Province of New Brunswick

IN THE MATTER OF THE NEW BRUNSWICK *HUMAN RIGHTS ACT*, R.S.N.B. 1973, c. H-11; AND

IN THE MATTER OF A BOARD OF INQUIRY APPOINTED TO INVESTIGATE THE COMPLAINT OF DAVID ATTIS

I. BACKGROUND

This Board of Inquiry was established on September 1, 1988 pursuant to Section 20 of the *Human Rights Act*, R.S.N.B. 1973, c. H-ll (the *Act)* by the Honourable Mike McKee, Minister of Labour for the Province of New Brunswick, to investigate the matter of a complaint of David Attis (the Complainant) against Board of School Trustees, District 15 (School Board). Hearings into this matter were not able to commence until December 1990 due to several court challenges to the jurisdiction of the Board of Inquiry. Although these challenges in the courts did significantly delay the commencement of the hearings of the Board of Inquiry, the decisions by the courts have assisted in answering many preliminary questions that would otherwise have been placed before this Board of Inquiry. The findings by the courts in relation to these preliminary questions will be referred to at relevant points in this decision.

The Board of Inquiry commenced hearings with the parties in December 1990 for eight days followed by fourteen days of hearings in April/May 1991. There were eleven witnesses called to give evidence. The proceedings have been transcribed and fill 23 volumes totalling 3981 pages.

The Complainant alleges that the School Board violated Section 5 of the *Act* by discriminating against him and his children in the provision of accommodation, services or facilities on the basis of religion and ancestry. Subsection 5(1) of the *Act,* the relevant subsection, states as follows:

> 5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall
> (a) deny to any person or class of persons 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 or sex.

The complaint dated April 21, 1988 alleges that the offence complained of

occurred between March 29, 1977 through to April 21, 1988, the date the complaint was filed. The complaint reads as follows:

> I am a Jew and three of my children are enrolled as students within District # 15.
>
> I have reason to believe that Malcolm Ross, a teacher employed by the School Board, made racist, discriminatory and bigoted statements to his students during the 1976-77 gchool year. I have reason to believe that the School Board knew of this, yet it merely transferred Malcolm Ross to another school.
>
> Malcolm Ross has written at least two books, (i.e. *Web of Deceit* and *Spectre of Power*, and has made widely published statements (eg. *Miramichi Leader*, October 22, 1986, page 5) that are anti-Jewish, racist, bigoted and discriminatory and that deny that six million Jews died during the Nazi Holocaust.
>
> On April 22, 1987, the School Board failed to pass a motion condemning bigotry and racism. On March 15 or 16, 1988, Ray Maybee, a member of the School Board, publicly stated that Malcolm Ross' opinions were well documented and he had done his homework, thus appearing to support Mr. Ross' discriminatory views. Furthermore, when the School Board reprimanded Malcolm Ross on March 15, 1988, it referred to his views merely as controversial rather than discriminatory and the reprimand applied only to his future actions, not his past actions.
>
> By its own statements and its inaction over Malcolm Ross' statements in class and in public, the School Board has condoned his views, has thus provided a racist and anti-Jewish role model for its students, has fostered a climate where students feel more at ease expressing anti-Jewish views, and has reduced the credibility of the content of its official history curriculum, thus depriving Jewish and other minority students of equal opportunity within the educational system that the School Board provides as a service to the public.
>
> I believe that the School Board has thus furthered the aims of the Ross' of our society. I would like to give a couple of examples:
>
> i) Several students at the Magnetic Hill School intend to present a petition to the Premier of New Brunswick in support of Malcolm Ross. When asked if they concurred with Ross' views, the students replied that they didn't know.
>
> ii) My eldest daughter, a grade 6 student at Beaverbrook School was invited by a friend to attend a gymnastic exhibition at Magnetic Hill School. She was reminded by a classmate that she shouldn't go there because that is "where the teacher who hates Jews" works. She attended nevertheless.
>
> I have reasonable cause to believe that the Board of School Trustees of District # 15 has violated Section 5 of the Human Rights Act.

Evidence as to events that occurred subsequent to April 21, 1988 was determined to be relevant and, therefore, admissible because the complaint was a continuing one and, further, because evidence as to what has occurred since the filing of the

complaint may be necessary to determine what would be appropriate remedial action should the complaint be upheld.

[The report went on to discuss what forms of complaints are acceptable under Human Rights Legislation, and to conclude that it would accept the complaint of David Attis. Then the Commission dealt with several procedural matters, including the designation of the parties and the status of intervenors, and Malcolm Ross' motion of non-suit.]

III. EVIDENCE

Before proceeding to discuss the evidence it is appropriate to make a few brief comments concerning the manner in which the evidence is to be presented. Only that evidence most relevant to the issue being decided by this Board has been summarized. For ease of analysis the evidence has been divided into the following four categories: employment record of Malcolm Ross; writings and statements by Malcolm Ross; School Board's actions; and alleged effects.

Employment Record of Malcolm Ross

Malcolm Ross, as evidenced by the employment record supplied by the School Board and background information supplied in the Review Committee report of February 25, 1987, was employed as a teacher at Birchmount School from September 1, 1971 to June 1976 and at Magnetic Hill School from September 30, 1976 to the present. Both of these schools are in School District 15. Malcolm Ross is currently a Modified Resource teacher at Magnetic Hill School and teaches approximately thirteen students per day for varying periods of time. Malcolm Ross does not have a homeroom class.

Writings and Statements by Malcolm Ross

The evidence presented to the Inquiry shows that Malcolm Ross has written and authorized publication of a number of books which have been the subject of complaint and/or controversy. These include (listed by copyright date):

1. *Web of Deceit* – Copyright 1978;
2. *The Real Holocaust (The Attack on Unborn Children and Life Itself)* – Copyright 1983;
3. *Spectre of Power* – Copyright 1987;
4. *Christianity vs. Judeo-Christianity (The Battle for Truth)* – Copyright 1987, 4th. printing 1989.

In addition to his published works, Malcolm Ross has written a number of letters to the editors of various papers in New Brunswick, including (listed in

chronological order):

1. Letter to the Editor – *The Moncton Times* February 22, 1978;
2. Letter to the Editor – *The Daily Gleaner* June 6, 1983;
3. Letter to the Editor – *The Miramichi Leader* October 22, 1986.

There was no evidence presented which contradicted the authorship of either the letters or the books as being that of Malcolm Ross. Further, the Inquiry was presented with evidence that Malcolm Ross appeared on a local television program on November 21, 1989 in which he discussed his views and the books which he had written.

School Board's Actions

Evidence, although hearsay, was presented that Malcolm Ross had uttered racist comments about "blacks in Rhodesia" while he was teaching at Birchmount School during the early to mid 1970s. Some of these comments were allegedly made in the classroom. Reference to these remarks can be found in the testimony of David Attis; in a letter to Ross MacCallum from Charles Devona, dated February 3, 1987; in submissions to the Review Committee which was established in 1987; and, in *Spectre of Power* (at page 112).

The evidence indicates that the publications of Malcolm Ross were causing public comment as early as 1978 and that the School Board was aware of the controversy during that year. A review of the evidence shows that Julius Israeli contacted the School Board, through letters to the Director of School District 15 and the principal of Magnetic Hill School, regarding his concerns about Malcolm Ross and his continued employment. In fact, Julius Israeli requested that the School Board dismiss Malcolm Ross. These letters were dated April 26, 1978, May 9, 1978 and another on May 17, 1978.

