

YOU BE THE JUDGE

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The Board of Inquiry appointed to investigate the complaint of David Attis against the Board of School Trustees of District 15 rendered its decision on 28 August 1991.¹ The Board of School Trustees, the Department of Education, the New Brunswick Teacher's Federation (hereinafter NBTF) and Malcolm Ross together on one side formed what some have referred to as a bizarre alliance against the complainant.

Considering the changes made to the order of this Board of Inquiry by the Court of Queen's Bench,² what is Malcolm Ross's real punishment? What role did the Board of School Trustees play that forced parent David Attis to file a complaint with the Human Rights Commission? What role did the teachers' professional organization, the New Brunswick Teachers' Association (hereinafter NBTA), play in the Malcolm Ross affair? Could this Inquiry and the expenditure of hundreds of thousands of dollars have been avoided?

Justice Paul S. Creaghan in the Court of Queen's Bench struck down clauses 1 and 2(d) of the order of the Board of Inquiry and left intact clauses 2(a), 2(b) and 2(c). This, for all intents and purposes, will keep Malcolm Ross out of the classroom in District 15, but the non-teaching position to which he has been assigned still maintains his status as a member of the NBTA and the NBTF. He is entitled to all the benefits of membership in these two professional organizations including seniority, pension benefits, and access to insurance, medical and dental plans if he wishes to subscribe to them. Whether or not he has tenure in this new position is open to question.

Clause 2(d) of the Human Rights Inquiry order³ clearly specified that his employment would terminate if at any time he published or wrote for the purpose of publication anything that mentioned a Jewish or Zionist conspiracy, or that attacked followers of the Jewish religion, and that he must not publish, sell or distribute any of a specified list of his publications. Despite the fact that clause 2(d) has been quashed on judicial review, Malcolm Ross' hold on his non-teaching position is tenuous at best, and would be especially so if he were to continue to embarrass the District 15 School Board by more anti-Semitic writings and commentaries. The District 15 School Board must certainly be near the breaking

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¹*Attis v. Board of Education of District 15* (1991), 121 N.B.R. (2d) 1, (*sub nom. Attis v. New Brunswick School District No. 15*) 15 C.H.R.R. D/339 (Human Rights Board of Inquiry). [References hereinafter are to the edition reported in this *Journal* at 238.]

²*Attis v. Board of Education District 15* (1991), 121 N.B.R. (2d) 361 (Q.B.).

³*Ibid.* at 269.

point both financially and emotionally over this issue and could well consider dismissing Malcolm Ross for just cause.

Malcolm Ross has been denied the right of returning to the classroom to practice the art of teaching, and the privilege of working with and interacting with young people. This is, of course, the prime reason for being in the teaching profession and Malcolm Ross has been sidelined. It is analogous to a member of the legal profession being denied the right to appear in court or to deal with clients, but instead being compelled to research in a law library. If a teacher loves his or her profession, then this is the most serious of punishments.

The order of the Board of Inquiry, as it stands, refers specifically to District 15 in the Province of New Brunswick. Since the order did not revoke Ross' teacher's license, it does not preclude a sympathetic board elsewhere in New Brunswick from hiring him as a classroom teacher. Further, recent reciprocal arrangements with many of the provinces in Canada have resulted in the recognition of the New Brunswick teacher's license in these provinces. District 15 has closed its classroom doors to Malcolm Ross, but doors are still open to him in most of Canada.

Does Malcolm Ross deserve to be sidelined as a teacher because of his continuous attacks on the Jewish religion? Are Malcolm Ross' rights being violated, or has he by his publications and speeches violated the trust that his province, his profession and his employer District 15 placed in him, namely to practice the profession of teaching to the highest ethical standards?

The principles of the *Code of Professional Conduct* of the NBTA (hereinafter the *Code of Conduct*) regard a teacher's first obligations to be to the students' physical, social, moral and educational growth. A teacher must have regard for the dignity, liberty and integrity of students under his or her supervision, endeavour to convey to students some understanding of their worth, and maintain high standards of professional competence. One might wonder if it would be possible for Malcolm Ross to convey to Jewish students some understanding of their worth, considering his expressed views.

