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HUMAN RIGHTS COMMITTEE
Seventy-ninth session
20 October - 7 November 2003

DECISION

Communication No. 970/2001

Submitted by:	Valery I. Fabrikant (The author is not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	3 April 2000 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 20 April 2001 (not issued in document form)
Date of adoption of decision:	6 November 2003

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Seventy-ninth session

concerning

Communication No. 970/2001[*]

Submitted by:	Valery I. Fabrikant (The author is not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	3 April 2000 (initial submission)

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

Meeting on 6 November 2003

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr.Valery I. Fabrikant, a Canadian national, who has been serving a life sentence since 1993 for four counts of murder, at the Archambault federal penitentiary in Sainte-Anne-des-Plaines, Quebec. He claims to be a victim of a violation by Canada of articles 6, 7 and 10 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to Rule 84, 1(a) of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in adoption of the decision.

Facts as presented by the author

2.1 In May 1998, the author suffered a heart attack. Angiography showed that four of his arteries were blocked - two almost totally - and allegedly indicated the need for intervention. According to the author, there is no available treatment in Quebec, but there is in British Columbia[1]. He alleges that he has been in contact with a doctor there who is willing to perform the operation but that the prison authorities refuse to transfer him. He lodged a series of internal complaints which he says have been ignored.

2.2 On 23 August 1999, the author filed a motion in Federal Court seeking a mandatory injunction for the delivery of urgent medical care. On 14 September 1999, the application was dismissed. On 1 November 1999, the author claims that all his lawsuits in Federal Court (unspecified) were stayed. The author appealed the September decision to the Federal Court of Appeal, but discontinued his proceedings on 14 February 2000.

2.3 On 23 February 2000, in the light of allegedly deteriorating health, the author applied to the Quebec Superior Court for urgent relief invoking the Canadian Charter of Fundamental Rights and Freedoms. On 29 February 2000, the motion was dismissed on the grounds of res judicata. On 16 June 2000, the Court of Appeal dismissed the author's appeal, on the grounds that the Superior Court had no jurisdiction. On 23 November 2000, the Supreme Court denied the author's application for leave to appeal.

The complaint

3. 1 The author claims that the failure of the State party to provide him with necessary and available medical treatment threatens his right to life under article 6; he further contends that this communication also raises issues under articles 7 and 10 of the Covenant.

State party's submission on the admissibility and merits of the communication

4.1 By Note Verbale, of 29 November 2001, the State party provided its submission on the admissibility and merits of the communication. It submits that the communication is inadmissible for lack of substantiation and incompatibility with the provisions of the Covenant.

4.2 On the facts, the State party submits that in 1991, before his incarceration, the author had a heart attack, and a procedure known as angioplasty was then performed on him. In May 1998, the author suffered a "myocardial infarction". He was treated by a cardiologist who recommended that the author undergo bypass surgery. The author refused to undergo this operation and insisted on having angioplasty. From 15 May 1998 up to the date of submission, the author was evaluated by at least twelve Canadian heart specialists who all concluded that angioplasty was not appropriate in his case and that he should be treated either by bypass surgery or by medication. Despite this overwhelming consensus of opinions, the author did not agree

[1] The author provides letters from three surgeons who claim that on the basis of his medical chart they would be able to operate and a letter from another doctor with a different opinion.

with the specialists and insisted on receiving angioplasty. He is currently being treated with medication. The State party submits that it has done everything possible to provide him with all necessary and appropriate medical care.

4.3 The State party submits that the author has pursued numerous cases against the Correctional Service of Canada (CSC) through the Canadian legal system, and against its employees, sub-contracting physicians and physicians who have treated him, seeking an order from any court or physicians' disciplinary committee to transport or transfer him to British Columbia where he could allegedly receive the angioplasty that he demands, or sanctioning them for not doing so. In 2001 (date not provided), in *Attorney General of Canada v. Fabrikant*, the Attorney General requested the Quebec Superior Court to issue an injunction prohibiting the author from filing any further complaints to the applicable disciplinary bodies against any nurses, doctors or lawyers dealing with him. As of the date of the State party's response, no decision has yet been rendered by the Court.

4.4 On admissibility, the State party submits that no specific violations of the Covenant have been identified by the author. In his letter of 3 April 2000, he requests the Committee's "help" in receiving angioplasty. He claims that by being denied this particular treatment, he is effectively being placed on "death row." As evidence in support of his request for "help", the author submits the letters of three American doctors who affirmed, without having examined him, that it would be possible to perform angioplasty on him. It submits that he failed to refer to the opinions of more than 12 Canadian specialists who advised him that he was not a good candidate for angioplasty and that he would benefit more from medication or bypass surgery. Moreover, he failed to address the opinions of the courts that dismissed the same demand for help in receiving angioplasty, and of the provincial medical disciplinary body that determined that the medical care and advice he has received was provided in accordance with the highest professional standards.

