Ross *v.* New Brunswick School District No. 15, [1996] 1 S.C.R. 825

David Attis *Appellant*

v.

The Board of School Trustees, District No. 15 *Respondent*

and

The Human Rights Commission of New Brunswick, Malcolm Ross, the Department of Education of New Brunswick, the New Brunswick Teachers' Federation, and the Canadian Jewish Congress
Respondents

and

Brian Bruce, Brian Bruce Consultants Ltd., the Human Rights Board of Inquiry, and the Minister of Labour of New Brunswick *Respondents*

and between

The Human Rights Commission of New Brunswick *Appellant*

v.

The Board of School Trustees, District No. 15 *Respondent*

and

David Attis *Respondent*

and

Malcolm Ross, the Department of Education of New Brunswick, the New Brunswick Teachers' Federation, and the Canadian Jewish Congress
Respondents

and

Brian Bruce, Brian Bruce Consultants Ltd., the Human Rights Board of Inquiry, and the Minister of Labour of New Brunswick *Respondents*

and between

The Canadian Jewish Congress *Appellant*

v.

The Board of School Trustees, District No. 15 *Respondent*

and

Malcolm Ross *Respondent*

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**The Human Rights Commission of New Brunswick,
the Department of Education of New Brunswick,
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**Brian Bruce, Brian Bruce Consultants Ltd.,
the Human Rights Board of Inquiry, and
the Minister of Labour of New Brunswick** *Respondents*

and

**The Attorney General of British Columbia,
the League for Human Rights of B'Nai Brith Canada,
the Canadian Civil Liberties Association, and
the Canadian Association of Statutory Human
Rights Agencies** *Interveners*

Indexed as: Ross *v.* New Brunswick School District No. 15

File No.: 24002.

1995: October 31; 1996: April 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for new brunswick

Civil rights -- Discrimination -- Services to the public -- Teacher publicly making discriminatory statements in his off-duty time -- Whether school board which employs teacher discriminating with respect to services it offers to public -- Human Rights Act, R.S.N.B. 1973, c. H-11, s. 5(1).

Judicial review -- Standard of review -- Human rights tribunal -- Issues raised involving constitutional and administrative law components -- Different standards of review applicable -- Relationship between administrative law standard of review and constitutional standard of review under Canadian Charter of Rights and Freedoms.

Administrative law -- Human rights tribunal -- Jurisdiction -- Teacher publicly making discriminatory statements in his off-duty time -- Human rights board of inquiry making finding of discrimination against school board which employs teacher -- School board ordered to remove teacher from his teaching position, and to terminate his employment immediately if he wrote anti-Semitic materials or sold his previous publications -- Whether Board's finding of discrimination and order beyond its jurisdiction -- Human Rights Act, R.S.N.B. 1973, c. H-11, ss. 20(1), (6.2), 21(1).

Constitutional law -- Charter of Rights -- Freedom of expression -- Teacher publicly making discriminatory statements in his off-duty time -- Human

rights board of inquiry ordering school board to remove teacher from his teaching position, and to terminate his employment immediately if he wrote anti-Semitic materials or sold his previous publications -- Whether order infringes on teacher's freedom of expression -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law -- Charter of Rights -- Freedom of religion -- Teacher publicly making discriminatory statements in his off-duty time -- Human rights board of inquiry ordering school board to remove teacher from his teaching position, and to terminate his employment immediately if he wrote anti-Semitic materials or sold his previous publications -- Whether order infringes on teacher's freedom of religion -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 2(a).

For several years, R, a teacher, publicly made racist and discriminatory comments against Jews during his off-duty time. R's writings and statements communicating his anti-Semitic views include four books or pamphlets, letters to a local newspaper, and a local television interview. A Jewish parent filed a complaint with the New Brunswick Human Rights Commission, alleging that the School Board, which employed R as a teacher, violated s. 5(1) of the *Human Rights Act* by discriminating against him and his children in the provision of accommodation, services or facilities on the basis of religion and ancestry. The Board of Inquiry (the "Board") found that R's off-duty comments denigrated the faith and belief of Jews. The Board further found that the School Board was in breach of s. 5(1), concluding that it discriminated by failing to discipline R meaningfully in that, by its almost indifferent response to the complaints and by

continuing his employment, it endorsed his out-of-school activities and writings. The Board directed the School Board to comply with the following, in clause 2: (a) place R on a leave of absence without pay for a period of 18 months; (b) appoint him to a non-teaching position, if one became available during that period; (c) terminate his employment at the end of that period if, in the interim, he had not been offered and accepted a non-teaching position; and (d) terminate his employment with the School Board immediately if he published or wrote anti-Semitic materials or sold his previous publications any time during the leave of absence period or at any time during his employment in a non-teaching position. The Court of Queen's Bench allowed R's application for judicial review in part, ordering that clause 2(d) of the order be quashed on the ground that it was in excess of jurisdiction. The court also concluded that paragraph 2 of the order violated ss. 2(*a*) and 2(*b*) of the *Canadian Charter of Rights and Freedoms* but that, with the exception of clause 2(d), it could be saved by s. 1 of the *Charter*. The Court of Appeal dismissed the cross-appeals with respect to clause 2(d) and allowed R's appeal, holding that clauses 2(a), (b) and (c) of the order infringed R's freedom of expression and freedom of religion and could not be justified under s. 1.

Held: The appeal should be allowed and clauses 2(a), (b) and (c) of the order restored.

(1) *Standards of Review*

This appeal raises two general issues in relation to the standard of judicial review. The first relates to the administrative law issue of the standard of

deference to be applied to the Board's finding of discrimination and its remedial order. The second relates to the standard of constitutional review to be applied to the Board's order. With respect to the administrative law issue, the superior expertise of a human rights tribunal is confined to fact-finding and adjudication in a human rights context, and the standard of review on the basis of reasonableness is applicable to these matters. For general questions of law, a standard of correctness is appropriate. In the process of performing its adjudicative function, a human rights tribunal applies general legal reasoning and statutory interpretation, matters which are ultimately within the province of the judiciary. Human rights tribunals, however, have relative fact-finding expertise and should be accorded deference by the courts in this function. This may be reinforced in this case by s. 21(1) of the Act which may import some privative effect. This fact-finding expertise of human rights tribunals should not be restrictively interpreted, and it must be assessed against the backdrop of the particular decision the tribunal is called upon to make. Here, the Court must decide whether the Board's finding of discrimination was beyond its jurisdiction. The Board's authority to determine the issue of discrimination is found in s. 20(1) of the Act. Since a finding of discrimination is impregnated with facts, and given the complexity of the evidentiary inferences made on the basis of these facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact-finding -- a conclusion supported by the existence of words importing a limited privative effect into the constituent legislation. As for the order, the Board's discretionary power set forth in s. 20(6.2) of the Act is in such broad terms that the order cannot be said to fall outside its jurisdiction. Here too the tribunal is entitled to the same deference in fact finding.

This case also involves a constitutional challenge to the Board's order. An administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*. The *Charter* standard and the administrative law standard, however, must not be conflated into one. Where the issues involved are untouched by the *Charter*, the appropriate administrative law standard is properly applied as the standard of review; but when, as in this case, the values invoked are *Charter* values, it is necessary to subject the decision to a s. 1 analysis. In such a case, there is no need for an administrative law review of the values that have been dealt with pursuant to *Charter* examination under s. 1. If the decision is found to be constitutional, it is difficult to see how it could be patently unreasonable. A review of these same values on an administrative law standard should not impose a more onerous standard upon government than under the *Charter* review. Conversely, if the decision is unconstitutional, then its acceptability according to an administrative law standard is no longer relevant, as the decision is invalid and in excess of the Board's jurisdiction.

(2) *Discrimination*

The Board was correct in finding that R's continued employment as a teacher constituted discrimination under s. 5(1) of the Act, with respect to educational services available to the public. On the basis of the factual evidence disclosing the substance of R's writings and statements, and the notoriety of his anti-Semitic comments in the community and beyond, the Board properly concluded that R's off-duty comments undermined his ability to fulfil his teaching position. The evidence establishes a "poisoned" educational environment

characterized by a lack of equality and tolerance. Although there is no direct evidence establishing an impact upon the school district caused by R's off-duty conduct, a reasonable inference is sufficient in this case to support a finding that R's continued employment impaired the educational environment generally in creating the "poisoned" environment. R's off-duty conduct impacted upon the educational environment in which he taught. Public school teachers assume a position of influence and trust over their students and must be seen to be impartial and tolerant. By their conduct, teachers, as "medium" of the educational message (the values, beliefs and knowledge sought to be transmitted by the school system), must be perceived as upholding that message. A teacher's conduct is evaluated on the basis of his or her position, rather than whether the conduct occurs within or outside the classroom. 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. It is not sufficient for a school board to take a passive role. Here, the Board found that the School Board failed to maintain a positive environment and concluded that the School Board had discriminated in its failure to take a proactive approach to the controversy surrounding R, thus suggesting the acceptance of R's views and of a discriminatory learning environment. There is no error in the Board's finding of discrimination against the School Board.

