HUMAN RIGHTS COMMITTEE

Ballantyne, Davidson and McIntyre v. Canada

Communications Nos. 359/1989 and 385/1989*/

31 March 1993

CCPR/C/47/D/359/1989 and 385/1989/Rev.1

VIEWS

Submitted by: John Ballantyne and Elizabeth Davidson, and Gordon McIntyre

Alleged victims: The authors

State party: Canada

Date of communications: 10 April and 21 November 1989 (initial submissions)

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

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 359/1989 submitted to the Human Rights Committee by J. Ballantyne and E. Davidson, and of communication No. 385/1989 submitted by G. McIntyre 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 authors of the communications, and the State party,

Adopts its

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

1. The authors of the communications (initial submissions dated 10 April 1989 and 21 November 1989 and subsequent correspondence) are John Ballantyne, Elizabeth Davidson and Gordon McIntyre, Canadian citizens residing in the Province of Quebec. The authors, one a painter, the second a designer and the third an undertaker by profession, have their

businesses in Sutton and Huntingdon, Quebec. Their mother tongue is English, as is that of many of their clients. They allege to be victims of violations of articles 2, 19, 26 and 27 of the International Covenant on Civil and Political Rights by the Federal Government of Canada and by the Province of Quebec, because they are forbidden to use English for purposes of advertising, e.g., on commercial signs outside the business premises, or in the name of the firm.

The facts as submitted by the authors:

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell clothes and paintings to a predominantly Englishspeaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the CommissionerEnquirer of the "Commission de protection de la langue française" that following a "checkup" it had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

2.3 Mr. McIntyre's business was established over 100 years ago and in the 25 years under his management has always operated without language constraints. Now he is allegedly disadvantaged *visàvis* French speaking competitors who are allowed to use their mother tongue without restriction. Of the seven funeral homes in the area, his is the only one operated by an Englishspeaking Canadian serving the Englishspeaking community. Out of a total population of 15,600 in the town in question, some 5,600 inhabitants speak English. Bill No. 178, however, prevents him from indicating in his commercial sign in English the service he provides. The author alleges a loss of business and a reduced impact on passersby, who no longer identify his services by an external sign.

2.4 Mr. McIntyre also claims that since he has "taken on the Government" a certain "fear factor" discourages potential clients. It leads to hate calls, threats and ridicule in the press by suggestions that he is a "racist".

The complaint:

3.1 The authors challenge sections 1, 6 and 10 of Bill No. 178 enacted by the Provincial Government of Quebec on 22 December 1988, with the purpose of modifying Bill No. 101, known as the Charter of the French Language (Charte de la langue française). The *ratio legis* of Bill No. 178, as stated explicitly by the Quebec legislature, was to override two judgments rendered by the Supreme Court of Canada on 15 December 1988, declaring several sections of the Charter unconstitutional. The official explanatory note preceding the text of the Charter states that only French may be used in public billposting and in commercial advertising outdoors. It stipulates that this rule shall also apply inside means of public

transport and certain establishments, including shopping centres. The authors claim to be personally affected by the application of Bill No. 178.

3.2 The authors furthermore claim that the "notwithstanding" clause contained in section 10 of Bill No. 178 overrides the safeguards contained in the Canadian Charter of Human Rights and Freedoms (Canadian Charter) and the Quebec Charter of Human Rights and Freedoms (Quebec Charter). They point out that section 33 of the Canadian Charter, and its counterpart section 52 of the Quebec Charter, allow for the suspension of protection against human rights violations.

3.3 The authors claim that these provisions, whenever applied, violate Canada's obligations under the Covenant, in particular article 2. Exempting legislation from compliance with the provisions of the Canadian or Quebec Charters of Human Rights and Freedoms effectively denies a remedy to citizens whose rights have been or are being violated by the legislation thus exempted.

Legislative provisions:

4.1 The relevant original provisions of the Charter of the French language (Bill No. 101, S.Q. 1977, C5) have been modified several times. In essence, however, they have remained substantially the same. In 1977, section 58 read as follows:

"Except as may be provided in this Act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

4.2 The original wording of section 58 was replaced in 1983 by section 1 of the Act to amend the Charter of the French Language (S.Q. 1983, C56) which read:

"58. Public signs and posters and commercial advertising shall be solely in the official language.

"Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and another language or solely in another language ..."

