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Title/Style of Cause:	James Demers v. Canada
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; First Vice-President: Paulo Sergio Pinheiro; Second Vice-President: Florentin Melendez; Commissioners: Freddy Gutierrez, Paolo G. Carozza, Victor E. Abramovich.
Dated:	21 October 2006
Citation:	Demers v. Canada, Petition 225-04, Inter-Am. C.H.R., Report No. 85/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
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I. SUMMARY

1. On March 25, 2004, the Inter-American Commission on Human Rights (hereinafter “Commission” or “IACHR”) received a petition filed by Mr. James Roger Demers (hereinafter “the Petitioner”) against the State of Canada (hereinafter “Canada” or “the State”). The Petitioner is an anti-abortion activist, who was arrested and later convicted of three offences under the Access to Abortion Services Act (“the Act”) in Vancouver, British Columbia, Canada. These convictions arose out of a series of anti-abortion demonstrations conducted by the Petitioner outside of Everywomans Health Centre, an abortion facility in Vancouver. The Act under which the Petitioner was convicted is a provincial statute. Mr. Demers does not state what sentence was imposed upon conviction. However, he states that the Act prescribes a maximum sentence of one year in prison and a fine of C\$10,000.

2. The Petitioner alleges that the State is responsible for violating the American Declaration of the Rights and Duties of Man (hereinafter “American Declaration”) with respect to himself, hundreds of thousands of unborn children, and their mothers. In particular, the Petitioner claims the violation of the following rights:

Art. I. The right to life (children)

Art. II. The right to equal protection under law (children)

Art. IV. The freedom of expression of and dissemination of ideas (Petitioner)

Art. VII. The right of special protection of women during pregnancy (mothers)

Art. XIII. The right to participate in the benefits of scientific discoveries (children and mothers)

Art. XVII. The right to be recognized as a person having rights and obligations (children and mothers)

Art. XXII. The right to associate with others (Petitioner)

Art. XXIX. The right to fully form and develop personality (children)

3. Mr. Demers' primary complaint is that his conviction and sentence violated his right to freedom of expression and to associate with others. His secondary complaint is that there is no legal protection for unborn children in Canada (since the 1988 Supreme Court of Canada decision of Morgentaler, Smoling and Scott v the Queen). Mr. Demers alleges that the multiple abortions that have taken place since 1988 constitute violations of the right to life of unborn children (along with other related rights, such as the right to equal protection of the law). In his petition, Mr. Demers does not name any persons whose rights have allegedly been violated as a result of abortions performed, stating that "Canada is the state responsible for violating the rights of Mr. Demers and hundreds of thousands of unborn children and their mothers." [FN1] He also alleges that (a) unnamed and indeterminate numbers of pregnant women have been pressured (by the Province of British Columbia, family, boyfriends and others) into having abortions and thus been denied special protection during pregnancy; (b) (pregnant) mothers are "denied the benefit of scientific discovery regarding the nature of the life" of their (unborn) children and (c) the right to associate with "those who care about the physical, emotional and spiritual impact that killing [an unborn child] will have on [the mothers]." The Petitioner also claims that with the decision of the Supreme Court of Canada, denying his application for leave to appeal, all his domestic remedies have been exhausted.

[FN1] Page 3, paragraph f of Petitioner's petition of March 19, 2004.

4. The State argues that the petition as a whole is inadmissible for failure to submit within the prescribed time period. The State also submits that portions of the petition are inadmissible as the Petitioner has failed to exhaust his domestic remedies, particularly with respect to his claims under Articles II, VII, VIII, XVII, XXII, and XXIX of the Declaration. Canada also submits that the petition is inadmissible with respect to the alleged violations of Articles I, II, VII, XIII, XVII, and XXIX since violations cannot be alleged in abstracto, and the Petitioner has failed to justify his standing in this regard. With respect to the Petitioner's claims under Articles XIII and XXIX of the Declaration, Canada contends that the Petitioner has failed to state any facts that tend to establish a violation of these provisions, and that these claims are accordingly inadmissible. In addition, Canada submits that the petition with respect to Articles I, II, VII, XIII, XVII, and XXIX is manifestly groundless since the Commission's past jurisprudence is clear and certain with respect to the Declaration and legally provided abortion services. With respect to the alleged violations of Article IV of the American Declaration (right to freedom of expression), the State acknowledges that the Petitioner received "final judgment" [FN2] on the issue of freedom of expression. The State does not offer any arguments to challenge the admissibility of the petition with respect to the Petitioner's allegations in this regard.

