



**International Covenant
on Civil and
Political Rights**

Distr.
RESTRICTED*

CCPR/C/70/D/736/1997
26 October 2000

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Seventieth session
16 October – 3 November 2000

VIEWS

Communication No. 736/1997

Submitted by: Mr. Malcolm Ross (represented by
Mr. Douglas H. Christie, legal
counsel)

Alleged victim: The author

State party: Canada

Date of communication: 1 May 1996

Prior decisions: - Special Rapporteur's rule 91
decision, transmitted to the State
party on 20 January 1997 (not
issued in document form)

Date of present decision: 18 October 2000

On 18 October 2000, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 736/1997. The text of the Views is appended to the present document.

[ANNEX]

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- Made public by decision of the Human Rights Committee.

ANNEXVIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4,
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

- Seventieth session -

concerning

Communication No. 736/1997**

<u>Submitted by:</u>	Malcolm Ross (represented by Douglas H. Christie, legal counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Canada
<u>Date of communication:</u>	1 May 1996
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The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2000

Having concluded its consideration of communication No. 736/1997 submitted to the Human Rights Committee by Malcolm Ross 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, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattath Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Under 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 one Committee member is appended to the present document.

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

1. The author of the communication is Malcolm Ross, a Canadian citizen. He claims to be a victim of a violation by Canada of articles 18 and 19 of the Covenant. He is represented by counsel, Mr. Douglas H. Christie.

The facts as submitted by the author:

2.1 The author worked as a modified resource teacher for remedial reading in a school district of New Brunswick from September 1976 to September 1991. Throughout this period, he published several books and pamphlets and made other public statements, including a television interview, reflecting controversial, allegedly religious opinions. His books concerned abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion. Local media coverage of his writings contributed to his ideas gaining notoriety in the community. The author emphasises that his publications were not contrary to Canadian law and that he was never prosecuted for the expression of his opinions. Furthermore, all writings were produced in his own time, and his opinions never formed part of his teaching.

2.2 Following expressed concern, the author's in-class teaching was monitored from 1979 onwards. Controversy around the author grew and, as a result of publicly expressed concern, the School Board on 16 March 1988, reprimanded the author and warned him that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was, however, allowed to continue to teach, and this disciplinary action was removed from his file in September 1989. On 21 November 1989, the author made a television appearance and was again reprimanded by the School Board on 30 November 1989.

2.3 On 21 April 1988, a Mr. David Attis, a Jewish parent, whose children attended another school within the same School District, filed a complaint with the Human Rights Commission of New Brunswick, alleging that the School Board, by failing to take action against the author, condoned his anti-Jewish views and breached section 5 of the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately led to the sanctions set out in para 4.3 below.

Relevant domestic procedures and legislation:

3.1 As a result of its federal structure, Canada's human rights law is bifurcated between the federal and the provincial jurisdictions. Each province, as well as the federal and territorial jurisdictions, has enacted human rights legislation. The details of the different legislative regimes may differ, but their overall structure and contour are similar.

3.2 According to the State party, the human rights codes protect Canadian citizens and residents from discrimination in numerous areas, including employment, accommodation and services provided to the public. Any individual claiming to be a victim of discrimination may file a complaint with the relevant human rights commission, which will in turn inquire into the complaint. The burden of proof to be met by the complainant is the civil standard based on a balance of probabilities, and the complainant need not show that the individual intended to discriminate. A tribunal appointed to inquire into a complaint has the authority to impose a wide range of remedial orders, but has no authority to impose penal sanctions.

Individuals concerned about speech that denigrates particular minorities may choose to file a complaint with a human rights commission rather than or in addition to filing a complaint with the police.

3.3 The complaint against the School Board was lodged under section 5(1) of the New Brunswick Human Rights Code. This section reads:

«No person, directly or indirectly, alone or with another, by himself or by the interpretation of another, shall

(a) deny to any person or class of persons with respect to any accommodation, services or facilities available to the public, or

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.»