4.3 The initial language legislation was struck down by the Supreme Court in *La Chaussure Brown's Inc. et al. v. the Attorney General of Quebec (1989) 90 N.R. 84*. Following this, section 58 of the Charter was amended by section 1 of Bill No. 178. While certain modifications were made relating to signs and posters inside business premises, the compulsory use of French in signs and posters outside remained.

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

"58. Public signs and posters and commercial advertising, outside or intended for the public

outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French,

"1.Inside commercial centres and their access ways, except inside the establishments located there;

"2.Inside any public means of transport and its access ways;

"3.Inside the establishments of business firms contemplated in section 136;

"4.Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.

"The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph".

"The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1."

4.5 Section 6 of Bill No. 178 modified section 68 of the Charter, which now reads:

"68. Except as otherwise provided in this section, only the French version of a firm name may be used in Quebec. A firm name may be accompanied with a version in another language for use outside Quebec. That version may be used together with the French version of the firm name in the inscriptions referred to in section 51, if the products in question are offered both in and outside Quebec".

"In printed documents, and in the documents contemplated in section 57 if they are both in French and in another language, a version of the French firm name in another language may be used in conjunction with the French firm name".

"When texts or documents are drawn up in a language other than French, the firm name may appear in the other language without its French version.

"On public signs and posters and in commercial advertising,

"1.A firm name may be accompanied with a version in another language, if they are both in French and in another language;

"2.A firm name may appear solely in its version in another language, if they are solely in a language other than French."

4.6 Section 10 of Bill No. 178 contains a socalled "notwithstanding" clause, which provides that:

"The provisions of section 58 and of the first paragraph of section 68, brought into effect under sections 1 and 6 respectively of the present Bill, shall operate irrespective of the provisions of section 2, paragraph (b), and section 15 of the Constitutional Act of 1982 ... and shall apply notwithstanding articles 3 and 10 of the Charter of Human Rights and Freedoms."

4.7 Another "notwithstanding" provision is incorporated into section 33 of the Canadian Charter of Human Rights and Freedoms, which reads:

"1. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."2. An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

"3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

"4. Parliament or the legislature of a province may reenact a declaration made under subsection (1).

"5. Subsection (3) applies in respect of a reenactment made under subsection (4)."

The State party's observations:

5.1 The communications were transmitted to the State party under rule 91 of the rules of procedure on 26 May 1989 and 29 January 1990. The deadlines for observations was set for 26 July 1989 and 29 March 1990, respectively. On several occasions, the State party requested an extension of time to make its submission, explaining that it needed more time as the issues involved were factually and legally complex and concerned both federal and provincial areas of legislative competence.

5.2 In its submission of 28 December 1990, the State party objected to the admissibility of the communications under article 5, paragraph 2(b), of the Optional Protocol to the International Covenant on Civil and Political Rights. It argued that domestic remedies had not been exhausted, since the authors had made no attempt to challenge Bill No. 178 and to "seek redress from the Canadian courts or other bodies that may be competent to resolve the issue pursuant to Canadian law".

5.3 The State party also stated that in at least two legal proceedings before the courts of Quebec, litigants were challenging this legislation. K.N., charged on 30 January 1990 on two counts of contravening the Charter of the French Language, was scheduled to appear before

the Court of Quebec on 19 December 1990, when the trial date was to have been set. In another case pending before the Court of Quebec, H.S. was charged in June 1990 on two counts of contravening the Charter by displaying a welcome sign outside his bakery in 35 languages. The respondent was scheduled to appear in court on 28 February 1991.

5.4 The State party further submitted that Quebec law provides the possibility for the authors to test the constitutional validity or application of Bill No. 178 through the use of an application for a declaratory judgment and referred to national jurisprudence in which certain provisions of the Charter of the French Language were declared to be of no force or effect.

5.5 The State party also pointed to the availability of the Federal Court Challenges Programme, which alleviates the financial hardship associated with the conduct of such litigation and states that the legal issues raised would be within the scope of the programme and the authors could, therefore, seek funding from the programme for the purpose of contesting the restrictions imposed by the provincial law.

Exhaustion of domestic remedies:

6.1 With respect to the requirement of exhaustion of domestic remedies, the authors maintain that following the enactment of Bill No. 178 there are no effective remedies which they could pursue. They refer to the relevant judgments of the Superior Court to the District of Montreal, the Appeal Court and the Supreme Court of Canada.

