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Case Note

***289** Freedom of Speech and Teachers' Duties: Malcolm Ross - The Final Chapter

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Ross v. New Brunswick School District No. 15 [FN1]

As expected, the Supreme Court of Canada has overturned the decision of the New Brunswick Court of Appeal after it had struck down the decision of a New Brunswick Board of Inquiry, which found that School District No. 15 had breached section 5 of the *Human Rights Code* by failing to provide discrimination-free educational services.

As reported previously, [FN2] the claim of Malcolm Ross to be able to voice and publicly publish his rabidly anti-Semitic views and be protected by the freedom of expression, and religion, as found in section 2(a) and (b) of the *Charter*, came into direct conflict with the purpose and role of provincial human rights legislation, which, in the educational context, is to foster equality, respect and tolerance of others in society, and to provide an education in a system free from bias, prejudice and intolerance.

The previously noted criticism of the decision of the New Brunswick Court of Appeal was that it had failed to properly apply the test enunciated by the Supreme Court of Canada in *R. v. Oakes*. [FN3] Not surprisingly, a large portion of the Supreme Court's decision centred upon a detailed application of the *Oakes* test.

***290 1. THE FACTS**

It will be recalled that the essence of the facts as found by the Board of Inquiry showed that Malcolm Ross, who had been employed as a teacher since September 1976, had made racist and discriminatory statements in published writings and appearances on public television from March 1977 to April 1988. Ross had argued, through his published writings and appearances, that Christian civilization was being undermined and destroyed by an international Jewish conspiracy. Ross had continued in his pattern of conduct despite a series of warnings by the School Board that such behaviour would not be tolerated, and that further disciplinary action would occur if he persisted. One of the problems was that the school board never did proceed to impose heavier penalties, but rather allowed the situation to simmer.

The Board of Inquiry had found that there was no evidence of any direct classroom activity by Ross on which to base a complaint under the *Human Rights Code*. However, it did find that his off-duty comments denigrated the faith and belief of Jews. The Board of Inquiry concluded that the School Board discriminated by failing to meaningfully discipline the teacher in that, by its almost indifferent response to complaints and by con-

tinuing his employment, it endorsed his out-of-school activities and writings. This resulted in an atmosphere where anti-Jewish sentiments flourished and where Jewish students were subject to a "poisoned environment," which greatly interfered with the educational services provided.

The Board of Inquiry order, struck down by the Court of Appeal, provided, inter alia,

> (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 to a non-teaching position if, within the period of time that Malcolm Ross is on leave of absence without pay, a non-teaching position becomes available in School District 15 for which he is qualified .... At such time as Malcolm Ross accepts employment in a non-teaching position his leave of absence without pay shall end.
> ...
> (d) terminate Malcolm Ross' employment with the School Board immediately, if, at any time during the eighteen month leave of absence or if 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 Zionist conspiracy, or attacks followers of the Jewish religion, or
>
> ***291** (ii) publishes, sells, or distributes any of the following publications directly or indirectly .... [FN4]

2. STANDARD OF REVIEW

After referring to the decisions of the Courts below, and before addressing the two broad issues raised by the appeal, the Supreme Court confirmed the standard of review that should be adopted in these type of proceedings.

The Court viewed the case as raising two issues in this regard.

> The first relates to the administrative law issue of standard of deference to be applied to findings of an administrative tribunal, in this case the finding of discrimination and its remedial Order. The second issue relates to the standard of constitutional review to be applied to the Board's Order.

In following its own decisions in *Pezim* [FN5] and *Mossop*, [FN6] the Court confirmed the difference between reviewing human rights tribunals and labour tribunals, namely, that the Court confine the superior expertise of a human rights tribunal to fact-finding and adjudication in a human rights context, and that the standard of review based upon "reasonableness" was applicable. However, "in relation to general questions of law, courts must be supposed to be competent, and a standard of correctness is appropriate."

The Court also had to address the fact that a form of privative clause was present in the New Brunswick *Human Rights Code*, but noted that "there are privative clauses and privative clauses, and the extent to which the legislature intends to afford protection from review is a function of the language of the clause, the nature of the legislation and the expertise of the tribunal in question."

The Court found that, given the extensive evidence that was heard by the tribunal, the ability to assess the credibility of witnesses, and given the "complexity of the evidentiary inferences made on the basis of the facts

before the Board," it was appropriate, in this case, to exercise a relative degree of deference to the finding of discrimination.

However, the task becomes more complex when the Court reviews the order of a tribunal which quite clearly could not conflict with the *Charter of Rights and Freedoms*, but which arose as a result of an exercise of administrative law decision-making.