(3) *Sections 2(a) and 2(b) of the Charter*

The Board's order infringes R's freedom of expression. R's writings and statements clearly convey meaning and are protected by s. 2(*b*) of the *Charter*. The truth or popularity of their contents is not relevant to this determination. The order

is intended to remedy the discrimination with respect to services available to the public, by preventing R from publicly espousing his views while he is employed as a public school teacher. On its face, its purpose and effect are to restrict R's expression. The order therefore violates s. 2(*b*) of the *Charter*. The order also infringes R's freedom of religion. This freedom ensures that every individual must be free to hold and to manifest without state interference those beliefs and opinions dictated by one's conscience. Assuming the sincerity of the beliefs and opinions, it is not open to the courts to question their validity. Both ss. 2(*a*) and 2(*b*) must be given a broad interpretation, generally leaving competing rights to be reconciled under the s. 1 analysis. In certain cases this can be done in a relatively peremptory manner, but in this case, where R's claim is to a serious infringement of his rights in circumstances requiring a detailed contextual analysis, the detailed s. 1 analytical approach provides a more practical and comprehensive mechanism to assess competing interests.

(4) *Section 1 of the Charter*

The *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. Here, the educational context must be considered when balancing R's freedom to make discriminatory statements against the right of the children in the School Board to be educated in a school system that is free from bias, prejudice and intolerance; relevant to this particular context is the vulnerability of young children to messages conveyed by their teachers. The

employment context is also relevant to the extent that the state, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence. Teachers are also employees of a school board and a teacher's freedoms must be balanced against the school board's right to operate according to its own mandate. The anti-Semitism context is relevant as well because the Board's order was made to remedy the discrimination within the public school system that targeted Jews. In its order, the Board balanced R's freedoms against the ability of the School Board to provide a discrimination-free environment and against the interests of Jewish students; it may therefore be entitled to greater deference. An attenuated level of s. 1 justification is appropriate in this case in light of the nature of the rights allegedly infringed by the order. The expression sought to be protected is at best tenuously connected to the core values of freedom of expression. R's religious belief, which denigrates and defames the religious beliefs of others, erodes the very basis of the guarantee in s. 2(*a*) of the *Charter*. R's religious views serve to deny Jews respect for dignity and equality.

The Board's order aims at remedying the discrimination found to have poisoned the educational environment in the School Board. This objective is clearly of sufficient importance to warrant overriding a constitutional freedom. There is also a rational connection between the order and its objective. While the evidence did not establish a direct link between the poisoned educational environment and R's anti-Semitic views, it is sufficient that the Board found it "reasonable to anticipate" that there was a causal relationship between R's conduct and the harm. It is possible to "reasonably anticipate" the causal relationship in this case because of the significant influence teachers exert on their students and

the stature associated with the role of a teacher. R's removal from his teaching position was thus necessary to ensure that no influence of this kind is exerted by him upon his students and to ensure that the educational services are discrimination-free. Accordingly, clauses 2(a), (b) and (c) of the order, which deal with R's removal from his teaching position, are rationally connected to the order's objective. They were also carefully tailored to accomplish this objective and minimally impair R's constitutional freedoms. The deleterious effects of these clauses upon R's freedoms are limited to the extent necessary to the attainment of their purpose. R is free to exercise his fundamental freedoms in a manner unrestricted by this order, upon leaving his teaching position, and he is not prevented from holding a position within the School Board if a non-teaching position becomes available. The objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on R produced by these clauses. Clauses 2(a), (b) and (c) of the order are justified under s. 1 and were properly made within the Board's jurisdiction.

Clause 2(d), however, fails the minimal impairment branch of the s. 1 analysis. It may be that R's continued presence in the School Board would produce a residual effect even after he was removed from a teaching position, which may be what the clause sought to address. However, the evidence does not support the conclusion that the residual poisoned effect would remain indefinitely. For that reason, clause 2(d), which imposes a permanent ban, does not meet the minimal impairment test. Clause 2(d) should be severed from the remainder of the order on the basis that it does not constitute a justifiable infringement of the *Charter* and is therefore in excess of the Board's jurisdiction.

Cases Cited

Applied: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *R. v. Zundel*, [1992] 2 S.C.R. 731; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Re Cromer and British Columbia Teachers' Federation* (1986), 29 D.L.R. (4th) 641; *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 21 B.C.L.R. (2d) 93; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Jones*, [1986] 2 S.C.R. 284; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Young v. Young*, [1993] 4 S.C.R. 3; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Butler*, [1992] 1 S.C.R. 452.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), (*b*), 15.

Human Rights Act, R.S.N.B. 1973, c. H-11, ss. 5(1) [rep. & sub. 1985, c. 30, s. 7; am. 1992, c. 30, s. 5(*a*)], 20(1) [rep. & sub. 1985, c. 30, s. 13(*a*); am. 1987, c. 6, s. 41], 20(4.1)(*d*) [ad. 1985, c. 30, s. 13(*d*)], 20(6.2) [*idem*, s. 13(*g*)], 21(1) [rep. & sub. *idem*, s. 14].

Authors Cited

Reyes, Allison. "Freedom of Expression and Public School Teachers" (1995), 4 *Dal. J. Leg. Stud.* 35.

APPEAL from a judgment of the New Brunswick Court of Appeal (1993), 142 N.B.R. (2d) 1, 364 A.P.R. 1, 110 D.L.R. (4th) 241, 19 C.H.R.R. D/173, allowing an appeal and dismissing cross-appeals from a judgment of Creaghan J. (1991), 121 N.B.R. (2d) 361, 304 A.P.R. 361, 86 D.L.R. (4th) 749, 16 C.H.R.R. D/250, which allowed in part an application for judicial review of a decision of a human rights board of inquiry (1991), 121 N.B.R. (2d) 1, 304 A.P.R. 1, 15 C.H.R.R. D/339. Appeal allowed.

Neil Finkelstein, *George Vegh*, *Joseph Weir* and *Janice Spencer*, for the appellant Attis.

Thomas S. Kuttner, *Charles Ferris* and *Irving Cotler*, for the appellant the Human Rights Commission of New Brunswick.

Joel Richler and *Keith Landy*, for the appellant the Canadian Jewish Congress.

Douglas H. Christie, for the respondent Ross.

Frank A. Falzon, for the intervener the Attorney General of British Columbia.

David Matas, *Marvin Kurz* and *Jacquie Chic*, for the intervener the League for Human Rights of B'Nai Brith Canada.

Edward L. Greenspan, *Q.C.*, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Joseph J. Arvay*, *Q.C.*, for the intervener the Canadian Association of Statutory Human Rights Agencies.

The judgment of the Court was delivered by

1 LA FOREST J. -- This appeal concerns the obligation imposed upon a public school board pursuant to provincial human rights legislation to provide discrimination-free educational services. It further involves the fundamental freedom of an individual teacher to publicly express his views and to exercise his religious beliefs during his off-duty time. The main issues raised by this appeal are whether a school board, which employs a teacher who publicly makes invidiously discriminatory statements, discriminates with respect to services it offers to the public pursuant to s. 5(1) of the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, and whether an order to rectify the discrimination, which seeks to remove the teacher from his teaching position, infringes upon the teacher's freedom of expression and freedom of religion guaranteed under ss. 2(*a*) and 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

I. Facts

2 The factual context within which these issues arise is as follows. On April 21, 1988, the appellant Attis filed a complaint with the Human Rights Commission of New Brunswick, alleging that the Board of School Trustees, District No. 15, violated s. 5 of the *Human Rights Act* by discriminating against him and his children in the provision of accommodation, services or facilities on the basis of religion and ancestry. The appellant Attis alleged that the School Board, by failing to take appropriate action against the respondent Ross, a teacher working for the School Board who publicly made racist, discriminatory and bigoted statements, condoned his anti-Jewish views and breached s. 5 of the Act by discriminating against Jewish and other minority students within the educational system served by the School Board.

3 On September 1, 1988, a human rights board of inquiry was established to investigate the complaint. In the complaint, the appellant Attis, a Moncton resident, described himself as a Jew. He alleged that the discriminatory conduct by the School Board occurred from March 29, 1977 to April 21, 1988, and arose out of the actions of the respondent Ross, a teacher at Magnetic Hill School. The latter made racist and discriminatory statements in published writings and in appearances on public television. In his published writings, which consist of four books or pamphlets published from 1978 to 1989, and three letters to New Brunswick newspapers, Ross (whom I shall hereafter refer to simply as the respondent) argued that Christian civilization was being undermined and destroyed by an international Jewish conspiracy.

4 At the time of the hearing before the Board of Inquiry, the respondent did not have a homeroom class, but was a modified resource teacher. He had been employed

at the school since September 1976, and before that as a teacher at the Birchmount School. Concerns about the respondent's writings had been expressed publicly since 1978, when the Chairman of the Human Rights Commission had sent a letter to the School Board requesting that his classroom performance be supervised. By 1987, the School Board's response to the controversy had become a public issue and the Department of Education of New Brunswick became involved.

5 In 1988, the School Board instituted disciplinary action against the respondent. On March 16, 1988, he was reprimanded and warned that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was also informed that the warning was applicable to his out-of-school activities. The reprimand remained in force until September 20, 1989. On November 21, 1989, the respondent made the television appearance previously mentioned and was again reprimanded by the School Board on November 30, 1989.