[FN2] This is in reference to the decision of the Supreme Court of Canada of September 25, 2003 to dismiss the Petitioner's application for leave to appeal his convictions for protesting outside of an abortion facility.

5. As set forth in this Report, having examined the contentions of the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to:

- a) declare the petition, with respect to the alleged violations of Article IV of the American Declaration, admissible,
- b) declare the alleged violations of Articles I, II, VII, XIII, XVII, XXII, XXIX of the Declaration as inadmissible,
- c) continue with the analysis of the merits of the case, to transmit the report to the parties, and to publish the report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BEFORE THE COMMISSION

6. On March 22, 2004, the Commission received a petition dated March 19, 2004, from the Petitioner. By letter of March 22, 2004 the Commission acknowledged receipt of the Petitioner's petition.

7. By note of November 10, 2005, the Commission transmitted the pertinent parts of the Petitioner's petition to the State and requested a response within two months.

8. On July 5, 2005, the Commission acknowledged receipt of the State's response received on May 20, 2005, and provided pertinent parts of the same to the Petitioner, with a one-month period to respond.

9. By letter of July 28, 2005, the Petitioner requested an extension of 60 days to respond, which the Commission granted by letter of August 30, 2005. By communication of the same date, the Commission informed the State of the extension granted to the Petitioner.

10. By letter of October 7, 2005, the Petitioner submitted additional observations, the pertinent parts of which were transmitted to the State by note of October 11, 2005.

11. By note of November 8, 2005, the State replied to the additional observations of the Petitioner of October 7, 2005, the pertinent parts of which were transmitted to the Petitioner by letter of November 14, 2005.

III. POSITIONS OF THE PARTIES

A. The Petitioner

12. The Petitioner asserts that on December 6, 9 and 10, 1996, he stood quietly on the public sidewalk outside Everywoman's Health Centre in Vancouver, British Columbia ("the Clinic"), holding a sign which stated: "Every human being has the inherent right to life (United Nations International Covenant on Civil and Political Rights)." On December 11, 1996, at the same location, the Petitioner stood holding a different sign:

Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception (Art. 4-1 American Convention on Human Rights).

13. The Petitioner claims that there was no verbal or other exchange between himself and any patients or personnel of the Clinic while he was outside it. He further contends that there was no indication that anyone was offended or upset by the sign or his presence. The Petitioner alleges that despite the peacefulness of his activity, the Clinic reported him to the police. The Petitioner was subsequently arrested by the police for protesting outside the Clinic and charged with three offences under the Abortion Services Act. Under the Abortion Services Act, it was unlawful to protest in an 'access zone' or to 'beset' a building in which abortion services are provided or to engage in 'sidewalk interference' while in an access zone. The Petitioner was charged with having committed all of these offences.

14. Pursuant to the Act was also the Abortion Services Access Zone Regulation, which established a 30 meter access zone around the Clinic, making it a criminal offence to communicate and disseminate information regarding abortion in a manner proscribed under the Act to expectant mothers within 30 meters of an abortion centre.

15. After his arrest on December 11, 1996, the Petitioner remained in custody for seven weeks awaiting trial under the Access to Abortion Services Act.

16. In 1997, the Petitioner was convicted of the offences for which he was charged in the Provincial Court of British Columbia at Vancouver. His subsequent appeals against conviction to the Supreme Court of Columbia and the Court of Appeal for British Columbia were dismissed on August 3, 1999, and January 17, 2003, respectively. On September 25, 2003, the Supreme Court of Canada dismissed the Petitioner's subsequent application for leave to appeal.

