WALDMAN V. *CANADA*: RELIGIOUS DISCRIMINATION IN THE CONSTITUTION

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The case of *Waldman* v. *Canada*,[1] decided by the Human Rights Committee established under the International Covenant on Civil and Political Rights, presents an unusual dilemma for Canada. What is Canada to do about religious discrimination entrenched in the Canadian Constitution?

The *Canadian Charter of Rights and Freedoms*[2] prohibits religious discrimination. The *Charter* is part of the Constitution of Canada. However, the Canadian Constitution, because of another provision, Article 93, discriminates in favour of Roman Catholics and against other religious denominations.[3]

Article 93 gives provincial legislatures exclusive power over education. The article states that any law enacted under this power shall not "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." In Ontario, at the time that the province joined Confederation, Roman Catholic schools had rights and privileges which other denominational schools did not. In particular, Roman Catholic denominational schools received state funding and other denominational schools did not.[4] The effect of Article 93 was to prevent the legislature of Ontario from prejudicially affecting those rights and privileges, from prejudicially affecting that funding. State funding of Roman Catholic schools in Ontario is, by virtue of Article 93, constitutionally entrenched.

Once the *Canadian Charter of Rights and Freedoms* was entrenched in the Constitution in 1982, and especially once the equality guarantee in the *Charter* became effective in 1985,[5] the question arose whether the discrimination flowing from Article 93 of the Constitution could survive the entrenchment of the guarantee of equality in section 15 of the *Charter*. The Supreme Court of Canada decided that it could.

Shortly after the *Charter* guarantee of equality sprang into life, the Ontario government of Premier Bill Davis introduced legislation, Bill 30, extending funding for Ontario Roman Catholic schools from primary to secondary education, and then referred to the courts the question of the constitutionality of its proposed legislation.[6] In 1987 the Supreme Court of Canada ruled that the proposed legislation was constitutional.[7]

Public funding of Roman Catholic secondary schools in Ontario was a right or privilege existing in 1867 at the time the Canadian Constitution came into effect protecting that funding. That protection survives today. One part of the Constitution, the *Canadian Charter of Rights and Freedoms*, could not be used to invalidate another part of the Constitution which guarantees denominational rights existing in 1867.[8]

Justice Wilson, writing the majority opinion, stated: "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."[9] In a concurring opinion, 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*."[10]

What generated the litigation was not the funding already in place for primary education, but new funding proposed by Bill C–30, for secondary education. Even that proposed funding was, according to the Supreme

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1 Human Rights Committee, *Waldman* v. *Canada*, 67th Sess., UN Doc. CCPR/C/67/D/694/1996 (5 November 1999).

2 Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter *Charter*].

3 *onstitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

4 *Adler* v. *Ontario*, [1996] 3 S.C.R. 609 at para. 57.

5 See s. 32(2) of the *Charter*.

6 *Reference Re Bill C-30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1157 para. d.

7 *Ibid.* at para. 1.

8 *Supra* note 4 at para. 38.

9 *Ibid.* at para. 9.

10 *Ibid.* at para. 78.

Court of Canada, protected by the Constitution. Justice Wilson found that, at the time of Confederation, Roman Catholic separate schools were entitled to public funding for secondary education, even if they were not getting that funding.[11] Thus, the Constitution of Canada requires the Ontario government to fully fund Roman Catholic separate schools. Seen in this light, according to the Court, Bill 30 simply righted an old wrong.

To call Bill C–30 the righting of an old wrong, as the Supreme Court did, in light of its other remarks that Bill C–30 was discriminatory, was perverse. The failure to fully fund Roman Catholic schools in 1867 was wrong. However, by 1985 and the entrenchment of the equality guarantee in the Constitution, it had ceased to be wrong. The Roman Catholic population in Canada in 1985 was no longer in the disadvantaged position it was in 1867. Whatever constitutional protection to which it was entitled in 1867 had ceased to be relevant to 1985. The Supreme Court of Canada, rather than confirming the righting of a wrong, was confirming the accumulation of wrongs. Because the Roman Catholics were wronged yesterday, it became acceptable, according to the Ontario legislature and the Supreme Court of Canada, to wrong other minorities today.

After the Bill C–30 case was decided, parents who wanted state funding for denominational schools that were not Roman Catholic went to Court to argue that the guarantee of equality in the *Charter* required funding in Ontario for their schools. Individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim and Jewish faiths argued that the *Ontario Education Act*,[12] 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 sought stating that the applicants were entitled to funding equivalent to that of public and Roman Catholic schools.

