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FREEDOM OF EXPRESSION IN THE PRIVATE WORKPLACE

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SOMMAIRE

The right to freedom of expression lies at the heart of many of the other human rights and freedoms upheld in Canadian society as inherent to a just and democratic value system. The workplace environment, like no other societal structure, constitutes an interactional forum wherein the actual exercise of freedom of expression by all parties consistently calls into play the dynamics of the traditional employer/employee relationship built on subservience and loyalty, and questions its precepts in the light of human rights considerations.

This memoir exposes the evolution of the law on freedom of expression in the Canadian private workplace, relying as well on the influence of international and American human rights instruments on Canadian adjudication. Initially perceived, amongst the array of other human rights and freedoms, as an implicit obligation to respect the individual or collective manifestation of one's opinions and viewpoints, freedom of expression has evolved to become the cornerstone of these other rights. The advent of human rights legislation, and in particular that of the *Canadian Charter of Rights and Freedoms* in 1982, has literally created a new sphere of activity with which the actors of the workplace must necessarily contend.

The scope of the present study is to examine how the courts have chosen to interpret the breadth of the protection offered to freedom of expression in the workplace environment as well as the corresponding limitations dictated by law, but also heavily influenced by a Canadian perception of what constitutes other equally laudable values meriting protection. Case law is replete with concrete examples involving the exercise of freedom of expression and the ensuing conflict with other guaranteed rights. This analysis attempts to circumscribe the vast array of forms of expression, particularly in the realm of employer/employee activities, in order to discern the guiding principles that emerge, and thus provide a portrait of the state of the law governing freedom of expression in the workplace.

Of particular interest, where restrictions are concerned, is an overview of the classical employer/employee subservient relationship and the origins of the quasi-absolute notion that employers have an overriding say in matters concerning their employees.

The concept of "whistleblowing" constitutes a relatively important exception to the restrictions imposed upon an employee's exercise of his/her freedom of expression, namely because it permits an employee to publicly denounce an employer who is infringing upon the law through its policies or practices. We will examine the evolution of this concept to examine whether it constitutes a veritable component of freedom of expression.

It is essential to note that this memoir analyzes principally freedom of expression issues, and not any of the correlated rights that often implicate this freedom in the area of labour relations, such as freedom of association or the right to a private life. In our opinion, these other rights and freedoms merit an independent analysis of their own, far beyond the scope of the present document.

The interest of a study of this nature lies in the fact that freedom of expression in the workplace has rarely been examined exclusively in a comparative context of this type. More often than not, the right to express oneself is considered in the overall portrait of human rights considerations, as an ancillary right to other prevailing and pertinent workplace issues. Furthermore, examining the issue from a comparative stance with other jurisdictions that have recently evolved considerably in the field of human rights provides an original perspective, for it permits us to envisage what may become of freedom of expression in the workplace in years to come.

RÉSUMÉ

Le travail, outre le fait qu''il constitue l'activité principale de la grande majorité des individus dans la société, représente également le forum primordial d'interaction entre travailleurs et donc l'endroit où les droits et libertés fondamentaux individuels de chacun s'exercent dans la collectivité. Il s'ensuit que l'institution du travail a été l'objet, ces dernières années, d'une analyse approfondie afin de déterminer l'étendue de la protection à offrir aux individus, à titre d'employés.

La relation traditionnelle employeur/employé ainsi que les relations de travail en général ont été substantiellement modifiées par l'arrivée et l'incorporation dans le droit canadien des principes de droits et libertés fondamentaux. Plus particulièrement, le droit à la liberté d'expression vient bouleverser la dynamique de subordination et de loyauté de la part de l'employé qui prévalait jusqu'alors dans le milieu du travail.

Ce mémoire expose l'état du droit de la liberté d'expression au sein de l'entreprise privée au Canada, en se fondant sur l'influence internationale qui a contribué considérablement à développer la position prise par les tribunaux canadiens vis-à-vis de cette question. Bien qu''initialement perçue comme imposant une obligation implicite de respecter la manifestation tant individuelle que collective des opinions et prises de position, la liberté d'expression est devenue la pierre angulaire des autres droits et libertés reconnus par la législation et les tribunaux. Ainsi, outre ses autres obligations habituelles, l'employeur doit dorénavant s'assurer que les droits et libertés fondamentaux de ses employés soient également respectés. Ces considérations ont littéralement transformé l'institution du travail et les rôles classiques attribués à chacun des intervenants.

Les instruments juridiques principaux qui édictent les droits et libertés fondamentaux au Québec, soit la *Charte des droits et libertés de la personne* du Québec ("*Charte québécoise*") et la *Charte canadienne des droits et libertés* ("*Charte canadienne*"), constituent les outils qui permettent le respect de ces principes que la société a jugés méritoires de protection. Plus particulièrement, ce sont les articles 3 de la *Charte québécoise* et l'article 2b) de la *Charte canadienne* qui établissent les normes en matière de liberté d'expression. Ces instruments quasi-constitutionnel et constitutionnel respectivement influencent directement les activités quotidiennes de l'employé et indirectement les relations de travail en général.

Bien que la *Charte canadienne* ne trouve pas application dans le cadre de litiges impliquant strictement des parties privées, la jurisprudence de la Cour suprême du Canada établit fermement que les valeurs qui émanent de cette Charte doivent servir comme guide, même en ce qui concerne des litiges entièrement privés. Aussi, le plus haut tribunal du pays a déjà établi que l'ordonnance de l'arbitre en matière de relations de travail est sujet à révision en fonction de la *Charte canadienne*. Ainsi, la jurisprudence abondante de la Cour suprême en matière de liberté d'expression, tant au niveau de la *Charte québécoise* que de la *Charte canadienne*, sert à établir les paramètres en fonction desquels les employeurs et employés doivent se comporter pour respecter les droits et libertés fondamentaux en matière de relations de travail.

Dans un premier temps, notre mémoire brosse un tableau comparatif des principes généraux qui émanent des juridictions canadiennes, européennes et américaines en matière de liberté d'expression. Notre étude se limite aux instances judiciaires pour ainsi ressortir un aperçu global de l'état du droit. De toute évidence, les manifestations d'expression au sein d'un lieu de travail sont très variées. Ainsi, l'expression peut se communiquer par une opinion politique ou autre, ou par le choix du port d'un certain vêtement. Par ailleurs, d'autres manifestations peuvent influencer directement l'obligation de l'employé de fournir une prestation de travail, telles qu'une grève ou des campagnes de boycottage. Une revue de la jurisprudence démontre que la Cour suprême du Canada s'est engagée, par son interprétation des instruments juridiques en matière de liberté d'expression,

à promouvoir une approche libérale qui englobe toute catégorie d'expression à prime abord comme étant protégée par les diverses Chartes. C'est par le biais des exceptions au droit de la liberté d'expression que le plus haut tribunal du pays a choisi d'établir les paramètres de l'exercice de ce droit. Un sommaire thématique de l'évolution de la jurisprudence de la Cour suprême conclut la première partie du présent mémoire.

Une analyse de l'influence des conventions internationales, notamment la *Convention (européenne) de sauvegarde des droits de l'homme et des libertés fondamentales,* fait également l'objet du premier chapitre de la présente étude. Ces précurseurs aux instruments juridiques canadiens exposent des engagements généraux aux droits et libertés fondamentaux au niveau international, y compris des ententes relatives à la liberté d'expression et à l'opinion individuelle. Nous soulignons le rôle de ces conventions internationales dans le forum canadien et adressons également un bilan des similitudes entre les deux régimes.

Nous terminons le premier chapitre de notre analyse en examinant l'approche des tribunaux américains vis-à-vis de la liberté d'expression au sein du milieu de travail. Cette fois-ci, c'est le secteur public qui fait l'objet d'analyse, compte tenu que la doctrine de "*employment at will*" prévaut dans le secteur privé. Cette doctrine édicte que les parties à un contrat de travail peuvent y mettre fin en tout temps sans motif. Les employés du secteur public, par contre, ont recours au *Bill of rights* qui offre une protection limitée à la liberté d'expression, à la condition qu'il s'agisse d'une question d'intérêt public et que l'exercice de cette liberté ne cause pas de bouleversements aux opérations de l'employeur. La jurisprudence en cette matière semble préconiser l'interprétation donnée par l'employeur quant à l'étendue de ces critères.

Nous abordons, dans le deuxième chapitre du mémoire, l'analyse du pouvoir élargi alloué à l'employeur d'imposer sa volonté sur ses employés en examinant la source du contrôle de l'employeur sur ses employés (Section 1) ainsi qu'une importante exception à cette autorité (Section 2). Plusieurs théories ont été développées pour servir comme fondement au pouvoir de l'employeur de dicter sa

volonté à ses employés. Bien que cette faculté d'imposer son autorité ait été interprétée comme étant absolue et d'une grande envergure, l'employeur fait face à plusieurs restrictions, tant intrinsèques qu'extrinsèques, dans l'exercice de son pouvoir. Cependant, une confusion entre les pouvoirs normatifs et disciplinaires de l'employeur résulte en une perception que le droit de l'employeur d'imposer sa volonté est innée, "naturelle" et tout à fait sans bornes.

Nous examinons également, par le biais d'un exemple fort percutant, les limites que peut subir la puissance de l'employeur de gérer son milieu de travail. En effet, bien que l'employé soit sujet à une obligation de loyauté irréprochable envers son employeur, le concept de "*whistleblowing*" assure que l'employé ne soit pas placé dans une situation où il doit choisir entre son propre intérêt à maintenir son emploi et les intérêts du bien-être de la société en général. L'employé qui dénonce son employeur sur la place public pour le non-respect de certaines de ses obligations soit légales ou morales, ne pourra faire l'objet de réprimandes ou de sanctions de la part de son employeur concernant ces agissements. Ainsi, la notion de "*whistleblowing*" sert à titre de protection contre le pouvoir disciplinaire de l'employeur dans de telles circonstances. Cependant, ce mécanisme doit être bien circonscrit afin d'éviter des situations où l'employé serait tenté d'utiliser ce moyen pour des fins autres que celles pour lesquelles il a été créé. Nous analysons ce concept dans le contexte québécois et suggérons des améliorations aux lacunes qui persistent dans ce domaine.

Puisque le milieu du travail est un lieu propice à l'exercice quotidien du droit à la liberté d'expression, nous considérons que le sujet abordé dans ce mémoire peut s'avérer de fort intérêt et d'utilité pour ceux qui s'intéressent à l'état du droit en matière de liberté d'expression au sein de l'entreprise privée. Bien qu'en constante évolution, la position prise par la Cour suprême du Canada en la matière préconise une approche libérale qui rend hommage et reflète la priorité donnée par notre société à l'avancement des droits et libertés fondamentaux. Nous osons espérer que le présent exercice puisse contribuer à cet avancement.

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INTRODUCTION

The workplace environment constitutes, for a large segment of society, the forum whereby the bulk of an individual's everyday activity is concentrated. Interaction with others, notably with co-workers and employers is intense and calls into play elements of individuality which occasionally come into conflict. The institution of work, translated for the most part into remunerated activity, is central to our societal structure. An individual's livelihood represents a source of satisfaction and accomplishment that contributes significantly to establishing his identity as a productive member of society. It is no wonder then that this sphere of activities has recently been the focus of much attention as society contemplates the protection to be afforded to individuals in their role as employees.

Labour relations have evolved considerably in the last decades and the advent of human rights legislation both on a national and international scale has played a pivotal role in determining the dynamics of the workplace as we know it today. Human rights considerations have dominated and transformed the traditional employer/employee relationship, based on the subservient role of the employee, in many ways, notably in that the employer must nowadays contend with the added obligation of ensuring that its employees' basic fundamental rights and freedoms are respected at the workplace.

At the centre of this evolution in Canada are the laws that embody the rights and freedoms which society has deemed meritorious of protection, that is the *Charter of Human Rights and Freedoms* of Quebec[1] (hereinafter referred to as the *Quebec Charter*) and *the Canadian Charter of Rights and Freedoms*[2] (hereinafter referred to as the *Canadian Charter*). These instruments guarantee several rights and freedoms that influence directly and indirectly labour relations in general and the individual employee's everyday activities. Of particular interest to the present study is the realm of freedom of expression, protected by Section 2 (b) of the *Canadian Charter* and

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1 R.S.Q., c. C-12.