4.5 The State party submits that in essence, the author is requesting the Committee to determine the factual medical issue whether he should receive angioplasty as opposed to other medical treatment. The Committee is being requested to choose between the conflicting medical opinions of numerous expert physicians, and is being asked to side with the physicians whose opinions are consistent with the author's preferred treatment.

4.6 In addition, the State party submits that the author has not asserted any connection between his demand for angioplasty and any potential violation of the Covenant. There has been no denial of medical treatment and in fact the author has repeatedly refused the treatment recommended to him. No Covenant provision could be interpreted as guaranteeing the author the medical treatment of his choice. The State party submits that the author's complaint has not been sufficiently substantiated and that therefore the communication should declared to be inadmissible as not constituting a "claim" within the meaning of articles 1 and 2 of the Optional Protocol.

4.7 The State party also argues that the author's claims are incompatible ratione materiae with the provisions of the Covenant, under article 3 of the Optional Protocol. It submits that the request of a prisoner to receive medical treatment of his choice, in particular against

overwhelming medical advice against that treatment, is not a "right" that is "set forth" in the Covenant.

4.8 On the merits, the State party submits that, although the author has not specified which Covenant rights he is alleges to have been violated, it presumes his claim would be assessed as an alleged violation of articles 7 and/or 10 of the Covenant. The State party argues that none of the doctors consulted in Canada is prepared to recommend or carry out angioplasty on the author, for the very reason that it is not in the author's interests. In the circumstances, the State party submits that this is not a case of denial of medical treatment; but rather, the State party acting in the author's best interest and providing him with the treatment recommended by numerous heart specialists.

4.9 The State party submits that the author relies on the statements of three American surgeons who claimed that it was possible to perform angioplasty on him, in support of his view that angioplasty is his best option. These surgeons based their opinions on a mere copy of his angiogram, and did not have the opportunity to examine him. The author is convinced that a Canadian physician, Dr. Hilton from British Columbia, is willing to perform angioplasty on him. In the author's perception, the only obstacle to his receiving angioplasty is the unwillingness of the CSC to transfer him from Quebec to British Columbia to receive the treatment. The State party submits that a review of the correspondence indicates that Dr. Hilton recommends surgery – and not angioplasty – but that he is willing to evaluate the author in his clinic to determine options for the best treatment for the author. In the State party's view, Dr. Hilton does not consider angioplasty to be in the author's best interests. Nor has he agreed to perform angioplasty on the author.

4.10 The State party submits that the author has repeatedly applied for a transfer to Williams Head Penitentiary, the nearest federal penitentiary to Victoria, British Columbia. On 25 October 1999, the receiving institution refused his request because of: (a) the author's refusal of treatment at Montreal's Heart Institute (which is one of the foremost medical facilities in Canada and the world) without adequate explanation; (b) the fact that Dr. Hilton had repeatedly advised against the treatment and considered that it would not be successful in the long run; and (c) the distance between Williams Head Penitentiary and the nearest hospital; and the physical stress of the proposed transfer. A subsequent request for a voluntary transfer and escorted temporary absence for medical reasons was denied on 23 May 2000, primarily because there was no change from the previous application.

4.11 The State party refers to the findings of the medical disciplinary board, after an action brought by the author against his physician, which found no fault with the treatment provided to the author and also refers to the evidence of an expert cardiologist who opined that the author had consistently received medical care and advice of the highest professional standards.

4.12 Finally, the State party argues that the fact that the author does not agree with the specialists' opinions does not constitute inhuman treatment or lack of respect for the author's inherent dignity which could be subsumed under articles 7 or 10, paragraph 1, of the Covenant.

Author's comments

5.1 On 2 August 2002, the author provided his comments on the State party's submission. He submits that he did not specify which articles of the Covenant he was alleging was violated as he thought that this would be obvious, namely a violation of article 6 of the Covenant due to a denial of medical care which threatened his life, and violations of articles 7 and 10. He explains that he refused bypass surgery as those who recommended it were not surgeons themselves and he had received the opinion of two heart surgeons in Quebec who did not recommend it. He accuses both the judiciary and the "professional orders" in Canada of corruption.

5.2 The author explains that he is not asking the Committee to pass a medical judgment on which treatment is appropriate for him but argues that, assuming he has a doctor to perform a procedure and has the money to pay for it himself, he should have the same rights as ordinary citizens to such medical treatment as he considers most appropriate. For the author, the possibility that the procedure might be too risky to perform is a matter for the patient and the doctor ready to perform it to decide.