6 The Board of Inquiry found there was no evidence of any direct classroom activity by the respondent on which to base a complaint under s. 5 of the *Human Rights Act*. However, it also found that his off-duty comments denigrated the faith and belief of Jews. It concluded that his actions violated s. 5(1) of the Act and that there was no reasonable excuse to justify the discriminatory effect of those actions. It further found that the School Board was liable for any breaches of s. 5 of the Act by its teachers and, as such, the School Board was also in breach of s. 5 of the Act. The Board concluded that the School Board discriminated by failing to discipline the respondent meaningfully in that, by its almost indifferent response to the complaints and by continuing his employment, it endorsed his out-of-school activities and writings. This, it held, resulted in an atmosphere where anti-Jewish

sentiments flourished and where Jewish students were subject to a "poisoned environment" within the School District "which has greatly interfered with the educational services provided" to the appellant Attis and his children: (1991), 121 N.B.R. (2d) 1, 304 A.P.R. 1, 15 C.H.R.R. D/339 (hereinafter cited to N.B.R.).

7 The Board of Inquiry made an order (at pp. 90-90B) dealing with the matter, which gives rise to the issues dealt with in this appeal. Paragraph (1) of the order requiring the Department of Education to take a number of steps aimed at encouraging policies for preventing discriminatory treatment was held by the judge on judicial review to be outside the jurisdiction of the Commission, an issue not taken up on appeal. Paragraph (2) of the order, however, is central to this appeal, and I therefore set it forth at length:

> (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 is 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)*

8 The respondent applied for judicial review requesting that the order of the Board of Inquiry be removed and quashed. On December 31, 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, ordering that clauses 1 and 2(d) of the order be removed and quashed on the ground that they were in excess of jurisdiction. Creaghan J. also concluded that clause 2(d) of the order violated ss. 2(*a*) and 2(*b*) of the *Charter* and could not be saved by s. 1 of the *Charter*: (1991), 121 N.B.R. (2d) 361, 304 A.P.R. 361, 86 D.L.R. (4th) 749, 16 C.H.R.R. D/250. The respondent appealed to the Court of Appeal for New Brunswick which allowed the appeal, Ryan J.A. dissenting: (1993), 142 N.B.R. (2d) 1, 364 A.P.R. 1, 110 D.L.R. (4th) 241, 19 C.H.R.R. D/173. The appellants, Attis, the Human Rights Commission and the Canadian Jewish Congress sought leave to appeal to this Court, seeking to have clause 2 of the Board's order upheld; no appeal was taken in relation to clause 1 of the order.

II. Decisions Below

A. *Court of Queen's Bench* (1991), 121 N.B.R. (2d) 361

9 Creaghan J. found that the Board of Inquiry had the right, under s. 20(4.1)(*d*) of the *Human Rights Act*, to determine that the Department of Education should be one of the parties to the inquiry. He also found that s. 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" (p. 368). Basing himself on that provision, he concluded with respect to clause 1 of the order that (at p. 368):

> 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.

10 He thus quashed clause 1 of the order as being beyond the jurisdiction of the Board. He found there was no claim other than that the School Board had violated the Act by continuing to employ the respondent as a teacher in the classroom. He specified that the investigation centred on whether there was a violation of the Act resulting from continuing to employ the respondent, and concluded (at p. 370):

> There was no jurisdiction in the Board of Inquiry to make an order [clause 2(d)] 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.

11 Creaghan J. stated that the principal ground for alleging that the decision of the Board of Inquiry and the resulting order were patently unreasonable was that the Board had no evidence on which it could make the findings necessary to support

its order. He noted that the Board of Inquiry found that there was evidence to support its conclusion. He reviewed the findings of the Board and stated that the function of a court on review is not to measure the findings against a standard of correctness. There was some evidence to support the conclusions of the Board, and he found that clauses 2(a), (b), and (c) of the order were not patently unreasonable.

12 Creaghan J. then undertook a *Charter* analysis. He concluded that the respondent's rights under ss. 2(*a*) and 2(*b*) of the *Charter* had been infringed and then, applying the *Oakes* test, concluded that clauses 2(a), (b) and (c) of the order were saved as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*. Despite his finding with respect to lack of jurisdiction in the Board to make clause 2(d) of the order, he stated he would not have applied s. 1 of the *Charter* to save it. He was not satisfied that the clause would meet the proportionality test, as the rational connection to the objective of s. 5 of the Act was tenuous.

B. *Court of Appeal* (1993), 142 N.B.R. (2d) 1

(1) Hoyt C.J.N.B. (for the majority)

13 In the Court of Appeal, Hoyt C.J.N.B. (with whom Angers J.A. concurred) held that clauses 2(a), (b) and (c) of the order offended the respondent's rights under ss. 2(*a*) and 2(*b*) of the *Charter* because they penalized him by preventing him from continuing to teach because of his publicly expressing his sincerely held views. He defined the issue in the following manner (at p. 16):

> The issue is whether an individual's freedom of expression can prevail against the fear that there will be a public perception that Mr. Ross' discriminatory remarks directed against a religious or ethnic minority are being condoned. The discrimination here is aggravated because the minority is one that has been historically targeted for discrimination and because the author of the discrimination is a teacher, who might be considered a role model to students.

14 Hoyt C.J.N.B. stated that there was "no doubt that a teacher may be disciplined for off-duty activities" (p. 17). He referred to the decision of this Court in *R. v. Zundel*, [1992] 2 S.C.R. 731, and stated that the purpose of the order, removing the respondent from the classroom, must be pressing and substantial before his constitutional guarantee of freedom of expression can be overridden by s. 1 of the *Charter*. Viewed in that context and considering the evidence, he concluded that the order could not stand. He emphasized that it was the respondent's activities outside the school that attracted the complaint. In such circumstances, he did not find the remedy met a "specific purpose so pressing and substantial" as to override the respondent's constitutional guarantee of freedom of expression. To find otherwise "would, in [his] view, have the effect of condoning the suppression of views that are not politically popular any given time" (p. 20). The denial of an individual's freedom of expression should, he stated, be restricted to the clearest of cases and the evidence in this case did not meet that test.

(2) Ryan J.A. (dissenting)

15 The dissenting judge, Ryan J.A., stated that "a teacher cannot discriminate, in the sense of show bias, inside the classroom or publicly, in such an important area as is this target in the *Human Rights Act* of this province" (pp. 27-28). He added that

anti-discrimination was a "laudable goal", an "important provincial aim", and stated (at p. 29):

> The right to be free from discrimination is not rooted merely in provincial legislation. It might be said to be quasi-constitutional from a provincial perspective but it is aided by s. 2 itself of the *Charter*.... Inherent in the evilness of discrimination is an outright attack on the freedoms of others protected under s. 2 by persons urging their own freedoms as though there were no consequences to the exercise of them.
>
> Therefore, . . . both values must be weighed.

16 Ryan J.A. would have applied s. 1 of the *Charter* to save clause 2(d) of the order. In his view, severing that part of the order "from the classroom situation simply does not answer the problem in a meaningful way" because it "falls too short of the mark" (p. 31). He emphasized that the wrong was in the continued discrimination the respondent, a public servant and role model to children, publicly promoted. He added that the respondent was known as a teacher whether within or outside the classroom, and that in this age of pervasive mass communication, we cannot underestimate the effect on young people of statements and writings made outside the classroom.

17 Ryan J.A. expressed the view that the objective of the order, ensuring a discriminatory free environment in the school, was sufficient to limit a *Charter* right or freedom, and that the order was rationally connected with that purpose. The *Human Rights Act* was conciliatory in nature and, as such, well suited to remedy discriminatory conduct.

18 Ryan J.A. found that "the redeployment order coupled with the restraint order tempers the harshness of an otherwise appropriate order of outright dismissal" (p. 35). A balance had to be struck between the respondent's freedoms, the victims' freedoms and an educational system that is based on impartiality and does not espouse prejudice, bigotry or bias. He concluded (at p. 35):

> A teacher teaches. He is a role model. He also teaches by example. Children learn by example. Malcolm Ross teaches by example. He is a role model who publishes and promotes prejudice. This is wrong.
>
> In any event, the Board of Inquiry acted within its mandate and determined, in the balancing of conflicting interests, to protect and improve the conditions and interests of the disadvantaged and disempowered.

19 The rights and freedoms guaranteed by the *Charter*, he continued, had to be measured against the underlying values and principles of a free and democratic society such as "the inherent dignity of the human being, commitment to social justice and equality and respect for cultural and group identity" (p. 36). To affirm the respondent's unrestrained freedom of expression and of religion would, in his view, be to trample upon these underlying values and principles, which themselves have been entrenched under the *Charter* and in international law (at p. 36). The respondent, he noted, was free to leave his public employment and exercise his freedom of expression and of religion without restraint. He added that the restriction placed on his freedoms by the order is not absolute, and concluded that the order was a justified infringement, the primary goal of which was to remedy the effects of discrimination.

III. Issues

20 Two broad issues are raised in this appeal. The first concerns whether the Board of Inquiry erred in finding that the School Board, in continuing to employ the respondent as a teacher, discriminated under s. 5(1) of the Act. The second issue is whether the Board of Inquiry's order directing that the School Board remove the respondent from a teaching position infringes ss. 2(*a*) and 2(*b*) of the *Charter* and whether it is saved by s. 1 thereof. Before proceeding to an analysis of these issues, however, I propose to dispose of a number of issues raised by the parties having to do with the appropriate standard of review this Court should adopt in these proceedings.

