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Human Rights Committee

Sixty-seventh session

18 October - 5 November 1999

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,  
of the Optional Protocol to the International Covenant on Civil  
and Political Rights

- Sixty-seventh session -

Communication N° 694/1996 \*/ \*\*/

Submitted by: Arieh Hollis Waldman (Initially represented by Mr. Raj Anand from Scott & Aylen, a law firm in Toronto, Ontario)

Alleged victim: The author

State party: Canada

Date of communication: 29 February 1996

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

Rights,

Meeting on 3 November 1999

Having concluded its consideration of communication No.694/1996 submitted to the Human Rights Committee on behalf of Arieh Hollis Waldman, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Arieh Hollis Waldman, a Canadian citizen residing in the province of Ontario. He claims to be a victim of a violation of articles 26, and articles 18(1), 18(4) and 27 taken in conjunction with article 2(1).\*

1.2 The author is a father of two school-age children and a member of the Jewish faith who enrolls his children in a private Jewish day school. In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. Other religious schools must fund through private sources, including the charging of tuition fees.

1.3 In 1994 Mr. Waldman paid \$14,050 in tuition fees for his children to attend Bialik Hebrew Day School in Toronto, Ontario. This amount was reduced by a federal tax credit system to \$10,810.89. These tuition fees were paid out of a net household income of \$73,367.26. In addition, the author is required to pay local property taxes to fund a public school system he does not use.

**The facts**

2.1 The Ontario public school system offers free education to all Ontario residents without discrimination on the basis of religion or on any other ground. Public schools may not engage in any religious indoctrination. Individuals enjoy the freedom to establish private schools and to send their children to these schools instead of the public schools. The only statutory requirement for opening a private school in Ontario is the submission of a "notice of intention to operate a private school". Ontario private schools are neither licensed nor do they require any prior Government approval. As of 30 September 1989, there were 64,699 students attending 494 private schools in Ontario. Enrolment in private schools represents 3.3 percent of the total day school enrolment in Ontario.

2.2 The province of Ontario's system of separate school funding originates with provisions in Canada's 1867 constitution. In 1867 Catholics represented 17% of the population of Ontario, while Protestants represented 82%. All other religions combined represented .2% of the population. At the time of Confederation it was a matter of concern that the new province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority. The solution was to guarantee their rights to denominational education, and to define those rights by referring to the state of the law at the time of Confederation.

2.3 As a consequence, the 1867 Canadian constitution contains explicit guarantees of denominational school rights in section 93. Section 93 of the Constitution Act, 1867 grants each province in Canada exclusive jurisdiction to enact laws regarding education, limited only by the denominational school rights granted in 1867. In Ontario, the section 93 power is exercised through the Education Act. Under the Education Act every separate school is entitled to full public funding. Separate schools are defined as Roman Catholic schools. The Education

Act states: "1. (1) "separate school board" means a board that operates a school board for Roman Catholics;...122. (1) Every separate school shall share in the legislative grants in like manner as a public school". As a result, Roman Catholic schools are the only religious schools entitled to the same public funding as the public secular schools. [\*The author was represented by Mr. Raj Anand from Scott and Aylen, a law firm in Toronto, Ontario, until 1998. ]

2.4 The Roman Catholic separate school system is not a private school system. Like the public school system it is funded through a publicly accountable, democratically elected board of education. Separate School Boards are elected by Roman Catholic ratepayers, and these school boards have the right to manage the denominational aspects of the separate schools. Unlike private schools, Roman Catholic separate schools are subject to all Ministry guidelines and regulations. Neither s.93 of the Constitution Act 1867 nor the Education Act provide for public funding to Roman Catholic private/independent schools. Ten private/independent Roman Catholic schools operate in Ontario and these schools receive no direct public financial support.

2.5 Private religious schools in Ontario receive financial aid in the form of (1) exemption from property taxes on non-profit private schools; (2) income tax deductions for tuition attributable to religious instruction; and (3) income tax deductions for charitable purposes. A 1985 report concluded that the level of public aid to Ontario private schools amounted to about one-sixth of the average total in cost per pupil enrolled in a private school. There is no province in Canada in which private schools receive funding on an equal basis to public schools. Direct funding of private schools ranges from 0% (Newfoundland, New Brunswick, Ontario) to 75% (Alberta).