3.4 In his complaint, Mr. Attis submitted that the School Board had violated section 5 by providing educational services to the public which discriminated on the basis of religion and ancestry in that they failed to take adequate measures to deal with the author. Under section 20(1) of the same Act, if unable to effect a settlement of the matter, the Human Rights Commission may appoint a board of inquiry composed of one or more persons to hold an inquiry. The board appointed to examine the complaint against the School Board made its orders pursuant to section 20 (6.2) of the same Act, which reads:

«Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

(a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,

(b) to rectify any harm caused by the violation

(c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,

(d) to reinstate any party who has been removed from a position of employment in violation of the Act

(e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and

(f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feeling or self-respect, in such amount as the Board considers just and appropriate.»

3.5 Since 1982, the Canadian Charter of Rights and Freedoms («the Charter») has been part of the Canadian Constitution, and consequently any law that is inconsistent with its provisions is, to the extent of that inconsistency, of no force or effect. The Charter applies to the federal, provincial and territorial governments in Canada, with respect to all actions of those governments, whether they be legislative, executive or administrative. Provincial human rights codes and any orders made pursuant to such codes are subject to review under the Charter. The limitation of a Charter right may be justified under section 1 of the Charter,

if the Government can demonstrate that the limitation is prescribed by law and is justified in a free and democratic society. Sections 1, 2(a) and 2(b) of the Charter provide:

«1. The *Canadian Charter of Rights and Freedoms* 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.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

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

3.6 There are also several other legislative mechanisms both at the federal and provincial level to deal with expressions that denigrate particular groups in Canadian society. For example, the Criminal Code prohibits advocating genocide, the public incitement of hatred and the willful promotion of hatred. The consent of the Attorney General is required to commence a prosecution with respect to these offences. The burden of proof on the Crown is to demonstrate that the accused is guilty beyond a reasonable doubt and the Crown must prove all the requisite elements of the offence, including that the accused possessed the requisite *mens rea*.

The procedure before the domestic tribunals:

4.1 On 1 September 1988, a Human Rights Board of Inquiry was established to investigate the complaint. In December 1990 and continuing until the spring of 1991, the first hearing was held before the Board. All parties were represented at the hearing and, according to the State party, were given full opportunity to present evidence and make representations. There were in total twenty-two days of hearing, and testimony was given by eleven witnesses. The Board found that there was no evidence of any classroom activity by the author on which to base a complaint of discrimination. However, the Board of Inquiry also noted that

«... a teacher's off-duty conduct can impact on his or her assigned duties and thus is a relevant consideration... An important factor to consider, in determining if the Complainant has been discriminated against by Mr. Malcolm Ross and the School Board, is the fact that teachers are role models for students whether a student is in a particular teacher's class or not. In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall within the scope of the employment relationship. While there is a reluctance to impose restrictions on the freedom of employees to live their independent lives when on their own time, the right to discipline employees for conduct while off-duty, when that conduct can be shown to have a negative influence on the employer's operation has been well established in legal precedent».

4.2 In its assessment of the author's off-duty activities and their impact, the Board of Inquiry made reference to four published books or pamphlets entitled respectively Web of Deceit, The Real Holocaust, Spectre of Power and Christianity vs. Judeo-Christianity, as well as to a letter to the editor of The Miramichi Leader

dated 22 October 1986 and a local television interview given in 1989. The Board of Inquiry stated, *inter alia*, that it had

«... no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are *prima facie* discriminatory against persons of the Jewish faith and ancestry. It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.

Malcolm Ross has used the technique in his writings of quoting other authors who have made derogatory comments about Jews and Judaism. He intertwines these derogatory quotes with his own comments in a way such that he must reasonably be seen as adopting the views expressed in them as his own. Throughout his books, Malcolm Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.

... The writings and comments of Malcolm Ross cannot be categorized as falling within the scope of scholarly discussion which might remove them from the scope of section 5 [of the Human Rights Act]. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research.»

4.3 The Board of Inquiry heard evidence from two students from the school district who described the educational community in detail. *Inter alia*, they gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students. The Board of Inquiry found no direct evidence that the author's off-duty conduct had impacted on the school district, but found that it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students. In conclusion, the Board of Inquiry held that the public statements and writings of Malcolm Ross had continually over many years contributed to the creation of a «poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children». Thus, the Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it was directly in violation of the Act due to its failure to discipline the author in a timely and appropriate manner, so endorsing his out-of-school activities and writings. Therefore, on 28 August 1991, the Board of Inquiry ordered

«... (2) That the School Board

(a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;

(b) appoint Malcolm Ross a non-teaching position if, ..., a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified. ...

(c) terminate his employment at the end of the eighteen months leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position.

