justify a "marked predominance" requirement for French no longer applied.[4] The authors' corporation not having done so, it was accordingly convicted and fined $500.

2.5 On 29 March 2001, the Court of Appeal rejected a motion of counsel for the authors' corporation to file new evidence as to the linguistic profile in Québec, considering that the evidence did not relate to the dispute as defined by the authors' corporation in the lower courts and on appeal. The Court recorded that the Superior Court had specifically invited the parties to submit new evidence, whose clear position was to proceed on the existing record. Furthermore, the Superior Court had considered the parties' positions unequivocal and considered its equitable obligation to ensure neither party was taken by surprise to be fulfilled.

2.6 On 24 October 2001, the Québec Court of Appeal dismissed the substantive appeals of the authors' corporation. The Court of Appeal considered that the formulation of section 58 in 1993 had reflected previous comments by the Supreme Court of Canada that requiring a "marked predominance" of French would be constitutionally acceptable in view of Québec's linguistic profile. The onus thus fell on the authors to show that there was no longer sufficient justification for what had at that point been considered acceptable restrictions. In the Court's view, the authors' arguments linguistic duality, multiculturalism, federalism, democracy, constitutionalism and the rule of law and the protection of minorities did not discharge that burden. The Court also distinguished the Committee's Views of violation in Ballantyne et al. v Canada, noting that in that case a requirement for exclusive use of French had been at issue.

2.7 The application of the authors' corporation for special leave to appeal to the Supreme Court of Canada was dismissed on 12 December 2002.

The complaint

3.1 The authors note, at the outset, that Québec's language laws have been considered by the Committee in Ballantyne et al. v Canada,[5] McIntyre v Canada[6] and Singer v Canada.[7] In Ballantyne et al., the Committee found that provisions of the Charter of the French Language

[3] Ford v Québec (Attorney-General) [1988] 2 SCR 712 and Devine v Québec (Attorney-General) [1988] 2 SCR 790

[4] The Supreme Court identified the following factors in the above cases by way of justification: (a) the declining birth rate of Québec francophones resulting in a decline in the Québec francophone proportion of the Canadian population as a whole, (b) the decline of the francophone population outside Québec as a result of assimilation, (c) the greater rate of assimilation of immigrants by the Anglophone community of Québec, and (d) the continuing dominance of English at the higher levels of the economic sector.

[5] 359/1989

[6] 385/1989

[7] 455/1991

which, at that time, prohibited advertising in English, violated article 19, paragraph 2, of the Covenant, but not articles 26 and 27. In Singer, the Committee found that amended provisions, which required external advertising to be in French, but which allowed inside advertising in other languages in some circumstances, constituted a violation of article 19, paragraph 2, in the case (concerning external signage). The present "marked predominance" provisions which the authors challenge came into effect after the Singer case was registered, but prior to the Committee's Views. The Committee there noted that it had not been asked to consider whether the present provisions complied with the Covenant, but concluded that they afforded the author an effective remedy in the particular circumstances of his case.

3.2 The authors contend that their right to freedom of expression under article 19, paragraph 2, is infringed by the prescription of any particular language in private commercial activity. They claim that restrictions on use of language are not warranted by the 'necessity' qualifier in article 19, paragraph 3, and that the Supreme Court of Canada was wrong to uphold any language restrictions as reasonable and warranted. They also claim that the requirement to use "markedly predominant" French in advertising violates their right to equality under article 2, paragraph 1; that it violates their right to freedom from discrimination on the basis of language under article 26; and that it violates their rights as members of a national minority (the English speaking minority in Québec) in accordance with article 27.

3.3 In relation to article 14, the authors claim that, on appeal, the court found the authors had the onus of proving that the special legislative measures to protect the French language were not warranted and justified under the Canadian Charter. The authors allege that they offered to adduce evidence to the appeal court, in order to discharge this burden of proof (they had not adduced any below, because the trial judge found that the State carried this onus, and had not discharged it). The authors contend that the appeal court wrongly believed they did not want to adduce any evidence.

3.4 Finally, the authors argue that the State party has failed to implement its Covenant obligations, in breach of article 2, paragraphs 2 and 3, by the insufficient coverage in domestic law of Covenant obligations and the failure of the courts in the present case appropriately to assess the complaint from a Covenant perspective.

State party's submissions on admissibility of the communication

4.1 By submissions of 6 April 2004, the State party contested the admissibility of the communication. Firstly, the State party argues that a corporation does not enjoy the rights protected by the Covenant. It contends that the corporation "Les Enterprises W.F.H. Ltée" was the entity prosecuted and convicted for breach of the Charter of the French Language. In Canadian law, a corporation is separate from its shareholders, with legal personality. Creditors of a corporation cannot recover debts from a shareholder. Corporations are also differently taxed from natural persons. The authors, therefore, cannot domestically claim to be separate persons and benefit from special rules applying to corporations but, before the Committee, lift the corporate veil and claim individual rights. The State party thus relies on the Committee's

jurisprudence that where an author of the communication was a corporation,[8] or where the victim of alleged violations was in fact the individual's corporation,[9] the communication is inadmissible.

