



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninety-third session
7 July -25 July 2008

DECISION

Communication No. 1481/2006

<u>Submitted by:</u>	Grant Tadman and Jeff Prentice (represented by Mr. Brian N. Forbes)
<u>Alleged victim:</u>	The authors
<u>State Party:</u>	Canada
<u>Date of communication:</u>	17 November 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 June 2006 (not issued in document form)
<u>Date of adoption of decision:</u>	22 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Alleged improper preference by denominational schools of teachers sharing same denominational beliefs, to detriment of authors

Procedural issues: Standing - exhaustion of domestic remedies – sufficient substantiation, for purposes of admissibility

Substantive issues: Discrimination on basis of religion – right to have children educated in accordance with parental preferences – effective remedy – application throughout federal States

Articles of the Optional Protocol: article 1; article 2; and article 5, paragraph 2(b)

Articles of the Covenant: article 2, paragraphs 1, 2 and 3; article 26; and article 50

[ANNEX]

ANNEX

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

Ninety-third session

concerning

Communication No. 1481/2006*

Submitted by: Grant Tadman and Jeff Prentice (represented by
Mr. Brian N. Forbes)

Alleged victim: The authors

State Party: Canada

Date of communication: 17 November 2005 (initial submission)

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

Meeting on 22 July 2008,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The communication, initially dated 17 November 2005, is submitted by Grant Tadman and Jeff Prentice. They claim to be victims of violations by Canada of article 2, paragraphs 1, 2 and 3; article 26 and article 50 of the Covenant. They are represented by counsel, Mr. Renton Patterson and Mr. Brian Forbes.

1.2 On 29 September 2006, the Special Rapporteur on New Communications decided to separate consideration of the admissibility and merits of the case.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The facts as presented

2.1 The alleged victims are teachers in Ontario, Canada. In 1986, Bill 30 was passed by the province of Ontario, granting full public funding to the separate Roman Catholic elementary and high school system in Ontario. In June 1987, in Reference Re Bill 30, An Act to Amend the Education Act (Ontario), the Supreme Court of Canada held that in light of Canada's constitutional structure, the amendment was permissible. The Ontario Education Act, as amended, also provided that for a ten-year period public school teachers who became surplus to public school requirements as a result of a movement of students to the newly-funded Catholic schools could be transferred, as "designated teachers", to a substantially similar position in the new system.¹ Thereafter, by provisions which were not before the Supreme Court on the occasion of the reference, the Act provided that in order to maintain the distinctiveness of the separate system, school boards could require as a condition of employment that teachers "agree to respect the philosophy and conditions of Roman Catholic Separate Schools in the performance of their duties",² although teachers employed by separate schools "will enjoy equal opportunity in respect of their employment, advancement and promotion".³

2.2 In December 1997, in Daly v Attorney-General, the General Division of the Ontario Court struck down the equal opportunity provision of section 136 of the Act on the ground that it infringed the right to self-determination guaranteed to denominational schools at the founding of the Union of Canada by section 93(1) of the Constitution Act 1867.⁴ As a result, separate school boards were permitted to prefer co-religionists in employment, advancement and promotion. On 27 April 1999, the Ontario Court of Appeal dismissed an appeal from the General Division's decision, and in October 1999, the Supreme Court of Canada denied leave to appeal.

Mr. Tadman's case

2.3 From 1975, Mr. Tadman as a teacher provided guidance and physical education in the public school system. In 1986, Mr. Tadman was transferred from the North York Board of the public school system to the Metropolitan Separate School Board. In June 1987, September 1987, December 1989, June 1991 and September 1991 he was re-assigned to different posts. He states that over this period he was never given a permanent position to teach in the two areas in which he was certified, as he had earlier had in the public system. He also details four occasions where he states to have made reasonable requests in order to obtain a permanent teaching post, but was turned down for unjustified reasons. He further states that he was subjected to discriminatory treatment on account of his non-Catholic background. He states in this respect that he was subjected to verbal harassment of staff and students, not given appropriate credit for teaching experience and qualifications, prevented from discussing certain health issues with students, and

¹ Section 135 of the Act.

² Section 136(1).

³ Section 136(2).

⁴ Section 93(1) provides: "**Education** : In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union".

denied the opportunity to be placed in the guidance department as he might make inappropriate comments due to his non-Catholic background.

2.4 As to remedies exhausted by him, in September 1987, Mr. Tadman asked the North York Board, as his former employer, to take him back as for reasons of conscience he could not continue to work in the separate school system. Following the Board's refusal to do so, he filed a grievance before a Board of Arbitration. On 17 August 1988, after hearing evidence, the Board of Arbitration rejected the grievance, finding that (i) the time span after which he had objected to his transfer was too great to be reasonable; (ii) he had had a "change of heart" concerning his ability to work in the separate system; (iii) the evidence "falls far short of demonstrating that [he] was inhibited from exercising his personal religious beliefs" by the separate school board; and (iv) according to his own evidence he was exempted from religious activities in the school, and "there is nothing in the evidence to suggest that this caused him any difficulties". An appeal to the Divisional Court was dismissed, with the Court finding that "the Board found as a fact that the Separate School Board had not interfered with his personal freedom of conscience, thought, belief or religion."