2.6 The issue of public funding for non-Catholic religious schools in Ontario has been the subject of domestic litigation since 1978. The first case, brought 8 February 1978, sought to make religious instruction mandatory in specific schools, thereby integrating existing Hebrew schools into public schools. On 3 April 1978, affirmed 9 April 1979, Ontario courts found that mandatory religious instruction in public schools was not permitted.

2.7 In 1982 Canada's constitution was amended to include a Charter of Rights and Freedoms which contained an equality rights provision. In 1985 the Ontario government decided to amend the Education Act to extend public funding of Roman Catholic schools to include grades 11 to 13. Roman Catholic schools had been fully funded from kindergarten to grade 10 since the mid 1800's. The issue of the constitutionality of this law (Bill 30) in view of the Canadian Charter of Rights and Freedoms, was referred by the Ontario government to the Ontario Court of Appeal in 1985.

2.8 On 25 June 1987 in the Bill 30 case the Supreme Court of Canada upheld the constitutionality of the legislation which extended full funding to Roman Catholic schools. The majority opinion reasoned that section 93 of the Constitution Act 1867 and all the rights and privileges it afforded were immune from Charter scrutiny. Madam Justice Wilson, writing the majority opinion stated: "It was never intended ... that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

2.9 At the same time the Supreme Court of Canada, in the majority opinion of Wilson, J. affirmed: "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 ..." In a concurring opinion in the Supreme Court, 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."

2.10 In a further case, Adler v. Ontario, individuals from the Calvinistic or Reformed Christian tradition, and members of the Sikh, Hindu, Muslim, and Jewish faiths challenged the constitutionality of Ontario's Education Act, claiming a violation of the Charter's provisions on freedom of religion and equality. They argued that the Education Act, 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 also sought stating that the applicants were entitled to funding equivalent to that of public and Roman Catholic

schools. The Ontario Court of Appeal determined that the crux of Adler was an attempt to revisit the issue which the Supreme Court of Canada had already disposed of in the Bill 30 case. Chief Justice Dubin stated that the Bill 30 case was "really quite decisive of the discrimination issue in these appeals." They also rejected the argument based on freedom of religion.

2.11 On appeal, the Supreme Court of Canada by judgement of 21 November 1996, confirmed that its decision in the Bill 30 case was determinative in the Adler litigation, and found 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.

### **The complaint**

3.1 The author contends that the legislative grant of power to fund Roman Catholic schools authorized by section 93 of the Constitution Act of Canada 1867, and carried out under sections 122 and 128 of the Education Act (Ontario) violates Article 26 of the Covenant. The author states that these provisions create a distinction or preference which is based on religion and which has the effect of impairing the enjoyment or exercise by all persons, on an equal footing, of their religious rights and freedoms. He argues that the conferral of a benefit on a single religious group cannot be sustained. When a right to publicly financed religious education is recognized by a State party, no differentiation should be made among individuals on the basis of the nature of their particular beliefs. The author maintains that the provision of full funding exclusively to Roman Catholic schools cannot be considered reasonable. The historical rationale for the Ontario government's discriminatory funding practice, that of protection of Roman Catholic minority rights from the Protestant majority, has now disappeared, and if anything has been transferred to other minority religious communities in Ontario. A 1991 census is quoted as indicating that 44% of the population is Protestant, 36% is Catholic, and 8% have other religious affiliations. It is also unreasonable in view of the fact that other Canadian provinces and territories do not discriminate on the basis of religion in allocating education funding.

3.2 The author also claims that Ontario's school funding practices violate Article 18(1) taken in conjunction with Article 2. The author states that he experiences financial hardship in order to provide his children with a Jewish education, a hardship which is not experienced by a Roman Catholic parent seeking to provide his children with a Roman Catholic education. The author claims that such hardship significantly impairs, in a discriminatory fashion, the enjoyment of the right to manifest one's religion, including the freedom to provide a religious education for one's children, or to establish religious schools.

3.3 The author further points out that this violation is not sustainable under the limitation provisions of article 18 (3), which only permits those limitations which are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others. According to the author, a limitation established to protect morals may not be based on a single tradition.