6.2 In particular, the authors of the first communication claim that because Bill 178 applies in spite of Canadian human rights laws and because the notwithstanding clauses of the Canadian and Quebec Charters, when invoked, suspend human rights as guaranteed, *inter alia*, by international human rights norms, they are denied an effective remedy within the meaning of article 2, paragraph 3, of the Covenant.

6.3 With regard to steps taken to assert their rights, the authors refer to numerous letters addressed to various provincial and federal authorities by individuals and lobby groups with no effect. As to judicial remedies, the authors explain that the Supreme Court's decision in *La Chaussure Brown's et al.*, which supports their plea, has no effect in view of the subsequent Quebec legislation which makes any further challenge of section 1 of Bill No. 178 futile.

6.4 As to the possibility of initiating proceedings for a declaratory judgment, the authors contend that the very existence of the "notwithstanding" clause renders Bill No. 178 immune to challenge.

6.5 Mr. McIntyre states that he has written to the Prime Minister of Canada, the leaders of the Opposition, members of the Senate of Canada and the premiers of all provinces, only to receive a number of replies that express various forms of support and indicate that Bill No. 178 indeed violates the right to freedom of expression andruns contrary to both the Canadian and Quebec Charters of Human Rights. As a member of the Chateauguay Valley English Speaking People's Association, he helped to organize a demonstration in Ottawa and to

circulate a petition, which gathered some 10,000 signatures and was subsequently sent to the SecretaryGeneral of the United Nations.

6.6 In a case submitted by other complainants, the Superior Court held, on 28 December 1984, that section 58 of the Charter of the French Language, in so far as it prescribed that public signs and posters and commercial advertising shall be solely in French, was inoperative from 1 February 1984.

6.7 The Court of Appeal upheld the judgment and allowed an appeal declaring Section 68 of the Charter, in so far as it prescribed that only the French version of a firm name is to be used, to be inoperative from 1 January 1986 by reason of the Quebec Charter of Human Rights and Freedoms and from 17 April 1982 by reason of the Canadian Charter of Rights and Freedoms.

6.8 The authors argue that both the Quebec and federal courts have thoroughly considered the implications of the challenged provisions and that they have found them in violation of relevant constitutional provisions. The authors stress that while recognizing that there are reasonable limits to the exercise of human rights, the courts have held that the prohibition of the use of any other language than French in commercial signs was neither an appropriate nor a justifiable remedy against threats to the French culture. In particular, they found that the obligation to use only French on commercial signs and in advertising violated the right of freedom of expression and constituted discrimination based on language.

6.9 The authors argue that the Supreme Court's judgment in the *La Chaussure Brown's et al.* case directly applies to their situation. Bill No. 178, however, overrides the Court's judgment and operates notwithstanding section 2(b) (freedom of expression) and section 15 (equality) of the Canadian Charter. The authors contend that it would be futile to go to the courts in view of the certain application of the "notwithstanding" clauses of the Canadian or Quebec Charters.

6.10 In addition, the authors complain that the Federal Government of Canada has not used its constitutional authority under section 90 of the Constitution Act, 1867, to disallow or set aside a Bill of a provincial government allowing fundamental human rights to be disregarded.

The Committee's decision to join consideration of the communications and to declare them admissible:

7.1 Pursuant to rule 88, paragraph 2, of its rules of procedure, the Committee joined consideration of the two communications at its fortieth session in October 1990.

7.2 During its forty-first session in April 1991, the Committee considered the admissibility of the communications. It disagreed with the State party's contention that there were still effective remedies available to the authors in the circumstances of their cases. In this context, it noted that in spite of repeated legislative changes protecting the *visage linguistique* of Quebec, and despite the fact that some of the relevant statutory provisions

had been declared unconstitutional successively by the Superior, Appeal and Supreme Courts, the only effect of this had been the replacement of these provisions by ones that are the same in substance as those they replaced, but reinforced by the "notwithstanding" clause of Section 10 of Bill 178.

7.3 As to the State party's contention that Bill 178 can be and is being challenged before the Quebec courts, the Committee noted that the issues raised in the cases before the local courts were not the same as those before the Committee and thus could not bear upon whether the authors of the communications still had remedies to pursue. The Committee further noted that the "notwithstanding" clause, which is not applicable to the provision(s) at issue in the proceedings referred to by the State party, remained applicable to Section 58 of Bill 178, the provision at issue in the communications before the Committee. It therefore concluded that no effective remedy was available to the authors in respect of their claim.