A. *Judicial Review: Administrative Law Standard and Charter Standard*

21 The appellant Attis' submissions in this appeal focused almost exclusively on the constitutionality of the Board's order. The Human Rights Commission, however, further submitted that the Court of Appeal erred in leaving undisturbed the judgment of the court of first instance quashing clause 2(d) of the order as in excess of jurisdiction. This submission is founded upon the standard of curial review appropriate for a court reviewing a tribunal's findings in the administrative law context.

22 The respondent's submissions on this point involve a constitutional and an administrative law component. With respect to the administrative law component, he submitted that there was insufficient evidence upon which to base a finding of discrimination under s. 5 of the Act, and thereby urged this Court to review the Board of Inquiry's finding on this point. He further submitted that the order granted to remedy the alleged discrimination is unconstitutional. Thus, this appeal

raises two general issues in relation to the standard of judicial review. The first relates to the administrative law issue of the standard of deference to be applied to findings of an administrative tribunal, in this case the Board's finding of discrimination and its remedial order. The second issue relates to the standard of constitutional review to be applied to the Board's order. I have found it appropriate to bifurcate the analysis according to these two general questions, in light of the different standards of appellate review mandated in the administrative law, and in the constitutional context.

23 In the administrative law context, I am guided by this Court's unanimous decision in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. In that case, Iacobucci J. stated that the central question to be asked in ascertaining the appropriate standard of review is "to determine the legislative intent in conferring jurisdiction on the administrative tribunal" (pp. 589-90). In answering this question, he found that courts have looked at a whole host of factors, including the tribunal's role or function, the existence of a privative clause and whether the question goes to the jurisdiction of the tribunal. He identified a spectrum of applicable standards of review in the following passage, at pp. 590-91:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1089 (*Bibeault*), and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

24 The Court in *Pezim* concluded that the case there fell somewhere between these two extremes. In the area of human rights, however, Iacobucci J. noted that the degree of deference to be accorded was at the lower end of the spectrum. This had earlier been established by the cases there cited. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, provides a clear example. There, speaking for the majority on this point, I discussed the deference the courts should show to administrative tribunals on the basis of their relative expertise. In observing that human rights tribunals are not analogous to labour tribunals, I stated, at p. 585:

> A labour arbitrator operates, under legislation, in a narrowly restricted field, and is selected by the parties to arbitrate a difference between them under a collective agreement the parties have voluntarily entered. As well, the arbitrator's jurisdiction under the statute extends to the determination of whether a matter is arbitrable. This is entirely different from the situation of a human rights tribunal, whose decision is imposed on the parties and has direct influence on society at large in relation to basic social values.

On the basis of this difference between human rights tribunals and labour tribunals, the Court confined the superior expertise of a human rights tribunal to fact-finding and adjudication in a human rights context. The standard of review on the basis of reasonableness is applicable to these matters. In relation to general questions

of law, courts must be supposed to be competent, and a standard of correctness is appropriate.

25 There is an additional element in this case, however, owing to the fact that the Board of Inquiry in this appeal was constituted under the New Brunswick *Human Rights Act*, s. 21(1) of which stipulates:

> **21**(1) 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.

Creaghan J. found this provision to constitute a privative clause and held that a standard of patent unreasonableness was to be applied by a reviewing court, and this position is supported by the Commission.

26 I had occasion in *Mossop* to discuss the effect of the existence of a privative clause in the tribunal's constituent legislation. The presence of a privative clause discloses the legislative intention to restrict judicial review of the administrative tribunal. The jurisprudence of this Court has established that privative clauses indicate an intention on the part of the legislature to shield from review. However, there are privative clauses and privative clauses, and the extent to which the legislature intends to afford protection from review is a function of the language of the clause, the nature of the legislation and the expertise of the tribunal in question.

27 The foregoing can be illustrated by an examination of *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230. In that case, the Court considered the privative

effect of a clause providing that the decision of a labour arbitration tribunal was "final and binding upon the parties". That case involved a determination of whether an arbitrator making an inquiry into whether a matter is arbitrable is permitted to be wrong. In essence, this Court sought to define the appropriate standard of review. Adopting a pragmatic and functional analysis, the majority concluded that the provision had limited privative effect, but on the type of specific issue in question, which involved a general question of law, the arbitrator had to be correct. More important than the actual wording of the provision was the degree of relative expertise possessed by the tribunal over the particular specialized questions. The purpose of arbitration was a relevant factor in the analysis in that case. This factor, I identified as constituting an amalgamation of other factors including the purpose of the statute, the reason for the tribunal's existence, the expertise of its members, and the nature of the problem before it.

28 Applying a similar analysis to the present case, I find that s. 21(1) of the Act imports limited privative effect only. The driving considerations for such a determination are the purpose of human rights tribunals and their relative expertise. As I noted in *Mossop*, the purpose of human rights commissions is multifaceted, in that they serve a general educational role to the government, the public and the courts on matters of human rights, provide for investigation and settlement of human rights complaints and act in an adjudicative capacity to settle particular disputes. The expertise of the tribunals appointed under their aegis is limited to fact-finding and adjudication in human rights matters. In the process of performing its adjudicative function, a human rights tribunal will be called on to apply general legal reasoning and statutory interpretation, matters which are ultimately within the province of the judiciary.

29 That having been said, I do not think the fact-finding expertise of human rights tribunals should be restrictively interpreted, and it must be assessed against the backdrop of the particular decision the tribunal is called upon to make. Here, inquiry into the appropriate standard of review is largely governed by the fact that the administrative law issue raised calls upon this Court to consider whether the finding of discrimination by the Board of Inquiry was beyond its jurisdiction. A finding of discrimination is impregnated with facts, facts which the Board of Inquiry is in the best position to evaluate. The Board heard considerable evidence relating to the allegation of discrimination and was required to assess the credibility of the witnesses' evidence and draw inferences from the factual evidence presented to it in making a determination as to the existence of discrimination. Given the complexity of the evidentiary inferences made on the basis of the facts before the Board, it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact-finding, a conclusion supported by the existence of words importing a limited privative effect into the constituent legislation.

30 The administrative law issue also involves a challenge to the order granted by the Board pursuant to its finding of discrimination. On strict administrative law considerations, the Board, by s. 20(6.2) of the New Brunswick Act, is granted very broad discretion to make orders pursuant to a finding of a violation of the Act. However, the issue is more complicated than that in this case. In considering the applicable standard of review to the Board's order, it is incumbent upon this Court to examine the relationship between the administrative law standard and the standard dictated by the *Charter*, recalling that the respondent has challenged the constitutionality of the order.

31 The precise relationship between the standard of review in the administrative law context and that to be applied under the *Charter* was considered in this Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Speaking for the Court on this point, Lamer J., as he then was, stated that it was not open to question that the order of an administrative tribunal was subject to the application of the *Charter*. The administrative tribunal is a creature of statute, appointed pursuant to a legislative provision, and deriving its power from statute. Where the administrative tribunal is constituted pursuant to legislation conferring discretion, the discretion conferred must not include the power to infringe the *Charter*, unless that power is expressly conferred or necessarily implied. In the result, an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*.

32 In *Slaight Communications*, Dickson C.J. did not enter into a searching examination of the relationship between the administrative law standard of review and the new constitutional standard of review under the *Charter*. He wisely noted that the relationship between these standards would need to be worked out in future cases and simply confined himself to a few comments. From these comments, it is evident that he saw no need for an administrative law review of values that had been dealt with pursuant to a *Charter* examination under s. 1. It would seem obvious that a review of these values on an administrative law standard should not impose a more onerous standard upon government than under the *Charter* review. However, the administrative law standard and the *Charter* standard are not conflated into one. When the issues involved are untouched by the *Charter*, the appropriate administrative law standard is properly applied as a standard of review. In the present case, where the values invoked are *Charter* values, if the order is

found to pass the s. 1 analysis, then I am quite unable to see how it could be patently unreasonable on the basis of these same values. Conversely, if at the conclusion of the value analysis under s. 1 the Court holds the order unconstitutional, then its acceptability according to an administrative law standard is no longer relevant, the Board's jurisdiction having necessarily been exceeded. As Dickson C.J. noted, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review *Charter* values. I shall consider the constitutionality of the Board's order later.

33 What requires examination at the administrative law level is the Board's decision regarding the issue of discrimination and the statutory jurisdiction of the Board to make its order. These reviews are untouched by the *Charter*. Rather, they must be determined in accordance with the interpretation of the provisions of the Act governing the Board's jurisdiction. The authority of the Board to determine the issue of discrimination is found in s. 20(1). Its findings are largely based on facts, about which this Court in *Mossop* has stated, human rights boards have a relative expertise, a consideration that may be strengthened by s. 21(1) of the Act. The issue of discrimination will be given attention shortly. So far as the power of the Board to make the impugned order is concerned, it is enough to say that the Board's discretionary power is set forth in s. 20(6.2) of the Act in such broad terms that it cannot be said to fall outside its jurisdiction. Indeed, s. 20(6.2)(*a*) and (*b*) authorize the Board to make any order to effect compliance with the Act or to rectify the harm caused by a violation of the Act. The order must, of course, be based on a full consideration of the facts. Here again the Board is entitled to deference in respect of its factual findings. There can be no doubt that, apart from the *Charter* issues, and assuming a violation of the Act, the order fell within the

jurisdiction of the Board. I shall turn then to a detailed discussion of the issue of discrimination.