2 *Canada Act 1982*, Schedule B, 1982 (U.K.), c.11.

Section 3 of the *Quebec Charter*, respectively. It is of utmost importance to delineate the application of these two pieces of legislation in order to fully comprehend the scope of the protection offered therein.

Strictly speaking, the *Canadian Charter* does not apply to litigation arising between private parties.[3] Thus, for this legislation benefitting from constitutional status to take effect, state action must be present in the form of a statute or other act involving the intervention of a government authority. At first glance, it would therefore appear that much of what transpires between a private employer and its employees would be excluded from constitutional protection. However, Supreme Court jurisprudence interpreting the *Canadian Charter* has confirmed that an order made by a labour adjudicator is subject to Charter scrutiny.[4] Appointed by an explicit legislative provision and deriving all of his powers from statute, this public official constitutes government authority in its broadest sense. In this manner, much activity involving labour disputes that would be excluded *a priori* from Charter application falls henceforth within its scope.

Notwithstanding the fact that the *Canadian Charter* requires state action in order to be invoked, this legislation has definite repercussions even in those cases where it does not apply, as illustrated by the following excerpt from the recent Supreme Court judgment in Hill v. Church of Scientology:

> "***Private parties owe each other no constitutional duties and cannot found their cause of action upon a* Charter *right. The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply,* Charter *rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with* Charter *values. It is very important to draw this distinction between* Charter *rights and Charter values. Care must be taken not to expand the application of the* Charter *beyond that established by s. 32 (1), either by creating new causes of action, or by subjecting all court orders to* Charter *scrutiny. Therefore, in the context of civil litigation involving only private parties, the* Charter *will "apply" to the common law only to the extent that the common law is found to be inconsistent with* Charter *values.***"[5]

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3 *Ibid*, article 32.

4 Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R.1038, 1077-1078.

5 Hill v. Church of Scientology [1995] 2 S.C.R. 1130, pp. 1170-1171.

On the one hand, Justice Cory emphasizes the parameters within which the *Canadian Charter* applies and even appears to disapprove of the Court's position adopted in Slaight Communications to the effect that an order emanating from an administrative tribunal would fall under Charter scrutiny. However, the emphasis put on Charter values as opposed to Charter rights implies, in our view, that underlying all litigation, including that between strictly private parties, is the necessity to respect the precepts advanced in the Charter. In other words, although an extension of the protection offered by the *Canadian Charter* is formally proscribed, the Supreme Court will examine all matters put before it in the light of Charter values nonetheless.

Application of the *Quebec Charter*, on the other hand, extends to all matters of provincial jurisdiction whether between private parties or involving government action.[6] Labour relations are thus subject to this quasi-constitutional law to the extent that the undertaking concerned falls under provincial competence. As pointed out by Robert Gagnon, the jurisprudence concerning the *Canadian Charter* has been deemed relevant in interpreting and applying values which are also contained in the *Quebec Charter*.[7]

The first chapter of our memoir is devoted to a comparative analysis of the interpretation given to freedom of expression by the Canadian, European and American jurisdictions. We have chosen to limit our study to the judicial instances in order to provide an overview of the principles that constitute the state of the law. Needless to say, the manifestations of freedom of expression in the workplace are ongoing and there are as many forms of expression as their are employees. Thus, the scope of expression can range from body language, mere words that communicate a personal opinion, political stance or artistic tendency to an employee's choice of clothing or body apparel. Although these types of expression may influence an employee's employment relationship, they may not have an actual incidence on his job

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6 See article 55 *Quebec Charter*; See Syndicat des communications graphiques, local 41-M v. Journal de Montréal, [1994] R.D.J., 456, p. 458.

7 R. Gagnon, Le droit du travail du Quebec: pratiques et théories, 3rd edition, Cowansville, Les Editions Yvon Blais, 1996, 21. A recent example of this tendency to extend jurisprudential interpretation of the *Canadian Charter* to the *Québec Charter* and vice-versa can be found in Libman v. Québec (Attorney-General) [1997] 3 S.C.R.569. See also Gauvin v. Tribunal du Travail, [1996] R.J.Q. 1603, p. 1608. (S.C., On appeal).

performance. At the other end of the spectrum lies expression related to collective working conditions which is usually manifested through strikes and boycott campaigns. The matters brought before administrative forums are numerous and varied with as many conflicting positions adopted by decision-makers.[8] We have thus chosen to concentrate our efforts on distinguishing the overriding principles that emerge from the higher courts in establishing a framework for freedom of expression adjudication.

A review of judgments delivered by the Supreme Court of Canada reveals this jurisdiction's commitment to adopting a "very broad interpretation of freedom of expression in order to extend the guarantee under the *Canadian Charter* to as many expressive activities as possible" as was recently stated by a unanimous Court in Libman v. Québec (Attorney General).[9] Exceptions to this broad and inclusive approach are considered under the restrictive clauses of both the Charters pursuant to an analytical framework established in an early case submitted to Charter scrutiny.[10] We will provide, in the first section, a synopsis of the Supreme Court of Canada's interpretation of the scope of freedom of expression as well as examine the precepts that have emerged concerning the exercise of this freedom in the workplace.

The influence of international conventions, notably that of the *Convention (European) for the protection of human rights and fundamental freedoms.*[11] (hereinafter referred to as the *European Convention*) is also addressed in the first chapter. Often drafted in broad terms that relay general commitments to fundamental rights and freedoms, international agreements are replete with references to freedom of expression and the right to an individual opinion. Considering the global economy and the increase in international relations and activity, these conventions often play a strategic role in the perception and image projected by a particular country. Although Canada's adherence to the dualist theory in international law requires that it adopt a particular agreement internally in order that it have force of law, oftentimes these conventions

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8 Indeed, a recent Court of Quebec judgment, Parent v. 9000-5489 Québec inc., DTE 97T-665, confirmed that dismissing an employer (a camp counsellor in this case) because he bore tattoos on his arms and chest was contrary to Section 3 of the *Quebec Charter*.

9 Libman v. Québec (Attorney General), *supra*, note 7, p. 591.

10 R. v. Oakes [1986] 1 S.C.R. 103.

11 213 U.N.T.S. 221 (1955).

constitute a moral obligation that precludes the necessity of a formal incorporation into domestic law.

Many similarities can be detected between the *European Convention* and the *Canadian* and *Québec Charters*. In particular, the restrictive clause in the former instrument allows for a similar approach as that adopted by Canadian courts regarding the scope of freedom of expression. Exceptions to the general rule of inclusion as protected expression are examined on a case by case basis, thus both jurisdictions avoid precedent based on the content or form of expression.

We have chosen to examine the American treatment of freedom of expression issues within the context of our section dealing with the public sector workplace because we are of the opinion that the American state of the law on the subject has evolved primarily within the public sector. Indeed, the employment at will doctrine whereby both parties to the employment contract can terminate the relationship at will still prevails in the private sector although some commentators would extend public sector considerations to this sphere of activities. Public employees in the United States can rely on the First Amendment of the *Bill of Rights*[12] to ensure respect of their freedom of expression in the workplace insofar as the matter involved is one deemed to be of public concern and that the exercise of such freedom does not cause disruptiveness in the workplace. The evolution of the case law has however resulted in increased discretion afforded to the employer in determining the subjective nature of these criteria.

The increased power afforded to employers brings us to the subject of our second chapter dedicated to examining the source of the employer's prerogative over its employees (Section 1) as well as an important exception to this employer control (Section 2). Various theories have been advanced to provide reasoning for the precept that an employer may impose its will over its employees, sometimes extending beyond even the parameters of the workplace. Although perceived by many as virtually

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12 U.S. Const., Amendment I (1791).

absolute and all-invasive, the employer's power encounters limitations both of an intrinsic as well as of an extrinsic nature.

The advent of the *Civil Code of Québec* has codified many notions governing employer/employee relations. In particular, the loyalty inherent in employee subordination is now incorporated in this legislation and the employee is expected to rigorously defend the interests of his employer while avoiding all situations involving potential or actual conflicts of interest. However, this overriding concept of fidelity to one's employer is subjected to an important exception, that of employee "whistleblowing" which we will examine in the last section.

It seems reasonable that an employee should not suffer retaliation for exposing an employer's disrespect of its legal or moral obligations, that is for blowing the whistle on an employer's illicit activities. However, considering the delicate nature of the public denunciation of one's employer, it would be preferable that a formal mechanism be in place to avoid all ambiguity surrounding the motives for public exposure and also for evaluating an employee's personal interests. An employee should not be put in a position whereby he must decide between the public's interest or his own personal interest in maintaining his job. On the other hand, an employee should not be permitted to manifest discontent with an employer's treatment by publicly exposing issues that are not meritorious of this forum. We will provide an overview of the prevailing situation in Québec and suggest remedial action that we consider to be presently lacking.

Freedom of expression has been afforded wide protection by the Canadian judiciary system. The interest of this study lies in the fact that the workplace provides a host of opportunities for expressing one's opinion, for establishing one's identity. Furthermore, the right to exercise one's freedom of expression is of fundamental importance in the advancement of the human race. It is of equal importance that the powers conferred by our legislators through the *Canadian* and *Québec Charters* be paid more than lip service to, for as eloquently put by John Stuart Mill, one of the great thinkers of our time, the expression of an opinion can only benefit all:

"***But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race, posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.***"[13]

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13 J.S. Mill, On Liberty, New York, W.W. Norton & Company, 1975, p. 18.

I. THE EXERCISE OF FREEDOM OF EXPRESSION IN THE WORKPLACE

Embellished by some and thwarted by others, the right to freedom of expression in the workplace has been omnipresent in various representative forms for several decades. Recognized for centuries as a salient feature of democracy, it has vigorously been adopted in Canada as a distinctive characteristic of its parliamentary system. Although the propagation of freedom of expression rights in the workplace has been markedly enhanced by the advent of human rights legislation, this fundamental concept has long since been accepted as a part of Canadian democracy dating back prior even to the enactment of the *Canadian Bill of Rights* in 1960.[14] The protection afforded to freedom of expression in Canada, and more particularly in Québec bears witness to the importance of this fundamental right in our society and is reflected in legislation of constitutional or quasi-constitutional stature. The *Canadian Charter* sets forth at article 2:

> ***"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;"***[15]

whereas the *Québec Charter* enunciates a similar protection at article 3:

> ***"3. Every person is possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly, and freedom of association."***

These fundamental freedoms are somewhat tempered by limitative dispositions, article 1 of the *Canadian Charter* and article 9.1 of the *Quebec Charter* respectively,

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14 8-9 Eliz.II, c.44; R.S.C. (1985), App.III. See Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573, at p. 583; Switzman v. Elbling [1957] S.C.R. 285; Saumur v. Ville de Québec [1953] 2 S.C.R. 299; Reference Re Alberta Statutes [1938] S.C.R. 100.

15 A similar protection is afforded at the federal level by Sections 1d) and e) of the *Canadian Bill of Rights*, *ibid*, albeit of a more limited nature and context.

which serve to balance competing rights as well as to offset the apparently absolute nature of the guaranteed protection of freedom of expression:

> "*1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*"
>
> "*9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.*"
>
> "*In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law*".

The workplace constitutes an environment whereby situations calling into play the dynamics of freedom of expression abound. Firstly, the two-tiered employer/employee relationship can create episodes of conflict between individual rights and freedoms and obligations arising out of the employment contract, for both the employer and the employee. Furthermore, collective rights, which embody a particular force due to the sheer magnitude of numbers, may potentially clash with individual freedoms and, as is more frequently the case, with employer rights or contentions. Indeed, the courts have had to, more often than not, creatively balance rights inherent to all of these relationships in resolving conflicts brought before them. Expressing one's freedom thus becomes a relative exercise contained by the adage that one's freedom ends where it either harms or infringes upon the freedom of another.[16]

The jurisprudence of the Supreme Court of Canada is replete with examples of alleged breaches of an individual's freedom of expression generally, and more particularly with respect to the workplace environment. Since the adoption of the *Canadian Charter*, the highest court of the land has attempted to define what is meant by freedom of expression in the Canadian context as well as devising parameters to circumscribe this freedom in order that its functionalism be fully understood. The general precepts have been extended to the labour relations context thus rendering the

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16 J.S. Mill, On Liberty, *op. cit.*, note 13, p. 53.

dynamics of managing the workplace somewhat of an easier task. However, much remains to be done in order that the spirit of human rights legislation is translated into concrete action that respects the ideology behind this body of law.