In addition to the above letters, the School Board had been contacted by Noel Kinsella, Chairman of the Human Rights Commission, in a letter of June 12, 1978. In the letter Noel Kinsella expressed concern over the writings of Malcolm Ross and requested that the classroom performance of Malcolm Ross be supervised. As well, in a May 17, 1978 article in *The North Shore Leader*, it was noted that Malcolm Ross had been the subject of an ATV commentary by Gary McCauley. While the commentary apparently did not mention Malcolm Ross or his book, *Web of Deceit*, by name, the article makes it clear that Malcolm Ross was the subject of the commentary. The article cites Reverend Gary McCauley as calling for the dismissal of Malcolm Ross and rejecting the right of Malcolm Ross to publish his writings under the protection of a right to free speech. Also in 1978, at least two articles appeared in the Moncton area newspaper, *The Moncton Transcript*, dealing with the issue. It is noted that in an article of June 2, 1978,

Noel Kinsella referred to the importance of protecting free speech versus suppressing the work of Malcolm Ross on the basis that it might cause discrimination. The article was written in relation to the publication of the book, *Web of Deceit*, and included comments from a member of the Jewish community and the School Board. Rabbi Stanley Greenberg expressed the view that the book had caused members of the Jewish community to become upset because of its being anti-Jewish and an improper portrayal of Zionism. Further, the article stated that Julius Israeli had been attempting to have Malcolm Ross dismissed and to have the Justice Department review this work in light of hate literature laws. Also, the article noted that Nancy Humphrey, Chairperson of the School Board at that time, stated the School Board's position as being that Malcolm Ross could do what he wanted on his own time. Also in 1978, Malcolm Ross and Julius Israeli wrote letters to the editor of *The Moncton Times* in which they each accused the other of distorting "the facts."

From 1979 up to and including 1984 there is little evidence of a public controversy concerning Malcolm Ross and his views. The evidence shows that Malcolm Ross' in-class teaching was being monitored at least for part of this time. In 1983, a letter by Malcolm Ross to the editor of *The Daily Gleaner* prompted the Human Rights Commission to contact the Superintendent of School District 15 to ensure that Malcolm Ross' activities were still being monitored. By 1986, the Malcolm Ross issue was again being addressed by various articles, letters and other media coverage. The media coverage at this time, according to Carl Ross, Chairman of the School Board, caused the School Board to begin to spend a lot of time on the issue. The testimony of Carl Ross further revealed that by 1986-1987 the School Board was receiving approximately ten to twenty letters per week on the issue. Further, the evidence shows meetings between representatives of the School Board and Malcolm Ross during this time.

On October 22, 1986 Malcolm Ross wrote a letter to the editor of *The Miramichi Leader* outlining his views. This letter is very relevant because it provides a clear summary of Malcolm Ross' opinions and dispels any uncertainties as to the interpretation to be placed on his earlier writings. Following this letter, School Board representatives met with Malcolm Ross on November 18, 1986. A follow-up letter from the School Board, dated November 26, 1986, shows that the meeting was held to discuss concerns over articles which had appeared in the media and contacts made with the School Board by the Departments of Justice and Education. The letter reveals that it was agreed that a monitoring scheme would be established in which Malcolm Ross' classroom would be visited "at least three times a week" and the materials being used in class by Malcolm Ross would be reviewed.

Also in 1986, a copy of a letter addressed to Julius Israeli from David Clark, the Attorney-General of New Brunswick at the time, was published. In the letter,

Mr. Clark refused to pursue legal action against Malcolm Ross under the hate literature laws of the *Criminal Code of Canada.* Further, an article by Don Hoyt of *The Telegraph Journal* on December 17, 1986, highlighted the public interest in Malcolm Ross' works by reporting the views of a number of individuals who had spoken out against Malcolm Ross and his views.

By 1987, the controversy over Malcolm Ross' writings was increasing both in the level of the School Board's involvement and in the public response to the entire issue. A number of news clippings appeared in various newspapers across the province. These news clippings largely dealt with the controversy over the possible prosecution of Malcolm Ross under the hate literature laws. They did, however, reflect a concern about the possible discriminatory effect of Malcolm Ross' views. Expressions of concern were also being received by the School Board from a number of people during 1987. Generally, the tone of the letters was one which called upon the School Board to act concerning Malcolm Ross. Further, the Department of Education was also actively involved in the Malcolm Ross issue during 1987.

Presumably in response to expressions of concern, the School Board decided to investigate the issue and its possible impact upon the school system. In a motion of January 28, 1987 the School Board established a Review Committee to "... review the possible impact of this issue upon the learning environment in school programs." Further, the School Board went on record at the same time to express its concern that the issue had the potential to cause harm to "... the positive human relations that are essential to the well being of a community ... ." The Review Committee interpreted its mandate as being a determination of how Malcolm Ross' personal views might, if at all, be affecting the delivery of the school curriculum and in what ways, if any, the positive human relations of the school community were being affected by the publicity surrounding the Malcolm Ross issue. In addition, however, the Review Committee defined "community" as including only the Magnetic Hill School community rather than all of School District 15. The School Board accepted the Committee's report on February 25, 1987. The Committee's findings, at page 8, were:

> 1. That there appears to be no evidence to suggest that Malcolm Ross is teaching his beliefs or discussing his religious theories with staff or students.
> 2. That there is not (sic) evidence to suggest that the publicity surrounding Malcolm Ross has had a negative effect on the human relations within the present school or between the school and the community.

The Committee's report does not make mention of a letter addressed to the Superintendent of School District 15 dated February 3, 1987 from Charles Devona alleging that Malcolm Ross had expressed racist comments in class while at Birchmount School. Nor does the report in its conclusions address the issues raised in the substantial and well written submission to the Committee from the Atlantic Jewish Council concerning Malcolm Ross' views and their possible

discriminatory effect. Finally, although the report lists allegations by two former teachers who had worked with Malcolm Ross that he had made comments of a racist nature while at Birchmount School, they are not referred to in its findings.

[Here the report dealt with expert witness Ernest Hodgson's opinion of the composition of the Review Committee.]

September 17, 1987 saw the first direct meeting between Malcolm Ross and the Chairman of the School Board. Carl Ross testified that he believed the meeting came about so that both parties could come to a clearer understanding of their respective positions. At this meeting, the publications of Malcolm Ross were discussed. In a letter dated April 26, 1988, Cheryl Reid, acting Superintendent at the time, states that Malcolm Ross was "... cautioned strongly against any further publications regarding [his] views..." at the meeting between Carl Ross, Cheryl Reid, Betty Lutes and Malcolm Ross. In response to disciplinary action related to the publication of his book, *Spectre of Power*, in late 1987 or early 1988, Malcolm Ross claimed that the School Board at the September 17, 1987 meeting had given "tacit approval" for the publication of this book.

Also in 1987, two motions proposed by Audrey Lampert concerning the Ross issue failed due to a lack of a seconder. These motions dealt with the release of the Review Committee report and with the School Board making a public statement rejecting all forms of racism and hatemongering.

The first significant event of 1988 was the imposition of disciplinary action against Malcolm Ross. The evidence shows that the School Board decided in March 1988 that Malcolm Ross had inhibited its ability to manage and direct the educational process and had detrimentally affected its reputation. It also noted a negative impact on Malcolm Ross' reputation and his perceived inability to foster an atmosphere of tolerance as a public school teacher. Therefore, by letter of March 16, 1988 in which the School Board referred to his writings as controversial, Malcolm Ross was informed that any further publications, or public discussion of his views or his works, would lead to greater disciplinary action, including the possibility of dismissal. The School Board also stated to Malcolm Ross that compliance with its directives would result in the matter being considered closed. Malcolm Ross grieved this decision without success. He disputed that the School Board's abilities were negatively affected or that the School Board's reputation had been adversely affected. It was shortly before the imposition of this disciplinary action that an opinion letter from Clyde Spinney, counsel to the School Board at that time, indicated that the School Board could discipline for out-of-school conduct. The reprimand and restriction, sometimes referred to as the "gag order," of March 16, 1988, was kept in Malcolm Ross' personal file until September 20, 1989 when it was ordered removed.

The next relevant action of 1988 was the filing of three complaints concerning the Malcolm Ross issue. On March 18, 1988, Kathleen Makela filed a complaint against the Board of School Trustees, District 15, alleging discrimination, as per Section 5 of the *Human Rights Act*, on the basis of ancestry and religion. Kathleen Makela also filed a complaint on April 20, 1988 in which she alleged a breach of Section 6 of the *Human Rights Act*. On April 21, 1988 David Attis filed the complaint which is the subject of the present Inquiry. Kathleen Makela's complaints were withdrawn and dismissed later in 1988.

