JUDICIAL REVIEW

CREAGHAN, J.

The Applicant upon judicial review requests that an order of a Board of Inquiry be removed into this Court and quashed pursuant to Rule 69.13.

Briefly, the facts that give rise to this Application are that Mr. David Attis made a complaint under the *Human Rights Act*, R.S.N.B. 1983, c. H-11 where he alleged that the Board of School Trustees, District No. 15 "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."

The Human Rights Commission, being unable to effect a settlement of the matter complained of, recommended to the Minister of Labour that he appoint a Board of Inquiry to investigate the matter of the complaint against the School Board.

As a result of its inquiry and investigation, by a decision dated August 28, 1991, the Board of Inquiry made the following order:

1) That the Department of Education:

(a) establish an annual review process to set goals and to assess progress in the implementation of the initiatives set out in the Ministerial Statement on 'Multicultural/Human Rights Education';

(b) develop in collaboration with school trustees and teachers a system of periodic appraisals of the overall quality of race relations in the school environment and procedures for responding to any discriminatory situations identified;

(c) encourage all school boards to implement a policy which will clearly establish the commitment of each board and teachers within that board to teach respect for individual rights and tolerance of differences; and,

(d) review the *Schools Act* in consultation with the New Brunswick Teachers' Association to determine whether it would be appropriate to define within it a clear statement as to the level of professional conduct expected of teachers in the Province of New Brunswick.

(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 Malcolm Ross qualified. The position shall be offered to him on terms and at a salary consistent with the position. At such time as Malcolm Ross accepts employment in a non-teaching position his leave of absence without pay shall end.

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

(d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or 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 or Zionist conspiracy, or attacks followers of the Jewish religion, or

(ii) publishes, sells or distributes any of the following publications, directly or indirectly:

Web of Deceit
The Real Holocaust (The Attack on Unborn Children and Life Itself)
Spectre of Power
Christianity vs. Judeo-Christianity (The Battle for Truth)

Section 20(1) of the *Human Rights Act* empowers the Board of Inquiry to investigate the matter complained of.

The Board of Inquiry determined that the Department of Education of the Province of New Brunswick should be, among others in addition to the party against which the complaint had been made, one of the parties to the inquiry as it had the right to do under section 20(4.1)(d) of the *Act*.

Section 20(6.2) of the *Act* provides that where the Board of Inquiry finds, on a balance of probabilities, that a violation of the *Act* has occurred, it may order any party found to have violated the *Act* to do certain things designed to rectify the violation.

In this instance, there was no claim that the Department of Education violated the *Act*; there was no investigation as to whether the Department of Education violated the *Act*; and there was no finding that the Department of Education violated the *Act*.

There was no jurisdiction in the Board of Inquiry to make an order requiring compliance by the Department of Education simply because it was designated as a party to the inquiry.

Let me now deal with the order as it was directed to the Board of School

Trustees, District No. 15 which was the party against which the complaint was made.

In this regard there appears to be two issues.

Did the Board of Inquiry act within its jurisdiction?

Did the order of the Board of Inquiry violate the rights of the Applicant under the *Charter of Rights and Freedoms* so as to be of no force and effect?

The complaint against the School Board seems fairly stated by the Board of Inquiry as follows:

> The thrust of the complaint is that the School Board, by failing to take appropriate action against Malcolm Ross, a teacher working for the School Board who allegedly made racist, discriminatory and bigoted statements both to his students and in published statements and writings, has condoned an anti-Jewish role model and thus breached Section 5 of the *Act* by discriminating against Jewish and other minority students within the educational system served by the School Board.

Any reasonable reading of the complaint is that the violation by the School Board complained of related to the presence of Mr. Ross as a teacher in the classroom. As the Board of Inquiry itself points out:

> 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.

There was no claim that the School Board violated the *Act* other than by continuing Malcolm Ross as a teacher in the classroom; the investigation centred on whether there was a violation of the *Act* resulting from continuing to employ Malcolm Ross as a teacher in the classroom; and there was no finding that the School Board was in violation of the *Act* other than by continuing Malcolm Ross as a teacher in the classroom.

There was no jurisdiction in the Board of Inquiry to make an order that directed the School Board to place restrictions on Malcolm Ross' activities outside the classroom in the event he was no longer employed by the School Board as a teacher in the classroom.