B. *Discrimination*

34 In light of the foregoing, it is important to approach with deference the findings of fact made by the Board in the course of determining whether there was discrimination on the part of the School Board. Bearing this in mind, the argument of the appellant Attis is essentially this: the Board was correct in finding that the respondent's continued employment as a teacher constituted discrimination under s. 5(1) of the New Brunswick *Human Rights Act*. The finding of discrimination, he continues, was made in light of the respondent's off-duty conduct, which poisoned the educational environment at the school and created an environment in which Jewish students were forced to confront racist sentiment. His continued employment signalled the School Board's toleration of his anti-Semitic conduct and compromised its ability to provide discrimination-free educational services.

35 Section 5(1)(*b*) of the Act provides:

> **5**(1) 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,
>
> because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

The Board of Inquiry found that s. 5 guarantees individuals freedom from discrimination in educational services available to the public. In this respect, the Board stated (at p. 60):

> The [educational] 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.

36 Thus the Board found that s. 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" (pp. 61-62). It concluded that the School Board had discriminated against the appellant Attis contrary to s. 5(1) of the Act, on the basis that the effect of its continued employment of the respondent created a discriminatory effect, one that a reasonable person would anticipate from the School Board's failure to address the conduct of the respondent in a meaningful way.

37 The respondent does not contest the Board's findings in relation to his off-duty conduct and publications, or in relation to anti-Semitic incidents in the School District. His point is that there is no direct evidence linking these two findings. I am unable to agree with this contention. For the following reasons, I am of the view that the finding of discrimination against the School Board must stand.

38 The Board of Inquiry heard evidence of the nature of the respondent's writings, publications and statements, which include a letter to the editor of *The Miramichi Leader*, a local television program interview, and the four books or pamphlets listed in the order. The Board found, without hesitation, that these publications contain *prima facie* discriminatory comments against persons of Jewish faith and ancestry. Their effect, in its view, was to denigrate the faith and beliefs of Jews and to incite in Christians contempt for those of the Jewish faith by their assertion that they seek to undermine freedom, democracy and Christian beliefs and values. The Board further found that the respondent's comments speak of Jews as the synagogue of Satan, and accuse Judaism of teaching that ". . . Jesus Christ is a bastard, a lewd deceiver, a false prophet who is burning in Hell" and that the Virgin Mary is a whore. The respondent was also found to have continuously alleged that the Christian faith and way of life are under attack as a result of an international conspiracy headed by Jews. The Board characterized his primary purpose as being "to attack the truthfulness, integrity, dignity and motives of Jewish persons" (p. 73). It also made a finding of fact as to the respondent's notoriety in the community of Moncton, and that continued media coverage of his statements and writings over an extended period contributed to his views having gained notoriety in the community and beyond. Given that these findings are findings of fact supported by the evidence, they are entitled to deference by this Court upon review, in light of the relative expertise of the Board in relation to the art of fact-finding in a human rights context, and I accept them.

39 On the basis of the factual evidence disclosing the substance of the respondent's off-duty conduct, and the notoriety of this conduct in the community and beyond, the Board considered how such conduct impacted upon the respondent's teaching

ability. In concluding that conduct of the type evinced by the facts of this case may undermine the capacity of a teacher to fulfil his or her position, the Board noted (at pp. 67-68):

> 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.

40 Whether the respondent's conduct did in fact adversely impact on the school community must be answered on the basis of the actual environment in the school as established by the evidence. The Board heard evidence from two students in the School Board, whom it found to be credible witnesses. The students described in detail the educational community in the school district. They gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas by other students into their own arms and into the desks of Jewish children, drawing of swastikas on blackboards, and general intimidation of Jewish students. The appellant's daughter, Yona Attis, one of the student witnesses, gave evidence of one occasion on which she had planned to attend the respondent's school to watch a gymnastic competition, when she was advised that she could not go to the school because that was ". . . where the teacher who hates Jews works". The teacher referred to was identified as the respondent. Yona Attis stated that she attended the competition, but that she felt scared while

there, and anxious ". . . that someone was going to come up behind [her] and grab [her] and beat [her] up or something". Further evidence of taunting and intimidation of the Jewish students was disclosed in her testimony, including incidents of shouting and signalling of the "Heil, Hitler" salute. What this evidence discloses is a poisoned educational environment in which Jewish children perceive the potential for misconduct and are likely to feel isolated and suffer a loss of self-esteem on the basis of their Judaism.

41 It is to be noted that the testimony of the students did not establish any direct evidence of an impact upon the school district caused by the respondent's off-duty conduct. Notwithstanding this lack of direct evidence, the Board concluded as follows (at p. 82):

> 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. [Emphasis added.]

This inference drawn on the basis of what is reasonable to anticipate must be considered in light of whether, in the circumstances, it is reasonable to anticipate that the respondent's off-duty conduct "poisoned" the educational environment in the School Board and whether it is sufficient to find discrimination according to a standard of what is reasonable to anticipate as the effect of the off-duty conduct. I will consider each of these points in turn.

42 A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the

educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.

43 Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole. Allison Reyes considers the importance of teachers in the education process and the impact that they bear upon the system, in "Freedom of Expression and Public School Teachers" (1995), 4 *Dal. J. Leg. Stud.* 35. She states, at p. 42:

> Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher).

44 By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see *Re Cromer and British Columbia Teachers' Federation*

(1986), 29 D.L.R. (4th) 641 (B.C.C.A.), at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. Reyes affirms this point in her article, *supra*, at p. 37:

> The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. [Emphasis in original.]

I find the following passage from the British Columbia Court of Appeal's decision in *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 21 B.C.L.R. (2d) 93, at p. 97, equally relevant in this regard:

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system.

45 It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned"

environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

46 The next question is whether a finding of discrimination may be supported by an inference on the basis of what is reasonable to anticipate as an effect of the off-duty conduct. In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, a public servant was discharged for publicly criticizing the government. Dickson C.J. observed two forms of impairment: impairment to perform the specific job and impairment in a wider sense. With respect to impairment of the first kind, the general rule, he stated, should be that direct evidence of impairment is required. He qualified this rule, however, as not absolute and stated that when the nature of the occupation is important and sensitive, and when the substance, form and context of the employee's comments are extreme, an inference of impairment may be sufficient. In that case, Dickson C.J. accepted the finding of the adjudicator that the public servant's off-duty conduct "could or would give rise to public concern, unease and distrust of his ability to perform his employment duties" (pp. 472-73).

47 Similarly in this case, the Board found that the respondent's off-duty comments impaired his ability to fulfil his teaching position. The teaching occupation is uniquely important. This, combined with the substance of the respondent's writings and statements and the highly public media through which they were disseminated, i.e. television and published works, supports the conclusion that this finding of the Board is correct.

48 Returning to *Fraser*, *supra*, with respect to impairment in the wider sense, Dickson C.J. stated, at p. 473:

> It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of [the impugned conduct].

In the present case, I note that the Board was presented with evidence from Ernest Hodgson on the likely effects of the respondent's conduct. He stated that the Jewish students having a general knowledge of the respondent could be fearful of him. Indeed, this is borne out in Yona Attis' testimony, and is supported by the pervasive awareness of the respondent's conduct throughout the community. Ernest Hodgson gave further evidence that it was possible that Jewish students would be negatively influenced by the respondent and that they would see themselves as the subject of suspicion, distrust and isolation. He considered that there might be a reluctance on the part of Jewish parents to become involved in the school system that might deter other Jewish families from moving to Moncton.

49 Pursuant to a television interview given by the respondent in 1989, the School Board itself characterized the effect produced by the respondent's conduct in this manner:

> . . . 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.

As to whether there is impairment on a broader scale, I conclude on the authority of *Fraser, supra*, that a reasonable inference is sufficient in this case to support a finding that the continued employment of the respondent impaired the educational environment generally in creating a "poisoned" environment characterized by a lack of equality and tolerance. The respondent's off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught.

50 The Board found that School District No. 15 discriminated contrary to s. 5 of the Act. It found the School Board had been reluctant to take disciplinary action against the respondent, notwithstanding the publicity his conduct received and the awareness on the part of the School Board of the situation in the community at large. In effect, its passivity signalled a silent condonation of, and support for the respondent's views. The Board found an obligation within the school community "to work towards the creation of an environment in which students of all backgrounds will feel welcomed and equal" (p. 83). It stated (at p. 80):

> 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.

I am in complete agreement with this statement, and I refer to the findings of the Board that the School Board failed to maintain a positive environment. The School Board, it found, was reluctant to become involved and was slow to respond when complaints about the respondent were first raised. The evidence discloses that as early as 1978, letters were sent to the Director of School District No. 15 regarding concerns about the respondent's continued employment, and requesting

his dismissal. The position of the School Board at that time was expressed by Nancy Humphrey, Chairperson of the School Board, as being that the respondent could do what he wanted on his own time. From 1979 through 1984, the respondent's in-class teaching was monitored; however, in 1983, media coverage of the respondent's activities was augmented.

51 By 1986-87, the School Board was receiving approximately 10 to 20 letters a week concerning the respondent. After he wrote an article in *The Miramichi Leader* in 1986, a scheme directed at more frequent monitoring of his class was put into place. By 1987, the public controversy surrounding the respondent had grown concerning the level of the School Board's involvement, and the question as to whether the respondent would be charged under the hate literature provisions of the *Criminal Code* was raised. A committee was established by the School Board in 1987 to review the possible impact of the issue on the learning environment. This committee, however, was found by the Board of Inquiry to have failed to address the questions it should have and to appreciate the subtle forms discrimination may take.