4.2 Secondly, the State party argues that even if the Committee were to regard a corporation as being able to enjoy some substantive Covenant rights, it would not follow that a corporation would be able to submit a communication. The Committee has repeatedly held that only individuals, personally, could submit a communication.[10] In addition, the Committee has held that domestic remedies had been exhausted by the corporation, rather than the author's name. The same applies presently. Moreover, the Committee has held that a corporation owned by a single person did not have Optional Protocol standing. Accordingly, the communication is inadmissible for, in fact, being an impermissible suit by a corporation.

4.3 Thirdly, the State party argues that domestic remedies were not exhausted. The State party argues that the Superior Court, on first appeal, held contrary to the trial court's view that it lay on the party challenging the Charter of the French Language to show by persuasive evidence that there was no justification for the restrictions (rather than lying on the Attorney-General to demonstrate justification). The Court then afforded the parties the opportunity to present new evidence, which they declined. It also gave counsel for the authors' corporation (also counsel before the Committee) the right to present further evidence, if wished, at a new trial. Counsel declined. After declining the Superior Court's invitation to supplement evidence, counsel for the corporation unsuccessfully attempted to do so in the Court of Appeal. The Court of Appeal considered that the new evidence had no bearing on the matter in issue as defined by the appellant itself both in the lower courts and in its appeal factum.

4.4 The State party emphasizes that counsel for the corporation was an experienced lawyer specializing in language law. Through counsel, the corporation chose to limit its evidence and define narrowly the legal question at issue before the national courts. This legal strategy failed, and the authors cannot now seek to revise the strategic decisions made by their counsel.[11] Now that the issue of burden of proof has been resolved, there is ongoing litigation in the domestic courts concerning the constitutionality of section 58 of the Charter of the French Language. In almost all of several dozen cases, which were stayed pending the outcome of the litigation in the instant case, the same counsel is acting and has indicated to the Attorney-General of Québec that he will be filing the evidence not filed in the litigation on the instant case. On this question, then,

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[8] A newspaper publishing company v Trinidad & Tobago Case No 360/1989, Decision adopted on 14 July 1989, and A publication and a printing company v Trinidad & Tobago Case No 361/1989, Decision adopted on 14 July 1989.

[9] S.M. v Barbados Case No. 502/1992, Decision adopted on 31 March 1994, and Lamagna v Australia Case No. 737/1997, Decision adopted on 7 April1999.

[10] Ibid.

[11] The State party refers, by analogy, to the Committee's constant jurisprudence in the article 14 context: Lewis v Jamaica Case No 708/1996, adopted on 15 August 1997, Morrison v Jamaica Case No 635/1995, adopted on 16 September 1998, Perera v Australia Case No 536/1993, x adopted on 28 March 1995, Leslie v Jamaica Case No 564/1993, adopted on 19 August1998, Morrison v Jamaica Case No 611/1995, adopted on 19 August 1998.

all appeal instances are open and a decision of the Supreme Court will be necessary practically to determine the respective rights of the parties, as well as, in consequence, the rights of persons such as the authors and their corporation. The State party thus argues that the Committee would short-circuit the domestic process if it required Québec at the present time to satisfy the Committee as to the appropriateness of section 58 of the Charter of the French Language before it had had the opportunity to do so in the domestic courts.

4.5 Fourthly, the State party argues that the authors' claims are not supported by, or do not correspond to, rights protected under the Covenant. As to the article 14 claim, the State party emphasizes the Committee's deference to factual and evidentiary findings of domestic courts unless manifestly arbitrary, amounting to a denial of justice or revealing a clear breach of the judicial duty of impartiality. The authors' corporation never raised these issues, nor do the arguments advanced support the allegations, as the record demonstrates the courts' anxiety to respect fair process. This aspect is thus inadmissible under article 2 of the Optional Protocol, for having failed to establish a violation of article 14 of the Covenant, or under article 3 of the Optional Protocol, for incompatibility with article 14.

4.6 As to the claim under article 19, the current section 58 of the Charter of the French Language evolved in response to the Committee's earlier Views and was presented in the State party's fourth periodic report. In its concluding observations, the Committee offered no comment on this matter. The authors have thus not established a violation of article 19. As to the article 26 claim, the State party refers to the Committee's earlier Views finding no breach of this article with respect to stricter legislation and thus submits there can be no violation. On article 27, the State party refers to the Committee's earlier Views that minorities within a State, rather than a province of a State, are implicated by this article which is thus not presently applicable. Finally, article 2 is a corollary right linked to a substantive right, thus not giving rise to an individual claim. In any event, Canada's legislative and administrative measures, polices and programs fully give effect to Covenant rights.