7.4 On 11 April 1991, therefore, the Committee declared the communications admissible.

The State party's request for a review of admissibility and submission on the merits; authors' comments thereon:

8.1 In a submission dated 6 March 1992, the Federal Government requests the Committee to review its decision on admissibility. It notes that the number of litigants who contest the validity of Bill 178 has grown, and that hearings before the Court of Quebec on the issue were held on 14 January 1992. The proceedings continue, and lawyers for the provincial government were scheduled to present Quebec's point of view on 23 and 24 March 1992.

8.2 The State party contends that Quebec's Code of Civil Procedure entitles the authors of the communications to apply for a declaratory judgment that Bill 178 is invalid and adds that this option would be open to them regardless of whether criminal charges had been instituted against them or not. It argues that consistent with the well-established principle that effective domestic remedies must be exhausted before the jurisdiction of an international body is engaged, Canadian courts should have an opportunity to rule on the validity of Bill 178, before the issue is considered by the Human Rights Committee.

8.3 The State party further argues that the "notwithstanding" clause in Section 33 of the Canadian Charter of Rights and Freedoms is compatible with Canada's obligations under the Covenant, in particular with article 4 and with the obligation, under article 2, to provide its citizens with judicial remedies. It explains that, firstly, extraordinary conditions limit the use of Section 33. Secondly, Section 33 is said to reflect a balance between the roles of elected representatives and courts in interpreting rights: "A system in which the judiciary is given full and final say on all issues of rights adversely impacts on a key tenet of democracy - that is, participation of citizens in a forum of elected and publicly accountable legislatures on questions of social and political justice ... The 'notwithstanding' clause provides a limited legislative counterweight in a system which otherwise gives judges final say over rights issues".

8.4 Lastly, the Government affirms that the existence of Section 33 *per se* is not contrary to

article 4 of the Covenant, and that the invocation of Section 33 does not necessarily amount to an impermissible derogation under the Covenant: "Canada's obligation is to ensure that Section 33 is never invoked in circumstances which are contrary to international law. The Supreme Court of Canada has itself stated that 'Canada's international human rights obligations should [govern] ... the interpretation of the content of the rights guaranteed by the Charter'." Thus, a legislative override could never be invoked to permit acts clearly prohibited by international law. Accordingly, the legislative override in Section 33 is said to be compatible with the Covenant.

8.5 In another submission, made through the Federal Government of Canada, the provincial government of Quebec contends that the communications under review do not reveal a breach of articles 2, 19, 26 or 27 by Quebec. As regards article 27, Quebec asserts that historical developments since 1763 amply bear out the need for French speakers to seek protection of their language and culture. Even if it were concluded that the dominant position of English speakers in Canada did not prevent the authors from invoking article 27 of the Covenants, its *travaux préparatoires* indicate that its aim was rather to protect specific linguistic rights, in particular in the spheres of education, justice, public administration and cultural and religious institutions:

"Accordingly, this article may not be invoked in support of the complainants' claims because, even if it applied to them, the right to commercial advertising and the right to use the business names they wish to include in the advertising do not come within its scope, *ratione materiae*. Consequently, the claims ... are incompatible with the provisions of the Covenant".

8.6 In respect of the authors' claims under article 26, the Government of Quebec points out that Sections 58 and 68 of the Charter of the French Language, as amended by Sections 1 and 6 of Bill 178, are general measures applicable to commercial advertising which lay down the same requirements and obligations for all tradesmen, regardless of their language. They treat equally all people who seek to advertise in Quebec. The authors of the communications have provided no evidence to show that they were treated differently from other tradesmen, or that the turnover of their businesses declined as a result of the adoption and application of Bill 178.

8.7 The Government of Quebec points out that in the linguistic sphere, the notion of *de facto* equality precludes purely formal equality and makes it necessary to accord different treatment in order to arrive at a result that restores the balance between different situations. It contends that the Charter of the French Language, as amended by Bill 178, "is a measured legislative response to the particular circumstances of Quebec's society, for which, in the North American context and in the face of the domination of the English language and the ensuing cultural, socio-economic and political pressures, 'francification' ('Frenchification') is still in an exposed position".