52 According to the acting superintendent, Cheryl Reid, in 1988 the respondent was "cautioned strongly against any further publications regarding [his] views". In the same year, the first disciplinary action was taken against the respondent, at which time he was informed that any further publications, or public discussions of his views or works would result in greater disciplinary action and possible dismissal. A reprimand in the form of a "gag order" was placed on his personal file. Subsequent to this, three complaints were filed against him. The Human Rights Commission began an investigation in response to these complaints. The Board

of Inquiry, however, found that the School Board strongly resisted the investigation. The investigation recommended that the Board of Inquiry be established in 1988.

53 In March 1989, the School Board adopted Policy No. 5006, intended to ensure that students were offered a positive and safe learning environment, in which they were taught respect for the rights and freedoms of the individual. In September 1989, the School Board decided to remove the "gag order" from the respondent's file. Two months later, the respondent appeared on television to express and discuss his views. The School Board responded by ordering a severe reprimand to the respondent, by way of letter, requesting that he refrain from "publicly assailing" another religion. The Board of Inquiry found it difficult to understand why the School Board only gave the respondent a reprimand at this time as opposed to terminating his employment, given that the respondent had been sent a strongly worded letter along with a copy of Policy No. 5006 making the intention of the new policy very clear to him.

54 A review of this chronology led the Board of Inquiry to conclude that the School Board had discriminated in its failure to take a proactive approach to the controversy surrounding the respondent, the effect of which was to suggest the acceptance of the respondent's views and of a discriminatory learning environment. The finding of discrimination against the School Board is supported by the evidence and I accordingly see no error in this finding of the Board of Inquiry.

55 A finding of discrimination does not end the analysis, however. The respondent also raises the issue of the validity of the order. As I have previously stated, the

important question in relation to the validity of the order is whether it is constitutionally sound. The respondent submits that his freedom of expression and freedom of religion have been infringed. I turn now to these constitutional issues.

C. *Freedom of Expression*

56 Section 2(*b*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

57 The appellants, with the exception of the Canadian Jewish Congress, concede that the respondent's freedom of expression was infringed by the Board's order. They were right to concede this point. The order does infringe the respondent's freedom of expression, a conclusion that is supported by the discourse surrounding s. 2(*b*) of the *Charter*.

58 The expression in question in this appeal concerns the respondent's writings, publications and statements. The Board of Inquiry considered the four books set forth in the order, as well as the letter to the editor in *The Miramichi Leader*, and the television interview in 1989, as the most important. The gist of the respondent's message is that Jews are heading a "conspiracy" or a "great Satanic movement" against Christians with a view to destroying the Christian faith and civilization. The respondent attributes many of the "evils in our land" to the fact that Christians have permitted "those `who hate the Lord' to rule over (them)". The

Board referred to the contents of the letter and found within it encouragement to others to condemn all Jews and to throw off the "yoke of Jewish domination". With this description of the expression in issue, I turn to the jurisprudence surrounding s. 2(*b*).

59 Section 2(*b*) must to be given a broad, purposive interpretation; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment; see *Zundel*, *supra*. As Cory J. put it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336, "[i]t is difficult to imagine a guaranteed right more important to a democratic society"; as such, freedom of expression should only be restricted in the clearest of circumstances.

60 Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, *supra*, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be; see *Zundel*, *supra*, at p. 753. The wide ambit of s. 2(*b*) is underscored by the following passage from McLachlin J.'s reasons in that case, at pp. 752-53:

> The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment.

> That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, *supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55.

61 In *Irwin Toy*, *supra*, and more recently in *R. v. Keegstra*, [1990] 3 S.C.R. 697, this Court has adopted a two-step enquiry to determine whether an individual's freedom of expression is infringed. The first step involves determining whether the individual's activity falls within the freedom of expression protected by the *Charter*. The second step is to determine whether the purpose or effect of the impugned government action is to restrict that freedom.

62 There can be no doubt that the first step is satisfied. The writings, publications and statements of Malcolm Ross constitute expression within the meaning of s. 2(*b*). They clearly convey meaning. The truth or falsehood of their contents is not a matter to be considered in the context of determining whether they fall within the guarantee of freedom of expression; nor is the unpopularity of the views espoused within them.

63 Further support for this position may be found in this Court's decision in *Keegstra*, *supra*, where the factual similarity of the content of the expression in that case with that of the respondent is striking. There the content of the expression in issue was as follows, at p. 714:

> Mr. Keegstra's teachings attributed various evil qualities to Jews.... He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil.

The "hate propaganda" in that case was held to be protected by s. 2(*b*). Dickson C.J. rejected the argument that hate propaganda was analogous to violence and found that its repugnance stemmed from its content and not from its form. It was, therefore, expression within the meaning of the provision, as is the expression in this appeal.

64 This brings me to the second step of the test, determining whether the purpose or effect of the impugned government action is to restrict the individual's freedom of expression. In this case, it is the order, rather than its constituent legislation, that is called in question. Consequently, it is the purpose of the order that must be considered.

65 Turning to this question, then, this Court has adopted an approach which examines the "facial" purpose of the legislative means chosen by Parliament to achieve its ends. In *Zundel*, *supra*, the constitutionality of the "false news" provisions of the *Criminal Code*, in particular s. 181, was in issue. The intervener, Canadian Jewish Congress, argued that the purpose of the provisions was to prevent the harmful consequences of publications, there too anti-Semitic publications. McLachlin J. held that the intervener's argument missed the point noting that this Court has examined the "facial" purpose of a legislative technique adopted to achieve a particular end. She stated, at p. 759:

> First, this Court has never focused upon a particular consequence of a proscribed act in assessing the legislation's purpose; the Court examines what might be called the `facial' purpose of the legislative technique adopted by Parliament to achieve its ends: see, for example, *Irwin Toy*, *supra*, at pp. 973-76. Second, a legislative provision may have many effects. One demonstrated effect of s. 181 in the case at bar is to subject Mr. Zundel to criminal conviction and potential imprisonment because of words he published. In the face of this reality, it is undeniable that s. 181, whatever its purpose, has the effect of restricting freedom of expression.

66 In the present case, the purpose of the Board's order, while intended to remedy the discrimination with respect to services available to the public, is to prevent the respondent from publicly espousing his views while he is employed as a public school teacher. On its face, the purpose of the order is to restrict the respondent's expression; it has a direct effect on the respondent's freedom of expression, and so violates s. 2(*b*) of the *Charter*.

D. *Freedom of Religion*

67 The respondent's expression in this case is of a religious nature. He, therefore, submits that his freedom of religion has also been infringed. I turn, then, to this contention.

68 Section 2(*a*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;

69 The appellant Human Rights Commission concedes that the Board's order infringes the respondent's freedom of religion, as embodied in s. 2(*a*) of the *Charter*, and the

appellant Attis does not raise the issue. The appellant Canadian Jewish Congress, however, submits that the order does not infringe the respondent's s. 2(*a*) freedoms.

70 In arguing that the order does infringe his freedom of religion, the respondent submits that the Act is being used as a sword to punish individuals for expressing their discriminating religious beliefs. He maintains that "[a]ll of the invective and hyperbole about anti-Semitism is really a smoke screen for imposing an officially sanctioned religious belief on society as a whole which is not the function of courts or Human Rights Tribunals in a free society". In this case, the respondent's freedom of religion is manifested in his writings, statements and publications. These, he argues, constitute "thoroughly honest religious statement[s]", and adds that it is not the role of this Court to decide what any particular religion believes.

71 I agree with his statement about the role of the Court. In *R. v. Jones*, [1986] 2 S.C.R. 284, I stated that, assuming the sincerity of an asserted religious belief, it was not open to the Court to question its validity. It was sufficient to trigger constitutional scrutiny if the effect of the impugned act or provision interfered with an individual's religious activities or convictions.

72 The essence of freedom of religion was encapsulated in the following passage from Dickson J.'s reasons in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to

> declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

Indeed, this Court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.

73 This said, a broad interpretation of the right has been preferred, leaving competing rights to be reconciled under the s. 1 analysis elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103, decided after *Big M*. This approach was adopted by the majority in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, which refused to formulate internal limits to the scope of freedom of religion. Speaking for the majority, I there stated, at pp. 383-84:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*; . . .
>
> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*). As Dickson C.J. stated in *R. v. Keegstra*, *supra*, while it is not logically necessary to rule out internal limits within s. 2, it is analytically practical to do so. . . .