Why has Malcolm Ross attracted so much attention? Are his statements so outrageous that it defies the imagination that such a man can be trusted to impart knowledge to young people as a public school teacher?

For the uninitiated, the following is a random selection of quotes taken from *The Real Holocaust*, a book published by Malcolm Ross in 1983:

The focus of attention in the Holocaust Studies is 'The Six Million' who allegedly died in such 'Death Camps' in Auschwitz, Dachau, and Buchenwald.⁴

Let us look at the methods of execution alleged to have been committed in the so-called Death Camps in Nazi Germany...⁵

Future generations may well learn that the Holocaust of World War II never occurred; or at least was grossly exaggerated.⁶

The Nuremberg War Crimes trials will doubtless be recognized some day as a travesty of justice.⁷

Never has our Race had such a challenge as today. Faced with massive conditioning designed to make you hate your Western Christian Heritage through such movies as 'Holocaust' and 'Roots'...⁸

Comments such as these have caused many citizens in general and a number of teachers in particular to complain bitterly not only about Ross' writings but also about his presence in the classroom. Their point is that the classroom Malcolm Ross cannot be divorced from the published Malcolm Ross.

James A. Beverley, Professor of Theology and Ethics at the Ontario Theological Seminary, in his book *Web of Error*, states, "While he is not wrong on everything, his poor and biased work removes him as a trustworthy guide on Jewish-Christian issues."⁹

Beverley considers chapter 7 of Ross' *Spectre of Power*¹⁰ as the most dangerous and sinister section of his writings. In it, Ross seems to bless the following ideas: a) the finances of Jewish people should be controlled by the state, b) one should not talk to Jews, c) it is doubtful that Jews should hold public office, d) the number of Jewish immigrants should be monitored carefully, e) Jews should wear a distinguishing mark, and f) Jewish books should be prohibited.¹¹

⁴M. Ross, *The Real Holocaust* (Moncton: Stronghold, 1983) at 18.

⁵Ibid. at 20.

⁶Ibid.

⁷Ibid. at 28.

⁸Ibid. at 37.

⁹J. Beverley, *Web of Error: An Analysis of the View of Malcolm Ross* (Sackville: Department of Religious Studies, Mount Allison University, 1990) at 2.

¹⁰(Moncton: Stronghold, 1978).

¹¹Ibid. at 11.

Thousands of public school teachers are of the view that it is a pleasure to teach and work with children from many cultures and religions. A teacher such as Malcolm Ross does not seem to share this view, certainly at least as it relates to Jewish children. What fear and frustration would Jewish parents feel if their children were assigned to a teacher with such known views, especially since he promotes those views so vigourously?

Over a fourteen year period, the Board of School Trustees in District 15 has faced pressure of varying degrees from parents and concerned citizens to have Malcolm Ross dismissed as a teacher. Over these years the School Board made many decisions, none of which led to the suspension or dismissal of Malcolm Ross for any period of time. The outcome of the Board of Inquiry and the subsequent judicial review certainly opens to question some of these decisions.

Did the Board condone racism by allowing Malcolm Ross to continue as a teacher at Magnetic Hill School? Was the Board showing tolerance for its employees doing what they wished to do on their own time? Was the Board showing an insensitivity to Jewish parents' concerns that Malcolm Ross' anti-Semitism was being reflected in the schools?

As outlined by Board of Inquiry Chair Brian Bruce, the School Board's involvement in a serious way began in 1978 when Julius Israeli requested that Malcolm Ross be fired as a teacher because of his anti-Jewish writings. The Reverend Gary MacAuley in that year also requested Ross' dismissal, and the Chair of the Human Rights Commission, Noel Kinsella, while concerned about freedom of the press, did request that Ross' classroom be supervised. District 15 School Board Chair, Nancy Humphrey, stated the Board's position: "that Malcolm Ross could do what he wanted on his own time."¹²

Until 1983 a period of relative calm ensued over this affair, but a 1983 letter by Ross to Fredericton's newspaper *The Daily Gleaner* sparked complaints, and a media response caused the School Board of District 15 to again take a serious look at Malcolm Ross. The publishing of his book, *The Real Holocaust*, in 1983 added fuel to the fire. According to then School Board Chair Carl Ross, the District 15 School Board by 1986 was spending a lot of time on this issue.