2.5 In 1992, Mr. Tadman applied to file a complaint with the Ontario Human Rights Commission. In April 1992, the Commission responded that it lacked jurisdiction to deal with the matter. In October 1992, the Ontario Ombudsman advised that it would not investigate the complaint, concurring with the Commission's position. In February 1994, he filed a complaint with the Ontario Human Rights Commission alleging discrimination on the basis of creed against the Metropolitan Separate School Board, denial of a position in the Board, and harrasment. No information is available on the outcome of this complaint. Also in February 1994, he filed a note of grievance to the teachers' union against the Board, alleging denial of equal employment opportunities and subjection to discriminatory statements by Board employees, including teachers at his school. In May 1994, the union decided it would pursue one aspect in relation to whether he should be assigned to a different school within the Board. No information is available on the outcome of this complaint.

2.6 In June 1994, he filed a complaint with the Ontario Labour Relations Board against his union, alleging breach of the latter's duty of fair representation. In August 1994, that Board dismissed his complaint for want of jurisdiction over disputes between a teacher and the union. In November 1994, he sued the School Board in the Ontario Court (General Division) alleging discrimination in employment, but specifically excluding the general statutory position of the separate schools. On 10 August 1995, the Court struck out the claim on the basis that Mr. Tadman had failed to exhaust the mandatory arbitration process. No appeal was taken from that decision.

2.7 On 29 October 1999, the Human Rights Committee declared inadmissible, on the basis that the authors could not claim to be victims of the alleged discrimination, a communication by Mr. Tadman and others, alleging violations of the same provisions of the Covenant as invoked here.⁵ The Committee noted 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'

⁵ Communication No. 816/1998, Decision adopted on 29 October 1999.

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.”⁶

Mr. Prentice’s case

2.8 Mr. Prentice taught mathematics and science part-time in a Catholic high school in Ottawa in the 1997-1998 school year. In 1998, he applied but was refused a permanent position. He states that this was on the basis that he was not a practicing Catholic in view of a note received from the School Board that he was not able to so attest.

The complaint

3.1 The authors allege that the facts disclose discrimination on the ground of religious belief, contrary to article 26 of the Covenant on three bases. Firstly, they claim to have suffered religious discrimination because of the hiring and promotion practices applicable in Ontario’s separate school system. Secondly, they contend that public funding of Roman Catholic schools is in breach of the provision in article 26. Thirdly, Mr. Tadman alleges that while he was a teacher in a Catholic secondary school, he was discriminated against for not being a Roman Catholic. The authors invoke the Committee’s Views in Waldman v Canada⁷ in support of these arguments.

3.2 The authors also contend that in light of the jurisprudence of the State party’s courts, they are without any effective remedy contrary to article 2 of the Covenant. Finally, the authors argue that the existence in Ontario of the alleged discriminatory provisions amounts to a breach of article 50 of the Covenant, extending equal protection in federal States.

State party’s submissions on admissibility

4.1 By submission dated 18 September 2006, the State party contested the admissibility of the communication, arguing that it is inadmissible (i) ratione materiae; (ii) as an abuse of the right of submission on account of delay; (iii) for absence of a victim; (iv) for failure to exhaust domestic remedies in respect of Mr. Tadman’s harassment claims; and (v) for insufficient substantiation of Mr. Tadman’s harassment claims.

4.2 The State party submits that the communication is incompatible ratione materiae with article 18, paragraph 4, of the Covenant, protecting the rights of persons to have their children educated in conformity with their religious convictions. Preserving the denominational character of a religious school requires, as has been recognized by the courts, the ability to hire teachers preferentially on the basis of religion. All religious schools in Ontario, regardless of denomination, have this right, consistently with article 18, paragraph 4.

4.3 The State party submits that the authors have offered no convincing explanation for the delay in submission of the communication, rendering it an abuse of the right of submission. Even taking the date in October 1999 as the latest possible relevant date since the refusal of the

⁶ Ibid., at 6.2.

⁷ Communication No. 694/1996, Views adopted on 3 November 1999.

Supreme Court to grant leave to appeal the Daly decision, over six years have passed until submission of the communication. No justification has been provided for this delay, which is excessive and hinders the State's ability to determine the certain facts and circumstances of the case which lie outside the records of either federal or Provincial archives.

4.4 The State party also argues, comparing the text of the communication with that already submitted by the author in 1999, that the authors' true complaint remains that Catholic separate schools should not be publicly funded, rather than the ostensible allegation of preferential hiring of Roman Catholics in separate school boards. The Committee rejected the author's standing on this issue in its decision on the original communication. This conclusion remains applicable, as neither author has indicated how public funding violates any of their Covenant rights. The State party also argues that re-submission of the same essential complaint amounts to an abuse of the right of submission.