There remains the matter of clauses 2(a), 2(b) and 2(c) of the order of the Board of Inquiry. Section 5(1)(b) of the *Human Rights Act* provides as follows:

> no person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall...
> (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public

The Board of Inquiry first of all found that there was no evidence of any direct classroom activity by Malcolm Ross on which to base a complaint under Section 5 of the *Act*.

However, the Board of Inquiry made a finding of fact "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 Board of Inquiry then decided on its review of the evidence that the School Board failed to address the problem created by Mr. Ross and by its lack of action it violated the *Act* directly and further it should be seen to have violated the *Act* indirectly by virtue of the actions of Mr. Ross as its employee.

Any judicial review of this decision of the Board of Inquiry from the aspect of jurisdiction must be considered in the fact of Section 21(1) of the *Act* which states:

> All orders and decisions of a Board of Inquiry are final and shall be made in writing, together with a written statement of the reasons therefor, and copies of all such orders, decisions and statements shall be provided to the parties and to the Minister.

This provision constitutes a private clause and the standard of curial deference that must be accorded to decisions of the Board of Inquiry acting within, and proceeding to apply, the statute delegating its authority must be limited to a finding by this Court that its decisions are patently unreasonable.

The Board of Inquiry refused to interpret Section 6(2) of the *Act* as to limit the application of Section 5(1). It also declined to characterize Section 3 of the *Act* as being in conflict with Section 5 and in any event the Board of Inquiry, on a balance of the competing rights as set out in the sections, found that Section 5 should prevail on the facts as it found them. These are legal interpretations of the Board of Inquiry's enabling legislation. Reference to the Board of Inquiry's decision shows the basis upon which it made these interpretations and they cannot be termed patently unreasonable by any judicial standard.

The Board of Inquiry makes a further finding that at law an employer is liable for its employees' actions for the purposes of Section 5 of the *Act*. Again the basis for this finding is set out and as it falls within the applicability of a provision of the enabling legislation, I can see no way the finding can be attacked as patently unreasonable.

Lastly, the Board of Inquiry made a procedural decision that a motion of non-suit should not be considered where the Applicant as the moving party was not

prepared to agree not to present evidence. This decision was supportable at law and was within the jurisdiction of the Board to make.

The principle ground for alleging that the decisions of the Board of Inquiry and the order that resulted were patently unreasonable is that the Board of Inquiry had no evidence upon which it could make the findings necessary to support its order.

The argument is that even accepting as fact that the published writings of Mr. Ross are discriminatory, there is no evidence that his published writings or his presence in the classroom as the author was the cause of discrimination, or acted to discriminate, against anyone with respect to the provision of educational services to the public.

The Applicant maintains that the Board of Inquiry's conclusion that the School Board violated Section 5 of the *Act* is only speculation as there is no evidence that connects Mr. Ross' writings or his presence as a teacher in the classroom to any act of discrimination with respect to the provision of educational services to the public.

The Board of Inquiry found that there was evidence to support its conclusion. It clearly saw Mr. Ross' published writings to be discriminatory based on its assessment of the writings themselves. Further it found that the nature of Mr. Ross' published opinions were generally known in the community from the testimony of those who had heard of Ross' views and from media reports concerning his published writings which were before the Board of Inquiry as evidence that the controversy concerning his opinions had been widely reported.

The Board of Inquiry then found that the presence of Malcolm Ross in the classroom created an atmosphere that encouraged discrimination against Jews with respect to the provision of educational services to the public by School District 15. It made this finding upon the evidence of witnesses who testified that the presence in the school district of a teacher in the classroom who, as a role model held published written opinions such as those of Mr. Ross, has an impact on the perception of the attitude of the School Board with respect to discrimination in the school district.

The function of this Court on review is not to determine whether these findings were correct. There was some evidence upon which the Board of Inquiry could come to the conclusions it did and I am not prepared to find that its findings were patently unreasonable as this term has been defined by the authorities binding upon me.

Section 20(6.2) of the *Act* states:

> Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act
> (a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,
> (b) to rectify any harm caused by the violation, ...

Clauses 2(a), 2(b) and 2(c) of the order of the Board of Inquiry in effect direct the School Board to remove Mr. Ross from a teaching position within the school district and to offer him a non-teaching position should one become available within a stipulated period of time. This order was within the jurisdiction of the Board of Inquiry to make pursuant to its enabling legislation. I have reviewed the reasons stated by the Board of Inquiry for making this order and I cannot see where it can be found to be patently unreasonable.