(d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or of at any time during his employment in a non-teaching position, he

(i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or

(ii) publishes, sells or distributes any of the following publications, directly or indirectly: Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of Power, Christianity vs Judeo-Christianity (The battle for truth).»

4.4 Pursuant to the Order, the School Board transferred the author to a non-classroom teaching position in the School District. The author applied for judicial review requesting that the order be removed and quashed. On 31 December 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, quashing clause 2(d) of the order, on the ground that it was in excess of jurisdiction and violated section 2 of the Charter. As regards clauses (a), (b), and (c) of the order, the court found that they limited the author's Charter rights to freedom of religion and expression, but that they were saved under section 1 of the Charter.

4.5 The author appealed the decision of the Court of Queen's Bench to the Court of Appeal of New Brunswick. At the same time, Mr. Attis cross-appealed the Court's decision regarding section 2(d) of the Order. The Court of Appeal allowed the author's appeal, quashing the order given by the Board of Inquiry, and accordingly rejected the cross-appeal. By judgement of 20 December 1993, the Court held that the order violated the author's rights under section 2 (a) and (b) of the Charter in that they penalised him for publicly expressing his sincerely held views by preventing him from continuing to teach. The Court considered that, since it was the author's activities outside the school that had attracted the complaint, and since it had never been suggested that he used his teaching position to further his religious views, the ordered remedy did not meet the test under section 1 of the Charter, i.e. it could not be deemed a specific purpose so pressing and substantial as to override the author's constitutional guarantee of freedom of expression. To find otherwise would, in the Court's view, have the effect of condoning the suppression of views that are not politically popular any given time. One judge, Ryan J.A., dissented and held that the author's appeal should have been dismissed and that the cross-appeal should have been allowed, with the result that section 2(d) of the Order should have been reinstated.

4.6 Mr. Attis, the Human Rights Commission and the Canadian Jewish Congress then sought leave to appeal to the Supreme Court of Canada, which allowed the appeal and, by decision of 3 April 1996, reversed the judgment of the Court of Appeal, and restored clauses 2(a), (b) and (c) of the order. In reaching its decision, the Supreme Court first found that the Board of Inquiry's finding of discrimination contrary to section 5 of the Human Rights Act on the part of the School Board was supported by the evidence and contained no error. With regard to the evidence of discrimination on the part of the School Board generally,

and in particular as to the creation of a poisoned environment in the School District attributable to the conduct of the author, the Supreme Court held

«... that a reasonable inference is sufficient in this case to support a finding that the continued employment of [the author] impaired the educational environment generally in creating a ‘poisoned’ environment characterized by a lack of equality and tolerance. [The author’s] off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught. (para. 49)

... The reason that it is possible to ‘reasonably anticipate’ the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove [the author] from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that educational services are discrimination free.» (para 101)

4.7 On the particular position and responsibilities of teachers and on the relevance of a teacher’s off duty conduct, the Supreme Court further commented:

«... Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community’s perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community’s confidence in the public school system as a whole.

... By their conduct, teachers as «medium» must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to «choose which hat they will wear on what occasion».

... It is on the basis of the position of trust and influence that we can hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a «poisoned» environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.» (paras. 43-45)

4.8 Secondly, the Court examined the validity of the impugned Order under the Canadian Constitution. In this regard, the Court first considered that the Order infringed sections 2(a) and 2(b) of the Charter as it in effect restricted respectively the author’s freedom of religion and his freedom of expression. The Court went

on to consider whether these infringements were justifiable under section 1 of the Charter, and found that the infringements had occurred with the aim of eradicating discrimination in the provision of educational services to the public, a 'pressing and substantial' objective. The Court further found that the measures (a) (b) and (c) imposed by the order could withstand the proportionality test, that is there existed a rational connection between the measures and the objective, the impairment of the author's right was minimal, and there was proportionality between the effects of the measures and their objective. Clause (d) was found not to be justified since it did not minimally impair the author's constitutional freedoms, but imposed a permanent ban on his expressions.

The complaint:

5.1 The author claims that his rights under articles 18 and 19 of the Covenant have been violated in that he is refused the right to express freely his religious opinions. In this context, his counsel emphasises, which was recognised by the Courts, that the author never expressed his opinions in class and that he had a good record as a teacher. Counsel further states that there is no evidence that any of the students at the school had been adversely affected by the author's writings or were influenced by them, nor that the author ever committed any act of discrimination. In this context, it is pointed out that there were no Jewish students in the author's class.