Subsequent to the above complaints being filed, the Human Rights Commission began its investigation. As part of this investigation the Human Rights Commission requested the School Board to release records concerning Malcolm Ross, his students, and a copy of the Review Committee Report. In addition, the Commission made two settlement offers which do not appear to have been pursued by the School Board. The School Board refused to release the requested documentation to the Commission on the basis that it wished to protect the confidentiality of teachers' records, that it was concerned over the possible identification of special needs students, and that it was concerned because of the confidential nature of the Review Committee report. This refusal was outlined in a letter of August 25, 1988 from Carl Ross to Francis Young of the Human Rights Commission. Upon the failure of the parties to resolve the complaint, the Commission recommended that this Board of Inquiry be established and on September 1, 1988, the Minister of Labour, the Honourable Mike McKee, complied with this recommendation.

During 1988 the School Board continued to monitor the inclass activities of Malcolm Ross. Further, the School Board was made aware of views both in favour of and opposed to Malcolm Ross. These ranged from expressions of dissatisfaction with Malcolm Ross by individuals such as Premier Frank McKenna and Education Minister Shirley Dysart, to a filing of a complaint with the Human Rights Commission by Charles Simon Puxley, concerning what he considered to be the unjust treatment of Malcolm Ross. By this point in time the Attorney-General, James Lockyer, had announced that no charges would be laid against Malcolm Ross under the hate-literature laws. Also, 1988 saw the development by the Department of Education of a Holocaust curriculum and a report on "Initiatives in Multicultural Education" describing various programs dealing with multiculturalism.

On March 22, 1989, the School Board adopted Policy 5006 which established guidelines for teachers regarding individual rights and freedoms. This policy was intended to ensure that students were provided with a positive and safe learning environment which taught respect for individuals' rights and freedoms. This policy also provided for disciplinary action in the event that any employee's actions constituted a hindrance to the provision of school services. In August of 1989, the

Minister of Education released a Ministerial Statement on Multicultural/Human Rights Education which was intended to set the direction for policy development by school boards to ensure that multicultural and human rights education formed "... an integral part of [the] school system."

On September 20, 1989, the School Board decided to remove the reprimand and restriction from Malcolm Ross' file and asked Malcolm Ross to comply with the provisions of Policy 5006. This decision and request were communicated to Malcolm Ross in a letter of September 22, 1989. Further, the School Board again informed Malcolm Ross that some of his past actions and comments had affected the administrative operation of Magnetic Hill School and had caused some parents to be concerned about general safety and the attention being brought to the school. On November 21, 1989, approximately two months after the removal of the restriction and reprimand from Malcolm Ross' file, Malcolm Ross appeared on a local television program. This appearance and the comments made while on the television program led to the School Board deciding, on November 30, 1989, to issue a severe reprimand to Malcolm Ross. This decision was communicated to Malcolm Ross in a letter of December 1, 1989. In this letter, Ross MacCallum, on behalf of the School Board, characterized Malcolm Ross' actions and the School Board's request in the following manner:

> The School Board is sincerely requesting that you refrain from *publicly assailing* another religious belief, the Jewish religion, when proclaiming your own faith. [Emphasis added.]

and

> In the view of the School Board, your current approach to the method of expounding upon your religious belief by *publicly denouncing* another borders on freedom or licence to judge and condemn ... . [Emphasis added.]

In a related letter of December 1, 1989, the School Board requested the Department of Education to provide input as to whether Malcolm Ross' appearance constituted a breach of the Ministerial Statement of 1989. Earle Wood, Deputy Minister of Education, responded that the Ministerial Statement was not meant as a ground for disciplinary action against an individual teacher. Rather, it was meant to provide a guideline to school boards so that they might develop their own policies. Further, the letter stated that day-today responsibility for disciplinary action lay with the School Board.

Alleged Effects

The evidence reveals that there were many incidents in which Jewish students were singled out, either in school activities or by other students, and made to feel different. For the purposes of this section of the decision, the evidence of Yona Attis and Leigh Lampert will figure most prominently. The evidence of David Attis regarding incidents against Jewish students is for the most part hearsay and

therefore cannot be given the same weight.

Before proceeding to review the evidence of Yona Attis and Leigh Lampert, some comments concerning the testimony of young witnesses in general, and the testimony of these two students in particular, is warranted. It is important to remember that testifying at any hearing is often difficult even for adults, especially during cross-examination. However, if a witness' evidence is to be given full weight it is important that the testimony be able to stand up to cross-examination. While it is true that the testimony of Yona Attis was punctuated with periods of strong emotionalism, it is also equally true that the evidence was presented in a credible and forthright manner, as was the evidence of Leigh Lampert. This Board accepts the evidence of Yona Attis and Leigh Lampert and given the length of time over which many of the incidents to which they referred occurred, the Board believes that the evidence was presented in a manner consistent with the passage of time.

One of the first incidents referred to by Yona Attis in her testimony occurred in the Spring of 1988 when she went to watch a gymnastic competition at Magnetic Hill School. Yona Attis testified that her friends, upon hearing that she was going to be attending the competition at Magnetic Hill School, told her that she could not go there because that was "... where the teacher who hates Jews works." Another friend stated that the teacher's name was Malcolm Ross. After this, Yona Attis testified that she went to the school but that the whole time she was there she was scared "... that someone was going to come up behind me and grab me and beat me up or something." Upon cross-examination, Yona Attis stated that she believed she would continue to have fear if she was to enter Magnetic Hill School because of the presence of Malcolm Ross at the school.

Yona Attis testified that as early as Grade 2 she could remember a supply teacher at Edith Cavell School asking the students in her class to raise their hands if they loved Jesus. She claimed that she felt different because only herself and one other did not put up their hands. Starting in Grade 5 a number of incidents began to occur. These ranged from name calling based on her religion, to the wearing of swastikas by some students, to the drawing of swastikas on her books and school bag. While in the earlier years, these events were caused by a small number of students in the school, in later years, such as when Yona Attis was transferred back to Edith Cavell School, as many as twenty students, at one time or another, participated. Another aspect of this taunting was the shouting and signalling of the "Heil, Hitler" salute in her presence. Further, Yona Attis testified that she was made to feel different when various entertainers would come to the school and promote their Christian beliefs. Two particular incidents which stood out in her mind involved in the one instance, a keyboard player and, in the other instance, basketball players who professed their belief in Christianity. She testified that she was upset and although she felt like walking out during these incidents she did not for fear of standing out. Yona Attis testified that as far as

she was concerned the teachers and principal did not really attempt to do anything about her situation. Yona Attis testified that she had suffered greatly as a result of all the name calling, the drawing and wearing of swastikas, and the apparent unwillingness of school officials to do anything to resolve the situation.

The evidence of Leigh Lampert indicates that he experienced incidents similar to those of Yona Attis while attending school in School District 15. It is evident that the wearing of swastikas and the drawing of swastikas on blackboards, walls, and books was also happening. Leigh Lampert also testified that a supply teacher, together with another student, gave the "Heil, Hitler" salute while in class.

With regard to the testimony of the other students all that needs to be said is that it generally supported the testimony of Yona Attis.

Yona Attis testified that her image of Malcolm Ross was created both by the media and perhaps by her father. Leigh Lampert also testified that his image of Malcolm Ross was largely determined by what he had heard from various media and from discussions at home. He further testified that he had read portions of *Spectre of Power* and had determined for himself that the book was anti-Semitic.

The testimony of David Attis indicated that he was a parent who was very concerned about the type of education his children would receive and how the presence of Malcolm Ross might affect this education. David Attis testified that he was concerned about the emotional drain on his daughter because of the various incidents which had occurred at school. He expressed his apprehension that his other daughters would also face discrimination within the school system because they were Jewish. Finally, David Attis testified that Yona Attis had informed him that the teachers did nothing to prevent the various attacks on her while she was at school.

There can be no doubt that David Attis sincerely believes that the writings and publications of Malcolm Ross are anti-Jewish, racist, bigoted and discriminatory. David Attis acknowledged that he had very little direct contact with the School Board on this issue prior to the complaint being filed on April 21, 1988. He maintained that this was so because he had become disillusioned with the process by which the School Board had handled complaints of discrimination in the past. Further, he believes that the School Board condoned Malcolm Ross' views by failing to act and to condemn those views. He is of the opinion that the School Board has, in effect, created a discriminatory environment within which Jewish students can not be treated equally.