74 This mode of approach is analytically preferable because it gives the broadest possible scope to judicial review under the *Charter* (see *B.(R.)*, at p. 389), and provides a more comprehensive method of assessing the relevant conflicting values. It is right to say, however, that the first sentence in the above quotation may appear to be at odds with the approach adopted in *Young v. Young*, [1993] 4 S.C.R. 3, where the Court was called upon to assess the application of the principle of court orders given in the best interests of the child as they affected the religious views and practices of a non-custodial parent. In that case, it seems to me, the interference with the non-custodial parent's rights was at best tangential. Under the *Divorce Act*, Parliament has set up a scheme intended to be in the best interests of a child which gives the courts discretion to assign custody to one (or both) of the parents and to permit the non-custodial parent access to the child. Exercise of these discretionary powers are as noted based solely on the best interests of the child and can be subjected to conditions to ensure that end, including in appropriate circumstances preventing the imposition of religious views of the non-custodial parent on the child, which was the issue in *Young*. Unless one is prepared to question the entire scheme devised by Parliament, it is difficult to see how the proper exercise of the discretion can be attacked on the basis of visitation "rights" that are granted solely on the basis of the best interests of the child. It is true that the judgments of L'Heureux-Dubé and McLachlin JJ. also placed reliance on the factors set forth in *Big M*, but these are really an earlier and simpler formulation of values later incorporated in the more complex s. 1 formulation devised in *Oakes*. So while there may be a difference in form, there is really no conflict between *Young* and *B. (R.)*. It is noteworthy, however, that under *B. (R.)*, consistently with *Young*, it may not always be necessary to have resort to the full panoply of tests elaborated in *Oakes*. At page 385 of that case, I stated:

> This is not to say that an elaborate examination of the criteria established in *R. v. Oakes, supra*, will always be necessary. The effect on religious beliefs will often be so insubstantial, having regard to the nature of the legislation, that *Charter* concerns will obviously be overridden.

75 What has to be kept in mind is that all rights under the *Charter* are guaranteed by s. 1 subject to the limitations there described. The important thing is that the competing values of a free and democratic society have to be adequately weighed in the appropriate context. I need not further explore when or under what circumstances a more peremptory process may be justifiable. I do refer again to Dickson C.J.'s remarks in *Keegstra* that while it is not logically necessary to rule out internal limits within s. 2 it is analytically practical to do so. That approach seems to me compelling in the present case where the respondent's claim is to a serious infringement of his rights of expression and of religion in a context requiring a detailed contextual analysis. In these circumstances, there can be no doubt that the detailed s. 1 analytical approach developed by this Court provides a more practical and comprehensive mechanism, involving review of a whole range of factors for the assessment of competing interests and the imposition of restrictions upon individual rights and freedoms.

76 I conclude that the order infringes the respondent's freedom of expression and freedom of religion, and the issue, then, is whether this infringement is justifiable under s. 1 of the *Charter*.

E. *Section 1 of the Charter*

77 In *Oakes, supra*, at p. 136, Dickson C.J. stated that in determining whether *Charter* rights and freedoms should be limited,

> [t]he 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 for 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.

Ultimately, any attempt to determine whether the order is a justifiable infringement of the respondent's freedom of expression and of religion must involve a weighing of these essential values and principles, namely the accommodation of a wide variety of beliefs on the one hand and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other.

78 The factors to be considered in applying the *Oakes* test have frequently been reviewed, most recently in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, where both the majority and minority agreed that an approach involving a "formalistic `test' uniformly applicable in all circumstances" must be eschewed. Rather, the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. McLachlin J. in *RJR-MacDonald, supra*, reiterated her

statement in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 246-47, that conflicting values must be placed in their factual and social context when undertaking a s. 1 analysis.

79 In addressing this contextual analysis, the appellant Human Rights Commission invited us to consider three contexts it deemed relevant to such an analysis, namely, the educational context, the employment context, and the anti-Semitism context. I shall consider these in turn.

80 In relation to the educational context, the Commission discussed modern educational theory which stresses "the inculcation of those fundamental values upon which a democratic polity rests" as a central function of a public school. It also referred to the Government of New Brunswick's Ministerial Statement, the guiding principles of which include the following: that every individual has a right to be educated in a school system that is free from bias, prejudice and intolerance; that any manifestation of discrimination on the basis of gender, race, ethnicity, culture or religion by any persons in the public school system is not acceptable; and that school programs and practices promote students' self-esteem and assist in developing a pride in one's own culture and heritage.

81 These considerations seem to me to be highly relevant. In discussing the interest of the State in the education of its citizens in *Jones*, *supra*, at p. 296, I stated that "[w]hether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society". And I adopted at p. 297 much of what was said in the American case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), in the following passage, at p. 493:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

The importance of the provision of education by the state, and the Government of New Brunswick's commitment to eradicating discrimination in the public school system must inform our constitutional review of the order, which, it will be remembered, was made to remedy practices in the provision of educational services found to be discriminatory.

82 There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is the education of the young. As stated in *Brown*, *supra*, education awakens children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and

tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.

83 It is this context that must be invoked when balancing the respondent's freedom to make discriminatory statements against the right of the children in the School Board "to be educated in a school system that is free from bias, prejudice and intolerance", a right that is underscored by s. 5(1) of the Act and entrenched in s. 15 of the *Charter*.

84 The second context, the employment context, is relevant to the extent that the State, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence. The appellant Commission submits that the "standard of behaviour which a teacher must meet is greater than the minimum standard of conduct otherwise tolerated, given the public responsibilities which a teacher must fulfil and the expectations which the community holds for the educational system".

85 More than being solely employees of the State, teachers are also employees of a particular school board. As such, a teacher's freedoms must be balanced against the right of school boards to operate according to their own mandates. Recalling New Brunswick's Ministerial Statement, this means that the interest of School District No. 15 to provide a school system free from bias, prejudice and intolerance must be balanced against the respondent's right to manifest his religious beliefs and express his particular views.

86 The final context the Commission has asked us to consider is the anti-Semitism context. The gist of its submission is expounded in the following passage from its factum:

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

In assessing this submission, it is helpful to refer to *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, where Dickson C.J. stated, at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

This direction is especially applicable in this appeal. The order rendered by the Board was made to remedy the discrimination it found to be manifest within the public school system of New Brunswick that targeted Jews, an historically disadvantaged group that has endured persecution on the largest scale. The respondent must not be permitted to use the *Charter* as an instrument to "roll back" advances made by Jewish persons against discrimination.

87 This context relates to one further consideration that must inform a contextual approach under s. 1. It must be recognized that human rights tribunals have played a leading role in the development of the law of discrimination, and this is reflected in the jurisprudence of this Court both in the area of human rights and under the *Charter*. This Court should proceed under s. 1 with recognition of the sensitivity

of human rights tribunals in this area, and permit such recognition to inform this Court's determination of what constitutes a justifiable infringement of the *Charter*.

88 In *RJR-MacDonald, supra*, I noted that "the evidentiary requirements under s. 1 will vary substantially depending upon both the nature of the legislation and the nature of the right infringed" (p. 272). The next consideration under a s. 1 analysis, then, is the nature of the legislation and of the right(s) infringed. To this end, McLachlin J. in *RJR-MacDonald* stated that "greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state" (p. 331). In this appeal, the Board's order, like its constituent legislation, is concerned with the competing interests of different individuals and attempts to balance the eradication of discrimination against the rights of other individuals. In fact, in making the order, the Board carefully considered the effect on the respondent, and determined that it was a necessary consequence in providing relief from the discrimination. In this appeal, the order made pursuant to the finding of discrimination reflects that balancing. The Board balanced the respondent's freedoms against the ability of the School Board to provide a discrimination-free environment and against the interests of Jewish students.

89 The nature of the rights allegedly infringed in this case is of equal significance. In my reasons in *RJR-MacDonald, supra*, I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process" (p. 280). This Court has subjected state action limiting such values to "a searching degree of scrutiny" (p. 281). This

standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 has been applied.

90 In *Keegstra*, *supra*, at p. 764, Dickson C.J. recognized that some forms of expression can undermine our commitment to democracy and found that "[h]ate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics". Hate propaganda, he held, strays some distance from the core values of freedom of expression and, consequently, restrictions on expression of that kind might be easier to justify than other infringements on freedom of expression. He stated, at p. 765:

> I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(*b*) rationale.

Dickson C.J. concluded that expression that promotes the hatred of identifiable groups is of limited importance as measured against freedom of expression values.

91 Similarly, any restrictions imposed by the order upon the respondent's freedom of expression should, in my view, attract a less "searching degree of scrutiny" and be easier to justify under s. 1. The Board determined that the primary purpose of the respondent's form of expression is "to attack the truthfulness, integrity, dignity and motives of Jewish persons" (p. 73). This Court has held that there is very little

chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. Ours is a free society built upon a foundation of diversity of views; it is also a society that seeks to accommodate this diversity to the greatest extent possible. Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth. However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.

92 In relation to the protection of individual autonomy and self-development, a value said to underlie s. 2(*b*), expression that incites contempt for Jewish people on the basis of an "international Jewish conspiracy" hinders the ability of Jewish people to develop a sense of self-identity and belonging. Again, I refer to the words of Dickson C.J. in *Keegstra*, *supra*, who said of the message of hate propaganda, at p. 763:

> The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered in so far as it advocates with inordinate vitriol an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.

93 The final "core" value said to underlie or justify the protection accorded by s. 2(*b*) is participation in the democratic process. The respondent's expression is expression that undermines democratic values in its condemnation of Jews and the Jewish faith. It impedes meaningful participation in social and political decision-

making by Jews, an end wholly antithetical to the democratic process. The expression sought to be protected in this case is, in my view, at best tenuously connected to freedom of expression values.

94 In relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(*a*) -- a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience. The respondent's religious views serve to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a s. 1 analysis. Where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate.

95 With this background, I turn to s. 1 of the *Charter*. This Court in *Oakes*, *supra*, developed an approach under s. 1 that requires two things be established: the impugned state action must have an objective of pressing and substantial concern in a free and democratic society; and there must be proportionality between the objective and the impugned measure.