5.2 Counsel argues that there is no rational connection between expressing a discriminatory religious opinion (i.e. this religion is true and that is false) and an act of discrimination (i.e. treating someone differently because of religion). In this regard, it is submitted that the author's opinions are sincere and of a religious character, opposing the philosophy of Judaism, since he feels that Christianity is under attack from Zionist interests. Counsel asserts that the requirement that an employee's conscience and religious expression be subject to State scrutiny or employer regulation in their off-duty time would make religious freedom meaningless.

5.3 Counsel further claims that the author's opinions and expressions are not contrary to Canadian law, which prohibits hate propaganda, and that he had never been prosecuted for expressing his ideas. Counsel submits that the author's case is not comparable to *J.R.T. and W.G. v Canada*¹, but rather draws comparison to the case of *Vogt v. Germany*² decided by the European Court of Human Rights. Counsel submits that the order destroyed the author's right to teach which was his professional livelihood.

5.4 Counsel further argues that, if the Board of Inquiry was of the opinion that there was an anti-Semitic atmosphere among the students in the school district, it should have recommended measures to discipline the students committing such acts of discrimination. The author denies that his views are racist, any more than atheism is racist or Judaism itself. It is further stated that criticism of Judaism or Zionism for religious reasons cannot be equated to anti-Semitism. The author feels discriminated against, because he is convinced that a teacher publicly attacking Christianity would not be disciplined in a similar way.

¹ Communication No. 104/1981, Inadmissibility decision adopted on 6 April 1983.

² Case No. 7/1994/454/535, Judgment passed 26 September 1995. In the case, Mrs. Vogt maintained, *inter alia*, that her dismissal from the civil service (as a schoolteacher) on account of her political activities as a member of the German Communist Party had infringed her right to freedom of expression secured under article 10 of the European Convention. In the circumstances, the Court found that article 10 had been violated.

The State party's submission and the author's comments thereon:

6.1 In its submission of 7 September 1998, the State party offers its observations both on the admissibility and the merits of the communication. The State party submits that the communication should be deemed inadmissible both for lack of substantiation and because it is incompatible with the relevant provisions of the Covenant. Alternatively, in the event that the Committee decides that the author's communication is admissible, the State party submits that it has not violated articles 18 and 19 of the Covenant.

6.2 The State party submits that the communication should be deemed inadmissible as incompatible with the provisions of the Covenant because the publications of the author fall within the scope of article 20, paragraph 2, of the Covenant, i.e. they must be considered «advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence». In this regard, the State party points out that the Supreme Court of Canada found that the publications denigrated the faith and beliefs of Jewish people and called upon «true Christians» to not merely question the validity of those beliefs but to hold those of the Jewish faith in contempt. Furthermore, it is stated that the author identified Judaism as the enemy and called upon «Christians» to join in the battle.

6.3 The State party argues that articles 18, 19 and 20 of the Covenant must be interpreted in a consistent manner, and that the State party therefore cannot be in violation of articles 18 or 19 by taking measures to comply with article 20. It is submitted that freedom of religion and expression under the Covenant must be interpreted as not including the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard, the State party also invokes article 5, paragraph 1, of the Covenant, and submits that to interpret articles 18 and 19 as protecting the dissemination of anti-Semitic speech cloaked as Christianity denies Jews the freedom to exercise their religion, instills fear in Jews and other religious minorities and degrades the Christian faith.

6.4 With regard to the interpretation and application of article 20, the State party makes reference to the jurisprudence of the Committee, in particular the case of *J.R.T. and W.G. v Canada*³. The State party notes that the author's counsel contends that the present case is distinguishable from *J.R.T. and W.G. v Canada* in that Mr. Ross did not introduce his opinions into the workplace; his opinions were of a religious nature; and none of his publications were contrary to Canadian law. While acknowledging that there are some factual differences between the two cases, the State party submits that there are also important similarities between them and that the rule concerning the inadmissibility of communications incompatible with the Covenant is equally applicable. First, it is pointed out that both communications concerned anti-Semitic speech. The State party denies counsel's contention that the author's views are of a religious nature, and