Ernest Hodgson, in discussing the potential for impact upon the school system of Malcolm Ross' views, testified that this type of issue could not help but manifest itself in the relations within the school and between the school and the community

at large. Of particular concern to Ernest Hodgson was the impact upon children of a teacher's outside activities. In the present case, Ernest Hodgson believed that Malcolm Ross' views and his public dissemination thereof, was certain to have an impact upon Jewish children. He held that teachers can have a great impact upon the students they teach. In this regard, he referred to a number of Codes of Ethics and/or Teaching Codes from across the country which dealt with the conduct expected of teachers. His opinion was that these codes reveal the need for teachers not to undermine the confidence or security of their students.

With regard to the position of Jewish students within the school system, it was his opinion that the situation was one in which the students, having a general knowledge of Malcolm Ross, could be fearful and otherwise afraid of Malcolm Ross. Further, he stated it was possible that Jewish students would be negatively influenced and would consider themselves the subject of suspicion or distrust and isolated from their friends. As well, it was possible that there would be a reluctance on the part of Jewish parents to participate within the school system and that Malcolm Ross' views could also discourage other Jewish parents from moving to the Moncton area.

IV. DECISION

[Here the report discussed general principles of interpretation applicable to human rights legislation, and determined to follow the broad, purposive approach.]

The general objective of the *Act* is a fundamental one: that of fostering respect and equal treatment for all persons without regard to the individual's race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex. Differential treatment of individuals on these grounds often results from prejudices that are deep rooted and ingrained in our society. Assisting individuals through education and public awareness to identify and recognize their prejudices and the unfairness of judging others on the basis of these prejudices is seen as one of the long term solutions to eliminating discrimination. At the same time, however, in addition to its objective of eliminating discriminatory conduct generally, human rights legislation has identified specific areas in which discriminatory conduct is prohibited. For example, Section 3 of the *Act* prohibits discrimination in the hiring or continuing employment of individuals; Section 4 prohibits discrimination in the rental and sale of housing and property; Section 5 prohibits discrimination with respect to any accommodation, services or facilities available to the public; Section 6 prohibits the publication of certain notices, signs, symbols or emblems that discriminate against any person; and, Section 7 prevents the exclusion of individuals on discriminatory grounds from professional associations or business or trade associations. The Act, with respect to these areas of discrimination, provides relief to those who have been the subject of the discrimination.

The courts have also now clearly established that it is the effect on the complainant and not the intent of the party accused of discriminating which is relevant in determining whether the human rights legislation has been breached.

[Here Prof. Bruce quoted Justice McIntyre in *Ontario Human Rights Copmmission & Theresa O'Malley* v. *Simpson-Sears*, [1985] 2 S.C.R. 536 at 547 and 549-50.]

There are several preliminary questions relating to the applicability of Section 5 which must be addressed before any conclusions with respect to the merits of the complaint can be reached.

Whether the Board of Inquiry is the proper forum

An argument was raised that this Board of Inquiry is not the proper forum for the resolution of the issue before it. It was argued that it should be addressed through provisions in the Collective Agreement and the *Public Service Labour Relations Act,* R.S.N.B. 1973, c. P-25, that allow a school board to discipline a teacher for just cause and provide a grievance and adjudication process through which a teacher can challenge the appropriateness of disciplinary action. As referred to in the evidence, the Employer has taken disciplinary action against Malcolm Ross on at least two occasions for reasons partially related to the issue before this Board of Inquiry. It was argued that labour relations would become a nightmare if disputes between a school board and teachers could be brought before a board of inquiry as well as processed through the grievance and adjudication process.

It is possible that the actions of a teacher that have been the subject of disciplinary action by an employer could come before an adjudicator and at the same time be before a board of inquiry as a result of a complaint under human rights legislation. There is no guarantee that in such a case priority will be given by the School Board to the requirements and objectives of the *Human Rights Act*. In such cases it is clear that the primary jurisdiction to address complaints alleging breaches of the human rights legislation is that of a board of inquiry. The Collective Agreement itself in Article 12 makes reference to the supremacy of legislation over the Collective Agreement. This basic principle, that the parties to a collective agreement cannot contract out of human rights legislation, is also supported in the Supreme Court of Canada decision *Re Winnipeg School Division No. 1 & Craton* (1986), 21 D.L.R. (4th) 1. See also *Ontario Human Rights Commission* v. *Borough of Etobicoke* (1982), 40 N.R. 159 (S.C.C.).

Counsel for the Teachers' Federation expressed concern that to allow such matters to come before a board of inquiry would create a watershed of complaints and be very disruptive of the traditional manner of handling such issues through

adjudication. There is no evidence to suggest that this would be the case. However, even if this was to occur, it would not allow a board of inquiry to relinquish its primary jurisdiction to deal with alleged violations of the *Act*.

[The report then concluded that the School Board and the complainant were persons and that public education in schools is a service for the purposes of the *Act*.]

Whether Section 6 restricts the scope of Section 5

Another argument of a preliminary nature challenged that Subsection 6(2) of the *Act* restricts the scope of Section 5 of the *Act*. Subsection 6(2) provides as follows:

"6(2) Nothing in this section interferes with, restricts, or prohibits the free expression of opinions upon any subject by speech or in writing."

It was argued that Subsection 6(2) prevents the application of Section 5 to situations in which teachers are exercising their right to freely express their opinions as was Malcolm Ross through his published writings and public statements. This argument is rejected for several reasons. Firstly, it is noted that in Subsection 6(2) the reference is to nothing in "this section" prohibiting the free expression of opinion. If it was intended for this exemption clause to have broader application, it would have stated that nothing in "this *Act*" interferes, restricts or prohibits the free expression of opinions.

A review of decisions in other jurisdictions where there are similar provisions in human rights legislation supports the conclusion that equivalent provisions to Subsection 6(2) have not been applied beyond the scope of the section within which they were found. To apply Subsection 6(2) to other provisions of the Act would substantially restrict and limit the applicability of these sections contrary to the broad purposive approach to interpretation which the courts have adopted. If for example, to follow the argument, Subsection 6(2) applied to limit Subsection 5(1), a teacher would be free to express any opinion in class or elsewhere regardless of how discriminatory it might be as long as it could be classified as the free expression of opinion by that teacher. Such a conclusion could not have been intended by the legislature.

Whether section 3 restricts the scope of section 5

An argument was raised by counsel that to order the School Board to impose any restriction on Malcolm Ross' right to publish and express his ideas could be seen as a breach by the School Board of Subsection 3(1). Subsection 3(1), which has been quoted earlier, prohibits an employer from discriminating against any person in respect of employment because of religion. It should be noted that there was

no evidence presented by Malcolm Ross that his religion requires him to write in the manner that he has written. His writings suggest that he is writing out of some religious conviction but there was no direct evidence of this and no argument made as to his beliefs meeting the tenets of any particular religion. However, in the event that the conclusion of this Board of Inquiry is incorrect as to there being insufficient evidence to prove that Malcolm Ross' writings are required by his religion, it is necessary to address the relationship between Sections 3 and 5.

Both Section 3 and Section 5 provide protection against discrimination on the basis of religion. Therefore, it is possible that a situation could exist where the legitimate expression of a religious belief by one individual could breach another individual's right to be protected from discrimination on the basis of religion. In such a case it would be necessary to reach a reasonable balance between the two rights. In determining the balance, it is useful to consider the case of *Boucher* v. *The King*, [1951] S.C.R. 265, at 277 where Rinfret J., in dissent, in considering the scope of freedom of expression stated:

> ... to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation." It should not be understood ... that persons subject to Canadian jurisdiction can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable.

By analogy, it can also be argued that freedom of religion has its limitations. When religious beliefs take the form of an attack and condemnation of those following another religion, this passes well beyond a legitimate freedom of religion and the protection otherwise provided by the *Act*. In such a case, it would not be a question, therefore, of balancing individual rights.