17. At trial, and at subsequent appeals, the Petitioner argued that the charges should be dismissed or convictions quashed because the Act violated the right to freedom of expression, and the right to life as guaranteed by the Canadian Charter of Rights and Freedoms ("the Canadian Charter" or "the Charter") and international law. Section 1 of the Canadian Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". With respect to the right to freedom of expression (under Section 2[FN3] of the Charter), the Petitioner contended that his protest conduct was for the purpose of protecting the life of fetuses and Section 7[FN4] of the Charter. Accordingly, the Petitioner argued that this purpose rendered the Act unconstitutional (together with his arrest and convictions thereunder having regard for the "balancing analysis" set out in Section 1 of the Charter; that is that the restrictions placed upon him went beyond what was reasonably "prescribed by law as can be demonstrably justified in a free and democratic society").

[FN3] 2. Everyone has the following fundamental freedoms:

- a) ...;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[FN4] 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

18. The trial court and appellate courts in British Columbia dismissed the Petitioner's challenge to the Act. The British Columbia Court of Appeal held the position that unborn children have no rights that must be taken into account when engaging in a Section 1 balancing analysis.

19. The Petitioner argues that the freedom of expression is not recognized and protected simply because of the personal gratification the speaker derives from saying what he thinks. It is protected because a free flow of information and opinions is essential to a free and healthy society. The Petitioner claims that it is the pregnant mother, headed into the abortion clinic, who is in greatest immediate need of information relevant to the nature of the child she carries, the consequences of her going through with an abortion, and of alternatives to abortion. The Petitioner notes that she cannot receive that information at the critical time unless people like Mr. Demers have at least a minimal opportunity to associate with her for the purposes of communicating with her.

20. Regarding the argument on right to life, the Petitioner claims that there is evidence that demonstrates that unborn children are fully human, though in the process of development. This process is violently interrupted long before these children become the adults that they otherwise would. The Petitioner claims that as fully human, unborn children are entitled to the same protection of law to which every other human being is entitled. The Petitioner notes that the Supreme Court of Canada has taken the position that scientific evidence is irrelevant to the question of whether unborn children are to have protection of law, by stating that "the task of properly classifying a fetus in law and in science are different pursuits".[FN5] As such, the Petitioner claims that despite evidence presented before the Canadian courts demonstrating that unborn children are fully human beings, the Canadian courts have chosen to ignore the findings. In his petition, Mr. Demers does not name any persons whose rights have allegedly been violated as a result of abortions performed, stating that "Canada is the state responsible for violating the rights of Mr. Demers and hundreds of thousands of unborn children and their mothers."[FN6] In response to the State's contention that his petition on behalf of these unborn children constitutes an actio popularis (for failure to identify any specific person or persons as victims), the Petitioner argues that the record of his trial in Canada "contains the name of a minor girl and her mother."[FN7] According to the Petitioner, this record "describes the daughter's abortion at the clinic and the misinformation that she received regarding abortions from the abortion clinic..."[FN8]

[FN5] Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. at 925; and Tremblay v. Daigle, [1989] 2 S.C.R. 530 at 553.

[FN6] Page 3, paragraph f of Petitioner's petition of March 19, 2004.

[FN7] See Petitioner's observations of October 02, 2005, para. 8, page 3.

[FN8] Ibid.

21. The Petitioner claims that the government's evidence (in the domestic proceedings) confirmed that the essential purpose of abortion-clinic counseling is to "affirm women to go through with an abortion"[FN9] (sic). According to the Petitioner, there are absolutely no restrictions in Canada on abortion. Right up to the moment of birth, unborn children may be aborted through partial birth abortion. The Petitioner claims that there are no requirements for full-term babies be anesthetized during the abortion process[FN10]. According to the Petitioner, the Province of British Columbia has gone a step further passing legislation designed to ensure that expectant mothers do not receive information about the nature of abortion.[FN11] Pursuant to the Access to Abortion Services Act, "British Columbia adopted the Abortion Services Access Zone Regulation establishing a 30-meter zone around abortion clinics, and criminalizing even the most peaceful polite communication of information regarding abortion to expectant mothers within 30 meters of an abortion center"[FN12].

[FN9] Petitioner's Petition dated March 19, 2004, p. 6.

[FN10] Ibid. pages 7-8.

[FN11] Ibid., p. 8.

[FN12] Ibid.