96 I have already discussed the end sought to be achieved by the order, that is to address the specific steps to be taken to remedy the discrimination in the School Board created through the respondent's writings and publications. More generally, the order aims at remedying the discrimination found to have poisoned the educational environment in the School Board.

97 In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, Dickson C.J. found that the objective of promoting equal opportunity unhindered by discriminatory practices based on race or religion was pressing and substantial. In arriving at his conclusion, he reviewed the harms caused by messages of hatred, including "substantial psychological distress", pressure to renounce cultural differences, and loss of self-esteem. As well, he noted that the result of such messages may be to increase discrimination. He then referred to the international community's commitment to the eradication of discrimination. To this end, he reviewed the international conventions to which Canada is a signatory and concluded (at p. 920) that they exhibit that the commitment of the international community to the eradication of discrimination extends to prohibiting the dissemination of ideas based on racial or religious superiority. Finally, he stated that ss. 15 and 27 of the *Charter*, in which the values of equality and multiculturalism are enshrined, strengthen the "substantial weight" to be given to the objective of preventing the harmful effects associated with hate propaganda.

98 In my view, all the above factors are relevant in assessing the importance of the objective of the impugned order. In the first place, they assert the fundamental commitment of the international community to the eradication of discrimination in general. Secondly, they acknowledge the pernicious effects associated with hate propaganda, and more specifically, anti-Semitic messages, that undermine basic democratic values and are antithetical to the "core" values of the *Charter.* The Board's order asserts a commitment to the eradication of discrimination in the provision of educational services to the public. Based upon the jurisprudence, Canada's international obligations and the values constitutionally entrenched, the objective of the impugned order is clearly "pressing and substantial".

99 The second part of the s. 1 analysis, the "proportionality test" involves three determinations: that the measure adopted is rationally connected to the objective (rational connection); that the measure impair as little as possible the right or freedom in question (minimal impairment); and that there be proportionality between the effects of the measure and the objective.

(1) Rational Connection

100 As noted by Ryan J. in the Court of Appeal, the Act in question is conciliatory in nature and makes no provision for criminal sanctions. It is, therefore, well suited to encourage reform of invidious discrimination. The Board focused on providing relief in crafting its order, and sought, as much as possible, to avoid punitive effects. The Board made a finding that s. 5(1) of the Act "guarantees individuals freedom from discrimination in educational services available to the public". In order to ensure a discrimination-free educational environment, the school environment must be one where all are treated equally and all are encouraged to fully participate. Teachers must ensure that their conduct transmits this message of equality to the community at large, and are expected to maintain these high standards both in and out of the classroom.

101 The Board held that the fact that the respondent publicly made anti-Semitic statements contributed to the "poisoned environment" in the school system, and that it was reasonable to anticipate that his statements and writings had influenced the anti-Semitic sentiment in the schools. As to the standard of proof required under s. 1, McLachlin J., in *RJR-MacDonald*, *supra*, stated that proof to the standard of science was not required, and accepted the civil standard of proof on

a balance of probabilities. In order to establish a rational connection between the impugned measure and its objective, scientific evidence need not be established. Similarly, in *R. v. Butler*, [1992] 1 S.C.R. 452, Sopinka J. accepted that if it was "reasonable to presume" that there was a causal relationship between the harm and the expression in question, then this was sufficient where a direct link could not be established. In this case, I think it is sufficient that the Board found it "reasonable to anticipate" that there was a causal relationship between the respondent's conduct and the harm -- the poisoned educational environment. In my view, this finding must depend upon the respondent's maintaining a teaching position. The reason that it is possible to "reasonably anticipate" the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove the respondent from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that the educational services are discrimination-free. The order seeks to remove the respondent from his teaching position through clauses 2(a), (b) and (c). These clauses are rationally connected to the objective of the order.

102 My concerns lie with clause 2(d) of the order, which I reproduce below:

> (2) That the School Board:
>
> . . .
>
> (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)*

I will deal with that part of the order under "minimal impairment".

(2) Minimal Impairment

103 In *RJR-MacDonald, supra,* at p. 342, McLachlin J. reasoned that an impairment must be minimal to the extent that it impairs the right no more than is necessary. She stated:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. . . .

104 In arriving at its order, the Board considered the alternatives available to remedy the discrimination. It concluded that the removal of the respondent from the classroom was "[t]he only viable solution" (p. 89). In the course of examining alternative solutions, the Board found that the situation could not be corrected through an apology and renunciation of his views by the respondent. Nor could it be corrected through continual monitoring of the respondent's classroom, as the Board considered the influence of a teacher to be "so much more complex than the

formal content of any subject matter taught by the teacher" (p. 89). The Board also rejected the exclusion of Jewish children from the respondent's class or school, emphasizing the importance of accessibility to schools within a public school system. Finally, it concluded that the situation could not be dealt with through monetary compensation to Attis for pain and suffering.

105 In making its order, the Board stated (at p. 88):

> 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.

The order, in clauses 2(a), (b) and (c), was carefully tailored to accomplish its specific objective, i.e. "to remedy the discriminatory situation in School District 15 created through the writings and publications of Malcolm Ross" (p. 85). Any punitive effect is merely incidental. In my view, clauses 2(a), (b) and (c) minimally impair the respondent's freedom of expression and freedom of religion. In relation to clause 2(d), however, I arrive at a different conclusion.

106 The Board found (at p. 89) that:

> Section 5 [of the Act] 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.

The Board, on the basis of the evidence before it, found that the respondent had to be moved out of his teaching position: by occupying a position of great influence, his presence contributed to a discriminatory educational environment. The Board did not find that the respondent's presence in a non-teaching position would compromise the ability of the School Board to create a discrimination-free environment. Indeed their order made provision for the possibility that the respondent would occupy a non-teaching position.

107 It may be that the continued presence of the respondent in the School Board produces a residual poisoned effect, even after he is removed from a teaching position, and it may be that this is what clause 2(d) seeks to address. Given the respondent's high profile and long teaching career, I acknowledge that the problem in the School District could remain for some time. However, the evidence does not support the conclusion that the residual poisoned effect would last indefinitely once Ross has been placed in a non-teaching role. For that reason, clause 2(d) which imposes a permanent ban does not minimally impair the respondent's constitutional freedoms. Clause 2(d) is not justified under s. 1.

(3) Proportionality Between Effects of Order and Objective

108 The deleterious effects of clauses 2(a), (b) and (c) of the order upon the respondent's freedom of expression and freedom of religion are limited to the extent necessary to the attainment of their purpose. The respondent is free to exercise his fundamental freedoms in a manner unrestricted by this order, upon leaving his teaching position. These clauses only restrict the respondent's freedoms to the extent that they prohibit the respondent from teaching, based upon

the exercise of his freedom of expression and freedom of religion. The respondent is not prevented from holding a position within the School Board if a non-teaching position becomes available; furthermore, he is to be offered a non-teaching position if it becomes available on terms and at a salary consistent with the position. In my view, the objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on the respondent produced by these clauses.

109 Given my conclusion that clause 2(d) fails the minimal impairment branch of the s. 1 analysis, it is unnecessary for me to consider it in relation to the proportionality branch. My conclusion, with respect to s. 1, is that clauses 2(a), (b) and (c) of the order are a justified infringement upon the freedom of expression and the freedom of religion of the respondent.

110 With respect to clause 2(d) of the order, this is an appropriate case in which to apply severance. The principle of severance may be applied to the order of an administrative tribunal on the same basis that the *Charter* applies to the order in the first place; any part of the order that is inconsistent with the *Charter* is beyond the jurisdiction of the Board and cannot stand. I would note, however, that severance may not be available in every case involving an administrative tribunal's order. The degree of tailoring of a tribunal's order to the individual case requires that it be clearly established that the part of the order sought to be severed does not interfere with the operation of the parts that remain. In this case, clause 2(d) is not so inextricably bound up with the valid clauses in 2(a), (b) and (c) that what remains will not independently survive. Thus, clause 2(d) will be severed from the

remainder of the order on the basis that it does not constitute a justifiable infringement of the *Charter* and is therefore in excess of the Board's jurisdiction.

IV- Disposition

111 In my assessment, the evidence reveals that the School Board discriminated within the meaning of s. 5(1) of the Act, with respect to educational services available to the public. The continued employment of the respondent contributed to an invidiously discriminatory or "poisoned" educational environment, as established by the evidence and the Board's finding that it was "reasonable to anticipate" that the respondent's writings and statements influenced the anti-Semitic sentiment. In my opinion, this finding is necessarily linked to the finding that the respondent's statements are "highly public" and that he is a notorious anti-Semite, as well as the supported view that public school teachers assume a position of influence and trust over their students and must be seen to be impartial and tolerant.

112 I have concluded that clauses 2(a), (b) and (c) of the Board of Inquiry's order are properly made within the Board's jurisdiction; any resulting infringement of the respondent's freedom of expression or freedom of religion is a justifiable infringement. Clause 2(d) of the order is not a justifiable infringement of the respondent's fundamental freedoms and is accordingly struck from the remainder of the order.

113 I would allow the appeal, reverse the judgment of the Court of Appeal and restore clauses 2(a), (b) and (c) of the order, with costs to the appellant Attis.

Appeal allowed with costs to the appellant Attis.

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