5.3 In addition, the author provides an update on his situation, stating that on 12 December 2001, he was transferred to British Columbia to receive angioplasty which was performed on 7 January 2002. Angioplasty was also performed on 19 July 2002. He claims that the fact that this procedure was eventually performed proves that his complaint against Canada is valid. He adds that he would be prepared to withdraw his complaint if the State party can find a doctor to open the remaining three blocked arteries (apparently, angioplasty only managed to open one artery) or grant him access to such a doctor if he should find one, and if it accepts that prisoners themselves and not prison doctors should be permitted to decide which medical procedure they undergo.

State party's first supplementary submission and the author's comments thereon

6.1 On 19 March 2002, the State party confirms that pursuant to the advice of another specialist, angioplasty was performed on the author on 7 January 2002. This specialist had stated that "It would be pertinent to repeat the coronary angiography in his [the author's] case in order to obtain answers to the patient's questions as well as those of the attending physicians. Although conservative medical treatment is often efficacious in controlling angina pectoris, it doesn't appear adequate for controlling the ischemia in this case, so that the possibility of the patient being at risk of death is real." He concluded "I recommend a coronary angiography with dilation, if indicated, on an elective, intermediate-term basis (that is, within a few weeks)." Further to this recommendation, the author was transferred to British Columbia. Following the treatment, on 14 January 2002, Dr. Hilton, the surgeon who performed the operation wrote, "…….I believe he is now safe." On 22 January 2002, the author's return to Quebec was approved.

6.2 The State party submits that as the author has now received the treatment that had formed the basis of his communication any alleged inconsistency with the Covenant has been corrected and the author cannot claim to be a victim of any violation of his rights under the Covenant. The issues raised, therefore, are moot and the communication should be declared inadmissible under articles 1 and 2 of the Optional Protocol. In the alternative, the State party submits that if the

communication is held to be admissible, it has provided an effective remedy to any of the alleged violations of the Covenant.

6.3 In his response of 13 May 2002, the author denies that his claim is moot and contends that according to the doctor who performed the angioplasty it would have been more successful if the procedure had been carried out three years earlier.

State party's second supplementary submission and the author's comments thereon

7. In a further submission of 15 October 2002, the State party responds to the author's request to have additional angioplasty to open the remaining 3 blocked arteries and his request that prisoners, and not prison doctors, should be allowed to decide which medical procedure the prisoner will undergo. On the latter issue, the State party submits that Commissioner's Directive No. 803 entitles prisoners to refuse consent to recommended treatment, but does not entitle prisoners to the medical treatment of their choice, particularly when their choice is against the advice of the physicians responsible for their care. It reiterates that the demand of a prisoner to receive the medical treatment of his choice is not a right set forth in the Covenant and accordingly this demand is incompatible with the Covenant. On the former issue, it submits that on 19 July 2002, the author did receive a further angioplasty and a coronography. In the circumstances, the State party submits that the communication is inadmissible pursuant to articles 1 and 2 of the Optional Protocol.

8. On 24 January 2003, the author reaffirmed that his claim is not moot, even if he has had two angioplasties since January 2002[2], as this procedure does not cure him - his heart disease is progressing and further angioplasties will be necessary. He claims that currently all cardiologists at the Cité de la Santé hospital are refusing to see him unless he is brought to the emergency section. He claims that they are punishing him for filing complaints against the prison doctors. At the time of writing he claims that he needs another angioplasty which will have to be performed in British Columbia, but the prison doctors are again continue to refuse to transfer him. He claims his life continues to be in danger and the prison authorities are refusing to provide medical care.

Issues and proceedings before the Committee

9.1 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.

9.2 As to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not challenged the admissibility on this ground.

9.3 The Committee notes the author's claim that he is being denied medical treatment in being refused a transfer to British Columbia to undergo surgery known as "angioplasty". It observes

[2] The author does not provide the dates.

that, the author was transferred to British Columbia on three occasions for the purposes of undergoing angioplasty - a fact which the State party claims renders the communication moot. In his final comments to the Committee, the author claims that he needs angioplasty again and that he will require such treatment regularly in the future. Without considering the issue of whether a detainee has a right to choose or refuse a particular medical treatment, the Committee observes that at any rate the State party remains responsible for the life and well-being of its detainees, and that on at least three previous occasions the State party did transfer the author to British Columbia to undergo the requested procedure. In addition, the Committee notes that insufficient information has been provided to suggest that the authorities have ever failed to determine the most appropriate treatment in accordance with professional medical standards. Thus, on the basis of the information provided, the Committee finds that the author has failed to substantiate for purposes of admissibility his allegation that the State party has violated any articles of the Covenant in his regard. The communication is therefore inadmissible under article 2 of the Optional Protocol.

10. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision 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.]