22. With regard to the admissibility of the petition, the Petitioner asserts that he exhausted all available remedies before the courts in Canada and that no further domestic legal remedies are available to address the issues raised in his petition. More specifically, the Petitioner claims that the Supreme Court of Canada dismissed Mr. Demers' application for leave to appeal the decision of the Court of Appeal of the Province of British Columbia on September 25, 2003, and sent notice of the judgment to the parties on September 26, 2003.

23. The Petitioner claims that violations of Articles II, VII, XIII, XVII, XXII, and XXIX of the Declaration are subsidiary to the violations of the right to life (Article I) and of freedom of expression (Article IV).

24. The Petitioner distinguishes this petition from the Baby Boy[FN13] case, contending, inter alia, that (a) the Baby Boy case involved "a criminal prosecution for one unborn child" as opposed to "the intentional killing of hundreds of thousands of unborn children";[FN14] (b). "Baby Boy" was an American, killed in a country that recognized many limitations on abortion following the first trimester of pregnancy" compared to Canada, "which recognizes no restrictions on abortion whatsoever"[FN15]; (c) in the Baby Boy case, "there was no governmental complicity in the commission of the abortion", while in this case there is ample evidence of the government's complicity in multiple abortions"[FN16]. The Petitioner further argues that since 1981 (when the Baby Boy case was decided) "science has not stood still" and that "there is more evidence to be considered regarding the nature of unborn children." [FN17]

[FN13] IACHR, Resolution No. 23/81, Case No. 2141, Baby Boy, United States of America, 1981.

[FN14] Petitioner's submission to the Commission of October 07, 2005, para. 15, pages 5-6.

[FN15] Ibid. page 6.

[FN16] Ibid.

[FN17] Ibid.

25. Finally, the Petitioner argues that the Commission "has never addressed the meaning of the right to life of unborn children in a situation such as this, where there is massive intentional taking of life with the complicity of a government that stands alone in the Western Hemisphere in offering no protection to unborn children".[FN18]

[FN18] Ibid. para.16, page 6.

26. The Petitioner also states that his petition complies with the time period provided for in Article 32 of the Commission's Rules of Procedure. In response to the State's contention that his petition was extemporaneous, the Petitioner asserts that he submitted his petition within six months of the Supreme Court of Canada's dismissal of his appeal on September 26, 2003, and not on January 21, 2005 as alleged by the State.

27. The Petitioner also indicates that his petition does not essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.

28. Moreover, the Petitioner notes that he has not failed in identifying by name specific person or persons other than himself as victims. According to him, the record of trial in his case contains the name and testimony of a minor girl and her mother. It describes the daughter's abortion at the clinic and the misinformation that she received regarding abortions from the abortion clinic.[FN19] Furthermore, in response to the State's position that "the petition must be brought by or on behalf of persons who claim to be victims", the Petitioner denounces this position as "perverse and cynical" given that "unborn children and dead people are not able to make claims".[FN20] The Petitioner also argues that death or birth certificates are seldom issued in the names of aborted children.

[FN19] Petitioner's submission to the IACHR of October 07, 2005, para. 8, page 3.

[FN20] Petitioner's submission to the IACHR of October 07, 2005, para. 8, page 3.

29. Referring to the case of The Human Rights Situations of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, doc.62 (2000), the Petitioner further claims that identification of specific victims is not always necessary. The Petitioner contends that the identification of particular victims serves no purpose in this case; that it does not aid in the investigation or trial of those alleged violations against unborn children; and that there is no question of fact regarding whether those alleged violations have occurred. Moreover, if the identification of particular

victims is necessary, the Commission should exercise its investigative powers under Article 18 of the Statute of the Inter-American Commission on Human Rights and under Article 40 of the Rules of Procedure of the Inter-American Commission on Human Rights. Additionally, the Petitioner claims that the Commission has held that individuals may serve as representatives of groups of which they are not members. In this case, the Petitioner is representing unnamed persons when there is no doubt as to the unnamed persons' existence and membership among a class of individuals whose rights have been allegedly violated, and this practice has been allowed in the past by the Commission.

30. Finally, the Petitioner asserts that his petition tends to establish violations of the American Declaration and is not manifestly groundless or out of order.