A. THE PRIVATE WORKPLACE AND THE ACTIVITIES INVOLVED

1. CANADA SUPREME COURT ADJUDICATION ON THE SCOPE OF FREEDOM OF EXPRESSION

As was previously mentioned, the Supreme Court of Canada has had numerous occasions to address the issue of freedom of expression. It is pertinent and necessary, we believe, to examine in this section not only the case-law pertaining to workplace issues but also to analyse the principles set forth by the highest court of the land regarding freedom of expression in general as these serve to elaborate the interpretation given by Canadian courts to Charter issues and, above all, provide guidelines as to what falls under Charter protection in all spheres of activity. Furthermore. reliance on general freedom of expression jurisprudence is necessary for, as previously mentioned, only a handful of cases touching upon the subject in the realm of labour relations are actually ever heard by the Supreme Court due to the requirement of the presence of state action in order for Section 2 (b) of the *Canadian Charter* to apply. An analysis of the jurisprudence emanating from this Court reveals that several years transpired following the coming into force of the *Canadian Charter* before the Supreme Court developed a systematic framework in which to examine factual issues relating to freedom of expression. Indeed, it was in 1989 in Irwin Toy Limited v. Québec[17] that a two-step examination was established and henceforth used to define the scope of Section 2(b) of the *Canadian Charter*. The facts at issue were not related to the realm of labour relations. However, the test elaborated has been applied to adjudicate issues relating to freedom of expression in the workplace.

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17 [1989] 1 S.C.R. 927.

In Irwin Toy, the Court was asked to examine the validity of a legislative provision that prohibited advertising aimed at persons under thirteen years of age in light of Section 2(b) of the *Canadian Charter*. Justices Dickson, Lamer, and Wilson, writing on behalf of the majority, stated that the first question to be addressed with respect to the issue was whether the human activity in question constituted expression under Section 2(b). It was determined that the legislator's intention was to afford a broad and inclusive interpretation of this term. Thus, any and all activity that conveys or attempts to convey meaning must be considered to have expressive content and *prima facie* falls within the ambit of the protected freedom.[18] Once it is determined that the activity in question benefits from constitutional protection, the second step of the analysis focuses on whether the purpose or effect of the government action in question[19] is to restrict freedom of expression. In order to demonstrate that the effect of the government's action was to restrain freedom of expression, the onus is on the plaintiff to demonstrate that the expression for which protection is being claimed contributes to the goals of pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.[20]

Human activity that is deemed to be protected expression according to the analytical framework set forth above is then submitted to an analysis under section 1 of the *Canadian Charter* prior to it being declared unconstitutional.[21] This, in order to determine whether the restriction on one's freedom of expression is justifiable in a free and democratic society. The vigorous test adopted by the Supreme Court and known today as the Oakes test[22] attempts to determine whether the impugned legislation or government action, although infringing upon an individual freedom can be "saved" due to certain pre-established criteria that render it justifiable. Thus, the legislation in

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18 *Ibid*, p. 969.

19 Government action, necessary for the application of the *Canadian Charter*, is often in the form of a legislative provision. However, in the field of labour relations, it can take the form of an arbitration award or other order where the judiciary body owes its existence to statute. See Slaight Communications v. Davidson, *supra*, note 4.

20 *Supra*, note 17, p. 976.

21 The analysis under Section 9.1 of the Québec Charter is to be considered similar to a Section 1 analysis for the purpose of this study. See *supra*, note 17, p. 980.

22 This test was first established in R. v. Oakes [1986] 1 S.C.R. 103.

question must be considered to have a pressing and substantial objective that merits overriding the constitutional protection accorded to freedom of expression. Furthermore, various aspects are examined to ensure that the means used are proportional to the end, that is to the objective envisaged. More precisely, three factors are taken into consideration: whether there is a rational connection between the means proposed and the actual objective of the legislation, whether there is a minimal impairment of the right or freedom in question by the means chosen, and finally whether the effects of the measure are deleterious to the point that they are not justified by the purpose for which they were created.

Although not the first case to extensively deal with the issue of freedom of expression, Irwin Toy has certainly become the cornerstone of freedom of expression judgments in Canada and the test therein adopted has continued to play a central role in the adjudication of issues dealing with this theme. Applied to the facts at hand, the Court concluded that the proposed limitation on freedom of expression was justified pursuant to a Section 1 analysis. Of particular interest is Justice McIntyre's scathing dissent whereby the case is made against justifying limitations on freedom of expression except in limited circumstances of urging and compelling nature. Similar to the "fortress model" adhered to by the American courts whereby no limit to freedom of expression is tolerated[23], Justice McIntyre's reasoning focuses on the dangers of limiting freedom of expression and concludes at p. 1008 of the judgment:

> ***"It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited".***

This judgment equally introduced the sole exception that has been explicitly pronounced by the Court to this day as to what the term "expression" encompasses. The Court expressly excludes violence from the protection guaranteed by Section 2(b), at page 970 of its reasons:

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23 The American model has consistently been rejected by Canadian courts. See for example Larose v. Malenfant, [1988] R.J.Q. 2643 (C.A.).

> ***"While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee."***

The singling out of a particular act as an exclusion from the scope of the protected freedom has been somewhat criticized.[24] According to certain authors, considerations of this nature fall into the category of limitations and should be analyzed under this light, rather than stating that violence does not convey meaning or a message, as exclusion implies. Indeed, as has been pointed out, this would be akin to judging the content of the message being relayed, something that the Court emphatically proscribed in Irwin Toy[25] and subsequent judgments[26]. Furthermore, since violence was not an issue in the facts of the case at hand, it appears far-fetched to make pointed reference to the issue and specifically exclude it from protection. In doing so, the Court gave significance to an exception, even though this may not have been its intention. Possibly in order to restrict a broad application of this exclusion, the Court found it necessary in later judgments to affirm that the exception for violence was limited to expression involving physical harm only[27] and could not extend to the written or spoken word.

The analytical framework developed in Irwin Toy has been applied to various factual situations by the Supreme Court, both within and outside the workplace environment. As can be observed in the case law to this date emanating from the highest Court of the land, particular emphasis has been afforded to maintaining the scope of the freedom of expression as broad as possible, this due to the fact that Section 1 has served as a vehicle for addressing individual behaviour and situations.

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24 J. Cameron, "The original conception of Section 1 and its demise: A comment on *Irwin Toy Ltd.* v. *A-G of Québec* (1989) 35 *McGill LJ* 253, p. 268; D. Lepofsky, "The Supreme Court's Approach to Freedom of Expression- *Irwin Toy* v. *Québec*- and the Illusion of Section 2 (B) Liberalism (1993) 3 *Nat'l J. of Const.Law* 37, p. 52; R. Moon, "The Supreme Court of Canada on the structure of freedom of expression adjudication" (1995) 4 *University of Toronto LJ* 419, p. 428.

25 *Supra*, note 17, p. 969.

26 See for example R. v. Keegstra, [1990] 3 S.C.R. 697.

27 *Ibid.*

(a) Silence as a form of expression

Less than a week after rendering the judgment in the Irwin Toy affair, the Supreme Court was called upon to deliver its decision and reasons in another matter involving freedom of expression, this time in the context of the workplace. At issue in Slaight Communications Inc. v. Davidson[28] was whether a labour adjudicator's orders to provide remedy following an unjust dismissal in the form of a letter of recommendation with specified content as well as a dictated response for all requests for information constituted an infringement on the employer's freedom of expression. Curiously enough, although the Irwin Toy decision had been rendered, no reference was made to the analytical framework established therein, although this may be due to the fact that Slaight Communications was heard prior to Irwin Toy. The Court therefore cursorily and unanimously concluded that the employer's freedom of expression was violated without analyzing the questions of scope put forth in Irwin Toy although they differ in opinion as to whether the infringement could be justified under a Section 1 analysis.

In overturning the unjust dismissal of Mr. Davidson, adjudicator Joliffe proceeded to order that the employer issue a letter of recommendation outlining factual issues as well as mentioning the decision of the adjudicator to the effect that the termination of Mr. Davidson had been an unjust dismissal. Furthermore, the employer was ordered to limit any and all communication to queries concerning his former employee by providing a copy of the letter of recommendation. As previously mentioned, the principal discord between the Justices of the Supreme Court surrounded the qualification of the limitations imposed rather than the nature of the protected expression. This is possibly due to the fact that what was at issue in this case was not so much the liberty of a particular form of expression but rather the imposition of

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28 *Supra*, note 4.

expression or in other words the freedom to remain silent as underscored by Justice Lamer in his dissent[29]:

> ***"There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression."***

No further examination of the nature of the type of expression that was seeking to be protected is offered by the Court. Indeed, the focus of the majority judgment delivered by Chief Justice Dickson, at the time, is on whether the infringement on the employer's freedom could be justified in a free and democratic society, thereby resorting to the classical Section 1 analysis commonly known as the Oakes test and referred to previously. The Court concluded that the orders in question were "saved" under a Section 1 analysis and constituted a minimal impairment of the employer's rights.

It is in the reasons of the dissent that one finds certain guiding principles that permit a more extensive framework for qualifying the scope of this particular form of expression, that is the right to limit what one expresses or to remain silent. To counter the argument put forward by the appellant that the letter of recommendation ordered by the adjudicator contained only statements of fact and therefore did not constitute a serious breach of the employer's freedom, Justice Beetz condemns the practice of attributing certain statements, factual or not, to one who doesn't necessarily believe in their veracity. This would be akin to forcing the author of these statements to telling a lie, that is to affirming statements that he sincerely does not believe in. As Justice Beetz eloquently puts it, the gravity of a violation of the freedom of expression of this sort should not be undervalued:

> ***"The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom expression.***

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29 *Ibid*, p. 1080.

> ***It is one thing to prohibit the disclosure of certain facts. The prohibition constitutes a* prima facie *violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the Charter. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression,....In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the Charter."***[30]

Although in disagreement with Justice Beetz regarding the first order, Justice Lamer writing his own reasons in dissent holds a similar viewpoint with respect to the second order prohibiting the employer from freely answering requests for information regarding his former employee. The fact that one is not allowed to comment on the contents of a dictated letter could be construed as meaning that one is in agreement with its contents "by implication" and this is considered by Justice Lamer to be highly unreasonable and contrary to the guarantee of freedom of expression[31].

The Supreme Court had occasion to address the issue of silence as a form of expression in a pre-Charter case that involved similar facts[32], although the majority in Slaight Communications distinguished the two cases and arrived at different conclusions. Following an upheld unfair labour practices complaint, the National Bank of Canada brought to appeal certain of the remedies ordered by the Labour Relations Board, namely those involving the sending of a letter to all employees of the Bank with a copy of the Board's decision and the depositing of sums of money for a determined period of time in order to further certain objectives of the Code. The said letter was to be signed by the president and chief executive officer and its contents were to be dictated by the Board. It was held *per curiam* that the remedy involving the depositing of sums of money into a trust fund for the benefit of all employees in furthering the objectives of the Code was in no way related to the alleged unfair labour practice in that the funds were intended to benefit even employees that were not implicated in the Bank's wrongdoing. Since the letter's principal issue involved the announcement of this trust fund, it was equally set aside for the same reasons.

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30 *Ibid*, p. 1061.
31 *Ibid*, p. 1075.
32 National Bank of Canada v. Retail Clerks' International Union [1984] 1 S.C.R. 269.