The Supreme Court of Canada rejected this challenge as an attempt to revisit its earlier decision on Bill 30. The Court ruled 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.[13]

However, that was not the end of the matter. Canada has signed and ratified the *International Covenant on Civil and Political Rights*, as well as the Optional Protocol to that Covenant. The Optional Protocol allows for an individual right of petition against signatory states. The Covenant, like the *Charter*, has a guarantee of equality.[14]

Arieh Waldman petitioned the Committee to find Canada in violation of the Covenant because of Roman Catholic separate school funding in Ontario. Given that the Supreme Court of Canada in the Bill 30 reference had already conceded that the Ontario scheme was discriminatory, it was perhaps inevitable that the Human Rights Committee, established under the Covenant to give its views on petitions, would come to the same conclusion.

The Government of Canada made a feeble attempt to argue that Ontario funding to Roman Catholic schools was non-discriminatory because the obligation to provide that funding was in the Canadian Constitution.[15] Yet the source of discrimination cannot change the fact of discrimination. The Human Rights Committee expressed the obvious view that the preferential treatment of Roman Catholic schools does not cease to offend the equality guarantee in the Covenant simply because it is in the Canadian Constitution.[16]

The *International Covenant on Civil and Political Rights* provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[17] So Canada, by ratifying the Covenant, freely undertook to change its laws, if necessary, to comply with the Covenant.

Canada ratified the Covenant on 19 August 1976. It entered into the Optional Protocol on 29 October 1979.[18] Neither at the time of the ratification of the Covenant or the Protocol did Canada append any reservation or understanding.

The *Canadian Charter of Rights and Freedoms* entered into force on 17 April 1982. By way of exception, the equality guarantee in the *Charter* entered

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11 *Ibid.* at para. 10.
12 *Education Act*, R.S.O. 1990, c. E.2.
13 *Supra* note 4 at para. 37.
14 1976, 999 *U.N.T.S.* No. 14668, art. 25.
15 *Waldman* v. *Canada*, *supra* note 1 at para. 4.3.4.
16 *Ibid.* at para. 10.4.
17 *Supra* note 14, art. 2(2).
18 See <http://www.unhchr.ch/pdf/report.pdf> (last modified: 16 November 2000).

into force on 17 April 1985. The three-year delay was to allow Canada to get its equality house in order.

During those three years there was much legal soul searching to root out inequalities that might offend the *Charter*. The House of Commons produced a report titled "Equality Now" in March 1984 under the auspices of a Special Committee on Visible Minorities in Canadian Society, chaired by Bob Daudlin.[19] The report had a whole chapter on education and put forth fourteen recommendations, none of which dealt with separate school funding. The federal government's Department of Justice produced a tandem report in 1985 titled "Equality Issue in Federal Law: A Discussion Paper."[20] Again, there was nothing on separate school funding.

To be fair to the House of Commons Committee, the ratifiers of *International Covenant on Civil and Political Rights* and the authors of the federal equality report, at the time of their efforts, separate school funding, though a potential equality problem, was a sleeping problem. Until Bill 30, which post-dated all of these efforts, separate school funding was far from the forefront of the equality debate. It is probably fair to say that none of the people involved in the earlier efforts anticipated that the Ontario government would later propose new discriminatory funding, and that the Supreme Court of Canada would rule that section 93 of the Constitution protected this new discrimination. Bill 30, given its timing, shortly after the entrenchment of the equality guarantee in the *Charter* and the heightened Canadian human rights consciousness, was inflammatory. The flames it lit are still burning.

The views of the Human Rights Committee are taken seriously by Canada. Canada views itself as being in compliance with its treaty obligations. When it is found not to comply, it attempts to change its practices, policies or laws in order to comply.

For instance, Sandra Lovelace petitioned the Committee claiming that Canada violated the Covenant because of its *Indian Act* legislation, removing Indian status from registered Indian women who married non-Indian men.[21] The *Indian Act* at the time allowed, as it does now, Indian men who married non-Indian women to retain their Indian status. The Committee found Canada in violation of the Covenant in 1981,[22] and Canada amended its legislation in 1985 to comply with the views of the Committee.[23] Today, Indian women who marry non-Indian men retain their Indian status.

Similarly, to give a provincial example, John Ballantyne, Elizabeth Davidson and Gordon McIntyre petitioned the Committee about the Québec law that prevented them from using the English language for purposes of advertising, on commercial signs outside the business premises or in the name of the firm.[24] The Committee in 1993 expressed the view that the Québec law violated the Covenant.[25] Québec, accordingly, changed the law that very same year to its present form, which does not prohibit the use of English, but requires that French be "markedly predominant."[26]

As contentious as separate school funding is, for Canada to adopt the stance of an international outlaw would be even more contentious. Such a stance would gut huge swathes of Canadian foreign policy and throw up an awkward obstacle to Canada's attempts to enforce obligations that other states owe to Canada. Once the Human Rights Committee says that Ontario separate school funding violates Canada's treaty obligations, something must be done.

The present Ontario government seems to not want to do anything at all. However, the implications of international lawlessness are more severe for Canada as a whole than they are for any one province.