³ The case concerned tape-recorded telephone messages from the author and a political party warning the callers «of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles». Pursuant to section 3 of the Human Rights Act, the Canadian Human Rights Commission ordered the author and the political party to cease using the telephone to communicate such matters. The Human Rights Committee decided that the communication from the political party was inadmissible for lack of standing, while the communication from the author was inadmissible as incompatible with the Covenant because the disseminated messages «clearly constitute[d] advocacy of racial or religious hatred».

argues that they promote anti-Semitism and cannot be said to be religious beliefs or part of the Christian faith. Second, it is pointed out that both communications involved orders made pursuant to human rights legislation and not charges under the hate propaganda provisions of the Criminal Code. In this regard, it is submitted that counsel is wrong when he argues that the author's writings and public statements were not contrary to Canadian law. The writings and statements did, according to the State party, contravene the New Brunswick Human Rights Act as they were found to be discriminatory and to have created a poisoned environment in the school district.

6.5 The State party further submits that the author's claim under article 18 should be held inadmissible as being incompatible with the Covenant also because his opinions «do not express religious beliefs and certainly do not fall within the tenets of Christian faith.» The State party argues that the author has «cloaked his views under the guise of the Christian faith but in fact his views express hatred and suspicion of the Jewish people and their religion.» It is further submitted that the author has not provided any evidence showing how anti-Semitic views are part of the Christian faith, and that no such evidence would be forthcoming. Similarly, it is asserted that the author's expressions are not manifestations of a religion, as he did not publish them for the purpose of worship, observance, practice or teaching of a religion.

6.6 Lastly on the compatibility of the communication with the provisions of the Covenant, the State party invokes article 18, paragraphs 2 and 4, and claims that States parties under these provisions have an obligation to ensure that teachers within their public education systems promote respect for all religions and beliefs and actively denounce any forms of bias, prejudice or intolerance. The State party argues that if it were to permit the author to continue teaching, it could be in violation of these provisions for impeding the rights of Jewish students to express their faith and to feel comfortable and self-confident in the public school system. Thus, it is submitted that the author's claim under article 18 should be held inadmissible as being incompatible also with article 18, paragraphs 2 and 4, of the Covenant.

6.7 Furthermore, the State party submits that both the claim under article 18 and the claim under article 19 should be held inadmissible on the ground that the author has not submitted sufficient evidence to substantiate a *prima facie* claim. Noting that the author only provided the Committee with copies of his own submissions to the Supreme Court and the decisions of the courts, the State party argues that beyond making the bald assertion that the decision of the Supreme court infringes the author's rights under articles 18 and 19, the communication provides no specificity of terms sufficient to support its admissibility. In particular, it is submitted that nowhere is the expansive and carefully reasoned decision of a unanimous nine-person Bench of the Supreme Court subjected to a sustained critique which would support the allegations made by the author.

6.8 As to the merits of the communication, the State party first submits that the author has not established how his rights to freedom of religion and expression have been limited or restricted by the Order of the Board of Inquiry as upheld by the Supreme Court. It is argued that the author is free to express his views while employed by the school board in a non-teaching position or while employed elsewhere.

6.9 Should the Committee find that the author's rights to freedom of religion and/or expression have been limited, the State party submits that these limitations are justified pursuant to article 18, paragraph 3, and 19, paragraph 3, respectively, as they were (i) provided by law, (ii) imposed for one of the recognized purposes, and (iii) were necessary to achieve its stated purpose. The State party submits that the analysis that

must be undertaken by the Committee in this respect is very similar to that which was employed by the Supreme Court of Canada under section 1 of the Charter, and that the Committee should give considerable weight to the Court's decision.

6.10 With regard to the requirement that any limitations must be provided by law, the State party points out that the author's writings and public statements were found to be discriminatory and to have created a poisoned environment in violation of subsection 5(1) of the New Brunswick Human Rights Act. It is further stated that the Order rendered by the Board of Inquiry was the remedy granted for the violation of subsection 5(1) and was made pursuant to the Act.