Justice Beetz, although agreeing with the conclusions arrived at by Justice Chouinard, submitted additional reasons on his behalf and that of his brothers Estey, McIntyre, Lamer and Wilson condemning the totalitarian and coercive nature of the orders in that no mention is made that both were initiatives of the Labour Board. The fact that it may be implied that these actions reflect the viewpoints of the Bank or its management personnel and that they have no way of modifying this impression without infringing the orders which specifically state that no alteration of the said letter was allowed, render both orders contrary to the tradition of a free nation such as Canada[33]and for these reasons must be set aside.

Although the facts in the case at bar preceded the advent of the *Canadian Charter*, passing reference is made to this constitutional legislation by Justice Beetz who stipulates that the guarantees of freedom of thought, belief, opinion and expression necessarily and *a fortiori* imply the prohibition of compelling anyone to hold or express opinions that are not his own.[34]Surprisingly enough, the Court found reason to distinguish this case from Slaight Communications, *supra*, on the basis that the compelling nature of the orders in the first case was aggravated by the fact that the letter was to be widely diffused to all employees and management personnel which was not the case of the letter of recommendation in Slaight Communications. Furthermore, then Chief Justice Dickson underlines the fact that the issues raised in the letter of recommendation in the latter case were purely factual and uncontested, thereby differentiating the two cases.

It is difficult to reconcile this stance considering that in both cases, the contents of the said letters were dictated by third parties in the form of orders following adjudications. To assert that factual issues were uncontested is somewhat understating matters in that the employer may have, for reasons entirely unrelated to his belief in their veracity, acquiesced to certain facts for the purposes of the particular hearing in question. Furthermore, one could equally conclude that the National Bank acquiesced

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33 *Ibid*, p. 295.
34 *Ibid*, p. 296.

to the facts stipulated in the letter to be sent to its employees as it had admitted to committing the offenses[35] accused of and had appealed only certain of the remedies ordered by the Labour Board. Finally, the fact that the letter of recommendation was to be handed out in response to all queries regarding the former employee in Slaight Communications is far more exacerbating, in our opinion, than being compelled to mail a letter to all employees internally, since they were most probably made aware of the Labour Board's decision and the factual issues involved during the course of the hearings.

A recent landmark judgment involving tobacco advertising legislation in RJR-Macdonald Inc. v. Canada (Attorney General)[36]addresses constitutional issues that have clearly enunciated the Supreme Court's viewpoint on silence as a form of expression. The complex and drawn-out legal battle focused on several legal topics, namely on the validity of all or part of the *Tobacco Products Control Act* which called for a total ban on advertising in the Canadian media as well as imposing upon manufacturers the obligation of printing unattributed health warnings on the packaging of tobacco products. Of particular interest for the purposes of our analysis are the questions involving the constitutionality of the above-mentioned legislation in light of Section 2(b) of the *Canadian Charter*. Although the Court was severely divided on other constitutional issues as well as on the final decision regarding whether the legislation in question constituted a justifiable infringement of the appellant's freedom of expression, it unanimously reiterated the principle set forth in Slaight Communications by Justice Lamer to the effect that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things".[37]

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35 *Ibid*, p. 282.

36 [1995] 3 S.C.R. 199.

37 *Ibid*, pp. 320 and 326. Although Justice Dickson at p. 320 attributes this statement to the Court in Slaight Communications , Justice Lamer's reasons (at p.1065 and following of the judgment in Slaight Communications) were written in dissidence since the Court concluded in the Slaight Communications case that the infringement was reasonable and justified in a free and democratic society.

The majority[38] concluded that the impugned legislation did not satisfy the analysis pursuant to Section 1 of the *Canadian Charter*, primarily due to the fact that the Act did not minimally impair the appellant's freedom of expression rights. Confirming the Court's commitment to upholding silence as a form of expression and above all proscribing behaviour on the part of a government authority that would attribute certain opinions or viewpoints to unwilling authors, Justice McLachlin, writing on behalf of the majority, decided at page 326 of the judgment that:

> ***"The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringement of the right to free expression guaranteed by s.2 (b) of the Charter."***

Attributing statements or opinions to involuntary authors has consistently been proscribed by the Supreme Court and although the issue of "silent" expression has come before the Court on rare occasions or been treated in *obiter*, the Court has repeatedly condoned legislation or other government action that has as its purpose an imposition of this nature. This view appeared to be somewhat tempered by Justice Wilson's dissident opinion in a 1991 decision, Lavigne v. Ontario Public Services Employees Union[39], although the majority decision in RJR-Macdonald has undoubtedly restored the Court's commitment to protecting this form of expression. In the former case, the plaintiff argued that his freedom of expression was infringed by his being compelled to pay union dues. The issue was treated as a secondary argument for the case primarily dealt with the freedom of association. Wilson J., writing in dissent on behalf of Justices L'Heureux-Dube and Cory on this point, seemingly questions whether the analytical framework set forth in Irwin Toy would apply in the context of "forced" expression.[40] This is curious indeed as the Court had previously dealt with compelled expression, namely in Slaight Communications and did not in any way seem to imply that it would not enter into protected freedom *a priori.*

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38 Justices Lamer, Sopinka, McLachlin, Iacobucci and Major. Despite agreement on the final disposition, Justices McLachlin, Iacobucci and Major gave separate reasons motivating their decisions.

39 [1991] 2 S.C.R. 211.

40 *Ibid,* p. 266.

Once it is affirmed that no apparent motives exist to exclude this form of expression from consideration under Section 2(b), the issue of whether silence is protected under the constitutional guarantee is deftly skirted by Justice Wilson in the following passage, at p. 270, where she attempts to make a distinction between the right to remain silent and that of being forced to say something:

> ***"I do not consider it necessary in this case to decide whether freedom of expression under s. 2(b) encompasses a right not to express oneself at all on an issue since it seems to me clear that the essence of Mr. Lavigne's complaint is not that he wishes to take a neutral or no position in relation to some of the causes supported by the Union but that he is vigorously opposed to some of them and objects to being compelled, as he says, to be identified with them through the payment of the equivalent of union dues. His objection, as I understand it, is to being compelled to say something rather than to being denied the right to say nothing."*** (Our emphasis).

This reasoning, far from casting new light on the debate, serves only to confuse the issue in our view. The obligation to say something is for all intents and purposes the flip side of the coin of the right to say nothing. The non-contribution to union dues would have reached either of these objectives and the plaintiff was in no way asking to vehemently show his opposition by a declared negative action or vice-versa. Justice Wilson proceeds, after concluding that both actions constitute expressive activity, to rigorously apply the analysis in Irwin Toy. Based on the fact that the government action in question i.e. the Rand formula, is not deemed to have as its purpose the control of the conveyance of meaning, the dissent concludes that the plaintiff had not proved that the activity in which he wished to engage contributed to the goals inherent to the protected guarantee of freedom of expression.

Justice Wilson attempts to introduce an additional dimension to the test established in Irwin Toy. Indeed, it is determined that since the payment of union dues does not prevent the plaintiff from denouncing his opposition through other means or compel him from remaining silent in other forums, the government action cannot really be seen as preventing expression.[41] In our view, this line of reasoning would set a dangerous precedent if allowed to be developed as it implies that the issue of scope to

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41 *Ibid*, p. 281.

be decided under Section 2 would not be decided on the merits of the activity being scrutinized but rather on its potential effects or whether other means exist that could possibly alleviate the damage caused by impinging on one's freedom. This would result in an onerous burden placed on the plaintiff and furthermore is not in line with the reasoning adopted in Irwin Toy of affording a broad interpretation to the scope of the guaranteed right under Section 2(b).

(b) Activities within/outside the workplace

Keeping in line with general labour litigation, Charter jurisprudence specifically addressing work environment issues distinguishes between activities carried on within the workplace and those outside of the workplace, on so-called off-duty time.[42] Labour arbitration has traditionally applied different considerations when meting out discipline for behaviour occurring on company premises during work hours rather than on strictly private time. The tendency has been to somewhat excuse or alleviate the seriousness of certain forms of misconduct when it is determined that they took place outside of the work premises. However, the Supreme Court has recently tempered this distinction[43] and has implied that it is not fundamental, in certain circumstances, in deciding the severity of discipline to be imposed for an employee's misconduct.

Freedom of expression adjudication following Irwin Toy has, in general, strictly adhered to the guidelines elaborated in this decision. In the first Charter judgment to deal directly with employee freedom of expression within the workplace, R. v. Keegstra,[44] the Court was called upon to examine a schoolteacher's conduct within the classroom, namely the teaching of hateful propaganda regarding Jews to his students. The teachings constituted a reflection of Mr. Keegstra's personal opinions and formed the basis of student evaluation. Reviewing the principles initially set forth in Irwin Toy,

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42 See for example CBC v. Canada (Labour Relations Board) [1995] 1 S.C.R. 157.
43 Toronto (City) Board of Education v. O.S.S.T.F., District 15 [1997] 1 S.C.R. 487.
44 [1990] 3 S.C.R. 697.

Justice Dickson, on behalf of the majority, reiterates the Supreme Court's commitment to the values underlying freedom of expression as well as emphasizing the liberal interpretation to be afforded the scope of the guarantee protected under Section 2(b) of the *Canadian Charter*. Of significant importance in the Keegstra affair is the enunciation of the principle that the message being conveyed cannot be judged on its contents as well as the clarification of the violence exception previously established.

Although the type of expression, i.e. hate propaganda, for which the plaintiff was seeking protection could be considered hideous and repulsive for many, the Court insists that it suffices that it be established that the proponent of hatred is attempting to convey a meaning for this form of expression to be considered protected.[45] Judgment on the contents of the message being conveyed cannot be taken into consideration when evaluating the breadth of the scope of the protection afforded as this would be going beyond the parameters established by the Court in earlier jurisprudence. As will be witnessed, the Court prefers examining issues pertaining to exclusion as limitations pursuant to Section 1 of the *Canadian Charter* thereby apparently maintaining a very broad and inclusive approach to the value of freedom of expression. Pronouncing itself on the second part of the analysis, the Court concluded that the impugned legislation directly attempted to curb particular meanings seeking to be expressed, i.e. hateful propaganda, and as such clearly had as its purpose the suppression of expression , hence meeting the second requirement of the Irwin Toy test.[46]

As for the violence exception mentioned in several previous judgments[47] and explicitly emphasized in Irwin Toy although violence was not at issue in this latter case, Justice Dickson considers that the communications involved do not constitute violence. Irwin Toy restricts the exception to forms of expression involving physical harm and the Court refuses to extend this definition by analogy to threats of violence, for this would imply exclusion based on the contents of the message being conveyed.

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45 *Ibid*, p. 729.

46 *Ibid*, p. 730.

47 Dolphin Delivery, *supra* at note 14; Reference Re ss. 193 and 195.1 (1)(c) of the Criminal Code(Man.) [1990] 1 S.C.R. 1123; Rocket v. Royal College of Dental Surgeons of Ontario [1990] 2 S.C.R. 232.

Furthermore, Justice Dickson finds it necessary to qualify the comments made regarding violence in Irwin Toy by affirming that it should be emphasized that "no decision of this Court has rested on the notion that expressive content is excluded from s.2(b) where it involves violence".[48] The Court thus appears to go back on earlier statements opening the door to potential exclusions by analogy and confirms the broad and inclusive nature of the guarantee, relegating the balancing of competing rights to analysis under Section 1. Indeed, the Court reaffirms its position to this effect, in the following passage by Justice Dickson, at page 734 of the judgment:

> ***"It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates the preferable course is to weigh the various contextual values and factors in s.1."***

The Court's approach to the violence exception in Keegstra is an indication of the difficulty inherent in establishing parameters of scope to what constitutes protected expression under the *Canadian Charter*. Indeed, the Court, after introducing an exclusion, feels the need to hastily clarify and restrict the scope of the exception. In this case however, the distinction between physical acts of violence and threats of violence is insufficient to clearly define what precisely is excluded from exception. Many may venture to say that the great majority of violent threats enter into the realm of violent acts if these are to be judged by the damage caused by apparently innocuous statements. Moreover, the context of hate propaganda is rife with examples of provocative comments and/or threats, intent upon inciting their audience to action rather than to objective reflection. It appears therefore inappropriate for the Court, in the particular context of hate propaganda, to launch a message to the effect that threats of violence cannot be assimilated to acts of violence. In her dissenting opinion, McLachlin J considers that acts of violence encompass threats of violence, although she concludes that Mr. Keegstra's activities do not fall into either category and thus are not to be excluded from protected expression.