Religious freedom is generally not viewed as entitling one to interfere with the rights of others. Dickson J. in the *Taylor* v. *Canadian Human Rights Commission* (1991), 75 D.L.R. (4th) 577, at 594, summarizes the general international community approach to whether religious freedom extends to the right to denigrate the views of followers of another religion. He notes that the commitment of the international community to "... eradicate discrimination extends to the prohibition of the dissemination of ideas based on racial or religious superiority." The fact that freedom of religion does not permit one to attack and condemn another religion has been very clearly stated in those human rights cases that address religious harassment. The board of inquiry in the *Suzanne Dufour* decision (1989), 10 C.H.R.R. D/6153 (Adell) dealt with this issue by stating as follows at paragraph 44243:

> No matter how convinced anyone may be that he or she has a religious message

> that others should hear and heed, the Code prohibits him or her from pressing that message in the work place. A religiously militant employer is no more entitled to impose his or her version of religious enlightenment on employees than a sexually militant employer is entitled to impose his or her sexual ideas or wishes.

By analogy, it can be argued that the *Act* prohibits those involved in the provision of school facilities from imposing their religious messages on those using the services of the school system.

In the event of a true conflict between Section 3 and Section 5 and in the absence of any clear direction in the statute as to which section will prevail, it is necessary to consider the circumstances of the particular case in order to reach a reasonable balance between competing rights.

Whether an employer is liable for its employees' actions for purposes of s. 5

[Here the Report reitterated the issue.]

The issue of the liability of an employer for discriminatory acts of an employee appears to have been resolved in the Supreme Court of Canada decision *Brennan* v. *Canada and Robichaud* (1987), 75 N.R. 303. In that case the complainant alleged that she had been sexually harassed and discriminated against by her employer, the Department of National Defence, and her supervisor, who was the person who had sexually harassed her. Mr. Justice La Forest who wrote the decision for the Court defined the issue as whether or not an employer is responsible for the unauthorized discriminatory acts of its employees in the course of their employment under the *Canadian Human Rights Act*. Mr. Justice La Forest found that the intention of the federal human rights legislation was to make employers statutorily liable for the discriminatory acts of their employees and was not dependent upon theories of employer liability developed in the context of criminal or quasi-criminal conduct or upon vicarious liability as developed under the law of tort. Mr. Justice La Forest summarizes his conclusions at pages 314-315 as follows:

> Not only would the remedial objectives of the Act be stultified if a narrower scheme of liability were fashioned; the educational objectives it embodies would concomitantly be vitiated. If, as was suggested by the Court of Appeal, society must wait for a Minister (who is already subject to public scrutiny) to discriminate before the Act comeg into operation, how effective can the educational function of the Act be? More importantly, the interpretation I have proposed makes education begin in the workplace, in the microdemocracy of the work environment, rather than in society at large.Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment', interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this tvpe of liability: it is surely statutory. However. it serves a purpose somewhat similar to that of vicarious liability in tort, bv placing

> responsibility for an orqanization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. [Emphasis added.]

Mr. Justice La Forest reached his conclusions regarding employer liability based on the general rules of interpretation applicable to human rights legislation. There would appear to be no reason why his conclusions are not equally applicable in the interpretation of Section 5 of the New Brunswick *Act* such that the School Board can be held liable for the actions of its teachers.

Mr. Justice LeDain agreed with the decision of Mr. Justice La Forest and elaborated as follows at pages 317-318:

> As held by the majority in the Federal Court of Appeal, the Act contemplates in gs. 4 and 4(2) that relief will be available againgt the person found to be engaging or to have engaged in a discriminatory practice, but I think it is an implication of the word 'indirectly' in 5. 7 and the nature of the relief available under 8. 41(2) that a discriminatory practice by an employee is to be considered to be a discriminatory practice by the employer as well, whether or not authorized or intended by the latter.

The term "indirectly" is also found in Section 5 and would, therefore, as in the federal legislation, imply the liability of an employer for the acts of its employees.

Obviously, if following an examination of the facts it is concluded that there has been a violation of Section 5 of the Act by the School Board through the actions of Malcolm Ross, any effective remedial action may have a detrimental effect on Malcolm Ross. Malcolm Ross was designated as a party to these proceedings because of this very concern. Counsel for Malcolm Ross at the commencement of the hearings of the Board of Inquiry acknowledged that he recognized the potential impact on his client and specifically mentioned the possibility of dismissal from employment. It is noted that Subsection 20(6.2) of the Act provides that the Board of Inquiry may make an order against any "party" found to have violated the Act.

Whether there was 'discrimination' for purposes of section 5

...

Section 5, it has been determined, guarantees individuals freedom from discrimination in educational services available to the public. The services provided in an educational facility are there for the general purpose of educating students. Education of students must be viewed in the broad context of including not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment. This would be in keeping with the broad purposive approach taken to the interpretation of human rights legislation. Section 5 requires that these services

be available to all students without discrimination on the basis of religion and ancestry, amongst other grounds.

There is an onus on a complainant to show a *prima facie* effect that would be a logical result of a discriminatory action. In some cases the effect is not easily proven especially where the complainant is claiming an effect that is not readily discernible such as a loss of self-worth or dignity as may be the case in relation to Section 5. The determination as to whether there has been such an effect revolves around, firstly, an assessment of the credibility of the complainant's evidence. Secondly, where the complainant's evidence is credible, it is necessary to determine whether this effect is a reasonable reaction given the circumstances. In making this second determination it is necessary to place oneself in the position of a reasonable person in the circumstances. It is not, of course, easy for an individual who is a member of a majority to understand the impact that certain actions may have on a member of a minority and care must be taken to ensure that the assessment is done from the position of the minority member. Further, if one is addressing the situation of a child one must look at it in terms of a reasonable child, or, if addressing the situation of a father, one must look at it in terms of a reasonable father. Emphasis is placed on this particular aspect because some counsel suggested that the reactions of Yona Attis were simply the result of the imagination of a child or the irrational reaction of a child. If children generally react in what might be seen as an irrational manner as measured from an adult viewpoint, that is not relevant. What is relevant is whether the child's reaction would be a reasonable one for a child of that particular age.

If the evidence of the complainant is credible, with respect to the claimed effect, and the effect is a reasonable one, in relation to the circumstances of the complainant, one must then look to the party who has allegedly discriminated to provide evidence or argument as to any reason or cause for the actions, that have been called into question not being found in breach of the Act. This approach is summarized by Mr. Justice McIntyre in the *Simpson-Sears* case, supra, at page 558 as follows:

> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

Section 5 attempts to create a learning environment which is as free from discriminatory effects as is reasonably possible given the influence of factors beyond the control of those administering the educational system. In the present case it is claimed that the Complainant and his children, on the basis of their religion or ancestry, are provided with an inferior or less secure learning environment than is available to parents and children of other religions and ancestries. This less secure environment, the Complainant argues, has created

apprehensions, fears, anger, isolation, and in a broader context has attacked the dignity and selfworth of the Complainant and his children. It has been claimed that the School Board and Malcolm Ross have created a "poisoned environment" in School District 15 for the Complainant and his children.

The evidence with respect to the effects of the alleged discriminatory actions on the Complainant and his children has been reviewed earlier in this decision. This Board of Inquiry has found the evidence of the Complainant, Yona Attis and Leigh Lampert, as to the effect of the impugned actions on them as a parent and students served by School District 15, to be very credible. It remains to be determined whether the alleged discriminatory actions could reasonably have caused these effects and, if so, whether there is reasonable cause to excuse the otherwise discriminatory actions. These actions will be considered in the following three categories:

(i) Malcolm Ross' actions on school property; (ii) Malcolm Ross' actions while off-duty; (iii) School Board's actions.

(i) Malcolm Ross' actions on school property

...