B. The State

31. In its response to the Petitioner's petition, the State argues that the petition should be found inadmissible for the following reasons:

- a. failure to meet the prescribed six-month deadline under the Commission's Rules of Procedure;
- b. failure to exhaust domestic remedies with respect to Articles II, VII, XIII, XVII, and XXII of the American Declaration;
- c. claims in abstracto with respect to the alleged violation of Articles I, II, VII, XIII, XVII, and XXIX are not permissible;
- d. failure by the Petitioner to substantiate his claims in relation to Articles XIII and XXIX of the Declaration; and
- e. the Petitioner's claims with respect to the rights of unborn children are manifestly unfounded due to the Commission's prior jurisprudence that legally provided abortion services do not violate any rights under the Declaration.

32. Regarding the timeliness of the Petition, the State claims that the Petitioner was informed of the Supreme Court of Canada's decision to dismiss his appeal on September 26, 2003, and that he did not submit his petition to the Commission until January 21, 2005. As such, Canada states that the Commission should find that it lacks competence *ratione temporis* to consider the instant petition.

33. Regarding the exhaustion of domestic remedies, the State notes that the Petitioner received final judgments on the issues of violation of freedom of expression and whether unborn children have a right to life, or recognition as "persons". However, even though available and effective, the Petitioner failed to seek domestic remedies for the remainder of the issues raised in his petition. For example, with respect to Articles II, VII, XIII and XVII, which are concerned with equality before the law, the State claims that the Petitioner could have but failed to raise these issues under Sections 15 and 28 of the Canadian Charter. While the Petitioner did raise Section 15 arguments in the provincial court and the British Columbia Supreme Court, the argument was based on the narrow legal issue of whether unborn children were included in the term "every individual", and he failed to pursue those arguments in the higher domestic courts.

Further, the rights of mothers and/or pregnant women were neither raised nor adjudicated before the domestic courts.

34. In addition, with respect to Article XXII, while the Petitioner argued a violation of the right to freedom of association before the provincial lower court, he chose to abandon this line of argument in all of his subsequent appeals.

35. Moreover, the State claims that the Petitioner's submissions with respect to Articles I, II, VII, XIII, XVII, and XXIX should be found inadmissible pursuant to Article 28(e) of the Commission's Rules of Procedure, since an individual petition cannot be of such a general nature regarding the victims of these alleged violations. The Petitioner claims, according to the State, that the victims of these alleged violations are "hundreds of thousands of unborn children and their mothers". According to the State, the alleged victims are not an identifiable group. Therefore the State submits that the Commission should declare this portion of the petition inadmissible *ratione personae*.

36. With regard to the Petitioner's arguments pursuant to Articles XIII and XXIX, Canada submits that these claims should also be dismissed pursuant to Article 34(e) of the Commission's Rules of Procedure. The Petitioner has failed to state any facts that tend to establish a violation of these rights. In any event, the State submits that the arguments pursuant to Article XXIX are an extension of arguments presented with respect to the alleged violations of Article I and VII and as such, do not warrant new consideration.

37. With respect to Article IV of the American Declaration, the State acknowledges that the Petitioner has received a "final judgment" and offers no arguments to challenge the admissibility of the Petitioner's claim that his right to freedom of expression was violated.

38. Finally, Canada submits that the Petitioner's submissions with respect to the right of unborn children under Articles I, II, VII, XIII, XVII and XXIX should be found inadmissible pursuant to Article 34(b) of the Rules of Procedure since these claims are manifestly groundless or out of order. The State submits that it is manifestly clear and certain based on the Baby Boy decision that legally provided abortion services do not violate any rights protected under the Declaration.

39. The State therefore contends that the Commission should find the Petitioners' petition to be inadmissible for failing to contain facts that tend to establish a violation of the American Declaration and as manifestly groundless and out of order.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission: *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

40. Upon considering the record before it, the Commission considers that it has the competence *ratione personae* to entertain the claim brought by the Petitioner with respect to the alleged violation of his right to freedom of expression and freedom of association in the present

petition. In accordance with the terms of Article 23 of the Commission's Rules of Procedure, the Petitioner is authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. Canada has been subject to the jurisdiction of the Commission, as a Member State of the OAS that deposited its instrument of ratification of the OAS Charter on January 08, 1990.[FN21] The Commission notes that the Charter and American Declaration became sources of legal obligation upon Canada becoming a Member State of the Organization of American States in 1990.