6.11 With regard to the requirement that the limitation must be imposed for one of the purposes set out in articles 18, paragraph 3, and 19, paragraph 3, respective, the State party submits that the Order was imposed both for the protection of the fundamental rights of others⁴ and for the protection of public morals. As regards the first of these purposes, the State party makes reference to the case of *Faurisson v France*⁵ and submits that the Order was imposed on the author for the purposes of protecting the freedom of religion and expression and the right to equality of the Jewish community. The State party points out that the Supreme Court found that the Order protected the fundamental rights and freedoms of Jewish parents to have their children educated and for Jewish children to receive an education in the public school system free from bias, prejudice and intolerance. As regards the protection of public morals, the State party submits that Canadian society is multicultural and that it is fundamental to the moral fabric that all Canadians are entitled to equality without discrimination on the basis of race, religion or nationality.

6.12 Furthermore, the State party submits that any restrictions contained in the Order were clearly necessary to protect both the fundamental rights and freedoms of the Jewish people and Canadian values of respect for equality and diversity (public morals). The State party argues that the Order was necessary to ensure that children in the school district could be educated in a school system free from bias, prejudice and intolerance and in which Canadian values of equality and respect for diversity could be fostered. Furthermore, it is argued that it was necessary to remove the author from teaching in order to remedy the poisoned environment that his writings and public statements had created. In this last regard, the State party submits, as the Supreme Court found, that teachers occupy positions of trust and confidence and exert considerable influence over their students. As a result, it is submitted that teachers should be held to a higher standard with respect to their conduct while teaching, as well as during their off-duty activities. According to the State party, the author, as a public school teacher, was in a position to exert influence on young persons who did not yet possess the knowledge or judgment to place views and beliefs into a proper context. Moreover, the Board of Inquiry heard witnesses who testified that Jewish students experienced fear, injury to self-confidence and a reluctance to participate in the school system because of the author's statements. It is submitted that to remedy this situation, it was necessary to pass the Order.

6.13 Finally, the State party notes that the author draws comparison to the European Court of Human Rights' decision in *Vogt v Germany*⁶ but argues that that decision is distinguishable from the instant case

⁴ Article 18, paragraph 3, refers to the «fundamental rights and freedoms of others» while article 19, paragraph 3, refers to the «rights and reputations of others».

⁵ Communication No. 550/1993, Views adopted on 8 November 1996.

⁶ See footnote no. 3.

in several important respects: First, the applicant in *Vogt* was an active member of a lawful political party for the stated purpose of promoting peace and combating neo-fascism. Secondly, the nature of speech involved in the two cases is profoundly different, as the political expression in *Vogt* was not of a discriminatory character as in this case.

7.1 In his comments of 27 April 1999, the author reiterates that there exists no evidence that he ever expressed any of his opinions in class. Furthermore, there exists no evidence that his privately established beliefs had any effect on his workplace, i.e. that they created a poisoned environment. The Board of Inquiry only found that it was reasonable to anticipate such effects.

7.2 The author denies that his writings and statements undermine democratic values and that they are anti-Semitic. He also denies that they amount to advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence. With regard to the State party's claim in relation to article 20 of the Covenant, the author submits that nowhere in his writings does he attempt to incite hatred, but rather to «defend his religion from the hatred of others». As regards article 5 of the Covenant, the author argues that he has never stated anything to the effect that Jews cannot practice their religion without restriction. On the contrary, it is submitted that the State party denied *him* the rights and freedoms recognized in the Covenant, when the Supreme Court ruled that the author cannot exercise his religious freedom and still be a teacher.

7.3 Furthermore, it is submitted that, as opposed to what is held by the State party, his statements express religious beliefs within the meaning of the Covenant. The author argues that his books were written «to defend the Christian Faith and Heritage against those who would denigrate them, and to encourage people to worship God, the Holy Trinity, as revealed in the Christian Faith». According to the author, «a perusal of his books point to his desire to work with other Christians to fulfill the ancient Christian mandate to establish the Kingship of Christ in Society». In this connection, the author also points out that the Supreme Court of Canada in its judgment held that the case involved religious expression, and that it found that the Order of the Board of Inquiry infringed the author's freedom of religion.

7.4 With regard to the State party's contention that the author has not submitted evidence as to how the Order, removing him from his teaching position but allowing him to express himself while in a non-teaching position, has impinged upon the freedoms to profess his religious beliefs or his freedom to express his opinions, the author claims that in June 1996 he was handed a lay off notice by his employer. The author claims that this is «severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression», and implies that the notice was a result of, or at least linked to, the previous Order and Supreme Court judgment against him. It is further claimed that he received no compensation or severance pay, and that the only reason given was that the job had been terminated. The author states that he has never been interviewed for, nor offered another position even though he at the time had worked the school district for almost 25 years.