Although the language law in Québec was politically as important to the government of Québec as separate school funding is to the government of Ontario, the government of Québec did not hesitate to change its law once the Human Rights Committee ruled against that law. The reason is, presumably, the sovereignist ambitions of Québec legislators. It matters a good deal more to Québec politicians how Québec appears in the international arena than it matters to Ontario politicians how Ontario appears in the international arena. Given the isolationism of Ontario politics, the violation of Canadian treaty obligations imposed by Ontario legislation will have to be handled

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19 Canada, Parliament, House of Commons, Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now! Minutes of Proceedings and Evidence of the Special Committee on Participation of Visible Minorities in Canadian Society* (Ottawa: Queen's Printer, 1984).

20 Canada, Department of Justice, *Equality Issue in Federal Law: A Discussion Paper* (Ottawa: Communications and Public Affairs, Department of Justice Canada, 1985).

21 *Indian Act*, R.S.C. 1970, c.I-6, s. 12(1)(b).

22 Communication R6/24, *Lovelace* v. *Canada*.

23 *Indian Act*, R.S.C. 1985, c. 27, s.4 repealing and replacing sections 5 to 14. Note especially s.7(1) replacing s.12(1).

24 *Charter of the French Language*, R.S.Q. 1977, c. 5, s. 58.

25 Human Rights Committee, *Views of the Human Rights Committee under Article 5*, para. 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, UNGAOR, 47th Sess., Supp. No. 40, UN Doc. CCPR/C/47/D/359/1989 and 385/1989 (5 May 1993) para. 12.

26 See *An Act to amend the Charter of the French Language*, S.Q. 1993 c. 40, ss. 18, 22, which amended, respectively, sections 58 and 68 of the *Charter of the French Language*, R.S.Q. c.C-11.

by the federal government and Parliament alone and directly.

Parliament cannot unilaterally amend the provisions of the Constitution dealing with separate school funding in Ontario without the agreement of the Ontario legislature.[27] As long as the Government of Ontario insists on maintaining the present regime, that regime is constitutionally protected.

Nonetheless, for the purpose of international compliance with the Covenant, the fact that separate school funding is in the Constitution is a red herring. Any constitutional provision that relates only to one province can be amended by Parliament and the legislature of that province.[28] There is little doubt that, if the Government of Ontario were willing to legislate an amendment to Article 93 of the Constitution to remove the protection for separate school funding that the Roman Catholic denominational schools now have, the federal government and Parliament would go along. The fix that Canada is now in is no different from the fix it would be in if a violation stemmed from provincial legislation without any constitutional status other than that it was within the power of the legislature to enact, and the province refused to do anything about that legislation. The only impact of the constitutional status of the Ontario legislation is that it prevents the *Charter* and the courts from solving the problem. The problem, like in the old pre-*Charter* days, will have to be solved by politicians and legislators.

Fortunately, what we are dealing with here is only money. The Parliament of Canada cannot legislate within the domain reserved to provincial legislatures simply because provincial legislation puts Canada in violation of international law. However, the government of Canada can spend on a subject matter reserved to provincial legislation, whether the subject matter has an international dimension or not.

Discrimination in funding can be resolved in one of two ways. One is to remove funding from those unfairly advantaged. The other is to give equivalent funding to those unfairly disadvantaged. Because of the Ontario government's unwillingness to act, the first alternative is not now an option. The only option is to give equivalent funding to those unfairly disadvantaged.

Money which the Government of Canada spends comes from taxpayers across Canada. While geographical inequality is not the sort of inequality against which either the *International Covenant on Civil and Political Rights* or the *Canadian Charter of Rights and Freedoms* protects, it would be unfair in a political, if not a legal sense, for the federal government to give separate school funding to Ontario schools and not to separate schools elsewhere in Canada.

Again, there are two alternatives. Either all Canadians would pay for separate school funding and all Canadians would benefit, or only Ontarians would pay and only Ontarians would benefit. The federal government could devise a scheme for Ontario-only payment by deducting any money that the federal government spent on separate school funding in Ontario from federal tax point or from funding transfers to Ontario.

The full funding of all separate schools is a politically contentious position because it has the effect of undermining the public school system. However, at the level of principle, the ending of discrimination is uncontentious.

It should be up to the voters of Ontario to decide whether they want full funding of all separate schools, or full funding of no separate schools. It can no longer be up to the voters of Ontario to decide whether they want full funding of only Roman Catholic schools and no others. The Government of Canada should put the state of Canada in compliance with Canada's treaty obligation under the *International Covenant on Civil and Political Rights*[29] by fully funding all separate schools in Ontario and deducting the money it spends on Ontario separate schools from transfer payments and tax points to Ontario. The government of Ontario should then be left to decide how it wants to respect the obligation not to discriminate, whether by maintaining funding of all separate schools or by funding no separate schools.❑

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[27] *Constitution Act, 1982*, *supra* note 2, s.43.
[28] *Ibid.* at s. 43.
[29] *Supra* note 14.