8.8 The requirements of Sections 58 and 68 of Bill 178 are said to be deliberately limited to the sphere of external public and commercial advertising, because it is there that the symbolic value of the language as a means of collective identification is strongest and

contributes most to preserving the cultural identity of French speakers: "the linguistic image communicated by advertising is an important factor that contributes to shaping habits and behaviour which perpetuate or influence the use of a language". Quebec concludes on this point that Bill 178 strikes a delicate balance between two linguistic communities, one of which is in a dominant demographic position both nationally and on the continent as a whole. This aim is said to be reasonable and compatible with article 26 of the Covenant.

8.9 In respect of the authors' claim under article 19, the Government of Quebec submits that the alleged violation does not come, *ratione materiae*, within the scope of application of article 19. In its opinion, "freedom of expression as referred to by the Covenant primarily concerns political,cultural and artistic expression and does not extend to the area of commercial advertising. Thus there are no grounds in article 19 of the Covenant for the allegations made by the authors ..." Quebec adds that the historical background and the fact that the evolution of linguistic relations in Canadaconstitutes a political compromise do not justify the conclusion that the requirement to carry out external commercial advertising in a certain way amounts to a violation of article 19:

"Even if this were not the case, freedom of expression in commercial advertising requires lesser protection than that afforded to the expression of political ideas, and the Government must be allowed a large measure of discretion to achieve its objectives".

8.10 The Government of Quebec concludes that the right to commercial outdoor advertising in a language of the authors' choice "is not protected by any of the provisions of the Covenant and, even if such a right was implicitly provided for therein, the Charter of the French Language, as amended by Bill 178, in terms of any possible infringement of such a right, is reasonable and designed to achieve objectives compatible with the Covenant." In any event, the Charter of the French Language, as amended by Bill 178, may provide Quebec with a means of preserving its specific linguistic character and give French speakers a feeling of linguistic security.

9.1 In their comments on the above submissions, the authors of communication 359/1989 deny the existence of effective domestic remedies. They contend that "simply put, the 'notwithstanding' clause automatically renders all domestic remedies exhausted because there is no recourse available to plead human rights violations." They note that the defence arguments in the cases currently pending before the Quebec courts are *not* based on Sections 2(b) and 15 of the Canadian Charter or Sections 3 and 10 of the Quebec Charter, which guarantee freedom of expression and protection against discrimination based on language. In the *La Chaussure Brown's et al.* judgment, the Supreme Court struck down basically the same legislation as a violation of the aforementioned guarantees. Because of the "notwithstanding" clause in Section 10 of Bill 178, the authors argue, they are precluded from even asking the Court to consider whether the law runs counter to the Charter guarantees of freedom of expression and protection against discrimination.

9.2 The authors contend that the same logic applies to the Government's suggestion that they seek a declaratory judgment: "Indeed the *La Chaussure Brown's et al.* decision has already ... decided that the law violates human rights. The point is ... that Bill 178 operates

'notwithstanding' the Charters, so that the Court could not consider such a question on its merits." In this context, the authors further point out that under Canadian law, they are unable to invoke the provisions of the Covenant before the domestic courts.

9.3 The authors reject the Federal Government's arguments on the application and limitations on Section 33 of the Canadian Charter as devoid of any basis in reality. They argue that any attempt to minimize the impact or emphasize the difficulty in applying the "notwithstanding" clause must fail when one considers the ease with which Quebec was able to implement the "Loi concernant la Loi Constitutionnelle de 1982", and the effects this has had in terms of curtailing the protection afforded by the Canadian Charter. Furthermore, the speed with which Bill 178 was enacted - one week after the Supreme Court's decision in *La Chaussure Brown's et al.* - belies the contention that the "notwithstanding" clause is subject to extraordinary limitations or is only applied in rare circumstances.

9.4 The authors dismiss the argument that the "notwithstanding" clause strikes a "delicate balance" between the power of the legislative authorities and the judiciary. They affirm that Section 1 of the Canadian Charter already provides such a balance by subjecting human rights to such reasonable limits prescribed by law which are justified in a free and democratic society. Section 9(1) of the Quebec Charter contains limitations to the same effect. In the authors' opinion, there is no justification, political expediency apart, for the presence of the "notwithstanding" clauses.