Further submission by the State party and the author's comments thereon:

8.1 In its further submission of 28 September 1999, the State party notes the author's assertion that there was no evidence to support the finding of a «poisoned environment» within the School District attributable to the author's writings and public statements. To contest this assertion, the State party refers to the unanimous decision of the Supreme Court and, in particular, its findings quoted in para. 4.7 supra. The State

party argues that the Supreme Court extensively reviewed the findings of fact as to discrimination and held that there was sufficient evidence. Thus, it is submitted, the author's assertions on this question must be rejected.

8.2 With regard to the issue of whether or not the author's opinions can be deemed religious beliefs within the meaning of the Covenant, the State party recognizes that the Supreme Court of Canada considered the opinions to be 'religious beliefs' within the meaning of the Canadian Charter. However, the State party points out that even if Canadian law places virtually no limits on what it considers to be religious beliefs under section 2 of the Charter, it nevertheless protects against abuses of the right to religious freedom by the limitation clause in section 1. The State party argues that while this is the approach taken under Canadian law, the jurisprudence of the Human Rights Committee suggests that it has applied a narrower interpretation with regard to article 18. In particular, the State party refers to the case of *M.A.B, W.A.T. and J.-A.Y.T. v Canada*⁷. It is due to this difference in approach that the State party submits that the claim under article 18 should be held inadmissible under article 3 of the Optional Protocol, even if the similar, Canadian provisions are interpreted differently in domestic law.

8.3 With regard to the author's employment status, the State party notes that the author «has been laid off his job since 1996», but contests that this was «severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression» or that it in any manner was connected to the previous actions against the author. It is submitted that the author's security of employment was only minimally affected by the Order of the Board of Inquiry, as upheld by the Supreme Court. It is stated that, after the Order was issued on 28 August 1991, the author was placed on leave without pay for one week only, from 4-10 September 1991. As of 11 September 1991, he was assigned to a full time position in the District office, providing assistance in the delivery of programs to students 'at risk'. According to the State party, that position, originally in place for the duration of the 1991-92 school year was specifically based on the availability of funding, but in fact continued to be funded through to June 1996. The funding was lost as part of a general reorganization of the New Brunswick School System, effective 1 March 1996. This entailed the abolition of School Boards and the vesting of authority for the administration of the educational system in the Minister of Education, with a consequent reduction of both teaching and administrative positions throughout the Province.

8.4 In any event, it is submitted, the author's non-teaching position was specifically noted to fall under the terms and conditions of the collective agreement between the Board of Management and the New Brunswick Teachers' Federation, which allows for any employee to complain of an improper lay off or dismissal and, if the complaint is upheld, to obtain relief. As the author has failed to seek such relief, it is submitted that he cannot now bring unsubstantiated allegations to the Committee that his loss of employment is a result of the Order or the judgment of the Supreme Court.

9. In his submission of 5 January 2000, the author reiterates his arguments with regard to the lack of direct evidence and again points out that his controversial views never formed part of his teaching. As regards his employment status, the author notes that the Supreme Court on 3 April 1996 upheld the Order against the School Board, following which he was to be offered a non-teaching post. It is submitted that he was never

⁷ Communication No. 570/1993, Inadmissibility decision adopted on 8 April 1994.

offered such a post, but that in fact he was laid off as of 1 July 1996. According to counsel, the fact that the author has not been offered further employment since his lay off in 1996 «is further evidence of the contempt with which the government» treats him.

Consideration of the admissibility of the communication

10.1 Before considering any claims 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.

10.2 The Committee notes that both parties have addressed the merits of the communication. This enables the Committee to consider both the admissibility and the merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of the grounds of admissibility referred to in the Optional Protocol.

10.3 With regard to the author's claim that his dismissal in 1996 was connected to the order of the Supreme Court and thus a result of the restrictions imposed upon his freedom of speech and freedom to manifest his religion, the Committee notes that the author has failed to make use of the domestic remedies that were in place. This part of the author's claim is thus inadmissible under article 5, paragraph 2(b) of the Optional Protocol.