[FN21] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," July 14, 1989, Ser. A N° 10 (1989), paras. 35-35; IACHR Report N° 81/05 Case 11.862 Andrew Harte & Family, Canada, October 24, 2005, Paras. 52-55.

41. With respect to the claims brought on behalf of unborn children and their mothers, Rule 23 of the Commission's Rules of Procedure provides that:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

42. While it is permissible for a petitioner to bring a petition on behalf of other persons or alleged victims, the Commission reaffirms its previous jurisprudence that:

The liberal standing requirement of the inter-American system should not be interpreted, however, to mean that a case can be presented before the Commission in abstracto. An individual cannot institute an *actio popularis* and present a complaint against a law without establishing some active legitimation justifying his standing before the Commission. The applicant must

claim to be a victim of a violation of the Convention, or must appear before the Commission as a representative of a putative victim of a violation of the Convention by a state party. [...] If the applicant fails to establish active legitimation, the Commission must declare its incompetence *ratione personae* to consider the matter.[FN22]

[FN22] IACHR, Report N° 48/96, Case 11.553 , Admissibility, Emérita Montoya González, Costa Rica, October 16, 1996, para.28. In this case the Commission's point of reference was Article 44 of the American Convention, which provides that "[A]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." For the purpose of analysis, the Commission considers this provision to be indistinguishable from Article 32 of the Commission's Rules of Procedure.

43. In the matter of Felix Roman Esparragoza Gonzalez & Nerio Molina Peñaloza[FN23], a petition was lodged before the Commission partly on behalf of "the great majority of Venezuelan citizens who voted in the elections held on November 8, 1998", alleging violations of their rights to political participation and information during the elections for representatives to the Andean and Latin American Parliaments in 1998.

[FN23] IACHR, Report N° 48/04 Petition 12.210, Inadmissibility, Felix Roman Esparragoza Gonzalez and Nerio Molina Peñaloza, Venezuela, October 13, 2004.

44. At paragraph 40 of its Report, the Commission found the petition inadmissible "because the petition constitutes an *actio popularis* presented in the name of an indeterminate group of persons." At paragraph 43 of the Report, the Commission reiterated its previous jurisprudence that "for a petition to be admissible there must be specific victims, individual and specific" and that this jurisprudence "does not admit petitions carried out as "*actio popularis*" i.e. on behalf of the population of a country, a criterion which would be applicable in this case".

45. Based on the foregoing jurisprudence, the Commission finds that "hundreds of thousands of unborn children and their mothers" as referred to by the Petitioner[FN24] do not constitute sufficiently specific, defined and identifiable groups for the purpose of Article 32 of the Commission's Rules of Procedure. The Commission's position is not attenuated by the Petitioner's contention that the record of his trial in Canada "contains the name of a minor girl and her mother."[FN25] Firstly, the Petitioner has provided no evidence to support his contention, for example, by way of a trial transcript. Accordingly, the Commission is in no position to assess the nature, quality, or veracity of these claims. Secondly, even assuming the veracity of the Petitioner's claim, the Petitioner has not supplied any further or more specific information or evidence to verify that the alleged experiences of the minor child and her mother are representative of the "hundreds of thousands of unborn children and their mothers" that the Petitioner seeks to represent. Finally, the references to the minor and unborn child did not occur

in the context of any legal proceedings action taken by the Petitioner on their behalf, but in the context of criminal prosecution against the petitioner himself. On the assumption that the Commission found that the Petitioner was in compliance with Article 32, the Petitioner would still have the burden of demonstrating exhaustion of domestic remedies with respect to the referenced minor and her mother. This is a burden that the Petitioner has patently not discharged. In the premises, the Commission accordingly finds the claims made under Articles I, VII, XIII, XVII, and XXIX of the American Declaration on behalf of the “hundreds of thousands of unborn children and their mothers” and/or the minor child and her mother referred to by the Petitioner, to be in abstracto, and therefore inadmissible, *ratione personae*.

[FN24] See page 3, paragraph f of Petitioner’s petition of March 19, 2004.

[FN25] See Petitioner’s observations of October 02, 2005, para. 8, page 3.