On 22 October 1986 the *Miramichi Leader* published a letter by Malcolm Ross which Brian Bruce stated, "provided a clear summary of his opinions and dispelled any uncertainties on the interpretation of his previous writing."¹³

¹²*Supra*, note 1 at 242.

¹³*Ibid.*

School Board action in response to criticism of this Ross letter was to monitor Ross' class at least three times per week and to review materials used in his class. The word monitor does not mean supervise. Monitoring could be done from the hallway or by walking through the classroom. This action, although probably annoying to Ross, was not a strong disciplinary move by the Board.

David Clark, the Attorney-General of New Brunswick in the Hatfield Government, also in 1986 refused to lay a charge under the hate literature laws of the *Criminal Code*,¹⁴ claiming the government would be unlikely to get a conviction.

By late 1986 the School Board was receiving a lot of mail as well as public pressure and media coverage on Malcolm Ross. On 28 January 1987 a Review Committee was set up by the Board to "review the possible impact of this issue upon the learning environment in school programs."¹⁵

The report was given to the Board one month later. The Committee stated that there was no evidence to suggest that Malcolm Ross was teaching his beliefs or discussing his religious theories with staff or students, and as well that no evidence suggested that the publicity surrounding Malcolm Ross had a negative effect on the human relations within the present school or between the school and community.

The haste with which this review was conducted (fifty-nine interviews were held in four days) and the rejection of expert advice on the conducting of interviews leads one to question the results of this review and the whole process used.

Audrey Lampert, the only Jewish member of the District 15 School Board, in the same year (1987) tried to get two motions brought to the floor – the first dealing with the release of the Review Committee's report and the second asking that the School Board make a public statement rejecting all forms of racism and hatemongering. Both failed for lack of a seconder.

Upon the release of Ross' book, *Spectre of Power*, the School Board responded to the outcry in a letter sent to Malcolm Ross on 16 March 1988, stating that his writings were controversial and informing him "that any further publications, or public discussions of his views or his works, would lead to greater disciplinary action, including the possibility of dismissal."¹⁶ This was the first time the Board

¹⁴R.S.C. 1985, c. C-46.

¹⁵*Supra*, note 1 at 243.

¹⁶*Ibid.* at 244.

had used the word dismissal as a possible punishment. (Clyde Spinney, the Department of Education counsel to the School Board, had informed the Board that it could, in his opinion, discipline teachers for out-of-school conduct.) The Board had finally decided, among other things, that the conduct of Malcolm Ross had inhibited its ability to manage and direct the educational affairs of the district, and had detrimentally affected its reputation.

On 22 March 1989 the District 15 Board adopted policy 5006: "Responsibility for Teaching Rights and Freedoms." The policy stated that District 15 Board of School Trustees and staff must provide an acceptable learning environment and tolerate individual differences. Non compliance by employees could result in disciplinary action. On 20 September 1989 the reprimand and restriction order placed in Malcolm Ross' file was removed, and in its place he was asked to comply with policy 5006.

Two months later Malcolm Ross appeared on a local television program to expound his views, and on 30 November 1989, the District 15 Board issued him a severe reprimand. Again we see more reprimands and more hesitations to take the step that might well have ended the need for an Inquiry. I think it is fair to say that some concerned people watching these happenings had decided that the only way that District 15 was going to dismiss Malcolm Ross was if they were compelled to under the law.

The whole situation came to a head with the filing of a complaint by David Attis on 21 April 1988. From April until September 1988 the Human Rights Commission of Inquiry was denied access to District 15 files relative to the case. During this time the Commission put forth two settlement offers to the School Board which were ignored.

It is worth asking whether the Board of School Trustees of District 15 would have ever had to make a decision on dismissing Ross if the *Code of Conduct* had covered this situation. In order to consider this, we have to look at Malcolm Ross' membership in the NBTA.