These alleged incidents of 1976 and earlier cannot be viewed as central to this complaint. The difficulty in determining whether any weight should be given to this evidence is that it is hearsay and relates to incidents that occurred approximately twelve years prior to the filing of the complaint. The failure to produce evidence of any subsequent discriminatory comments by Malcolm Ross in the classroom suggests that such direct discriminatory comments were not made on a repetitive basis or at all. This conclusion is supported by the findings of the Review Committee Report of 1987 which amongst other things sought to determine whether Malcolm Ross had made discriminatory comments in the classroom. Although the report was flawed in some respects, this Board is prepared to accept its finding that there was no recent evidence of Malcolm Ross having made any discriminatory comments in his classroom. It is determined that no weight should be attached to the evidence of alleged incidents in the school prior to and including 1976. There is, therefore, no evidence of any direct classroom activity by Malcolm Ross on which to base a complaint under Section 5 of the Act.

(ii) Malcolm Ross' actions while off-duty

Most of the evidence presented related to alleged discriminatory actions by Malcolm Ross while off-duty which it is claimed had the effect of creating a poisoned learning environment within School District 15 for Jewish parents and students. This evidence consists largely of public statements and published

writings by Malcolm Ross and resultant media coverage. It is not alleged that any of the public statements and published writings were carried out as part of Malcolm Ross' assigned school duties. However, it is to be 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 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.

...

Although the above case dealt with criminal conduct by a teacher, its analysis of the effect on the teacher-student relationship of offduty conduct is relevant to the present case.

Finally, the case of *Abbotsford School District 34 Board of School Trustees* v. *Shewan and Shewan* (1986), 70 B.C.L.R. 40 (B.C.S.C.) is useful for its review of several cases relating to teachers' off-duty conduct. Mr. Justice Bouck reached the following conclusion at page 64:

> What do these decisions tell us? They say a teacher is an important member of the community who leads by example. He or she not only owes a duty of good behaviour to the school board as the employer but also to the local community at large and to the teaching profession. An appropriate standard of moral conduct or behaviour must be maintained both inside and outgide the classroom.

There have been some concerns expressed by counsel that a finding that off-duty conduct by a teacher can result in a breach of Section 5 of the Act will be seen as an invitation to commence a 'witch hunt' and that restricting a teacher's freedom to express opinions while off-duty will do much greater harm than any good that will result from protecting students and parents from discrimination. One might consider a situation where there are two teachers both with the same prejudicial views. In one case the teacher does not make the prejudicial views known and in the second case the teacher publicly proclaims the prejudicial views such that they become known generally in the school community. Neither teacher, however, in any way allows these prejudicial views to affect his or her classroom

behaviour and conduct. In the case of the teacher who has not expressed the prejudicial views there is no discriminatory effect on any students within the school community because the teacher has not allowed the prejudicial views to influence his or her conduct in the classroom and students of minority groups about which the teacher may have prejudicial views have no knowledge of the teacher's viewpoint. This does not mean that the teacher's views are condoned, simply that they have not knowingly impacted on the school community and that there is no basis for a complaint under the Act. In the case of the teacher who has proclaimed the discriminatory views publicly the effect may adversely impact on the school community. It may raise fears and concerns of potential misconduct by the teacher in the classroom and, more importantly, it may be seen as a signal that others view these prejudicial views as acceptable. It may lead to a loss of dignity and self-esteem by those in the school community belonging to the minority group against whom the teacher is prejudiced.

The *Act* does not prohibit a person from thinking or holding prejudicial views. The *Act,* however, may affect the right of that person to be a teacher when those views are publicly expressed in a manner that impacts on the school community or if those views influence the treatment of students in the classroom by the teacher. While it may be argued that this approach may only result in such prejudices going 'underground', it, at the very least, will reduce the scope of the discriminatory conduct by not allowing the prejudicial views to be seen as circulating and receiving support within the educational system.

...

The evidence also established that there was substantial media coverage of these writings and statements by Malcolm Ross over a long period of time which contributed to his views becoming well known to the local community and beyond. A review of this media coverage indicates that it was generally accurate in reporting on the content of Malcolm Ross' views.

This Board of Inquiry has 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 views of Malcolm Ross are most succinctly stated in the letter to the editor of *The Miramichi Leader* referred to earlier. He refers to the international conspiracy in this letter as follows:

> How then could these capitalists support communism?
> These questions troubled me, and several years after leaving university I began to hear about an "international conspiracy." Most disturbing of all, this "conspiracy" seemed to be headed by those that many Christians held to be God's Chosen People,' the Jews.

Malcolm Ross goes on to speak very highly of several authors, such as Martin Luther, who he argues support the international conspiracy theory. He states in the newspaper article:

> My work is not "disguised" as Christian, as Dr. Israeli insists, but is completely faithful to the spirit of the Christian faith from earliest Christian times to at least our "post-Auchwitz Christian" church when the Jewish infiltration of top offices in the Vatican and elsewhere led to the sorry state of the Christian church and Christian society today.It is indeed the "Judeo-Christian society" our society has fought against for years, a society under the control of a Jewish controled mass media, Jewish controled international finance, and now a Jewish-dominated "Christianity" where every "evangelist" who appears on our television spews out the same old line: "The Jews are God's Chosen People so we must support them no matter what they do." ... I believe many of the evils in our land stem from the fact that we have denied the kingship of Christ in our society and have allowed those "who hate the Lord" to rule over us.

The intensity with which Malcolm Ross attacks the followers of Judaism is clearly evident in the following quotation from his letter:

> My whole purpose in writing and publishing is to exalt Jesus Christ and to inform Christians about the great Satanic movement which is trying to destroy our Christian faith and civilization.

Further on in the letter he quotes what he claims is biblical support for claiming that Jews are the synagogue of Satan. His encouragement of others to condemn the Jews and throw off the "yoke of Jewish domination" is assisted through referring to Judaism as teaching that " ... Jesus Christ is a bastard, a lewd deceiver, a false prophet who is burning in Hell." He further claims that Judaism teaches that the Virgin Mary is a whore. Malcolm Ross concludes his articles by indicating that he intends to continue his research, writing and publishing.

These same themes are constantly repeated in his writings which attack the Jewish religion. Whether these attacks fall within the scope of hate literature for the purposes of the *Criminal Code* is not a question that can be determined by this Board of Inquiry. This Board of Inquiry has been charged with determining whether these attacks by a school teacher have led to discrimination in the provision of services by the School Board.

A television interview which Malcolm Ross gave in 1989 gives further insight into his motives and purpose for writing. This Board of Inquiry agrees with the characterization which the School Board gave to the interview when it ordered Malcolm Ross to refrain from publicly assailing and denouncing another religion. The School Board went on to state that in its view "... the climate created by this aggressive approach creates hostility that permeates and interferes with the desired tolerance required by the school system to show respect for the rights of all students and their families to practice their religious faith. This Board of Inquiry has no hesitation in concluding that the public statements and writings of Malcolm Ross have 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.

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. 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. As an example, much reference was made in evidence to the comments in Malcolm Ross' books regarding the numbers killed in the Jewish Holocaust. The facts as to the actual numbers killed was not questioned in a scholarly fashion but rather portrayed in a fashion so as to buttress Malcolm Ross' position that there is a Jewish conspiracy to take over the world.

There was also an argument raised that Malcolm Ross was attacking Zionism rather than Judaism and, therefore, that his writings fell outside of the scope of discrimination on the basis of religion or ancestry. A review of his writings makes it clear that he is attacking Judaism as well as Zionism. The letter to the editor of *The Miramichi Leader* written by Malcolm Ross, which has been quoted extensively, makes this very clear. Nor can the argument that Malcolm Ross has stated occasionally in his writings that not all Jews are part of the conspiracy be seen to eliminate their discriminatory effect.

On a review of all of the evidence and circumstances surrounding Malcolm Ross' off-duty conduct in relation to his published statements and writings, it is the conclusion of this Board of Inquiry, on the balance of probabilities, that actions

of Malcolm Ross have violated Subsection 5(1) of the Act and there is no reasonable cause to excuse the discriminatory effect of these actions.

(iii) School Board's actions

...