***292** In an extension of its decision in *Slaight*, [FN7] the Court found that there would be no need for an administrative law review of values that had to be dealt with pursuant to a *Charter* examination. For where, as in this case, the values invoked are *Charter* values (i.e., freedom of expression, and religion) then if the order is found to pass the section 1 analysis, then it is impossible to see how such order could be viewed as patently unreasonable. "Conversely, if at the conclusion of the value analysis under s. 1 the Court holds the Order unconstitutional, then acceptability according to an administrative law standard is no longer relevant," and the tribunal's jurisdiction would have automatically have been exceeded.

3. FINDING OF DISCRIMINATION

The Court had little problem accepting the tribunal's factual findings that there was a "poisoned environment" for Jewish students at the school. It is not necessary for our purposes to repeat those findings of fact. What is of interest is the Court's willingness to accept the tribunal's approach of linking Ross's conduct to the creation of such a poisoned atmosphere, notwithstanding the lack of direct evidence on the point.

The tribunal's basic finding was that "given the high degree of publicity surrounding Malcolm Ross' publications *it would be reasonable to anticipate* that his writings were a factor influencing some discriminatory conduct by the students" [emphasis added]. Thus, the Court stated that

> this inference drawn on the basis of what is reasonable to anticipate must be considered in light of whether, in the circumstances, it is reasonable to anticipate that the respondent's off-duty conduct "poisoned" the educational environment ... and whether it is sufficient to find discrimination according to a standard of what is reasonable to anticipate as the effect of the off-duty conduct. [FN8]

The Court went about answering the first part of this formulation by observing that

> [a] school is a communication centre for a whole range of values and aspirations of society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all ***293** persons within the school environment feel equally free to participate. [FN9]

As such, a school board has a duty to maintain a positive school environment for all persons served by it.

It will be interesting to see how future individuals or groups within society utilize the foregoing statements when claiming that a school board has permitted a state of systemic discrimination to deny a "positive school environment" for their children.

In terms of the role of teachers within the educational system the Court went on to state that "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." Although stating what to most in the educational community is the obvious, one can expect to see such words and ideas repeated in arbitration

awards which have to address inappropriate conduct by teachers, and whether discipline, including suspension or discharge, is warranted.

The following statements leave no room for doubt as to the view the courts will adopt when considering the role of a teacher. “The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.”

In language that would find relevance in the Supreme Court's subsequently released decision of *R. v. Audet*, [FN10] the Court went on the state that

> [b]y 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*. [FN11] [Emphasis added.]

As the Court observed, such a view has already found support in the *Shewan* [FN12] and *Cromer* [FN13] cases, where it has been stated that teachers are not able to choose “which hat they will wear on what occasion.”

***294** Before the alarm bells start ringing in the halls of teacher federations/associations across the country the concluding words of the Court on this point should be well noted, namely, that it should not 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 a 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. [FN14]

The next question was whether a finding of discrimination may be supported by an inference on the basis of what is reasonable to anticipate as an effect of off-duty conduct. In this regard the Court relied upon the observations of Dickson C.J. in the *Fraser* [FN15] case, where it was stated that “when the nature of the occupation is important and sensitive, and when the substance, form and context of the employee's comments are extreme, an inference of impairment may be sufficient.” Thus, the Court found little problem in applying such principle to the instant case, and findings of the Board of Inquiry, when reviewing Ross's conduct and behaviour, as well as the lack of effective response from the employer to the point where it could be said that the employer's “passivity signalled a silent condonation of, and support for the respondent's views.”

4. FREEDOM OF EXPRESSION AND RELIGION

All appellants, with the exception of one, conceded that the Board of Inquiry's order prima facie breached Ross's freedom of expression. As has been stated many times by the Supreme Court, the issue is not whether Ross's views are shared or accepted by the majority, or are truthful. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular the views may be (*Zundel*). [FN16] The obvious effect of the Board's order was to restrict Ross' ability to air his views, however odorous.

***295** Similarly, since Ross claimed that his religious belief was being interfered with, the Court maintained its approach of addressing such issues under section 1 so as to maintain as broad an interpretation of religious freedom as possible, however questionable his religious beliefs may be.

5. SECTION 1

The Court found that to determine whether the order was a justifiable infringement of Ross's freedoms involved weighing certain essential values and principles, namely, “the accommodation of a wide variety of beliefs on the one hand, and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other.” The Court stressed that the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs.

The Human Rights Commission invited the Court to address the contextual analysis by looking at the educational context, the employment context, and the anti-Semitism context. This the Court did.

In relation to the educational context the Court found highly relevant the evidence from the Government of New Brunswick's Ministerial Statement, the guiding principles of which included the following: that every individual has a right to be educated in a school system free from bias, prejudice and intolerance; that any manifestation of discrimination on the basis of gender, race, ethnicity, culture, or religion by any persons in the public school system is not acceptable; and that school programs and practices promote student's self-esteem and assist in developing pride in one's own culture and heritage.