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48 *Supra*, note 44, pp. 731-732.

The employment context as such was not examined in Keegstra as the appeal was against a conviction pursuant to the Criminal Code pertaining to hate propaganda. Although the plaintiff was dismissed from his position due to his actions, the circumstances surrounding the dismissal and the impact on the plaintiff's freedom of expression were not addressed. More recently, the Court was called upon to examine a factual situation in Ross v. New Brunswick School District No. 15[49] that bore significant resemblance to the Keegstra affair and that brought into play this time the workplace environment and its impact on an employee's claims of freedom of expression.

The plaintiff in Ross, a public schoolteacher, was the subject of a Human Rights Board of Enquiry order directing that the School Board which employed him discipline him for anti-Semitic behaviour carried on by the employee outside of the classroom. More particularly, the plaintiff had for years communicated, through writings and public statements, his aversion to Jewish persons, and this was passively tolerated by his employer. Following a complaint to the Human Rights Commission by the parents of a student, the School Board was convicted of endorsing the plaintiff's activities by its indifference and ordered to place Mr. Ross on a prolonged period of leave of absence, appoint him to a non-teaching position if one became available and finally to terminate his employment at the end of the leave of absence if a non-teaching position had not been offered and accepted.[50] At issue in the appeal before the Supreme Court was the constitutional validity of these orders in light of the plaintiff's right to freely express himself and to manifest his religious beliefs.

Once again the Court proceeded with a broad and liberal approach to what constitutes protected expression. A brief overview and application of the Irwin Toy test permitted the Court to unanimously conclude that Mr. Ross' activities constituted protected expression and the focus was quickly reverted to the contextual analysis to determine whether the order could be justified and thereby saved under Section 1 of the *Canadian Charter*. The liberalism of the Supreme Court is curtailed at this phase, as has

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49 [1996], 1 S.C.R.. 825.
50 *Ibid*, pp. 838-839.

been the case in nearly all freedom of expression adjudication to date and the balancing of this individual right with other community rights resulted in the contested government action being restored.

The employment context was taken into consideration under the Section 1 analysis, that is examined as a contextual issue and weighed against other factors to determine whether the orders deemed to be unconstitutional could be saved. The traditional private/public distinction[51] is adopted by Justice LaForest on behalf of the Court:

> ***"...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".***"[52]

Beyond their role as employees of the State, it was considered that teachers were also employees of particular school boards that had their own *modus operandi* with which its employees were expected to conform. In particular, the mandate of the school board for which the plaintiff worked called for a school system free from bias, prejudice and intolerance which clearly had to be weighed against the individual claims of Mr. Ross to express his own views and to manifest his personal religious beliefs.[53]

Reference is also made by the Court to the type of workplace, namely the educational environment,[54] as another factor to be taken into consideration in the contextual analysis. Emphasis is placed on the importance of providing a discrimination-free environment that promotes tolerance and fairness as values to be promoted and upheld. Throughout this reflexion, no distinction is made regarding the fact that the activities carried out by the plaintiff occurred outside the workplace on strictly private time. This is not in keeping with traditional labour litigation which

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51 This distinction will be studied in a later section on freedom of expression and public employees.

52 *Supra*, note 49, p. 874.

53 *Ibid.*

54 For a comprehensive look at the topic of freedom of expression and public school teachers, we refer you to the following text: A. Reyes, "Freedom of expression and public school teachers", (1995) 4 *Dalhousie Journal of Legal Studies* 35, pp. 35-72.

considers this factor as mitigating evidence as opposed to misconduct which occurs on company premises which would be viewed as an aggravating factor.[55] Moreover, the Court itself had confirmed this tendency in a judgment rendered one year prior to Ross, in CBC v. Canada (Labour Relations Board)[56] whereby it was implied that if the expression had occurred during company time and on company premises, different considerations would apply as opposed to the factual situation at bar which involved union activities outside of the workplace. This judgment will be examined in depth in a further section dealing with union-related activities.

Misconduct outside of the workplace concerning freedom of expression was the subject of a very recent judgment, Toronto (City) Board of Education v. O.S.S.T.F., District 15[57] implicating once again the activities of a schoolteacher. Although the conduct in question, aggressive and threatening letter-writing to the plaintiff's superiors, took place outside of working hours, it obviously directly affected work colleagues and influenced the working environment. Following a succession of job promotion refusals, the plaintiff filed a complaint with the Human Rights Commission claiming systemic discrimination by his employer against persons of South Asian origin. During the course of the hearings, which eventually determined that his complaint was unfounded, Mr. Bhadauria engaged in the writing of a series of letters to his superiors at the Board of Education containing unsettling statements and veiled threats. As a result of this behaviour, the plaintiff was dismissed from his functions as no longer being able to fulfill his duties as a teacher.

In reviewing the particular circumstances of the case at bar, Cory J., on behalf of the majority, specifically alluded to the nature of the profession involved as being a deciding factor in evaluating the gravity of the behaviour reproached. Moreover, the distinction between whether the activities occurred within or outside the workplace was

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55 See for example Adams Mine v. United Steelworkers of America, (1982) 1 CLRBR (NS) 384; Almeida v. Canada [1991] 1 F.C. 266.

56 *Supra*, note 42, pp. 199 and 202.

57 *Supra*, note 43.

categorically set aside in this particular context, as reflected by the following passages of Justice Cory's reasons, at page 511:

> ***"There can be no doubt that the opinions expressed and the wording used in the letters of Mr. Bhadauria constituted very significant if not extreme misconduct. The letters did not simply express dissatisfaction with working conditions; they were threats of violence. The fact that they may have been written outside the hours of teaching duty cannot either excuse or alleviate the seriousness of the misconduct. ... In their position of trust, teachers must teach by example as well as by lesson, and that example is set just as much by their conduct outside the classroom as by their performance within it. Thus misconduct which occurs outside regular teaching hours can be the basis for discipline proceedings."***

Thus, the Court informs that the mitigating/aggravating factors usually associated with whether behaviour occurred outside or within the premises of the workplace, respectively, are not to be considered as in the past. It is not clear whether this is related to the public role played by teachers or whether this finding could readily be applied to professions or employee classifications in the private sector. It appears that the Court wants to limit application of the conclusions in Toronto Board of Education to the particular setting of the education field as the previous case of Ross is heavily relied upon to affirm the Court's position. In particular, reference is made to the vulnerability of students and the need for public confidence in the education system as motivating factors in disciplining the type of behaviour displayed by the plaintiff.[58] The Court overturned the Board of Arbitration's finding that the employer's actions constituted an unjust dismissal, basing its decision on the fact that the evidence simply did not confirm the position that the plaintiff s's actions were of a temporary nature. On the contrary, the evidence supported an opposite conclusion and thus rendered the decision patently unreasonable.

It must be remembered that the Toronto Board of Education judgment was not examined on constitutional grounds. The sole issue to be decided concerned the reasonableness of an arbitration board in overturning an employer's disciplinary measure of dismissal. Therefore, it is difficult to ascertain that the same principles would apply in the context of constitutional scrutiny. However, the fact that the Court

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58 *Ibid*, p. 513.

incorporated the constitutional findings in the Ross case to a purely labour litigation matter is perhaps an indication that its guidelines are to be uniformly applied. Furthermore, it would be difficult to envisage that the Court would not consider to be bound by the affirmations made in Toronto Board of Education in a future case involving human rights considerations.

(c) Unpopular opinions and freedom of expression

The task of weighing individual claims of freedom of expression against collective or community rights of another nature are rendered more difficult when the rights involved are considered to be "morally" reprehensible in the public's opinion as is illustrated by the cases studied above and by others that the Court has had to examine.[59] Since the Court's tendency and declared objective has been that of maintaining a broad scope with regards to Section 2(b), the exceptions to protected expression have been few and far between. Indeed, the Court has on only one occasion categorically declared a particular "activity" as being *a priori* beyond the reach of constitutional protection, in the case of Reference Re ss. 193 and 195 Manitoba, *supra*, whereby it was affirmed that the keeping of or being associated with a bawdy house did not constitute expression under the Charter. Strangely enough, the sole justification given by Justice Wilson, speaking for the majority on this point, is simply that the scope of Section 2(b) is not so broad as to include such an activity.[60] Moreover, the Court affirms that the disposition proscribing this activity does not prevent communicative activity in relation to a bawdy house. It is difficult to see how the parameters for exclusion were established in this case and why the Court chose to limit its reasoning to these few brief remarks as the exceptional nature of this exclusion certainly merits a lengthier motivation. Indeed, to state that communicative activity in relation to that which is proscribed is not impeded is illusory. "Being associated" with a bawdy house constitutes for some the epitome of expression, that is their means of livelihood and the

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59 See for example, Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code (Man.), *supra*, note 47.

60 *Ibid,* p. 1206.

way that they choose to earn their living. It is difficult to imagine how these persons could continue to express themselves through their work without being associated with their place of work. Obviously, one could always find another forum for expression but this can be said of practically every type of protected expression and certainly does not constitute a justifiable reason for exclusion.

Following the judgment in Keegstra, *supra*, examined above, where the Court had to contend with a teacher's reproachable behaviour in communicating personal negative precepts regarding Jews to his students, the Court had occasion to deal with equally provocative topics in R. v. Butler [1992] 1 S.C.R. 452 and R. v. Zundel [1992] 2 S.C.R. 731. Although these cases deal with issues that are remote from the employment context, the principles emanating from these decisions on the issue of freedom of expression, coupled with those in Keegstra, provide the general framework which the Supreme Court has used in future adjudication, especially with regard to unpopular forms of expression.

These judgments essentially confirm the Court's approach developed in Irwin Toy that the definition of what falls into the realm of protected expression must be kept as broad as possible.[61] Also, considerations pertaining to the content of expression are emphatically proscribed and the Court's commitment to this principle is tested with cases of this nature involving forms of expression which do not necessarily receive public approbation. Thus, in Butler, *supra*, the distribution of sexually explicit material depicting potentially violent messages is considered protected expression under the *Canadian Charter*. The vehicles used to convey messages of obscenity, i.e. films and magazines, are not inherently violent as per the violence exception elaborated in earlier decisions and therefore Sopinka J., writing for the majority, concludes that the activity in question constitutes valid protected expression under the *Canadian Charter* and the legislation banning it to be unconstitutional.

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61 For a very recent judgment confirming the Supreme Court's position on the broad and inclusive interpretation to be given to Section 2(b) in the context of political expression, see Libman v. Québec (Attorney General), *supra*, note 7.

Under Section 1 scrutiny however, the legislation proscribing obscenity, section 163 of the Criminal Code, is considered a justifiable encroachment on the individual claim to freedom of expression on the basis that the objective of the avoidance of harm to society is a viable goal in a free and democratic society.[62] In order to arrive at this conclusion, Sopinka delves into the realm of morality and society's concept of what is considered undue exploitation of sex and consequently what materials or forms of expression would be encompassed in the prohibition. Although an examination of the content of expression was avoided in the cursory analysis under Section 2 (b), Justice Sopinka necessarily encounters the debate when he examines the question of limitations.

Initially refuting that a standard of public and sexual morality could be upheld under the *Charter*, Sopinka goes on to defend Parliament's role in establishing legislation founded on a common notion of morality for the purposes of safeguarding the values which are integral to a democratic society.[63] Focusing on the overriding objective of protecting society from harm, Justice Sopinka attempts to avoid the "shifting purpose" objective explicitly rejected by the Court in the past.[64] In other words, the Court claims that the principle objective since the enactment of the legislation was always the avoidance of harm to society and that what has changed over time is the definition of what constitutes offensive or harmful materials. Moral corruption of a certain kind has led to the detrimental effects, the harm to society.[65] In this way, the Court avoids having to attribute an objective based on a public definition of conventional morality which certainly could not be sustained by a Charter analysis and succeeds in upholding the impugned legislation. However, Sopinka J. seems to base his final analysis not on this moral concern, but rather on a political aim of gender equality and the protection of a disadvantaged segment of society, thus engaging in the balancing of interests which has become characteristic of Supreme Court adjudication:

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62 R v. Butler, [1992] 1 S.C.R.452, p. 497.
63 *Ibid*, p. 493.
64 R. v. Big M Drug Mart [1985] 1 S.C.R. 295.
65 *Supra,* note 62, p. 494.