It has been argued by the Complainant that the School Board discriminated directly against him and his children by failing to take appropriate disciplinary action against Malcolm Ross. With respect to this failure and other actions of the School Board or its individual members, the Complainant has argued that the School Board must be seen to have condoned the views of Malcolm Ross. Further, it was claimed that the School Board failed to properly control discriminatory actions by students against the Complainant's daughter and other Jewish children. The responsibility of the School Board for the overall management and control of the school environment within District 15 and for the direction and control of teachers in the District was not contested by the School Board. This responsibility is acknowledged in the *Schools Act* and the Collective Agreement.

For ease of review, the School Board's actions will be subdivided into the following categories: disciplining of Malcolm Ross; Review Committee Report; failure to pass two motions; control of discriminatory incidents in the school environment; and, reaction to the Human Rights Commission.

The most striking impression from a review of the School Board's handling of the Malcolm Ross issue is the reluctance of the School Board to become involved and the slowness of its response. Malcolm Ross published his first book in 1978 and no disciplinary action took place until March of 1988 although his classes were monitored on a fairly regular basis and a Review Committee was established in 1987. In the interim there were other publications, letters to the editor, and numerous media reports regarding the matter. The School Board in its evidence pointed to several factors to explain what appears to be an inordinate delay and unwillingness to fulfill its mandate as a school board to provide leadership in dealing with this conflict. The School Board pointed to letters and comments from the provincial Government, as well as the Human Rights Commission itself, stressing the right of Malcolm Ross to freedom of speech in his private life. Reference was also made to the numerous reviews and delays by the various Attorneys-General in deciding whether to prosecute Malcolm Ross under the hate literature provisions of the *Criminal Code.* Further, reference was made to the absence of any evidence that Malcolm Ross was expressing his views in the classroom. As well, Malcolm Ross was viewed as a very competent and capable teacher. Finally, it was argued on behalf of the School Board that the Complainant had failed to direct his concerns to the School Board and, therefore,

it had been unable to deal with them.

On reviewing the evidence it appears that some of these reasons have validity. The School Board was receiving conflicting signals from the provincial Government and the Human Rights Commission suggesting that Malcolm Ross' right of freedom of expression prevented the School Board from taking any disciplinary action against him for comments made while off-duty. It was only in March of 1988 that the School Board received a letter from Clyde Spinney, counsel to the School Board at that time, outlining the legal precedent that supported the right of the School Board to control the off-duty conduct of employees when it adversely affects the employer. This legal precedent had been well developed for many years and it is difficult to understand why it was only in 1988 that the School Board had this matter clarified. The case *Fraser* v. *Public Service Staff Relations Board* (1982), 45 N.R. 25 was decided by the Federal Court of Appeal in November 1982 and upheld by the Supreme Court of Canada as reported in (1986), 63 N.R. 161. This case established the right of an employer to discipline an employee for off-duty conduct. The *Fraser* case refers to public servants being duty bound to exercise restraint in making public comments critical of their employer, the government, which would impair their usefulness as employees. The court held that, although direct evidence of performance was usually necessary, impairment could be inferred where the civil servant's occupation was both important and sensitive and the substance, form and context of the criticism was extreme. In the present case, it has been found that there was in fact evidence of impairment of Malcolm Ross' ability to perform his employment duties. As well, it is noted that Malcolm Ross' criticism of the Jewish religion was extreme.

There is no evidence that the School Board deliberately declined to take action with the knowledge that it had the authority to do so. However, viewed from the Complainant's position it no doubt created the impression that the School Board was unsympathetic to the effect of Malcolm Ross' writings on him and his children. The reprimand and restraint order issued in March 1988 as disciplinary action against Malcolm Ross by the School Board referred to the views expressed in his writings as being controversial and causing difficulties for the School Board. The Complainant has criticized the Board for referring to Malcolm Ross' writings as controversial rather than discriminatory. This Board of Inquiry has concluded that in taking disciplinary action it was not necessary for the School Board to refer to Malcolm Ross' writings as discriminatory. An employer, in imposing disciplinary action, will normally characterize the reasons for disciplinary action as widely as possible so as to avoid any relevant actions being excluded as a basis for the disciplinary action.

...

Given Malcolm Ross' television appearance and the removal of the record of disciplinary action two months earlier, one can see why the Complainant questioned the School Board's voluntary removal of the record with respect to a situation that had created such controversy for so many years and when its disciplinary action was apparently working quite successfully. It must be appreciated, however, that the School Board had sent a rather strongly worded letter to Malcolm Ross, together with a copy of Policy 5006, making it very clear as to what the intent of this policy was when the School Board removed the record of disciplinary action.

Given the above, it is difficult to understand why on December 1, 1989 the School Board merely gave Malcolm Ross a severe reprimand as opposed to terminating his employment. The previous disciplinary action in 1988, one might argue, was taken when there was no policy in place and Malcolm Ross may have thought that he had a right to speak out freely while off-duty. His comments while appearing on the television program, however, were clearly in violation of School Board policy and direction.

The School Board determined what disciplinary action to take in response to Malcolm Ross' television appearance at a Special Board meeting on November 30, 1989. This was the same day that the Supreme Court of Canada denied Malcolm Ross' leave to appeal from the decision of the New Brunswick Court of Appeal respecting the challenge by the School Board and other parties to the jurisdiction of this Board of Inquiry to proceed. It is possible that at this point in time the School Board anticipated that the Board of Inquiry would be proceeding and may have determined that it was best not to terminate Malcolm Ross' employment pending further direction and comment from this Board of Inquiry. However, if this was so, the School Board neither publicly indicated that this was the reason for not imposing more serious disciplinary action nor was any evidence presented to this Board of Inquiry to this effect.

In summary, it was the apparent reluctance of the School Board to take disciplinary action prior to 1988 that can be seen as creating the effect for the Complainant that the School Board was in fact supporting and condoning Malcolm Ross' views. It certainly is no excuse for the School Board to say that the Complainant had not brought his concerns directly to the School Board. The publicity which this matter had received over many years meant that the School Board was very much aware of the situation in the community. In such situations it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty.

The School Board in 1987 established a Review Committee to review the possible impact of the private actions of Malcolm Ross upon the learning environment in school programs. Ernest Hodgson in his evidence was very critical

of this Committee. Ernest Hodgson's evidence, as summarized earlier, was critical of the composition of the Review Committee, the mandate which the Committee adopted and the manner in which the Committee interviewed individuals and gathered data. This Board of Inquiry has concluded that many things could have been done to improve the operation of the Committee. It does appreciate, however, that in these matters there are financial considerations that sometimes restrict the ability of a school board to create the "perfect" committee. To the extent that the School Board was not attempting to hold out the findings of the Committee as anything more than an internal examination, so as to assist it in dealing with the issue, the School Board cannot be faulted in terms of the structure of the Committee.

The Board, however, is in agreement with Ernest Hodgson that the Review Committee's report did not address the questions which it should have. The Review Committee interpreted its mandate as limited to an examination of the human relations of the school community at the Magnetic Hill School. The Committee appeared to concentrate its information gathering on the question of whether Malcolm Ross had ever stated his views in class or whether students could recall talking about his views with other students outside of the classroom. Although the larger school community in School District 15 may have been given an opportunity to speak to the Review Committee, if they had so requested, the Review Committee did not actively encourage the wider community to do so. The Review Committee also appeared to ignore the input that it did receive from Jewish members of the school community in School District 15 and, particularly, did not appear at all to address the very well prepared brief submitted by the Atlantic Jewish Council. It very much gave the impression, as a committee, of being an ostrich with its head in the sand. The School Board, in accepting the report, failed to appreciate the necessity of addressing the larger picture and the difficult issue of assessing the subtle forms which discrimination can take. The failure of the School Board to be more comprehensive and understanding in attempting to deal with the real issues cannot help but have made the Complainant feel that the School Board was not sincere in its attempts to deal with the issue. Further, this failure reinforced the Complainant's belief that, because the issue was one which affected such a small minority of the school community, the School Board did not wish to deal with it.

Evidence was presented with respect to two motions before the School Board which failed to pass for want of a seconder. This Board of Inquiry has reviewed the circumstances surrounding those motions and has concluded that the evidence, as to reasons for the motions not passing, is insufficient to warrant finding the actions were discriminatory.