3.4 The author further asserts that when a right to publicly financed religious education is recognized by a State party, no differentiation should be made on the basis of religion. The full and direct public funding of Roman Catholic schools in Ontario does not equally respect the liberty of non-Roman Catholics to choose an education in conformity with a parent's religious convictions, contrary to Article 18(4) taken together with Article 2.

3.5 The author states that Article 27 recognizes that separate school systems are crucial to the practice of religion, that these schools form an essential link in preserving community identity and the survival of minority religious groups and that positive action may be required to ensure that the rights of religious minorities are protected. Since Roman Catholics are the only religious minority to receive full and direct funding for religious education from the government of Ontario, Article 27 has not been applied, as required by Article 2, without distinction on the basis of religion.

### **State party's observations**

4.1 By note of 29 April 1997, the State party agrees to the combined consideration of admissibility and merits of

the communication by the Committee.

4.2 In its submission of February 1998, the State party denies that the facts of the case disclose violations of articles 2, 18, 26 and 17 of the Covenant.

4.3.1 With regard to the alleged violation of article 26, the State party contends the communication is inadmissible *ratione materiae*, or, in the alternative, does not constitute a violation. The State party recalls that a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. It refers to the Committee's jurisprudence in communication No. 191/1985 *Blom v. Sweden*, Views adopted on 4 April 1988, selected decisions volume 2, **CCPR/C/OP/2.**, where the Committee found that the State party was not violating article 26 by not providing the same level of subsidy for private and public education, when the private system was not subject to State supervision. It also refers to the Committee's Views in communications Nos. 298/1988 and 299/1988 *Lindgren and Lundquist v. Sweden*, Views adopted on 9 November 1990 (CCPR/C/40/D/298-299/1988)., where the Committee decided that the State party could not be deemed to be under an obligation to provide the same benefits to private schools as to public schools, and that the preferential treatment given to public sector schooling was reasonable and based on objective criteria. The Committee also considered that the State party could not be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all.

4.3.2 The State party argues that its funding of public schools but not private schools is not discriminatory. All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. According to the State party, it is not a deprivation by the Government that a child or a parent voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school system. The State party emphasizes that the province of Ontario does not fund any private schools, whether they are religious or not. The distinction made in the funding of schools is based not on religion, but on whether or not the school is a public or a private/independent institution.

4.3.3 According to the State party, the establishment of secular public institutions is consistent with the values of article 26 of the Covenant. Secular institutions do not discriminate against religion, they are a legitimate form of Government neutrality. According to the State party, a secular system is a tool which assists in preventing discrimination among citizens on the basis of their religious faiths. The State party makes no distinctions among different religious groups in its public education and does not limit any religious group's ability to establish private schools.

4.3.4 Apart from its obligations under the Constitution Act 1867, the State party provides no direct funding to religious schools. In such circumstances, the State party argues that it is not discriminatory to refuse funding for religious schools. In making its decision, the State party seeks to achieve the very values advanced by article 26, the creation of a tolerant society where there is respect and equality for all religious beliefs. The State party argues that it would defeat the purposes of article 26 itself if the Committee was to hold that because of the provisions in the Constitution Act 1867 requiring the funding of Roman Catholic schools, the State party now must fund all private religious schools, thus undermining its very ability to create and promote a tolerant society that truly protects religious freedom, when in the absence of the 1867 constitutional provision, it would have no obligation under the Covenant to fund any religious schools at all.

4.4.1. In relation to article 18, the State party refers to the travaux préparatoires which make it clear that article 18 does not include the right to require the State to fund private religious schools. During the drafting the question was expressly raised and answered in the negative. See Bossuyt, *Guide to the Travaux Préparatoires of the ICCPR*, 1987, at 369. As a consequence, the State party argues that the author's claim under article 18 is inadmissible *ratione materiae*. In the alternative, the State party argues that its policy meets the guarantee of freedom of religion contained in article 18, because it provides a public school system which is open to persons of all religious beliefs and which does not provide instruction in a particular religion or belief, and because there is freedom to establish private religious schools and parents are free to send their children to such religious schools. The State party denies that paragraph 4 of article 18 obligates States to subsidize private religious schools or religious education. The State party makes reference to Nowak, *UN Covenant on Civil and Political*