As noted by the Court, “there can be no doubt that the attempt to foster equality, respect and tolerance in the educational system is a laudable goal.” What the Court found even more pressing was the fact that in Ross's case one was dealing with “young children,” and that young children are especially vulnerable to the messages conveyed by their teachers. Thus, the Court felt that such children are “less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school.” The students, so it found, would be more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong.

***296** Thus, it is that context which must be

> invoked when balancing the respondent's freedom to make discriminatory statements against the right of children ... “to be educated in a school system that is free from bias, prejudice and intolerance,” a right that is underscored by s. 5(1) of the [Human Rights Code] and ... s. 15 of the Charter. [FN17]

The second context was relevant to the extent that the State, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence. Thus, teachers' freedoms must be balanced against the right of school boards to operate according to their own mandates. Taken to the extreme such a proposition could be dangerous indeed. Restricted to the factual situation raised by the *Ross* case it becomes a trite proposition.

The third and final context can be summarized in the words of the Commission's factum, which stated that

> [a]fter Auschwitz it is simply not feasible to consider the constitutional values of freedom of expression and freedom of religion where these are proclaimed to shield anti-Semitic conduct, without contemplating the centrality of that ideology to the scourge of death and destruction which swept across Europe during the era of the Third Reich. [FN18]

The order of the Board was made so as to remedy the discrimination found to be manifest in the New Brunswick's school system, and which targeted Jews, an historically disadvantaged group that has endured persecution on the largest scale. Malcolm Ross could not be permitted to use the *Charter* as an instrument to “roll back”

advances made by Jewish persons against discrimination.

The Court added another context of its own, namely, that "[i]t must be recognized that human rights tribunals have played a leading role in the development of the law of discrimination," [FN19] and that has been reflected in the Court's own jurisprudence both in the area of human rights and under the *Charter*. Thus, the Court considered that it should proceed under section 1 with a recognition of the sensitivity of human rights tribunals in this area, and thus permit such recognition to inform the Court's determination of what constitutes a justifiable infringement under the *Charter*.

***297** The Court then addressed the nature of the legislation and nature of the rights infringed. In Ross's case the Board's order and the underlying Human Rights Code were concerned with the "competing interests of different individuals and attempts to balance the eradication of discrimination against the rights of other individuals." [FN20]

The Court found that the order in fact balanced the respondent's freedoms against the ability of the school board to provide a discrimination-free environment, and against the interests of the Jewish students. Although the Court correctly viewed the rights allegedly being infringed as equally important, it was able to rely upon the *Keegstra* [FN21] case for the proposition that "expression that promotes the hatred of identifiable groups is of limited importance as measured against freedom of expression values." [FN22]

The Court further considered that since the Court has previously held that there is very little chance that expression that promotes hatred against an identifiable group is true, then it follows that such views will attract a "less searching degree of scrutiny" and it is easier to justify the type of order provided under section 1.

In addressing one of the core values underlying freedom of expression, to wit, the right to participation in the democratic process, the Court was able to conclude that Ross's "expression is expression that undermines democratic values in its condemnation of Jews and the Jewish faith. It impedes meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process." [FN23]

In response to Ross's claim that his freedom of religion was being trampled by the order, the Court considered that "any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) - a basis that guarantees that every individual is free to hold and manifest the beliefs dictated by one's conscience." Thus, "where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate." With the foregoing background and context the Court turned to the various tests established by *Oakes*.

***298** The Court had no other possible choice but to find that the order's objective of remedying a discriminatory situation, and correcting a poisoned educational atmosphere, met the test of being a "pressing and substantial concern in a free and democratic society."

The Court based this, in part, upon Canada's fundamental commitment to the international community, through adoption of international conventions, to eradicate discrimination generally. Further, that the order acknowledged the pernicious effects associated with hate literature, and more specifically anti-Semitic messages that undermine basic democratic values, and are antithetical to the "core" values of the *Charter*.

The Court then turned to the three branches of the proportionality test.

6. RATIONAL CONNECTION

Given the goal of having to correct the poisoned environment in the school system, the Court found that the Board of Inquiry had established a rational connection between its order and the objective, but only insofar as the order removed Ross from his teaching position, which therefore removed his ability as a teacher to exert influence on his students.

However, the Court did find section 2(d) of the order too broad in its impact and dealt with that aspect under "minimal impairment." This part of the order required the school board to terminate Ross's non-teaching employment (assuming it unfolded) if he continued to publish, and write for the purposes of publication, his hate literature.

7. MINIMAL IMPAIRMENT

The Court has previously opined that impairment must be "minimal to the extent that it impairs the right no more than is necessary." As is noted by the Court, that process cannot always be a perfectly tailored situation. Thus, although the removal of Ross from the classroom was carefully tailored to accomplish the goal of improving the educational atmosphere, requiring the school board to terminate him from a non-teaching position, if he continued to write and distribute his hate propaganda, was seen as too invasive of Ross's right to freedom of expression and religion.