46. Given that the petition alleges violations of rights protected under the American Declaration of the Rights and Duties of Man that have taken place in the territory of a State Party, the Commission concludes that it has the competence *ratione loci* to take cognizance of them.

47. Further, the Commission has the competence *ratione temporis* to examine this matter. The petition is based on facts alleged to have occurred beginning in 1996, at which time the obligations undertaken by the State under the American Declaration were in effect.

48. Finally, inasmuch as the Petitioner has filed complaints alleging violations of the American Declaration the Commission is competent *ratione materiae* to examine the substance of the complaints.

B. Duplication of Proceedings and *res judicata*

49. The Petitioner has indicated that his petition does not essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioner’s claims under Article 33 of the Commissions Rules of Procedure.

C. Exhaustion of Domestic Remedies

50. Having regard for the Commission’s previous finding that the claims brought on behalf of unborn children, et. al. are inadmissible, *ratione personae*, the Commission will only consider whether the Petitioner has exhausted domestic remedies with respect to the other claims brought by the Petitioner, namely violations of his right to freedom of expression and freedom of association under Articles IV and XXII of the American Declaration, respectively.

51. Article 31 of the Commission’s Rules of Procedure provides that the admissibility of a petition submitted to the Inter-American Commission pursuant to Article 23 of the

Commission's Rules of Procedure is subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to have the opportunity to address the alleged violation of a protected right, and where appropriate resolve it, prior to any submission before an international mechanism.

52. The requirement of prior exhaustion applies when domestic remedies are available in practice within the national system, and would be adequate and effective in providing a remedy for the alleged violation. In this sense Article 31(2) specifies that the requirement is not applicable when: the domestic legislation does not afford due process for the protection of the right in question the alleged victim did not have access to domestic remedies, or if there was unwarranted delay in reaching a final judgment in response to the invocation of those remedies. As indicated by Article 31 of the Commission's Rules of Procedure, when a petitioner alleges one of these exceptions, it then falls to the State to demonstrate that domestic remedies have not been exhausted, unless that is clearly evident from the record.

53. According to the principles of international law as reflected in precedents established by the Inter-American Commission and Court, it may first be noted that the State in question may expressly or tacitly waive the invocation of this rule.[FN26] Second, in order to be considered timely, the objection that domestic remedies have not been exhausted must be raised during the first stages of the proceeding. Otherwise, it will be presumed that the interested State has tacitly waived its use.[FN27] Finally, the State that alleges non-exhaustion of domestic remedies must indicate which remedies should have been exhausted, as well as provide evidence of their effectiveness.[FN28] Consequently, if the State in question does not provide timely arguments with respect to this requirement it will be understood to have waived its right to argue the non-exhaustion of domestic remedies and thereby discharge the burden of proof that would correspond to it.

[FN26] See, e.g., IACHR, Report N° 69/05, petition 960/03, Admissibility, Iván Eladio Torres, Argentina, October 13, 2005, para. 42; I/A Court H.R., Ximenes Lopes Case. Preliminary Objections. Judgment of November 30, 2005. Ser. C No. 139, para. 5; I/ A Court H.R., Case of Moiwana Village. Judgment of June 15, 2005. Ser. C No. 124, para. 49; I/ A Court H.R., Case of the Serrano-Cruz sisters. Preliminary Objections. Judgment of November 23, 2004. Ser. C No. 118, para. 135.

[FN27] See, e.g., I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53, I/A Court H.R., Castillo Petruzzi Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; and I/A Court H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40. The Commission and Court have established that "the first stages of the process" must be understood as the admissibility stage of the proceedings before the Commission, that is, "before any consideration of the merits." See, for example, IACHR, Report N° 71/05, petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, October 13, 2005, which cites, I/A Court H. R, Herrera Ulloa Case. Judgment of July 2, 2004. Series C No. 107, para. 81.

[FN28] See, e.g., IACHR, Report N° 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, 7 March 2005, paras. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections, supra, para. 53; I/A Court H.R., Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and I/A Court H.R., Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

54. In the present case, the Petitioner has argued that he has pursued all domestic remedies available to him in Canada, including an appeal to the Supreme Court of Canada. Regarding the Petitioner's claim of a violation of his freedom of association under Article XXII, the Petitioner has not controverted the State's assertion that while he argued a violation of the right to freedom of association before the provincial lower court, he chose to abandon this line of argument in all of his subsequent appeals. Based on the record before the Commission it appears that the Petitioner failed to exhaust domestic remedies in respect of this claim, and that it is accordingly inadmissible.