Rights, CCPR commentary, at 330-333. According to the State party, the purpose of article 18 is to ensure that religious observance, beliefs and practices remain a private matter, free from State coercion or restraint. It is the State's obligation to provide an education open and accessible to all children regardless of religion. There is no obligation to either offer or finance religious instruction or indoctrination. While the province must ensure that religious freedom and religious differences are accommodated within the public school system, it has no obligation to fund individuals who, for religious reasons, exercise their freedom to opt out of the public school system.

4.4.2 The State party argues that failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion. It points out that there are many spheres of government action which hold religious significance for religious believers and the State party rejects the suggestion that it must pay for religious dimensions in spheres in which it takes a role, such as religious marriages and religious community institutions such as churches and hospitals.

4.4.3 In the alternative, if the Committee were to interpret article 18 as requiring States to fund religious schools, the State party argues that its limitation meets the requirements of paragraph 3 of article 18 as it is prescribed by law and is necessary to protect public order and the fundamental rights and freedoms of others. The objectives of the State party's education system are the provision of a tuition-free, secular public education, universally accessible to all residents without discrimination and the establishment of a public education system which fosters and promotes the values of a pluralist, democratic society, including social cohesion, religious tolerance and understanding. The State party argues that if it were required to fund private religious schools, this would have a detrimental impact on the public schools and hence the fostering of a tolerant, multicultural, non-discriminatory society in the province.

4.4.4 Public schools, in the State party's opinion, are a rational means of fostering social cohesion and respect for religious and other differences. Schools are better able to teach common understanding and shared values if they are less homogeneous. The State party submits that one of the strengths of a public system of education is that it provides a venue where people of all colours, races, national and ethnic origins, and religions interact and try to come to terms with one another's differences. In this way, the public schools build social cohesion, tolerance and understanding. Extending public school funding rights to private religious schools will undermine this ability and may result in a significant increase in the number and kind of private schools. This would have an adverse effect on the viability of the public school system which would become the system serving students not found admissible by any other system. Such potential fragmentation of the school system is an expensive and debilitating structure for society. Moreover, extending public school funding rights to private religious schools could compound the problems of religious coercion and ostracism sometimes faced by minority religious groups in homogeneous rural areas of the province. The majority religious group could reintroduce and even make compulsory the practice of school prayer and religious indoctrination and minority religious groups would have to conform or attend their own, virtually segregated schools. To the extent that full funding of private schools enables such schools to supplant public schools, the government objective of universal access to education will be impaired. Full public funding of private religious schools is likely to lead to increased public school closings and to the reduction of the range of programs and services a public system can afford to offer.

4.4.5 The State party concludes that if the province of Ontario were required to fund private religious schools, this would have a detrimental impact on the public schools, and hence the fostering of a tolerant, multicultural, non-discriminatory society in the province, thus undermining the fundamental rights and freedoms of others. According to the State party it has struck the appropriate balance by funding a public school system where members of all groups can learn together while retaining the freedom of parents to send children to private religious schools, at their own expense, if they do desire.

4.5.1 As to the author's allegation that he is a victim of a violation of article 18 in conjunction with article 2 of the Covenant, the State party recalls that article 2 does not establish an independent right but is a general undertaking by States and cannot be invoked by individuals under the Optional Protocol without reference to other specific articles of the Covenant. It cannot be argued that article 2 in combination with article 18 has been violated if there is no such right in article 18 itself.

4.5.2 Alternatively, the State party rejects a violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to a distinction or discrimination within the meaning of article 2 of the Covenant. For substantive arguments concerning the issue of discrimination, it refers to its arguments relating to the alleged violation of article 26.