***299** The Court apparently based its rationale upon the fact that the Board of Inquiry did not find that Ross's presence in a non-teaching position would compromise the ability of the school board to create a discrimination-free environment. In fact, as is seen, the order made provision for his presence in a non-teaching position.

In response to the argument that the Board of Inquiry made Ross's employment conditional upon him ceasing his activity, and thus was still concerned about him poisoning the educational atmosphere, the Court acknowledged that there may exist a residual poisoned effect, even after he was removed from his teaching position. However, the Court found that "the evidence does not support the conclusion that the residual poisoned effect would last indefinitely once Ross has been placed in a non-teaching role." Thus, the Court believed that the permanent ban did not minimally impair Ross's constitutional freedoms.

What is surprising about this latter conclusion is that the Court did not adopt a process of logic which likely led the Board of Inquiry to draft this part of the order as it did. Surely, it is "reasonable to anticipate" that if Ross was placed in a non-teaching position, but continued to produce his hate propaganda, that the students attending the school, who had been influenced by Ross, would view his continued employment as a victory for those who wish to abuse their freedom of expression and religion to spew such venom.

If the Court thought it reasonable for the Board of Inquiry to have relied upon an inference that connected Ross's activities to the poisoned educational atmosphere, surely the Board was entitled to infer, through reasonable anticipation, that the effect of placing Ross in a non-teaching position and being able to continue his hate campaign would not fully correct the situation. Given that many times an order is partially anticipatory it should not be necessary for there to be "evidence" called to support this form of remedial order.

The fact is that Ross's freedom of expression and religion are still intact as he has the perfect right to continue in the vein he chooses, but it should not be as an employee of a school board whose educational atmosphere

he helped poison.

8. PROPORTIONALITY BETWEEN EFFECTS OF ORDER AND OBJECTIVE

Since Malcolm Ross is free to leave his employment and continue to exercise his freedom of expression and religion free from the confines***300** of the order, the Court found clauses 2(a)(b)(c) of the order are limited to the extent necessary to the attainment of their purpose. Since clause 2(d) of the order was found to fail the minimal impairment branch of the test, the Court did not consider this in relation to the proportionality branch. In the end result the Court severed that portion of the Board's order offending section 1, and otherwise overturned the Court of Appeal's decision.

There will no doubt be a temptation for school boards in some parts of the country to rely upon many of the Court's observations concerning the obligations of teachers. As in all cases addressing the extent of an individual's freedoms there is the opportunity to attempt to misapply the Court's conclusions. However, perhaps the best signifier of how the Supreme Court may respond to a different factual situation is its willingness to uphold Ross's freedom of expression and religion to create and spout his destructive thoughts, even though he may remain a non-teaching employee of a school board.

When looking back in time to 1985, perhaps justice would wear a more credible face if the federal government had been ordered to place Mr. Fraser [FN24] in a position which did not have to deal with the public, rather terminating him for criticizing the government for its metrification policy! Mr. Fraser's attempted exercise of his freedom of expression was certainly far more harmless than Mr. Ross's antics. One would hope that if the case of a teacher who publicly criticizes his or her school board concerning educational issues comes before the Supreme Court of Canada, the Court will extend as broad a right to freedom of expression to that teacher as it has to Mr. Ross.

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[FN1]. *Attis v. New Brunswick No. 15 Board of Education* (1996), (sub nom. *Ross v. New Brunswick School District No. 15*) 133 D.L.R. (4th) 1 (S.C.C.).

[FN2]. (1994) 5 E.L.J. 361.

[FN3]. [1986] 1 S.C.R. 103.

[FN4]. Above, note 1 at 67.

[FN5]. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

[FN6]. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

[FN7]. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

[FN8]. Above, note 1 at 20.

[FN9]. Ibid.

[FN10]. [1996] S.C.J. No. 61.

[FN11]. Above, note 1 at 20.

[FN12]. *Abbotsford School District 34 v. Shewan* (1987), 21 B.C.L.R. (2d) 93 (C.A.).

[FN13]. *Cromer v. B.C.T.F.* (1986), 29 D.L.R. (4th) 641 at 660 (B.C. C.A.).

[FN14]. Above, note 1 at 21.

[FN15]. *Fraser v. Canada (Treasury Board)*, (sub nom. *Fraser v. P.S.S.R.B.*) [[[1985] 2 S.C.R. 455.

[FN16]. *R. v. Zundel*, [1992] 2 S.C.R. 731.

[FN17]. Above, note 1 at 33.

[FN18]. Ibid. at 34.

[FN19]. Ibid.

[FN20]. Ibid.

[FN21]. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[FN22]. Above, note 1 at 35.

[FN23]. Ibid. at 36.

[FN24]. See above, note 15.
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