9.5 Finally, the authors reject the affirmation that the "notwithstanding" clauses are compatible with Canada's international human rights obligations. Thus, the overriding provision of Bill No. 178 can be maintained only because of the existence of these clauses. The authors submit that Canada has failed to take all necessary steps to comply with its obligations under the Covenant and the Optional Protocol.

9.6 In a further comment, counsel to Mr. McIntyre reiterates that Bill No. 178 violates fundamental rights protected by the Covenant. He argues that while Quebec has pointed to figures which show a slow decline in the use of French across Canada, it omitted to point out that, in Quebec, French has been gaining ground on English and the English community is in decline. Furthermore, while Quebec has portrayed the 1982 constitutional amendments as an attack on the French language, it can on the contrary be argued that Section 23 of the amended Charter of Rights and Freedoms has been particularly effective in assisting the francophone population outside Quebec.

9.7 Counsel to Mr. McIntyre dismisses Quebec's view that the English minority is particularly well-treated as "highly tendentious". On the contrary, he argues, this minority has been subjected to "systematic discouragement" since 1970, a conclusion endorsed by the Supreme Court of Canada in the case of *Quebec Association of Protestant School Boards v. A.G. Qué.* (1984). Furthermore, although French minorities in the rest of Canada have often been treated unfairly in the past, this situation is now improving. As a result, counsel denies that historical or legal arguments would justify the restrictions imposed by Bill No. 178 in the light of articles 19, 26 or 27 of the Covenant.

9.8 Counsel contends that in respect of the causal connection between the language of outdoor commercial advertising and the perceived threat to the survival of French, Quebec merely tries to reargue its unsuccessful defence in the case of *La Chaussure Brown's et al.* He reiterates that there is no connection between the contested legislative provisions and any rational defence or protection of the French language.

9.9 Counsel asserts that in respect of the alleged violation of the right to freedom of expression, there is no reason to exclude commercial expression from protection. Any distinction between commercial and non-commercial expression would be difficult to operate, and, moreover, the notion of freedom of expression has been interpreted in a broad and liberal manner by the Supreme Court of Canada in recent years.

9.10 Finally, in respect of Section 33 of the Canadian Charter, counsel contends that since the rights to freedom of expression and protection from discrimination are protected under the Covenant, Section 33 cannot be used as a tool which would render these rights inoperative: "Section 33, while not invalid *ab initio*, is inoperative with regard to these rights which Canada is under an international obligation to uphold".

Review of admissibility:

10.1 The Committee has taken note of the parties' comments, made subsequent to the decision on admissibility, in respect of the admissibility and the merits of the communications. It takes the opportunity to explain its admissibility findings.

10.2 The State party has contended that as the issue of the validity of Bill No. 178 is before the Quebec courts and the authors may apply for a declaratory judgment that the Bill is invalid, the communications remain inadmissible. The Committee notes that the State party has not replied to the argumentation set out in its decision on admissibility, as reflected in paragraphs 7.2 and 7.3 above. From the State party's submission, it further appears that the cases pending before the courts of Quebec concern the offence provisions of Bill 178 and not the "notwithstanding" clause in Section 10 thereof, nor Section 33 of the Canadian Charter and Section 52 of the Quebec Charter. This clause remains applicable to Section 58 of the Charter of the French Language, as amended by Section 1 of Bill 178. Any challenge of Section 58 based on alleged violations of fundamental freedoms is therefore bound to fail.

10.3 It remains to be determined whether a declaratory judgment declaring Bill No. 178 invalid would provide the authors with an effective remedy. The Committee notes that such a judgment would still leave the Charter of the French Language operativeand intact, and enable the Quebec legislature to override any such judgment by replacing the provisions struck down by others substantially the same and by invoking the "notwithstanding" clause of the Quebec Charter. On the basis of precedent, and in the light of the legislative history of Bill 178, such a course of action is not merely hypothetical. The net result, a continued ban on languages other than French in outdoor advertising, would remain the same. Furthermore, a declaratory judgment would not pronounce on the compatibility, with international obligations assumed by Canada, of the "notwithstanding" clauses cited above.

10.4 The Committee has further reconsidered, *eo volonte*, whether all the authors are properly to be considered victims within the meaning of article 1 of the Optional Protocol. In that context, it has noted that Mr. Ballantyne and Ms. Davidson have not received warning notices from the Commissioner-Enquirer of the "Commission de protection de la langue française" nor been subjected to any penalty. However, it is the position of the Committee that where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as "victims" within the meaning of article 1 of the Optional Protocol.