I now turn to the question as to whether the order of the Board of Inquiry violates the Applicant's *Charter* rights.

The Applicant maintains that the order of the Board of Inquiry should not be allowed to stand as it affects him because it violates several of his rights under the *Charter of Rights and Freedoms*.

He argues that by finding that the School Board violated Section 5 of the *Human Rights Act* by continuing his employment as a teacher and that by applying a remedy that requires the School Board to remove him from the classroom and to dismiss him from any non-teaching position if he writes for the purpose of publication anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion or publishes, sells or distributes any of the named works he has previously published, the Board of Inquiry has violated his constitutional rights under Sections 7, 2(a) and 2(b) of the *Charter*.

It can be argued that the order of the Board of Inquiry does to some extent limit the Applicant's right to liberty. However, it is clear that the Board of Inquiry's finding and order were made only after a full examination of the evidence all interested party wished to bring before it and only after the Applicant had a fair opportunity to present a full and complete answer with respect to the complaint under investigation as it might affect him. In my view it cannot be said that the Applicant was deprived of any rights under Section 7 of the *Charter* except in accordance with the principles of fundamental justice and consequently there cannot be said to have been a violation of Section 7.

It is with Section 2 of the *Charter* that the real constitutional argument of the Applicant lies. The relevant parts of the section are as follows:

> Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

I do not think there can be any doubt that Malcolm Ross' freedom of conscience and religion and his freedom of thought, belief, opinion and expression have been impinged by the finding and order of the Board of Inquiry.

The argument that Mr. Ross' writings do not reflect religious expression does not bear scrutiny of his published writings. The Board of Inquiry did not come to an opposite conclusion even though it questioned the legitimacy of his religious views and the existence of a religious tenet that required him to publish them.

Malcolm Ross' rights under both Sections 2(a) and 2(b) of the *Charter* have been impinged and it is required that I subject the order of the Board of Inquiry to the test as set out in section 1 of the *Charter*.

Section 1 provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Any Section 1 inquiry must be predicated upon an underlying commitment to uphold the rights and freedoms guaranteed by the *Charter* and further a court, in coming to a conclusion as to whether any *Charter* right should be limited, must reflect the purpose of the *Charter*. To use the words of Chief Justice Dickson in *Regina v. Oakes* (1986), 26 D.L.R. (4th) 200 at p. 225:

> The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect to cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

There are two central criteria that must be satisfied. First, the thrust of Section 5 of the *Human Rights Act* must be of sufficient importance to warrant overriding the protected constitutional rights. Second, the order of the Board of Inquiry must meet the test of proportionality, that is, it must be reasonable and demonstrably justified.

The order of the Board of Inquiry must be rationally connected to the objective of rectifying the cause and effect of the violation of the *Human Rights Act*. Further, the order should impair as little as possible the constitutional rights

in question. Lastly, the effect of the order which limits Mr. Ross' constitutional rights must be proportional, that is, reasonable and demonstrably justified, with respect to the importance of the objective of Section 5 of the *Human Rights Act*.

My analyses of the direction of the Supreme Court of Canada in *Oakes* upon the facts of this case leads me to the conclusion that the finding of the Board of Inquiry and Clauses 2(a), 2(b) and 2(c) of its order are saved as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society pursuant to Section 1 of the *Charter*.

I must say, however, that although my previous finding with respect to the lack of jurisdiction in the Board of Inquiry to make the direction it did in Clause 2(d) of its order makes it unnecessary to go further, I would not apply Section 1 of the *Charter* to save Clause 2(d) in the order.

Applying a rigorous application of the standard of proof by a preponderance of probabilities, the Respondents have failed to satisfy me that Clause 2(d) of the order meets the test of proportionality. The rational connection to the objective of Section 5 of the *Act* is tenuous, there is too great an impairment of the constitutional rights in issue and I do not find that the effect of this aspect of the order is reasonable and demonstrably justified given the importance of Section 5 of the *Human Rights Act* within the factual situation that arises in this instance.

Accordingly, for all of the above reasons, Clause 1 and Clause 2(d) of the order of the Board of Inquiry are removed into this Court and quashed. The Application with respect to Clauses 2(a), 2(b) and 2(c) or the order of the Board of Inquiry is dismissed.

No party having asked for costs, none will be granted.