All public school teachers under contract in New Brunswick are required by statute to be members of the NBTA or its affiliate, L'Association Des Enseignants Francophones du Nouveau Brunswick. These organizations are in turn members of the NBTF. Both the NBTA and the NBTF are required to accept all teachers as members. The compulsory acceptance of Malcolm Ross as a member of these

associations places on them the duty of fair representation.¹⁷ Support is not automatic and each case is reviewed. While the duty to represent is not absolute, in some cases which have been rejected by the professional organizations, teachers have won on their own, and the professional organizations have ended up paying the legal costs involved.

The NBTA has not been involved with the Malcolm Ross affair. However, an area where it should have been involved was in the enforcement of the *Code of Conduct*, which has as its most severe sanction the recommendation to the Minister of Education that a teacher's licence be revoked, which in effect means he or she cannot teach in New Brunswick. This has been done in several cases, and the NBTA's recommendations for such licence cancellation have always been accepted by the Minister of Education.

At least one teacher in New Brunswick attempted to file a charge under the *Code of Conduct* against Malcolm Ross but was told that there were no grounds. Based on specific clauses of the *Code of Conduct*, this interpretation was probably correct. However if the overall principles of this code could be cited as the basis of the charge, then a case might be made.

Section 1 of the order of Human Rights Board of Inquiry was a cry for the Department of Education or the NBTA, or both, to develop a clear statement as to the level of conduct expected of teachers in the province of New Brunswick. This, of course, would have prevented the necessity for a Board of Inquiry. The Court's quashing of this part of the order does not diminish in any way this real need.

The NBTA *Code of Conduct* seems limited in relation to some other teachers' codes of professional conduct in Canada. One example is the *Code of Ethics* of the Ontario Teachers' Federation. It includes a section not even covered in the NBTA *Code of Conduct* entitled: "Duties of a Member to the Public." The relevant paragraph states: "A member shall.... b) recognize a responsibility to promote respect for human rights."¹⁸ Such a clause in the NBTA *Code of Conduct* might well have allowed an ethics charge against Malcolm Ross to stick.

Certainly with the Malcolm Ross affair in mind the NBTA Social Studies Council a number of years ago recommended to the Minister of Education that

¹⁷If a teacher's job is at stake and the situation relates to the Collective Agreement between the Province of New Brunswick and the NBTB, the Executive Committee of the NBTB studies the case and, with legal guidance from the NBTB counsel, decides whether or not to support it. The NBTA follows a similar route within its purview, which involves matters not connected with the Collective Agreement.

¹⁸Professionalism (Toronto: Federation of Women Teachers' Association of Ontario, 1989) at 19.

a curriculum unit on the Holocaust be developed and prescribed for the schools of the province. An excellent unit was developed and is now in use in New Brunswick schools. On the professional side, the NBTA "published policies that deplored racism in all its forms" and stated publicly that "Holocaust denial is another form of anti-Semitism."¹⁹ A motion to this effect was passed at the annual meeting of the NBTA in 1987. Jack MacKinnon, the Executive Director of the NBTA, also made the organization's position very clear in an issue of the *NBTA News*, stating: "we abhor racism in all its styles and modes and we have encouraged workshops on the topic for both our branches and councils."²⁰

If these statements and policies had been in place earlier, and if the *Code of Conduct* had contained a clause such as the human rights clause in the Ontario Teachers' Federation *Code of Ethics*, an ethics charge against Malcolm Ross might well have resulted which could have had more far reaching implications for Malcolm Ross' teaching career than the Board of Inquiry, and at far less cost. The Chair of the Board of Inquiry made a very valid point in this area, and although it is not now part of the order, it should be acted upon by the professional teachers' organization.

Another question that comes to mind is that if the NBTA was not involved, then how did the NBTF get involved, and why?

The decision by the NBTF to join forces with the Board of School Trustees of District 15 to defend Malcolm Ross' contractual rights may well have been made in haste. Certainly a key factor in the NBTF decision was the fact that the District 15 Board had decided not to fire Malcolm Ross. If his employer had decided that he should not be fired, then how could his union do other than protect his contractual rights?

The NBTF was also concerned about a possible damage suit against them by Ross if the duty to represent was not fulfilled. There is some evidence to indicate that had the School Board exercised its responsibility for discipline and fired Malcolm Ross for just cause, that the normal union grievance procedure might well have turned him down, forcing him to go to court. The District 15 Board would have faced a legal challenge to their actions, but the cost might well have been considerably lower than the estimated \$250,000 they have expended to date on the litigation costs related to the Board of Inquiry.²¹

¹⁹XXXIII:5 *N.B.T.A. News*, 14 January 1991 at 13.