4.6.1 In respect to the alleged violation of article 27, the State party contends that the communication is inadmissible *ratione materiae* or in the alternative does not demonstrate a violation. According to the State party, the travaux préparatoires make it clear that article 27 does not include a right to require the State to fund private religious schools. The article only protects against State actions of a negative character: individuals "shall not be denied the right". A proposal to include an obligation to take positive measures was defeated. Nowak, UN Covenant on Civil and Political Rights, CCPR commentary at 481, 504. Although under article 27 a State party may be required to take certain positive actions, in the light of the intention of the drafters positive actions should be required only in rare circumstances. According to the State party, the province of Ontario has taken positive measures which protect the right of members of religious minorities to establish religious schools and to send their children to those schools. It is not further required to fund those schools.

4.6.2 In the alternative, restrictions on the rights contained in article 27 may occur where they have a reasonable and objective justification and are consistent with the provisions of the Covenant read as a whole. For the reasons given in relation to the creation of a tolerant society, Ontario's decision not to extend funding to all private religious schools meets this test for justification.

4.6.3 The State party refers to its arguments in relation to article 18 and reiterates that there can be no argument that article 27 in combination with article 2 has been violated if there is no such right in article 27 itself. In the alternative, there is no violation of article 2 because a differentiation based on reasonable and objective criteria does not amount to an invidious distinction or discrimination within the meaning of article 2. The State party refers to its arguments concerning article 26 above.

### **Author's comments**

5.1 Counsel submits that the State party has admitted the discriminatory nature of the educational funding, and based this on a constitutional obligation. Counsel argues that article 26 of the Covenant does not allow exceptions for discriminatory constitutional laws and that historical anomalies cannot thwart the application of the equality provisions of the Covenant. Counsel rejects as circular the State party's argument that the difference between the funding of Roman Catholic schools and other religious schools is one between public and private schools. Counsel notes that the public quality of Roman Catholic schools is a bureaucratic construct assigned to one group of ratepayers based on their religious affiliation to the discriminatory exclusion of all other ratepayers.

5.2 Counsel rejects the State party's argument that the extension of non-discriminatory public funding to other religious schools would harm the goals of a tolerant, multi-cultural, non-discriminatory society, and argues that on the contrary, the current circumstance of discriminatory and selective funding of only one religious denomination in the establishment and operation of religious schools is highly detrimental to fostering a tolerant, non-discriminatory society in the province and encourages the divided society among religious lines that it claims to defeat.

5.3 According to counsel, the State party's argument that the claim under article 18 is inadmissible *ratione materiae* because article 18 does not include a right to require the State to fund public schools, is a misrepresentation of the author's submissions. Counsel argues that article 18(1) includes the right to teach religion and the right to educate one's children in a religious school. If this is possible for some and not for others on discriminatory grounds, then article 18 is violated in conjunction with article 2. According to counsel, in order to give article 2 its full and proper meaning, it must have the effect of requiring non-discrimination on the listed grounds with respect to the rights and freedoms in the Covenant, even if in the absence of discrimination, no violation of the Covenant existed. If a violation of the Covenant was always required without the application or consideration of article 2, article 2 would be superfluous, in counsel's opinion. Counsel refers to the jurisprudence

of the European Court of Human Rights in relation to article 14 of the European Convention on Human Rights, which recognizes that a measure which in itself is in conformity with the requirements of the article enshrining the right or freedom in question may however infringe this article when read in conjunction with article 14 for the reason that it is of a discriminatory nature. (Judgement of 23 July 1968, relating to certain aspects of the laws on the use of languages in education in Belgium) Counsel clarifies that he does not claim a violation of article 18 on its own, but only in conjunction with article 2, because the funding of only Roman Catholic schools results in discriminatory support for Roman Catholic education.

5.4 According to counsel, the State party makes the same error in replying to his claims under article 27 in conjunction with article 2. He argues that, since Roman Catholic schools are the only religious minority to receive full and direct funding for religious education from the Government of Ontario, article 27 has not been applied, as required by article 2, without distinction on the basis of religion.

5.5 Counsel agrees with the State party that the fact alone that it does not provide the same level of funding for private as for public schools cannot be deemed to be discriminatory. He acknowledges that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In the absence of discrimination, the withdrawal of such funding is a policy decision which is for the Government to take. Counsel notes that the amendment of the provision of the Canadian Constitution Act 1867 requires only the agreement of the Government of the province affected and the federal Government. Such amendments have been recently passed in Quebec and Newfoundland to reduce historical commitments to publicly-funded education for selective religious denominations.