> ***"The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, directly or indirectly, to individuals, groups, such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relation to each other. I therefore conclude that the restriction on freedom of expression does not outweigh the importance of the legislative objective."***[66]

Protection of the viewpoint of the minority opinion was the focus of a subsequent judgment delivered by the Supreme Court in R. v. Zundel, *supra*. At issue was the publication by Mr. Zundel of a pamphlet claiming that the Holocaust was a myth and other statements of the type. The publication of knowingly false statements or news constituted criminal activity pursuant to Section 181 of the Criminal Code and Mr. Zundel was accused pursuant to this provision. Reiterating the guidelines established in Irwin Toy, McLachlin J., on behalf of the majority, emphasizes the protection of minority rights against the well-intentioned majority as a primary objective of the institution of the Charter.[67] Indeed, it is the sustaining of unpopular opinions that requires protection, not that of points of view that are commonly accepted. In motivating her position, Justice McLachlin extends the scope of protection under Section 2(b) to include deliberate lies maintaining that "exaggeration—even clear falsification—may arguably serve useful social purposes linked to the values underlying freedom of expression".[68] Justice McLachlin then proceeds to cite examples of situations whereby falsehoods are meritorious for the ideals they support, such as giving false statistics to sustain the advancement of a humanitarian cause.

A blanket statement by the Supreme Court promoting the propagation of lies as acceptable and even quasi-virtuous behaviour sets a dangerous precedent in our view. To declare that in certain particular circumstances, falsehoods can be exceptionally justified by the merits of the causes which they support is quite different than attributing a social purpose deserving of constitutional protection to blatant lies. Moreover when

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66 *Ibid*, p. 509.
67 R. v. Zundel [1992] 2 S.C.R. 731, p. 753.
68 *Ibid*, p. 754

one considers that McLachlin J. could have relied on the second argument[69] raised to arrive at the same conclusion, the opportuneness of such a motivation is seriously brought into question. Indeed, the difficulty of determining with absolute certainty the veracity of information, or consequently its falsity, is in our view sufficient justification for inclusion of this form of expression in the constitutional guarantee. As so eloquently stated by Justice McLachlin in the following passage at page 756 of the judgment, the ambiguous nature of the meaning to be relayed in a particular message renders the veracity of information a strictly relative matter:

> ***"One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader... The result is that a statement that is true on one level or for one person may be false on another level for a different person."***

This reasoning alone could have supported the Court's contention to the effect that unpopular points of view merit protection without extending the principle to explicitly include lies. Although the Court has demonstrated its reticence to limit inclusion when defining scope, one could venture to ask whether Section 2(b) has been deprived of its sense independently of Section 1. Indeed, the Court has over time engaged in an increasingly cursory analysis of the breadth of the freedom of expression guarantee and has chosen to elaborate its guidelines and principles on the matter at the limitations stage pursuant to Section 1.[70] This obviously allows the Court to qualify all issues examined as contextual and thereby not necessarily creating precedent. However, this does not clearly establish the state of the law regarding freedom of expression issues nor allow prevailing societal tendencies to be reflected in the judgments delivered by the highest Court of the land.

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69 *Ibid,* p. 756.

70 For a critical analysis of the method adopted by the Supreme Court, see R. Moon, "The Supreme Court of Canada on the structure of freedom of expression adjudication", (1995) 4 University of Toronto L.J., 419.

(d) Union-related activities

The first significant case concerning freedom of expression under Charter scrutiny concerned the constitutional validity of a limitation, in the form of an injunction, on secondary labour picketing. Although the Court concluded, in Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd.[71] that an injunction did not qualify as government action and thus did not fall under Charter review, it went on to elaborate on the constitutionality of the restrictive measure. McIntyre J. begins by expounding on the merits of freedom of expression and informs that the guarantee enshrined in the Charter had its roots well-entrenched prior to receiving constitutional status.[72] Following a discourse on the origins and virtues of expression, McIntyre categorically rejects the pre-Charter position of the Court to the effect that picketing is not a form of expression. The case at bar involved secondary picketing of a business that was associated with a company that was carrying out the work of striking employees of Purolator. It was thus determined that:

> ***"...in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent."***[73]

Consequently, the injunction infringing upon this form of protected expression was deemed unconstitutional and the issue turned to whether the limitation could be justified in a free and democratic society. Curiously enough, the justifications raised under the Section 1 analysis hinge exclusively on hypothetical considerations rather than examining evidence pertaining to the particular contextual situation. Indeed, McIntyre proceeds to evaluate the social costs of picketing in general and concludes that it results in harm both to business interests in terms of productivity and to the community's

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71 *Supra*, note 14.

72 Indeed, Rand J. had already stated in Switzman v Elbling , [1957] S.C.R. 285, p. 306, that the freedom was "little less vital to man's mind and spirit than breathing is to his physical existence"; See also Reference Re Alberta Statutes [1938] S.C.R. 100.

73 *Supra*, note 14, p. 586.

interest due to the social and economic instability potentially caused.[74] However, since a picket line had not actually been established, no evidence was made available to evaluate the harm caused by this strike measure. Thus, it is difficult to understand how Justice McIntyre arrives at certain conclusions regarding the "necessary" elements of collective bargaining. The Court determined that secondary picketing is not essential to collective bargaining and it is implied that picketing in general is a harm to be tolerated by society but should not be allowed to extend beyond the boundaries of the actual dispute.[75] Once again, no evidence or data is provided on which these affirmations are founded. Essentially, the Court appears to justify the restriction solely on the grounds that secondary picketing in some abstract manner causes harm to third parties.

The principal fault with the reasoning advanced by the Court is that no empirical justification regarding the alleged harm caused by secondary picketing is provided. The potential negative consequences of a picket line are presented as findings of fact and inevitable in a labour dispute and thus a speculative situation of harm is created and amplified by hypothetical facts No consideration is given to the various elements of individual choice involved at different stages of the strike action. The conclusions thereby arrived at depend entirely on the damaging effects of a proposed picket line. Moreover, it is difficult to see how the Court does not hold the same opinion on primary picketing for this manifestation of labour unrest can also be deemed to cause harm to others. In many ways, the treatment given picketing in this case unjustifiably undermines the social purpose of collective bargaining for it fails to provide a global vision of what is at stake, choosing to focus only on the harm caused without considering employee contentions in the particular context examined.

Labour issues aside, to imply that a justifiable limitation on freedom of expression has been established because the activity engaged in causes harm to others is a simplistic conclusion that undeniably goes against the Court's tendency of

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74 *Ibid*, p. 591.
75 *Ibid.*

promoting a liberal interpretation of the constitutional protection afforded to this freedom. Nevertheless, the Court's stance on freedom of expression in relation to picketing has been upheld and the judgment in Dolphin Delivery has been oft-cited as stating the law on the matter.

Picketing, this time in its primary form, of the law courts in the province of British Columbia, provided the Court with another occasion to announce its position concerning the constitutionality of this activity under Charter review. In British Columbia Government Employees Union v. The Attorney-General of B.C. (B.C.G.E.U.),[76] court workers had set up a picket line in the course of a legal strike but also wanted to control access to the premises to those conducting business in the courts such as witnesses, lawyers, litigants, etc. Thus, a pass system was instituted whereby such individuals would present themselves at the picket line in order to have a pass issued prior to entering the courthouse and would thereby be considered to have honoured the picket line. The Chief Justice of the Supreme Court of British Columbia, Justice MacEachen, considering such action to be illegal, issued an injunction prohibiting interference with Court activities and/or the limiting of access to the Courts.

Following the Court's reasoning in Dolphin Delivery to the effect that picketing constitutes protected expression under Section 2(b), Justice Dickson proceeds to render a similar decision justifying the restriction under Section 1 in B.C.G.E.U. Access to the courts is considered a component of freedom of expression and thus the balancing act between competing interests is facilitated in this case, according to the Chief Justice. Indeed, one cannot speak of freedom of expression of any sort if access to the Courts is impeded.[77] An analysis of this form of expression concludes that although picketing may be perfectly legal when viewed from a labour relations perspective under the Labour Code, this does not imply immunity from a criminal point of view from actions in contempt of court. Although extolling the virtues and necessity of collective action in a labour relations context, the Court again focuses on the "harm" potentially caused

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76 [1988] 2 S.C.R. 214.
77 *Ibid*, p. 229.

by such action and concludes, that the picketing of a court-house to "urge the public not to enter except by permission of the picketers could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia".[78]

The Court appears to arrive at this conclusion in the same fashion as that in Dolphin Delivery, that is with no evidence on which to base its claim of harmful consequences resulting from picketing. Indeed, the evidence made available indicated, on the contrary, that the picketing in question was carried out in a peaceful and non-aggressive manner. It is recognized by the Court that the effectiveness of a picket lies essentially in the element of persuasion inherent in free speech intended to support a cause, but the Court seems to distinguish labour picketing from regular persuasion, as noted by Prof. Moon,[79] who criticizes the Court's approach as going against its earlier stated position. Indeed, Dickson J. suggests that individual freedom of choice disappears in the presence of a picket line and a quasi-automatic response of adherence to collective action kicks in. The dissent goes even further and does not even consider the activity in question as falling under the scope of the guarantee of freedom of expression. McIntyre J. views the impediment of access to the courts as unlawful conduct and thus does not apply the reasoning of Dolphin Delivery to the facts of the case at bar. This approach of raising the "criminal" nature of an activity as sole justification for exclusion from protected activity was clearly cast aside in future decisions of the Supreme Court, for example in Reference re ss. 193 &195 Manitoba, *supra.*[80]

Freedom of expression was again indirectly at issue in a 1995 decision, CBC v. Canada (Labour Relations Board)[81] illustrating the conflict that potentially arises between union activities and the carrying out of job-related functions. In this matter, the employer faced an unfair labour practice complaint for allegedly forcing an employee to choose between his position as a journalist and radio host and his activities as union

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78 *Ibid,* p. 233.
79 *Supra,* note 70, p. 455.
80 *Supra*, note 47.
81 *Supra*, note 42.

president. The source of the conflict stemmed from the fact that the journalist had published an article against free trade in a union newspaper thereby violating the CBC's policy of impartiality, according to the employer. The constitutional issue of whether the employer's action constituted a breach of the Charter guarantee under Section 2(b) was not raised although the employer in this case can be assimilated to a government body and the journalistic policy relied on was created as a consequence of a statute-imposed obligation.[82] Nevertheless, although the Court examined the factual issue from a strictly labour relations angle, and more particularly focused on whether the Canada Labour Relations Board decision was subject to review, certain guidelines regarding an employee's right to engage in outside activities involving freedom of expression were established.

The facts in this case are essential to understand the series of compromises engaged in by the employee, Mr. Goldhawk, and we will cite them at length for illustrative purposes. The activity engaged in by Goldhawk essentially constituted political speech enjoining support for a union position on free trade that went against government policy and that occurred during the course of an election period. The article, written in a union newspaper, was subsequently rendered public by a journalist writing for a national newspaper. Following pressure from his employer, Goldhawk agreed to temporarily cease his work as host of a national radio show and following the election offered to give up his position as union spokesperson while retaining that of president of the union, two positions normally combined. His employer refused and thus Goldhawk was forced to give up his union activities in order to resume his professional activities.