10.5 In the light of the above, the Committee sees no reason to review its decision on admissibility of 11 April 1991.

Consideration of the merits:

11.1 On the merits, three major issues are before the Committee:

(a) whether Sec.58 of the Charter of the French Language, as amended by Bill 178, Sec.1, violates any right that the authors might have by virtue of article 27;

(b) whether Sec.58 of the Charter of the French Language, as amended by Bill 178, Sec.1, violates the authors' right to freedom of expression; and

(c) whether the same provision is compatible with the authors' right to equality before the law.

11.2 As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities withinsuch a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either

that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3(a) and 3(b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

11.5 The authors have claimed a violation of their right, under article 26, to equality before the law; the Government of Quebec has contended that Sections 1 and 6 of Bill 178 are general measures applicable to all those engaged in trade, regardless of their language. The Committee notes that Sections 1 and 6 of Bill 178 operate to prohibit the use of commercial advertising outdoors in other than the French language. This prohibition applies to French speakers as well as English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly, the Committee finds that the authors have not been discriminated against on the ground of their language, and concludes that there has been no violation of article 26 of the Covenant.

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 reveal a violation of article 19, paragraph 2, of the Covenant.

13. The Committee calls upon the State party to remedy the violation of article 19 of the Covenant by an appropriate amendment to the law.

14. The Committee would wish to receive information, within six months, on any relevant measures taken by the State party in connection with the Committee's Views.

[Done in English, French and Spanish, the English and French texts being the original

versions.]

Footnotes

*/ Made public by decision of the Human Rights Committee.

*/ Five concurring and dissenting opinions, signed by eight Committee members, are appended to the present document.

APPENDIX

Individual opinions under rule 94, paragraph 3, of the Human Rights Committee's rules of procedure, concerning the Committee's Views on Communications Nos. 359/1989 (*Ballantyne/Davidson v. Canada*) and 385/1989 (*McIntyre v. Canada*)

A. Individual opinion by Mr. Waleed Sadi (dissenting)

I respectfully dissent from the Committee's decision and submit that it would have been appropriate to review the Committee's earlier decision on admissibility, on the basis of non-exhaustion of domestic remedies. My reasons are the following:

I am persuaded by the State party's contention that it would be open to the authors, under the Quebec Code of Civil Procedure, to apply for a declaratory judgment holding Bill 178 and the "notwithstanding" clause in Section 10 thereof to be invalid. Article 5, paragraph 2(b), of the Optional Protocol requires the authors of communications to exhaust available domestic remedies; the Committee should not have proceeded with the examination of the merits of the cases in view of the availability of the domestic remedy in question.

In my opinion, the authors have not been able to refute the State party's contention that a declaratory judgment would not only be an available but also an effective remedy. The Canadian judicial system should have the opportunity to pronounce upon the constitutionality of Bill 178 and its controversial "notwithstanding" clause before the Committee proceeds with a finding on the merits of the communications. The Committee's decision to adopt Views under article 5, paragraph 4, of the Optional Protocol, and to find a violation of article 19 of the Covenant has no precedent and is not, in my opinion, in accordance with the provisions of article 5, paragraph 2(b), of the Protocol. I thus register my disagreement with the Committee's opinion that recourse to the Canadian courts, including the Supreme Court of Canada, would be futile and therefore not required for purposes of the Optional Protocol.

W. Sadi

[Done in English, French and Spanish, the English text being the original version.]

B. Individual opinion by Mr. Birame Ndiaye (dissenting)

In accordance with article 27 of the Covenant, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Through this provision, the Covenant categorically recognizes ("persons ... shall not be denied"), for every individual belonging to these three categories of minority, certain rights, namely, the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language.

These rights are recognized in respect of individuals for their own sake, but also and above all for the survival of the minority as an entity. Indeed, the existence of minorities such as those defined in article 27 cannot be imagined after the disappearance of the single element which constitutes them, namely, their ethnic character, religion or, lastly, language. The *rationale* of article 27 is the preservation of the three minorities referred to, and not the protection of the rights enunciated therein, merely for the sake of protection.

