finetune the program in order to better attain the objective(s). Establishing or adding new objectives risks confusing the public and producing an inferior outcome to one involving setting up entirely new programs. Each program should be judged on its own merits and if its objective(s) no longer ranks (rank) high among government priorities, then the program should be either scaled back or terminated.

With unemployment rates in double digits and with the national unemployment rate exceeding 7 percent for almost 20 consecutive years and expected to remain above this level for the rest of this century, a sharply focused UI program not only is warranted, but also can play a key role in the inevitable reform of the social welfare system in Canada and in the reform of the current system of fiscal federalism.

Moreover, the UI system tends to transfer income from workers who are less prone to becoming and remaining unemployed to those who are more likely to become unemployed and remain unemployed for longer periods of time.

If every participant in the labour market faced the same probability of becoming unemployed, and when unemployed experienced the same duration of unemployment, there would be no need for UI as either an income redistribution or an insurance program. Individuals would adjust their savings behaviour accordingly and real wages would adjust in the labour market to reflect the same, anticipated unemployment experience.

But the burden of unemployment is not distributed equally among all participants on the labour market. Certain groups of individuals are more likely to become unemployed than others, and within these groups certain individuals are more likely to experience longer or more frequent spells of unemployment. Many within these groups are low-wage earners. Therefore, UI can spread the burden of unemployment by redistributing income and the redistribution of income is likely to be in the direction of low-income individuals and households.

Fred Lazar is an Associate Professor of Economics, Faculty of Administrative Studies and Faculty of Arts, York University. Economic Report is a regular feature of Canada Watch.

LEGAL REPORT

Freedom To Discriminate? The Malcolm Ross Case

by Bruce Ryder

Discrimination Versus Expression

Discrimination and expression are concepts that have demonstrated imperial tendencies in the Charter era. Discrimination now encompasses all rules or practices that have the effect of promoting group-based disadvantage, intentionally or unintentionally, discretely or systemically. Expression now encompasses all human activity that conveys a meaning short of violence. Discriminatory words and non-violent actions convey a meaning, and thus count as expression. If they have the effect of creating barriers to equality, they also count as discrimination. The area of overlap between discriminatory and expressive acts is thus large and growing, and subject to the contradictory constitu-

> *"A teacher in the public school system, like other professionals or holders of the public trust, can quite properly be expected to uphold the ideals of a secular, multicultural society, including a commitment to equality."*

Continued, see "Freedom to Discriminate" on page 80.

"Freedom to Discriminate," continued from page 79.

tional mandates of prohibition and protection.

Heated controversies at the clashing boundaries of freedom of expression and equality rights are increasingly common features of the Canadian legal landscape. One of the best examples of this clash, and of the lack of any consensus on the principles that ought to mediate it, can be found in the competing and diverse responses of the judges in the *Malcolm Ross* case.

Decisions in the Ross Case

Ross is a New Brunswick school teacher better known as an active propagator of anti-Semitic propaganda. Outside of the classroom, Ross has made a secondary career of hate promotion through the publication of books and articles positing, among other things, a Jewish conspiracy to destroy Christianity. After the local school board failed to take effective disciplinary action against Ross, a Jewish parent, David Attis, filed a complaint with the Human Rights Commission alleging that the continued employment of Ross deprived Jewish and other minority students of equal educational opportunity.

The board of inquiry member, Professor Bruce, found that Ross's publications and statements had "contributed to the creation of a poisoned environment" in the school district and had "greatly interfered" with the provision of education services to Attis and his children. As a result, the school board was ordered to transfer Ross to a non-teaching position, and to terminate his employment immediately if he published any further attack on Jewish people.

The four judges who heard appeals of the board's decision reached three separate results. On the first appeal, to the New Brunswick Queen's Bench, Creaghan J. upheld the removal of Ross from the classroom but struck down the "gag order" on the grounds that neither the complaint nor the evidence established that hate promotion by a person in a non-teaching position would have a negative impact on equal access to education services.

On further appeal to the New Brunswick Court of Appeal, a 2 to 1 majority of the court struck down the board's order in its entirety as a violation of Ross's freedom of expression guaranteed by section 2(b) of the Charter. Hoyt C.J. (Angers J.A. concurring) argued that the evidence failed to establish a "pressing and substantial" basis for interfering with Ross's freedom of expression outside of his employment responsibilities.