Although there were many incidents related by Yona Attis and Leigh Lampert in which they felt singled out and made to feel different, the evidence indicated that the number of students denigrating them because of their religious affiliation

was not many. Although there was no evidence that any of the students making anti-Jewish remarks were directly influenced by any of Malcolm Ross' teachings, 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. With respect to some of these situations some teachers and principals involved were helpful in providing support and assistance. In other situations the evidence indicated that teachers and principals did not appreciate the distress that the situation was causing or did not handle it in the best manner possible. Although keeping Yona Attis after school for ten minutes so that she could walk home alone undisturbed might have been an acceptable temporary solution to deal with the situation, a more appropriate response would have been to establish an active program of identification of such problems and provision of assistance to the teacher most closely involved in trying to resolve the problem.

This Board of Inquiry does not hold itself out as an expert regarding the best way in which to address discriminatory situations such as were described by Yona Attis and Leigh Lampert. It would simply recommend that qualified people be brought together to address the problem. Again, there is an obligation on the School Board to take a proactive approach to search out these situations and ensure that they are not allowed to go unnoticed because of the small minority of students affected by them. It is the School Board's obligation to ensure that teachers have the resources and the assistance to deal with the problem. This Board is not suggesting that it is possible to prevent every situation in which minority students are attacked on the basis of their minority affiliations. The Act, however, has given clear direction that within the school community there is an obligation to work towards the creation of an environment in which students of all backgrounds will feel welcomed and equal.

The final aspect of the School Board's conduct raised before this Board of Inquiry was the School Board's reaction to the investigation by the Commission and the Commission's attempt to resolve the dispute as required by the Act. The School Board gave the appearance of reacting very defensively to the investigation. It has made the point that it felt an obligation to protect the privacy of a teacher's file and of the fact that certain students were receiving remedial assistance. It also strongly resisted the release of the Review Committee report to the Commission on the basis that some of the information contained in it was confidential. Rather than attempt to work out some imaginative solutions to these concerns, the School Board appeared to be actively resisting the investigation. Its approach again manifested the attitude that if improper conduct was brought to its attention it would certainly deal with it but it was not prepared to aggressively seek out and resolve the problems.

This Board of Inquiry would, having reviewed all of the evidence, conclude on the balance of probabilities that the School Board has discriminated against the

Complainant contrary to Subsection 5(1) of the Act and there is no reasonable cause to excuse the discriminatory effect. The reasons have been summarized above and a reading of these will indicate that generally this Board found no evidence of any intent to discriminate. The effect, however, on the Complainant and his children is one which a reasonable person would anticipate resulting from the actions of the School Board particularly the failure to address the Malcolm Ross issue in any meaningful way prior to 1988.

V. REMEDY

...

The remedy provided by this Board of Inquiry will, firstly, identify measures which the School Board and the Department of Education can take to avoid discriminatory situations developing in the school environment. Secondly, the remedy provided will address the specific steps which must be taken to remedy the discriminatory situation in School District 15 created through the writings and publications of Malcolm Ross. It is with respect to this latter remedy that it is difficult to provide relief without at the same time being seen to punish the discriminator. In developing its remedies this Board of Inquiry has been very conscious of the direction given by Mr. Justice McIntyre, as quoted above, that the emphasis should be on the provision of relief and not the punishment of those discriminating. In this case, however, it has been determined impossible to provide a relief that does not have punitive aspects to it.

There is an onus on all those involved in the delivery of educational services within the Province of New Brunswick, and within School District 15 in particular, to make it clear to all students, at all levels, that the school environment is one where they are all equal and welcome without discrimination. There are many steps which can be taken to accomplish this goal. The School Board and the Department of Education in recent years have already taken some positive steps. The Department of Education in August 1989 issued a ministerial statement on "Multicultural/Human Rights Education" which proposes many excellent initiatives both within the Department of Education and at the School Board level to promote the "essential values of tolerance, understanding and respect for all persons." The initiatives are summarized in the ministerial statement as follows: [Here Prof. Bruce ennumerated the Department of Education's policy statement providing for information sessions, new resource materials, and consultation with experts and multicultural groups in an effort to foster sensitivity to multicultrualism and human rights within School Boards.]

The Department has already developed for the school curriculum an addition to its modern history courses entitled "The Holocaust" which has provided a positive remedy for the Complainant in the present case.

Although this Board of Inquiry finds the proposed initiatives within the ministerial statement very comprehensive, a strong commitment to implement these initiatives is required. Often in bureaucratic institutions commitment and focus are hard to maintain. There should, therefore, be an annual review process established within the Department of Education to set goals and assess progress made in the attainment of these goals. Further, to ensure that the initiatives are having an effect at the local level this annual review process should involve an appraisal of the state of race relations in the school environment. In relation to this appraisal, the Department of Education should establish specific methods and procedures to identify and respond to any harassment or discrimination.

School District 15, in 1988, adopted a policy which specifically acknowledged the obligation of the School Board and its entire staff to establish a "learning environment that teaches respect for individual rights and tolerance for individual differences." Such a policy is essential not only in terms of it being an express commitment to the community served by the School Board but also in terms of providing direction and guidance to teachers. As such, it ensures that stringent disciplinary action can be taken for any blatant abuse of such a policy by a teacher. Steps should be taken by the Department of Education to encourage all school boards to implement such a policy.

In relation to this, it is recommended that the Department of Education consider a review of the *Schools Act* to determine the appropriateness of defining within it a clear statement as to the level of professional conduct expected of teachers. Although it is not suggested that the front line responsibility for enforcement of employment obligations should be removed from the school boards, such a provision in the *Schools Act* could serve to ensure that some central control rests with the Department of Education to maintain minimum provincial standards. Such a review of the *Schools Act* should include consultation with the New Brunswick Teachers' Association which is responsible for monitoring the professional obligations of its members.

This Board of Inquiry has carefully reviewed the writings and statements of Malcolm Ross and his reaction to directions from the School Board to refrain from such writings and publications. Malcolm Ross' commitment to his beliefs and intent to publicly proclaim these beliefs through his writings, even following clear direction from the School Board, is obvious. His views have been categorized as extreme in terms of the critical and vindictive manner in which they attack those of the Jewish religion and ancestry. The role of this Board of Inquiry has been to determine whether Section 5 of the *Act* has been violated and, if so, what is necessary to remedy that violation. Section 5 strives for a discrimination-free environment in the school system so that everyone within School District 15 can enjoy the public educational services provided by the School Board without discrimination.

Malcolm Ross, by his writings and his continued attacks, has impaired his ability as a teacher and cannot be allowed to remain in that position if a discrimination-free environment is to exist. It is not a situation that can be corrected through an apology and renunciation by Malcolm Ross of his views given the very strong stand he has taken. It is not a situation that can be corrected through continual monitoring of Malcolm Ross' classroom as the influence of a teacher on students is so much more complex than the formal content of any subject matter taught by the teacher. It is not a situation that can be corrected through asking the School Board not to place any Jewish students in Malcolm Ross' class or in the Magnetic Hill School where he teaches as accessibility to schools within a public school system cannot be restricted on the basis of religion or ancestry. It is not a situation which can be remedied simply through monetary compensation to the Complainant for the pain and suffering that has resulted.

The only viable solution is that Malcolm Ross must be removed from the classroom. The Complainant has indicated that he would not be adverse to Malcolm Ross being given a non-teaching position within School District 15. There has been no evidence presented as to the availability of such positions in School District 15 and whether the School Board would consider Malcolm Ross to be properly qualified to fill any such position. If there are such non-teaching positions available, in which student contact, if any, is minimal, it would be a means of providing a remedy while being no more punitive to the discriminator than is necessary. Should Malcolm Ross be placed in such a non-teaching position, his continued employment would, of course, be dependent upon him not publishing, writing or selling, directly or indirectly, any publication that mentions a Jewish or Zionist conspiracy or which can be seen as an attack on Judaism and its followers. This prohibition would include any of the books and writings mentioned in this decision which have been written by Malcolm Ross. The placement of Malcolm Ross in such a position by the School Board should not be viewed as breaching any term of any collective agreement covering such a position to which the School Board is a party.

[Order *infra* at 269.]