In the cases submitted to the Committee [Ballantyne/Davidson (359/1989) and McIntyre (385/1989)], Quebec considered that "historical developments since 1763 amply bear out the need for French-speakers to seek protection of their language and culture". Thus, the goal pursued by the Charter of the French Language, as amended by Bill 178, is the very same as that aimed at by article 27 of the Covenant, to which effect must be given, if necessary by restricting freedom of expression on the basis of article 19, paragraph 3. Under this provision "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a)For respect of the rights or reputations of others;

(b)For the protection of national security or of public order (*ordre public*), or of public health or morals".

The limitations embodied in article 19, paragraph 3(a) and (b), are applicable to the situation of the French-speaking minority in Canada. And as this country has maintained, albeit with too narrow a conception of freedom of expression, "the Charter of the French Language, as amended ...., may provide Quebec with a means of preserving its specific linguistic character and give French-speakers a feeling of linguistic security". This is reasonable and is geared to ends compatible with the Covenant, namely, article 27.

Unfortunately, the Human Rights Committee has not endorsed the State party's view and has not agreed to integrate the requirements of implementation of article 27 in its decision. For the Committee, there is no linguistic problem in Canada or, if it does exist, it is not so

important as to merit the treatment which the authorities of that country have chosen to extend to it. I can only disassociate myself from its conclusions.

B. Ndiaye

[Done in English, French and Spanish, the French text being the original version.]

C. Individual opinion by Mr. Kurt Herndl (dissenting/concurring)

I agree with the Committee's Views that the facts of the McIntyre case disclose a violation of article 19 of the Covenant. As to the communication of Mr. Ballantyne and Ms. Davidson, I believe that a question remains whether they are indeed "victims" within the meaning of article 1 of the Optional Protocol.

With respect to the Committee's rationale in paragraph 11.2 of its Views, the communications in my opinion do not raise issues under article 27 of the Covenant. The question as to whether the authors can or cannot be considered as belonging to a "minority" in the sense of article 27 would seem to be moot in as much as the rights that the authors invoke are not "minority rights" as such, but rather rights pertaining to the principle of freedom of expression, as protected by article 19 of the Covenant, which obviously must be taken to include commercial advertising. On this account, as the Committee rightly states in paragraphs 11.3 and 11.4 of its Views, there has been violation of a provision of the Covenant, i.e. article 19.

K. Herndl

[Done in English, French and Spanish, the English text being the original version.]

D. Individual opinion by Mr. Bertil Wennergren (concurring)

I concur with the Committee's findings in paragraph 11.2 of the Views that the authors have no claim under article 27 of the Covenant, but I do so because a prohibition to use *any* other language than French for commercial outdoor advertising in Quebec does not infringe on any of the rights protected under article 27. It is, under the circumstances, of no relevance, whether English speaking persons in Quebec are entitled to the protection of article 27 or not. I feel, however, that I should add that in my opinion, the issue of what constitutes a minority in a State must be decided on a case by case basis, due regard being given to the particular circumstances of each case.

B. Wennergren

[Done in English, French and Spanish, the English text being the original version.]

E. Individual opinion by Mrs. Elizabeth Evatt, cosigned by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring and elaborating)

It may be correct to conclude that the authors are not members of a linguistic minority whose right to use their own language in community with the other members of their group have been violated by the Quebec laws in question. This conclusion can be supported by reference to the general application of those laws - they apply to all languages other than French - and to their specific purpose - which attracts the protection of article 19.

My difficulty with the decision is that it interprets the term "minorities" in article 27 solely on the basis of the number of members of the group in question in the State party. The reasoning is that because English speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of article 27.

I do not agree, however, that persons are necessarily excluded from the protection of article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a State, but is not clearly a numerical minority in the State itself, taken as a whole entity. The criteria for determining what is a minority in a State (in the sense of article 27) has not yet been considered by the Committee, and does not need to be foreclosed by a decision in the present matter, which can in any event be determined on other grounds. The history of the protection of minorities in international law shows that the question of definition has been difficult and controversial and that many different criteria have been proposed. For example, it has been argued that factors other than strictly numerical ones need to be taken into account. Alternatively, article 50, which envisages the application of the Covenant to "parts of federal States" could affect the interpretation of article 27.

To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity. These questions do not need to be finally resolved in the present matter and are better deferred until the proper context arises.

E. Evatt

N. Ando

M.T. Bruni Celli

V. Dimitrijevic

[Done in English, French and Spanish, the English text being the original version.]