4.5 The State party also argues that Mr. Tadman has not shown that he has exhausted domestic remedies with respect to the alleged harassment. The Daly decision did not foreclose the issues raised in the communication, as that judgment held only that Catholic school boards are permitted to preferentially hire and promote Catholics, but only to the extent necessary to preserve the Catholic nature of the Catholic schools. This rule does not cover the harassment alleged; on the contrary, section 5 of the Ontario Human Rights Code specifically guarantees freedom from harassment in the workplace on account of creed. Mr. Tadman has not shown that he fully pursued his rights under the Code. Moreover, in Mr. Tadman's action in the civil courts, he specifically disclaims the issue that would later be resolved in the Daly case.

4.6 Lastly, the State party argues that the two incidents of harassment alleged to have occurred would, even if proven, not amount to discrimination in breach of article 26. In particular, there is nothing inappropriate about children in a religious school asking teachers about religious practices. In addition, Mr. Tadman filed an Education Act grievance and human rights complaint on these issues. The Board of Arbitration found the claims unsubstantiated, and his review of this decision was dismissed. In these circumstances, the Committee should defer to domestic fact-finding.

Authors' comments on the State party's submissions

5.1 By letter of 17 November 2006, the authors responded, disputing the State party's submissions. As to domestic remedies, the authors argue that in light of Daly it would be futile to pursue further proceedings. The authors also dispute that article 18, paragraph 4, of the Covenant covers a right to employ members of a religious denomination in schools of that denomination and argue that it does not permit discrimination against specific teachers. The authors, again invoking Waldman, argue that the establishment of the separate system made it inevitable that teachers in the State system would need to be transferred to the separate system, in view of the numbers of transferred students.

5.2 As to the question of delay, the authors argue that the delay in question is imputable to Canada and the absence of appropriate response to the Views in Waldman. The authors also dispute that the passage of time has prejudiced the State's capacity to resolve the issues in question. In regard to their status as victims, the authors allege that they are not agitating the

same question as was decided in the original Tadman communication, but that instead they are claiming personal injury in the form of discrimination suffered as teachers.

Supplementary submissions of the State party

6.1 On 11 April 2007, the State party responded to the authors' comments. The State party stresses that Waldman, repeatedly invoked by the authors, is irrelevant in the present case. Waldman addressed the funding of denominational schools, and did not in any way address preferential hiring of co-religionists as teachers in denominational schools. By focusing almost exclusively on Waldman and the issue of funding, the authors seek to reargue the different question of public funding for Catholic schools in Ontario, on which the authors have no standing.

6.2 The State party stresses that all denominational schools in Ontario, regardless of denomination, have the right to preferentially hire on the basis of religion in order to preserve the denominational character of their schools, consistent with article 18, paragraph 4, and the values of the Covenant. Nor has Mr. Tadman shown any link between preferential Catholic hiring and the alleged harassment suffered by him. In addition, the passage of time has been prejudicial: the two examples Mr. Tadman has cited occurred almost twenty years ago with anonymous students, making it impossible now to conduct proper investigations.

Issues and Proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee notes its decision on the earlier communication presented by the author (Tadman No. 1) to the effect that the author did not have standing as a victim to challenge issues of public funding of denominational schools in Ontario. To the extent that the present communication addresses the same issues which the Committee decided in Waldman, the communication is inadmissible under article 1 of the Optional Protocol.

7.3 As to Mr. Tadman's own circumstances, the Committee notes that in the civil proceedings instituted by him in the Ontario courts, he specifically disclaimed any challenge to the general issue of preferential treatment for co-religionists in denominational schools (sections 135 and 136 of the Act). Instead, he confined himself to raising his particular personal difficulties in his own workplace. The Court decided that these difficulties had not been raised in the earlier arbitration, and Mr. Tadman was therefore not entitled to raise them presently. Mr. Tadman did not appeal against this decision. It must therefore be concluded that Mr. Tadman's communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies. The Committee also notes the earlier findings of fact reached by the Board of Arbitration and the Divisional Court (see para 2.4, *supra*) that Mr. Tadman did not in fact suffer any limitation of his freedom of conscience, thought, belief or

religion. The Committee refers to its previous jurisprudence in Keshavjee v Canada,⁸ pursuant to which it defers to such findings of fact reached by the domestic authorities, unless manifestly arbitrary or amounting to a denial of justice. This part of Mr. Tadman's communication is therefore inadmissible also under article 2 of the Optional Protocol, for insufficient substantiation.

7.4 As to Mr. Prentice, the Committee notes that the communication discloses no effort by the author to contest or challenge before the State party's authorities or the courts the alleged basis for the refusal of his promotion. The author having failed to make a reasonable effort to substantiate the alleged violation of his rights before the national authorities, Mr. Prentice's communication must be held to be inadmissible, under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust remedies.

7. The Committee therefore decides:

- (a) that the communication is inadmissible under articles 1, 2 and 5, paragraph 2(b), of the Optional Protocol;
- (b) that this decision shall be communicated to the authors and, for information, 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.]

⁸ Communication No. 949/2000, Decision adopted on 2 November 2000.