5.6 Counsel maintains that when a right to publicly financed religious education is recognized by States parties, no differentiation shall be made among individuals on the basis of the nature of their particular beliefs. The practice of exclusively funding Roman Catholic religious education in Ontario therefore violates the Covenant. Counsel therefore seeks funding for all religious schools which meet provincial standards in Ontario at a level equivalent to the funding, if any, received by Roman Catholic schools in Ontario.

### **State party's further observations**

6.1 In a further reply, the State party emphasizes that the recent constitutional amendments affecting education in Quebec and Newfoundland do not bring about the remedy sought by the author of equivalent funding for all religious schools. The changes in Quebec preserve the denominational status of Catholic and Protestant schools in that province, and protect that status through an alternate constitutional means, by way of the notwithstanding clause in the Charter. The changes in Newfoundland demonstrate a clear rejection of the very remedy sought by the author, since it has replaced its religious based school system, where 8 different religions representing 90% of the population each had the right to set up their own publicly funded schools, with a singular public system where religious observance will be permitted at the request of parents.

6.2 In respect of counsel's argument concerning article 2 of the Covenant, the State party rejects his suggestion that article 2 can convert laws or Government actions otherwise consistent with the rights and freedoms of the Covenant, into contraventions. In the State party's opinion, the author seeks to raise equality arguments by combining article 2 with articles 18 and 27 respectively. It is the equality guarantee in article 26 of the Covenant that is the proper context for raising such issues. The State party notes that article 26 has no equivalent in the European Convention for the Protection of Fundamental Human Rights and Fundamental Freedoms. The State party argues that a complainant who is unsuccessful under article 26 should not be entitled to an identical reexamination of the issue simply by combining article 2 with various substantive Covenant provisions.

6.3 The State party further observes that article 2 of the Covenant requires the State to respect and ensure to all individuals within its territory the rights recognized in the present Covenant. The funding of denominational separate schools in Ontario is not required to ensure the rights contained in articles 18 and 27 of the Covenant, neither is it related to, or in addition to, the obligations created by those articles. The funding arises solely out of the constitutional obligation under section 93(1) of the Constitution Act 1867, not out of any obligation under, in conformity with, nor the augmenting of any right in any of the articles of the Covenant.



## **Author's further comments**

7. By submission of 15 March 1999, the author notes that the State party's rationale for the discriminatory treatment of religious schools, the desire to foster multiracial and multicultural harmony through maximizing public funding for the secular school system, would actually require the withdrawal of special funding for Roman Catholic separate schools. He further points out that the fact that Quebec had to resort to the notwithstanding clause in the Charter in order to preserve its funding for separate schools indicates that this system is in violation of the equality rights contained in the Charter, and by consequence of article 26 of the Covenant. The author refers to the constitutional changes in respect of the education system in Newfoundland and states that it is indicative of the fact that constitutional change in relation to denominational schools is possible even over the objections of those with vested interests.

## **State party's further observations**

8.1 In a further reply to the author's comments, the State party contests the author's interpretation of the use of the notwithstanding clause in Quebec. According to the State party, the amendment to section 93 of the Constitution Act, 1867, took away the constitutional protection for Protestant and Catholic denominational schools in Quebec in order to replace them with linguistic school boards. Continued constitutional protection for the denominational schools, however, is provided through the alternate method of the notwithstanding clause. According to the State party, this shows that the issue of denominational school funding continues to involve the present day complex balancing of diverse needs and interests.

8.2 The State party notes that in his comments, the author for the first time indicates that a possible remedy for the alleged discrimination would be the elimination of funding for the Roman Catholic separate schools. So far, the State party's reply to the author's communication has focussed on his claim that the failure to extend funding constituted a violation of the Covenant, not on a claim that the failure to eliminate funding from the Roman Catholic separate school system is violative of the Covenant. The State party notes that in another communication (No. 816/1998, Tadman et al. v. Canada) presented to the Committee under the Optional Protocol this question has been addressed and therefore it requests the Committee to consider jointly the two communications.