In concluding that the Labour Board's decision to allow the Union's complaint was not unreasonable, the Court identified two infringements of the employer on the Union's activities, and consequently on that of its members. The union's choice of its president as well as its decision to have the person chosen as president to act as its

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82 See *Broadcasting Act* R.S.C. 1985,c. B-9, s.3. It is to be noted however that Iacobucci J., at p. 191 of the majority judgment of the Court, refuses to confer the status of legislation upon the journalistic policy of the CBC.

spokesperson were both restricted by the employer and these activities were considered to fall within the ambit of what was protected as union activities under the Labour Code. Moreover, it was considered that the publication by a union spokesperson of an article expressing an opinion to the effect that a particular government policy constituted a threat to members of the union, fell into the realm of activity that an employer could not legally impede or interfere with. Iacobucci J, on behalf of the majority, confirms the Court's earlier stated position in Lavigne that union activities outside the workplace can significantly contribute to the collective bargaining process and thus are to be considered protected under the Labour Code. His colleague Justice Wilson is cited, in *obiter*, in this case, referred to earlier, dealing with Charter review of the freedom of expression guarantee:

> ***"Whether collective bargaining is understood as primarily an economic endeavour or as some more expansive enterprise, it is my opinion that union participation in activities and causes beyond the particular workplace does foster collective bargaining. Through such participation unions are able to demonstrate to their constituencies that their mandate is to earnestly and sincerely advance the interests of working people, to thereby gain worker support, and to thus enable themselves to bargain on a more equal footing with employers. To my mind, the decision to allow unions to build and develop support is absolutely vital to a successful collective bargaining system".***[83]

Although the employee's freedom to participate fully in union activities and also the Union's freedom to make choices related to the collective bargaining process are sustained by this judgment, the Court implies that the matter would have been decided otherwise had the activity been carried out on company premises during company time.[84]

This overview of Supreme Court adjudication pertaining to freedom of expression and more particularly with respect to work-related issues permits us to discern an approach that has been rigidly followed by the highest court of the land since the inception of the *Canadian Charter*. Indeed, the analytical framework adopted

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83 *Supra*, note 42, p. 197.
84 *Ibid*, p. 199.

certainly provides clear-set guidelines regarding the manner in which freedom of expression matters will be dealt with in the future.

As has been pointed out, the dominant tendency found throughout the Court's judgments is the reluctance to restrict the broad nature of the freedom as set forth in Section 2 (b) of the *Canadian Charter*. However, it is difficult to determine whether this reflects the Court's vision of the breadth of the right to freedom of expression in Canada or whether the vehicle of "escape" provided by Section 1 of the *Canadian Charter* simply allows it to assume a liberal and expansionist view of the freedom. It is evident nevertheless, that the mere presence of a constitutional provision allowing for a legal limitation on rights allows the judiciary to adopt a somewhat broader viewpoint concerning the scope of a fundamental freedom, relinquishing responsibility for the limitation to the legislative powers.[85] Judgments to date have rarely focused on an analysis of activity involved, preferring to readily accept practically all activity under the protective umbrella of Section 2 and then reducing the scope under Section 1 of the *Canadian Charter*.

Emphasis is given to individual rights to freedom of expression, but it is clear that the Courts condone activities only to the extent that they comply with a societal view of what is deemed to be acceptable. Moreover, the individual/societal dichotomy is emphasized by the two-step approach consistently followed by the Court. In the first step of analysis, individual behaviour is examined *per se* but is then pitted against other competing values in the second step. The reality is that it is at this level that the Court formally positions itself. Thus, it is through justification of an exception to its supposedly general rule of inclusion of protected expression that the Supreme Court has moulded freedom of expression adjudication in Canada.

It is evident that the Court wishes to develop a purely Canadian vision of freedom of expression in Canada. Indeed, it has on several occasions rejected

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85 This line of reasoning has been upheld by various jurisdictions and more recently by the Constitutional Court of South Africa in Case and Another v. Minister of Safety and Security, (1996) 5 BCLR 609. Of particular interest in this case is the reference to Canadian Supreme Court jurisprudence (R v. Butler [1992] 1 S.C.R. 452) in upholding a limitation to obscenity based on the precept of avoidance to harm to society.

definitions of scope raised in international forums, namely in the American model. We will examine this attempt to maintain a distinctive nature in the treatment of freedom of expression cases in the next section as well as analyzing the influence of international agreements on Canadian jurisprudence. It will be seen that the international models of law appear to provide an interpretative framework that Canadian courts have readily identified with and that appears more in conformity with the values sustained by our Charter legislation than their American counterpart.

2. INTERNATIONAL HUMAN RIGHTS LAW AND ITS IMPACT ON FREEDOM OF EXPRESSION IN THE CANADIAN PRIVATE WORKPLACE

The realm of human rights and/or freedoms has been greatly enhanced by the proliferation of a panoply of human rights instruments enacted immediately following the end of the Second World War and thereafter. Although initially heralded as a universal effort in avoiding a World War re-occurrence, the *Universal Declaration of Human Rights*[86] (hereinafter referred to as the *Universal Declaration*), has proven to be the most important piece of legislation in promoting human rights internationally and setting worldwide standards for respect of these rights. It is also the forbearer of a series of international conventions that have focused on specific areas of protection, including that of the workplace environment and labour relations in general. The ratification by Canada of several of these agreements has thereby incorporated many of these international areas of priority into Canadian domestic law. Furthermore, we will observe that other instruments that have not undergone a formal ratification process by Canadian authorities nevertheless command respect by our tribunals due to somewhat of a moral obligation incumbent upon a nation to abide by the principles contained in these international covenants.[87] This may be due to the fact that most of these agreements reiterate principles initially elaborated in the *Universal Declaration*, to

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86 (1948) G.A. Res.217 A (III) U.N. Doc. A/810, p. 71

87 For an interesting overview of this question, see K. Benyekhlef "Liberté d'information et droits concurrents: la difficile recherche d'un critère d'équilibration" (1995) 26 *R.G.D.* 265-306.

which Canada has unequivocally given its support over the years, although this declaration is not considered to be of a binding nature.

The Supreme Court of Canada initially expressed a certain reticence to citing these international instruments in motivating its judgements and even more so to relying on the jurisprudence pronounced by foreign or international jurisdictions. Following the advent of the *Canadian Charter*, the attitude of the highest court of the land has evolved considerably. Perhaps out of necessity for guidelines in elaborating its own policy on human rights, recent decisions are replete with examples of references to international covenants and jurisprudence. It must be noted furthermore that early drafts of the Charter relied heavily on the international models as a basis for formulating the construction of its freedom of expression and limitation clauses.[88]

An entirely different stance has been adopted toward the incorporation of American jurisprudence and legislative instruments concerning human rights. The majority position continues to exercise great reserve in accepting any semblance of an American vision into Canadian domestic law, relying primarily on the distinctive nature of the respective judicial systems in justifying a rejection of the values emanating from American forums. Nevertheless, we will see that a certain minority position retains the American model as a valid approach in addressing the issue of freedom of expression.

(a) International conventions and their influence on Canadian domestic law

Although the purpose of this study is not to provide an in-depth examination of all the pertinent international human rights legislation that Canada has adhered to over the years, we feel that providing an overview of the international covenants that pertain primarily to the exercise of freedom of expression is a relevant exercise that permits the the reader to properly situate the evolution of Canadian law in its complete contextual

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88 For a critical analysis of the influence of human rights legislation on Canadian adjudication see L.E. Weinrib "Hate promotion in a free and democratic society: R. v. Keegstra" (1991) 36 *McGill L.J.//R.D.* McGill, pp. 1416-1449; W. Schabas and D. Turp, "La Charte canadienne des droits et libertés et le droit international: les enseignements de la Cour suprême dans les affaires Keegstra, Andrews et Taylor" (1990-1991) 6 *R.Q.D.I.* 12-25.

setting. The influence of international bodies of law cannot be undermined or easily cast aside, especially due to Canada's direct participation and involvement in propagating a universal consensus that certain forms of improprieties must be eradicated worldwide.

The principal international conventions that bring into play freedom of expression are embodied in the *International Bill of Rights*, a body of law comprised of the *Universal Declaration* mentioned above as well as the *International Covenant on economic, social and cultural rights* (993 U.N.T.S.3(1966) (hereinafter referred to as the *Economic, social and cultural covenant*) and the *International Covenant on civil and political rights* (999 U. N. T. S.171(1966) (hereinafter referred to as the *Civil and political rights covenant*) and its optional protocols.[89]

Although differing in content, all of these conventions provide for some form of protection of the freedom of expression, as reflected by Section 19 of the *Universal Declaration:*

> "***Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."***

and the more elaborate Section 19 of the *Civil and political rights covenant*:

> "***1. Everyone shall have the right to hold opinions without interference.***
>
> ***2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.***
>
> ***3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:***
> ***(a) For respect of the rights or reputations of others;***
> ***(b) For the protection of national security or of public order (ordre public), or of public health and morals."***

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89 Two optional protocols have been ratified to date, the first dealing with the acceptance of individual communications of violations of the *Civil and political covenant* as apposed to State applications. This optional protocol entered into force in Canada on August 19, 1976, some ten years after the principal covenants were initially adopted. Canada is not a signatory to the second protocol, aiming at the abolition of the death penaly, ratified on July 11,1991 by member States.

A similar commitment to freedom of expression values is reiterated in other covenants of this nature,[90] coupled in some instances with a limitative clause similar to Section 1 of the *Canadian Charter*. We will examine later how this latter particularity has facilitated reference to these international instruments, owing to the similarity between this clause of limitations and the Canadian vision of human rights which allows for a balancing of competing rights. Finally, the ratification by Canada of the *International Convention on the elimination of all forms of racial discrimination*[91] on November 13,1970, which makes specific reference to the upholding of freedom of expression in the general context of eradicating racial discrimination at Section 5(d)(viii), completes the portrait of Canada's participation in propagating values pertaining to freedom of expression.[92]

Recourse to international rights and freedoms instruments by the Canadian courts has increased substantially over the years. As of March 1, 1996, over 500 reported Canadian cases have made reference to international human rights law over time, with the bulk of over 400 cases occurring following the advent of the *Canadian Charter* on April 17, 1982.[93] As reported by Professors Schabas and Turp,[94] reference to international covenants and jurisprudence proved to be superficial, cursory and somewhat shoddy prior to the coming into force of the *Canadian Charter*. Indeed, several examples of outright errors when citing the pertinence of international

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90 See for example section 8 of the *Economic, social and cultural covenant*. The latter piece of legislation does not specifically provide for freedom of expression although the extended rights to work and to form unions pursuant to Sections 6-8 partly offset this void.

91 Can.T.S. 1970, No. 28.

92 For an overview of the international obligations entered into by Canada pertaining to the employment context in general and which may directly or indirectly influence freedom of expression in the workplace, we invite the reader to consult the following repertory by Jean-Bernard Marie updated to January 1, 1997 "International instruments relating to human rights", (1997) 18 *Human Rights Law Journal*, No.1-4, p.79. Of particular interest, we point out the following international agreements to which Canada has adhered to: *ILO Convention (no.87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S., 17 (1948); *ILO Convention (no. 100) concerning equal remuneration for men and women workers for work of equal pay*, 165 U.N.T.S.,303 (1951); *ILO Convention (no.111) concerning discrimination in respect of employment and occupation*, 362 U.N.T.S 31 (1958). Canada has not signed the *ILO Convention (no.98) concerning the application of the principles of the right to organize and bargain collectively*, 96 U.N.T.S.257 (1949).

93 See W. Schabas, International Human Rights Law and the *Canadian Charter*, 2nd ed., Scarborough, Carswell, 1996, pp. 255 and following.

94 *Loc. cit.*, note 88.

instruments of law were raised by the authors[95] to demonstrate the lack of attention or importance given to this source of law in earlier years. Recently, Canadian tribunals and in particular the Supreme Court of Canada, have used these international conventions and declarations as a direct source motivating their findings, rather than using them in a complimentary fashion as was the prior tendency. An example in point has been the trilogy of cases involving hate propaganda delivered on December 13,1990: R. v Keegstra, *supra*, Canada (C.C.D.P.) v Taylor [1990] 3 S.C.R. 892 and R. v. Andrews [1990] 3 S.C.R. 870.