²⁰*Ibid.*

²¹The actual cost to the NBTF of its participation is not known because the NBTF will not release the figures. The figure of \$250,000 was obtained by analogy to the amount of money spent to date by the Board of School Trustees in District 15. Various N.B. government agencies also spent in aggregate approximately \$250,000.

There is no doubt that the NBTF involvement on the side of Malcolm Ross lent credence to his case. At the same time, the NBTF involvement fostered mistrust and deeply hurt the feelings of Jewish teachers in the province as well as teachers who abhor everything that Malcolm Ross stands for as expressed in his writings and comments. The aggressive nature of NBTF counsel George Filliter's line of questioning at the hearings, and his comments to the press were further cause for concern to a number of teachers. As a result of such concerns expressed to the NBTF executive, its legal counsel were directed that in future a representative of the NBTF would make all public comments on our participation in the affair.

The detractors from the NBTF's position state emphatically that the District 15 School Board was protecting Malcolm Ross' rights, and that the NBTF's involvement was redundant and a waste of tens of thousands of dollars of the NBTA's and AEFNB's members' money. Most teachers, even some detractors of the NBTF position, admit that the NBTF did have a duty to remain acutely aware of the proceedings going on at the Board of Inquiry because of the contractual rights concerns. However, its participation should have been limited to a watching brief.²² A watching brief would have demonstrated the concern for contractual rights and at the same time have given no legal support or appearance thereof to the School Board or Malcolm Ross.

The Board of Inquiry sidelined Malcolm Ross as a teacher in District 15. The Inquiry did the work that should have been done by the School Board itself or by a stronger *Code of Conduct*. It took a concerned citizen, David Attis, to file a complaint with Human Rights and expose members of his family and himself to public view, to bring this crisis to a head.

The Board of School Trustees of District 15, faced with the fact that Malcolm Ross would not stop publishing his anti-semitic views, was irresolute, and refused to do the task that was clearly its responsibility. The School Board only responded when pressed to the wall, a point that comes through clearly in the report of the Human Rights Board of Inquiry. The Inquiry emphasized the importance of teaching and teachers in the community.

The public has shown that it cares greatly who is teaching the children. Racist teachers who proselytize may be found in the classroom. Should they be there? They teach everybody's children – you be the judge.

²²This suggestion was made in the form of a petition signed by eighty-eight teachers from Fredericton High School and submitted to the NBTF.

LETTERS/LES LETTRES

March 2, 1992

Editor-in-Chief,
University of New Brunswick Law Journal,
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Dear Editor-in-Chief:

The undersigned acted as Counsel to the Inquiry Committee established pursuant to the *Judges Act* in relation to the Judges of the Nova Scotia Court of Appeal who acted on the Donald Marshall Jr. Reference.

The "Forum" in Volume 40 of your Journal in relation to this matter was of great interest and valuable in generating discussion about the important issues which were raised by the Inquiry and the subsequent Report of the Committee. While we agree with some of the views expressed and disagree with some of the others, we feel it necessary to comment on one matter.

Two of the authors criticized the Inquiry Committee for not making "obiter" comments with respect to the conduct of former Mr. Justice Pace and former Chief Justice MacKeigan concerning the composition of the panel which heard the Reference. Professor MacKay recognized that the Committee was correct in concluding that it did not have jurisdiction to deal with the removal of these former judges. Mr. Crawford was less discerning. Nevertheless, it was argued by both authors that the Committee should have made *obiter* comments on the conduct of those judges in relation to their participation in the Reference.

In our view, it would have been improper to do so since their conduct in this respect was not a matter which was before the Committee. There was no evidence in relation to their participation and no argument on that issue. It would have been gratuitous and contrary to the principle of fairness for the Committee to extend its mandate in such an arbitrary manner.

Yours sincerely,

Harvey Yarosky
Ed Ratushny

/fr

cc: Mr. Crawford
Professor MacKay