The authors' comments on the State party's submissions

5.1 By letter of 27 June 2004, the authors' responded disputing the State party's submissions. The authors, firstly, rely on the Committee's decision in Singer to reject any ground of inadmissibility on the grounds of corporate rights. In Singer, the Committee considered with reference to the personal nature of freedom of expression that author individually, and not only his company, was personally affected by the Bills concerned. The only domestic difference between the cases being that Singer concerned a declaratory proceeding brought by Singer's corporation, while the present case concerns a prosecution against the authors' corporation, the authors invite the Committee to apply Singer. The authors argue that they have the freedom to impart information concerning their business in the language of their choice, and have been personally affected by the restrictions at issue. They refer to trial testimony identifying the personal aspect of the advertising in the present case. Finally, the authors argue that if this ground of inadmissibility were to be accepted, it would exclude almost all commercial expression from Covenant protection, as most people engaged in trade do so through the vehicle of a corporation.

5.2 Secondly, as to domestic remedies, the authors reject the State party's submissions. They argue that the remarks of the Supreme Court of Canada in Ford and Devine to the effect that that French "marked predominance" requirement was justified in Charter terms were entirely based on considerations relating to the vulnerability of the French language and the *visage linguistique* of Québec. In the authors' view, these considerations did not meet the cumulative requirements of article 19, paragraph 3, and are thus in violation of the Covenant.

5.3 The authors argue that they did not refuse to introduce new evidence on the vulnerability of the French language and the *visage linguistique* of Québec to the Superior Court, on first appeal. Before the Superior Court, they stated that they would prefer to introduce such new evidence before him, rather than at a new trial. They contend the Superior Court misinterpreted this statement to mean a renunciation to provide any evidence at all, even before him. They point out, moreover, that in Ford and Devine, the Québec Government supplied evidence on the vulnerability of the French language for the first time at the level of the Supreme Court of Canada.

5.4 The authors point out that they filed extensive evidence not before the Supreme Court in Ford and Devine, including documentation relating to Canada's Covenant obligations, the submissions of the parties and the Committee's decisions in McIntyre and Singer and State practice in the area. They argue that the Superior Court judgment, upheld on appeal, had the effect of imposing a burden on an accused (to supply certain evidence) without allowing the accused to meet that burden, in violation of article 14. The fact, moreover, that other proceedings are challenging the "marked predominance" requirement does not change the fact that the present authors have exhausted available domestic remedies for their convictions.

5.5 Thirdly, the authors argue that they have more than sufficiently supported their allegations, more than sufficiently identified the rights protected under the Covenant, and more than sufficiently described the conduct in violation of those rights. The communication should thus be declared admissible.

Supplementary submissions of the State party

6.1 By Note of 24 August 2004, the State party reiterated its submissions of admissibility, pointing out in particular that the current authors were not involved in the domestic proceedings, their corporation being the only party. The Committee has consistently decided that only individuals can submit a communication, and the inadmissibility of the communication does not have an impact on the scope of article 19's protection of commercial speech.

6.2 The State party emphasizes that the Superior Court invited counsel for the corporation to add to his evidence if he wished to do so in the context of a new trial. He declined to do so, preferring instead to obtain a judgment that he could appeal. After having declined the Superior Court's invitation, he again sought to add evidence before the Court of Appeal, which denied the application on behalf as the new evidence was not related to the judicial debate framed by the corporation itself in the lower courts and on appeal. The authors cannot before the Committee seek to review the strategic decisions of counsel to limit evidence and narrowly define the issues in the domestic courts.

6.3 The State party argues that it is clear that the authors mainly seek to challenge before the Committee a question of burden of proof in Canadian law. That issue has already been resolved before the domestic courts, who are currently examining the separate question of the constitutionality of section 58 of the Charter of the French language with its "marked predominance" requirement.

Issues and proceedings before the Committee

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

7.2 The Committee observes, on the issue of exhaustion of domestic remedies, that the authors' corporation, at the level of the Superior Court, expressly declined the Court's invitation to tender evidence going to the alleged insufficiency of justification of section 58 of the Charter of the French Language, being evidence not before the Supreme Court of Canada at the time it had suggested that a "marked predominance" requirement for French was be acceptable. Instead, the corporation was content to argue the issue on burden of proof only. The Court of Appeal, for its part, rejected the corporation's application to file additional evidence on the basis that it was beyond the narrow question framed by the corporation in the lower courts and on appeal. In such circumstances, the authors, through their corporation, have expressly withdrawn from the domestic courts in their case the factual elements and their assessment by the domestic courts which the Committee is now presented with, namely whether the situation currently prevailing in Québec is sufficient to justify the restrictions on article 19 rights imposed by section 58 of the Charter of the French Language. That wider question, which the authors' seek to present to the Committee through the lens of the Covenant, is the subject of current litigation in the State party's courts by the same counsel who withdrew the issue in the present case. It follows that the authors, through their corporation, have failed to exhaust domestic remedies, with the result that the communication is inadmissible pursuant to article 5, paragraph 2(b), of the Optional Protocol.

7.3 In the light of the Committee's finding above, it need not address the remaining arguments of admissibility advanced by the State party.

8. The Human Rights Committee therefore decides:

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

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

[Adopted in 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.]