In a dissenting judgment, Ryan J.A. would have upheld the removal of Ross from the classroom and the gag order on the grounds that the "continued discrimination publicly promoted by Ross" was incompatible with public employment with the school board as "a role model to children." Hoyt C.J.'s majority opinion implicitly disagreed with the Bruce-Creaghan-Ryan holding that active and public hate propagandizing is incompatible with the fulfillment of a teacher's responsibility to accord his or her students equal access to education.

Expression and Public Office

There are a number of questionable features of the New Brunswick Court of Appeal decision that ought to be subject to a searching inquiry by the Supreme Court of Canada on appeal. One is the assumption that a teacher's activities outside of school can be safely ignored in assessing any impact on educational equality. The evidence of the perceptions and experiences of Jewish students indicated that the very public nature of Ross's hate promotion did in fact contribute to the poisoning of their educational environment. Fear and apprehension are not conducive to learning, but Ross's activities virtually ensured that Jewish students would experience these emotions on contact with him. Although the evidentiary basis for its conclusion was thin, the board of inquiry's assessment of the evidence left it with "no hesitation" regarding the discriminatory effects of his public hate promotion. This factual finding is insulated from judicial interference by the finality clause in the New Brunswick *Human Rights Act*.

Another problem is the too-simple equation of freedom of expression with the right not to be dismissed from public office by a human rights tribunal. A teacher in the public school system, like other professionals or holders of the public trust, can quite properly be expected to uphold the ideals of a secular, multicultural society, including a commitment to equality. In this sense, freedom of expression does not mean that the public expression of hate is irrelevant to the kinds of employment to which one is entitled. Thus, for example, the Court of Appeal decision does not mean that Ross has a *right* to be a teacher as well as a hate propagandist on the side. His removal from the classroom by order of the human rights tribunal may have been set aside, but the school board could almost certainly dismiss him from employment with just cause if he continues to violate the school board's multicultural policies and the New Brunswick teachers' Code of Professional Conduct. Moreover, such an action by the school board would not be subject to the *Charter of Rights and Freedoms*, unless it could be said to be dictated by government. Hoyt C.J.'s opinion leads to the odd conclusion that an employ-

ers' powers to take disciplinary action against employees appear to be much broader than the state's ability to sanction discriminatory actions by public employees.

Freedom To Discriminate?

Perhaps the most controversial element of Hoyt C.J.'s reasoning in the *Ross* case is the assumption that the Charter guarantee of freedom of expression is capable of protecting as fundamental rights activities that are prohibited by Canadian anti-discrimination statutes. In other words, in the *Ross* decision, freedom of expression has trumped the prohibition on discrimination. It is fair to say that this is not the usual understanding of how conflicts are resolved between expression and discrimination in human rights legislation.

Ordinarily, discrimination that is accomplished through expression is not a legally protected activity for that reason. If it were, legal prohibitions on discrimination would be ineffective. For example, prohibitions in Canadian human rights legislation on discriminatory signs, discriminatory employment advertisements, and sexual harassment all target activity that is often purely expressive. The fact that the statements "no Indians need apply" or "sleep with me or you're fired" express ideas has not prevented them from being sanctioned as discrimination. Presumably this is because preventing discriminatory effects is more important in a democracy than protecting the expression through which it is accomplished.

The question that arises, of course, is whether the type of expression at issue in *Ross* can be distinguished from other kinds of discriminatory statements that do not stand a chance of being protected as the exercise of Charter freedoms. Ross's public promotion of hate was found to have discriminatory effects, and this factual finding had to be accepted by the appellate court, so his case cannot be distinguished on that basis. The bottom line, then, is whether protecting anti-Semitic speech is more important than preventing its discriminatory effects. Is protecting anti-Semitic speech more important than, say, protecting the right to say "no Indians need apply"? Hoyt C.J. seemed to think so, since he euphemistically described Ross's views as "religious" views that are being suppressed because they are "not politically popular." This is obviously a value judgment. For others, anti-Semitism, far from being a politically unpopular idea, is an oppressive social practice that has a lengthy history associated with unprecedented violence. On this view, anti-Semitic speech should be no more entitled to immunity from prosecution under anti-discrimination law than other kinds of prohibited speech with discriminatory effects.

Bruce Ryder is an Associate Professor at Osgoode Hall, York University. Legal Report is a regular feature of Canada Watch.