8.3 In case the Committee does not join the consideration of the two communications, the State party provides further arguments concerning this matter. In this context, the State party explains that without the protection of the rights of the Roman Catholic minority, the founding of Canada would not have been possible and that the separate school system remained a controversial issue, at times endangering the national unity in Canada. The State party explains that the funding is seen by the Roman Catholic community as correction of a historical wrong.

8.4 The State party submits that there are reasonable and objective grounds for not eliminating funding to Roman Catholic separate schools in Ontario. The elimination would be perceived as undoing the bargain made at Confederation to protect the interests of a vulnerable minority in the province and would be met with outrage and resistance by the Roman Catholic community. It would also result in a certain degree of economic turmoil, including claims for compensation of facilities or lands provided for Roman Catholic schools. Further, the protection of minority rights, including minority religion and education rights, is a principle underlying the Canadian constitutional order and militates against elimination of funding for the Roman Catholic separate schools. Elimination of funding for separate schools in Ontario would further lead to pressure on other Canadian provinces to eliminate their protections for minorities within their border.

## **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 The Committee notes that the State party has challenged the admissibility of the communication ratione materiae. The Committee, however, considers that the author's claim of discrimination, in itself and in conjunction with articles 18 and 27, is not incompatible with the provisions of the Covenant. The State party has not raised any other objections and accordingly the Committee finds the communication admissible. The Committee does not consider that there would be any difficulty or disadvantage to the parties in proceeding to consider this case on its own without joinder as requested by the State party.

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant.

10.3 The State party has argued that no discrimination has occurred, since the distinction is based on objective and reasonable criteria: the privileged treatment of Roman Catholic schools is enshrined in the Constitution; as Roman Catholic schools are incorporated as a distinct part of the public school system, the differentiation is between private and public schools, not between private Roman Catholic schools and private schools of other denominations; and the aims of the public secular education system are compatible with the Covenant.

10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-Government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of nondiscrimination laid down in the Covenant. The Committee does not take issue with this argument but notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools. It has also noted the author's submission that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In this context, the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

10.7 The Committee has noted the author's arguments that the same facts also constitute a violation of articles 18 and 27, read in conjunction with article 2(1) of the Covenant. The Committee is of the opinion that in view of its conclusions in regard to article 26, no additional issue arises for its consideration under articles 18, 27 and 2(1) of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide an effective remedy, that will eliminate this discrimination.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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\*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure Mr. Maxwell Yalden did not participate in the examination of the case.

\*\*The text of an individual opinion by member Martin Scheinin is appended to this document.

[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.]

## Appendix

### Individual opinion by member Martin Scheinin (concurring)

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.

1. The Covenant does not require the separation of church and state, although countries that do not make such a separation often encounter specific problems in securing their compliance with articles 18, 26 and 27 of the Covenant. Varying arrangements are in place in states parties to the Covenant, ranging from full separation to the existence of a constitutionally enforced state church. As the Committee has expressed in its General Comment No. 22 [48] on article 18, the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, "shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers" (para. 9).

2. The plurality of acceptable arrangements in the relationship between state and religion relates also to education. In some countries, all forms of religious instruction or observance are prohibited in public schools,

and religious education, protected under article 18 (4), takes place either outside school hours or in private schools. In some other countries there is religious education in the official or majority religion in public schools, with provision for full exemption for adherents of other religions and non-religious persons. In a third group of countries instruction in several or even all religions is offered, on the basis of demand, within the public system of education. A fourth arrangement is the inclusion in public school curricula of neutral and objective instruction in the general history of religions and ethics. All these arrangements allow for compliance with the Covenant. As was specifically stated in the Committee's General Comment No. 22 [48], "public education that includes instruction in a particular religion or belief is inconsistent with article 18 (4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" (para. 6). This statement reflects the Committee's findings in the case of *Hartikainen et al. v. Finland* (Communication No. 40/1978).

3. In the present case the Committee correctly focussed its attention on article 26. Although both General Comment No. 22 [48] and the *Hartikainen* case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of *Blom v. Sweden* (Communication No. 191/1985) and *Lundgren et al. and Hjord et al. v. Sweden* (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the *same level* of funding as public schools does not amount to discrimination.

4. In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant.

5. When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

Martin Scheinin (signed)



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