55. With respect to the right to freedom of expression, there appears to be no disagreement between the parties that the Petitioner exhausted domestic remedies, having regard for the decision of the Supreme Court of Canada of September 25, 2003 to dismiss the Petitioner's application for leave to appeal his convictions for protesting outside of an abortion facility. The Commission therefore finds that that the Petitioner did exhaust all domestic remedies with respect to the allegations of violations of Article IV of the American Declaration is admissible.

56. In summary, therefore, the Commission finds that the Petitioner failed to exhaust domestic remedies with respect of alleged violations of his right to freedom of association, but finds that he did with respect to alleged violations of his right to freedom of expression.

D. Time Period for Submission of the Petition

57. In accordance with Article 32 of the Commission's Rules of Procedure, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The six-month rule ensures legal certainty and stability once a decision has been taken.

58. The Commission has established that domestic remedies were exhausted with respect to the Petitioner's allegations that his right to freedom of expression was violated, pursuant to the decision of the Supreme Court of Canada, which was transmitted to the Petitioner on September 26, 2003. While the State contends that the Petitioner submitted his petition extemporaneously on January 21, 2005, the record of the Commission clearly shows that the Commission received the Petitioner's petition on March 25, 2004. The date of submission complies with the six-month period prescribed by Article 32 of the Commission's Rules of Procedure; accordingly, the Commission finds that this requirement has been satisfied.

E. Characterization of the Facts Alleged

59. Article 27 of the Commission's Rules of Procedure mandates that petitions state facts "regarding alleged violations enshrined in the American Convention on Human Rights and other applicable instruments." In addition Article 34(a) of the Commission's Rules of Procedures requires the Commission to declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules.

60. Having regard for the Commission's previous findings on the admissibility of the Petitioner's claims, the Commission proposes to confine the application of Article 27 of its Rules of Procedure to the Petitioner's alleged violations of Article IV of the American Declaration.

61. Article IV of the American Declaration provides that

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

62. It is axiomatic that this right may be the subject of legitimate limitations by the State, for example, in the interest of public order or security. However, the issue raised by the Petitioner is whether the criminal sanctions imposed by the State on him as a consequence of his activities outside of an abortion clinic represent a violation or legitimate curtailment of his freedom of expression. After carefully reviewing the information and arguments provided by the Petitioners and the State, and without prejudicing the merits of the matter, the Commission considers that the petition states facts that could prima facie establish violations of Article IV of the American Declaration of the Rights and Duties of Man.

63. In accordance with the foregoing analysis, and without prejudging the merits of this petition, the Commission decides to declare this petition admissible pursuant to Articles 37 of its Rules of Procedure solely with respect to the alleged violations of Article IV of the American Declaration, and to be inadmissible with respect to the other alleged violations of the American Declaration propounded by the Petitioner.

V. CONCLUSIONS

64. The Commission concludes that it is competent to take cognizance of the instant case and that the petition is admissible, pursuant to Articles 31 to 34 of the Commission's Rules of Procedure only in respect of Article IV of the American Declaration.

65. With respect to the claims brought under Articles I, II, IV, VII, XIII, XVII, and XXIX of the American Declaration, the Commission finds them to be inadmissible, *ratione personae*.

66. With respect to the claim brought under Article XXII, the Commission finds it to be inadmissible for failure to exhaust domestic remedies.

67. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible only with respect to the alleged violation of the rights recognized in Article IV of the American Declaration on the Rights and Duties of Man.
2. To declare inadmissible the claims of the petitioner under Articles I, VII, XIII, XVII, XXII and XXIX of the American Declaration.
3. To notify the parties of this decision.
4. To continue with the analysis of the merits of the case with respect to Petitioner's claims under Article IV of the American Declaration.
5. To make this report public, and publish it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 21st day of the month of October, 2006.
(Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President; Freddy Gutiérrez, Paolo G. Carozza and Víctor E. Abramovich, Commissioners.