10.4 Insofar as the author claims that he is a victim of discrimination, the Committee considers that his claim is unsubstantiated, for purposes of admissibility, and thus inadmissible under article 2 of the Optional Protocol.

10.5 The Committee notes that the State party has contested the admissibility of the remainder of the communication on several grounds. First, the State party invokes article 20, paragraph 2, of the Covenant, claiming that the author's publications must be considered «advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence». Citing the decision of the Committee in *J.R.T. and W.G. v Canada*, the State party submits that, as a matter of consequence, the communication must be deemed inadmissible under article 3 of the Optional Protocol as being incompatible with the provisions of the Covenant.

10.6 While noting that such an approach indeed was employed in the decision in *J.R.T. and W.G. v Canada*, the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.

10.7 Similarly, the Committee finds that the questions whether there were restrictions on the author's right to manifest religious belief and whether any such restrictions were permissible under article 18, paragraph 3, are admissible.

10.8 The State party has also submitted that the communication should be held inadmissible as the author has not submitted sufficient evidence to support a *prima facie* case. The State party argues that the author, instead of filing a detailed submission to the Committee, merely relied on the decisions of the domestic courts and his own submissions to the Supreme Court. Thus, it is held, the communication «provides no specificity of terms sufficient to support its admissibility». The Committee finds, however, that the author has stated his claims of violation clearly and that the adduced material sufficiently substantiates those claims, for purposes of admissibility. Thus, the Committee proceeds with the examination of the merits of the author's claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

11.1 With regard to the author's claim under article 19 of the Covenant, the Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions set out in paragraph 3. The first issue before the Committee is therefore whether or not the author's freedom of expression was restricted through the Board of Inquiry's Order of 28 August 1991, as upheld by the Supreme Court of Canada. As a result of this Order, the author was placed on leave without pay for a week and was subsequently transferred to a non-teaching position. While noting the State party's argument (see para 6.8 *supra*) that the author's freedom of expression was not restricted as he remained free to express his views while holding a non-teaching position or while employed elsewhere, the Committee is unable to agree that the removal of the author from his teaching position was not, in effect, a restriction on his freedom of expression. The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

11.2 The next issue before the Committee is whether the restriction on the author's right to freedom of expression met the conditions set out in article 19, paragraph 3, i.e. that it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

11.3 As regards the requirement that the restriction be provided by law, the Committee notes that there was a legal framework for the proceedings which led to the author's removal from a teaching position. The Board of Inquiry found that the author's off-duty comments denigrated the Jewish faith and that this had adversely affected the school environment. The Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it had discriminated against the Jewish students in the school district directly, in violation of section 5 of the New Brunswick Human Rights Act, due to its failure to discipline the author in a timely and appropriate manner. Pursuant to section 20 (6.2) of the same Act, the Board of Inquiry ordered the School Board to remedy the discrimination by taking the measures set out in para 4.3 *supra*. In effect, and as stated above, the discrimination was remedied by placing the author on leave without pay for one week and transferring him to a non-teaching position.

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to reevaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were applied for the purposes recognized by the Covenant, the Committee begins by noting⁸ that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in *Faurisson v France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

11.6 The final issue before the Committee is whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the «poisoned school environment» experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions. The Human Rights Committee accordingly concludes that the facts do not disclose a violation of article 19.

11.8 As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts

⁸ As it did in General Comment No. 10 and Communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996.

or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the Committee holds that article 18 has not been violated.

12. 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 do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Individual opinion of Hipólito Solari Yrigoyen (dissenting)

In my opinion, paras 11.1 and 11.2 of the Committee's Views should read as follows:

Concerning the author's claim of a violation of the right protected by article 19 of the Covenant, the Committee observes that the exercise of the right to freedom of expression covered by paragraph 2 of that article entails special duties and responsibilities enumerated in paragraph 3. It cannot, therefore, accept the claim that the author's freedom of expression was restricted by the Board of Inquiry's Order of 28 August 1991 as upheld by the Supreme Court of Canada, since that Order was in keeping with article 19, paragraph 3, of the Covenant. It must also be pointed out that the exercise of freedom of expression cannot be regarded in isolation from the requirements of article 20 of the Covenant, and that it is that article that the State party invokes to justify the measures applied to the author, as indicated in paragraph 6.3 above.

H. Solari Yrigoyen [signed]

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]