Chief Justice Dickson, in the last series of judgments rendered following his official retirement, leaves behind a veritable legacy in the form of this trilogy by advocating and enhancing the role that international instruments will henceforth come to play in Canadian adjudication. Although the viewpoint advanced by the Supreme Court is far from being unanimous as to the role that should be played by "foreign" jurisdictions, there is no doubt that international legislation and its interpretation in other forums must necessarily be contended with in the future. Suffice it to say that in support of its obligations to undertake measures to eradicate racism on its territory pursuant to the *Convention on the elimination of all forms of racial discrimination*, *supra*, Canada formally submitted in its periodic reporting the prosecution of the cases mentioned above involving hate propaganda.[96]

Without reiterating the merits of the Supreme Court's position on whether restrictions on hate propaganda constitute a justifiable infringement of one's freedom of expression which were dealt with in an earlier section, it is interesting to note how the Court uses international law to harmonize and fully motivate its decisions in these three judgments. The majority of the Court begins its analysis of the preponderance to be given to international jurisdictions by reinforcing its reticence to adopt into Canadian law notions based on the American approach. Traditionally espousing an extremely liberal approach based on State non-intervention in an individual's exercise of his fundamental rights and freedoms, the American judicial system would have

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95 *Supra,* note 93, pp. 12-13.
96 *Ibid*, footnote 23.

categorically rejected the hate propaganda restrictions under review. Citing the cultural and contextual differences between the two nations and emphasizing above all the lack of a limitation clause similar to Section 1 of the *Canadian Charter* in the *American Bill of Rights, supra,* as a basis for distinguishing the two systems, Justice Dickson emphatically rejects the American model as a basis of comparison.[97] This view has been consistently maintained by the majority of Supreme Court judgments and furthermore confirmed in a subsequent matter, Lavigne v. Ontario Public Services Employees Union, whereby Justice LaForest, on behalf of the majority alludes to and reiterates the differences between the two nations when considering American treatment of human rights and freedoms.[98]

Justice McLachlin, stating the dissenting position in Keegstra, opts for an entirely different stance on the role to be played by the American interpretation of human rights legislation. Her analysis contrasts the American and international systems, primarily focusing on the fact that the great majority of international instruments contain broad limitation clauses as opposed to the First Amendment of the American *Bill of Rights* which affords a libertarian approach to freedom of expression. According to the minority position, the *Canadian Charter* resembles the American *Bill of Rights* in that it too provides for a far-reaching protection of the right while limiting its justifiable infringements.[99] It is to be noted however that this essentially textual argument is not necessarily confirmed when one examines Canadian adjudication, for Section 1 has served more often than not as a restrictive measure to the broad scope given to freedom of expression under Section 2 (b). Thus, in a diametrically opposed viewpoint with respect to the majority as to the preponderance to be given to American law, Justice McLachlin concludes that the Canadian model emulates and more closely resembles its American counterpart rather than other international jurisdictions law in the application of Section 2 (b) of the *Canadian Charter*:

> ***"The Charter follows the American approach in method, affirming freedom of expression as a broadly defined and fundamental right, and contemplating***

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97 See Keegstra, *supra*, note 26, p. 743.
98 *Supra*, note 39, pp. 331-332.
99 See Keegstra, *supra*, note 26, p. 822.

> ***balancing the values protected by and inherent in freedom of expression against the benefit conferred by the legislation limiting that freedom under s.1 of the Charter. This is in keeping with the strong liberal tradition favouring free speech in this country--a tradition which has led to conferring quasi-constitutional status on free expression in this country prior to any bill of rights or Charter."***[100]

As pointed out by Professor Weinrib,[101] the dissenting opinion that would compare the Canadian model of freedom of expression to the *American Bill of Rights* is somewhat faulty and furthermore disproved by the very important historical fact that the international instruments were considered an improvement over the pioneer First Amendment clause and that Section 1 of the *Canadian Charter* in turn was equally construed as an evolutionary amelioration of the said instruments. Indeed, the *Canadian Charter*'s broad enunciation of rights coupled with an equally broad and general limitation clause contrasts sharply with the American prohibitive clause devoid of an express limitation clause.

Turning to the issue of international covenants and agreements as a source of motivation for determining that restricting hate propaganda constitutes a just measure in a free and democratic society, Justice Dickson affirms the importance of these instruments in that they too deal within a context of balancing and competing rights and liberties. The preeminence afforded by international law to the suppression of discrimination in general and to the recognition of certain values must be given priority in Canada's analysis under Section 1 of the *Canadian Charter*.[102] Thus, Chief Justice Dickson, at the time, confirms his position on the matter, initially enunciated in Reference Re Alberta Public Service Employee Relations Act (Alta) [1987] 1 S.C.R. 313 and subsequently reiterated in Slaight Communications inc. v. Davis, *supra*, in 1989 in the following excerpt at page 1056, to the effect that Canada's international obligations play a decisive role in developing policy at the domestic level:

> ***"The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the* Charter*'s protection". I believe that the* Charter *should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".***

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100 *Ibid*, pp. 822-823.
101 *Supra*, note 88, pp. 1433-1437.
102 *Supra*, note 26, p. 750.

Citing other international sources, Justice Dickson makes specific reference to the *European Convention* of which Canada is, for obvious reasons, not a signatory but which has proven to be an international instrument with which it has particularly identified. This is possibly due, as pointed out by Justice Dickson, to the fact that its freedom of expression disposition contains a limitative clause similar to Section 1 of the *Canadian Charter*. However, according to our view, it is of distinctive nature that the limitative clause in the European document is exclusive to the freedom of expression disposition and not of general nature as that of the *Canadian Charter*. An analysis of the *European Convention* is undertaken in the next section as this piece of legislation has resulted in a relatively prolific source of jurisprudence that has on several occasions inspired Canadian courts.

(b) The European Court of Human Rights on freedom of expression in the workplace

Following the proclamation of the *Universal Declaration* by the United Nations on December 10, 1948 and the subsequent institution of the Council of Europe in 1949, the leading European States felt compelled to elaborate a control mechanism for the values set forth in the *Universal Declaration* and thus render this instrument efficient and enforceable. After much debate as to whether this structure should be of universal application or rather restricted to European States, the Council of Europe proceeded to elaborate a regional body of law, the *European Convention*, which essentially reflects the commitment of the signatory States to upholding the principles enunciated in *the Universal Declaration.* Adopted on November 4, 1950, the *European Convention* entered into force on September 3, 1953 following the necessary ratification by ten member States of its contents. The preamble of this international instrument explicitly alludes to the fact that the Convention's *raison d'être* was "to take the first steps for the collective enforcement of certain of the Rights stated in the *Universal Declaration*". As

of January 1, 1997, 34 States have adhered to the *European Convention.*[103] Several optional protocols dealing with complimentary issues have been enacted since the *European Convention*'s inception and the Council of Europe's statutes now provide for mandatory adherence to the Convention for new members with ensuing optional ratification of the various protocols.

Notwithstanding the fact that Canada is not a party to the *European Convention* nor to its protocols, this body of law has substantially influenced Canadian human rights adjudication. This is due to the Convention's association with the *Universal Declaration*, a legally non-binding instrument which has nevertheless acquired the value of custom over the years and which Canada has certainly felt "morally" bound to respect, as was mentioned in a previous section. The predominant role played by this particular convention is also partly explained by the prolific case-law emanating from the European Commission of Human Rights and the European Court of Human Rights, both institutions created pursuant to Article 19 of the *European Convention* to serve as judiciary arms for the enforcement of the Convention. Furthermore, a limitative clause specific to the right to freedom of expression, and not of a general nature as those that can be found in both the *Quebec* and *Canadian Charters*, provides for a somewhat analogous framework that facilitates the incorporation of this international body of law and its accompanying jurisprudence into Canadian law.

The protection of freedom of expression is elaborately stated at Article 10 of the European Convention:

> ***1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.***
>
> ***2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.***

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103 *Supra*, note 92, p. 84.

- **Principal characteristics of the case-law pertaining to the European Convention**

The commitment to freedom of expression by European States has been consistently upheld by the European Court of Human Rights as reflected by this oft-cited passage in Handyside v. U.K., one of the early cases[104] dealing with the issue of freedom of expression to be addressed by the Strasbourg authorities:

> ***"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no "democratic society".***"[105]

Despite this far-reaching profession of faith to a liberal approach to freedom of expression, the Court went on to find that the prohibition to publish an "obscene" document destined primarily to children over the age of 12 was justified under Section 10 (2) of the *European Convention*. Nevertheless, the Court's statement regarding the value to be afforded to freedom of expression has been cited verbatim or referred to in essentially all the European case-law dealing with the issue generally or in the context of work-related matters.

In a somewhat similar fashion as that shown by Canadian courts, there appears to be no form of freedom of expression which is not protected by Article 10 of the European Convention. Thus, a wide range of activities in the political, artistic and commercial realm of expression have been considered to fall within the ambit of the

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104 The first case that addressed the issue De Becker v. Belgium, Eur. Court H.R. Series A no.4 (1962) was perfunctorily dealt with by the Court as there had been an out-of court settlement in the matter. It involved a Belgian journalist and author who was constrained to work for the enemy after the Germans confiscated the newspaper for which he worked in 1940. Later convicted for collaborating with the enemy and forced to leave the country in order to obtain a liberation, Mr. de Becker filed several complaints, notably under Article 10 of the *European Convention* claiming violation of the right to express himself. Following an amendment to Belgian law that henceforth allowed persons in his situation to address themselves to the civil courts in order to re-claim rights lost in the past due to the old régime, Mr. de Becker withdrew his complaint before the Strasbourg authorities.

105 Eur. Court H.R., Series A, no.24 §49 (1976).

European Convention. Utmost priority has been afforded to free speech by the press,[106] although in a recent judgment, Prager and Oberschlick v Austria,[107] the Court refused to consider the conviction of a journalist and a publisher for defamation of a judge as meritorious of protection. The free flow of information,[108] particularly in the telecommunications field, has been upheld as an important component of freedom of expression in recent years.[109] Political expression has equally benefitted from a high degree of protection by the Strasbourg authorities[110] whereas there appears to be a certain reluctance to venture so far as to condone the propagation of blasphemy, especially with religious connotations.[111] Finally, a certain hierarchy in the categories of expression deemed to merit protection appears to have emerged, with for example, artistic expression resulting at the lower end of the scale and political expression seemingly meritorious of all-encompassing protection. Thus, although professing a commitment to the protection of artistic expression in Mueller v. Switzerland,[112] it was determined that a State's seizure of paintings judged to be obscene by the standards of national law, in an artistic exhibition open to the general public, and the ensuing conviction of the artist for obscenity constituted a justifiable interference by the State for the protection of public morals.

Confronted with the task of balancing competing rights as their Canadian counterparts have often grappled with, the European authorities have construed a similar framework for adjudication based on establishing the definition of what falls

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106 See Sunday Times v. U.K., Eur. Court H.R., Series A, no. 30 (1979); Lingens v. Austria, Eur. Court H.R., Series A, no. 103 (1986); Castells v Spain, Eur. Court H.R., Series A, no. 236 (1992); Jersild v. Denmark, Eur. court H.R., Series A, no. 298 (1994); Goodwin v U.K., (1996) 22 E.H.R.R. 123.

107 Eur. Court H. R., Series A, no.313 (1995).

108 Open Door & Dublin Well Woman v. Ireland, Eur. Court H.R., Series A, no.246 (1992).

109 Autronic v. Switzerland, Eur Court H.R., Series A, no. 178 (1990) (satellite television); Informationsverein Lentia v. Austria, Eur Court H.R., Series A, no.276 (1993) (State monopoly on radio and television).See also Groppera Radio AG v. Switzerland, Eur. Court H.R., Series A no.173 (1990) where it was determined that the prohibition to transmit a neighbouring country's radio programs via cable met the requirements of Section 10 (2) and thus did not violate the applicant's freedom of expression.

110 See Piermont v. France, Eur. Court H.R., Series A, no.314 (1995), where measures expelling and prohibiting a German national from re-entering French Polynesia and New Caledonia following a political speech were considered unnecessary in a democratic society.

111 Otto-Preminger Institut v. Austria, Eur. Court H.R., Series A, no. 295 (1994); Wingrove v United Kingdom, (1997) 24 E.H.R.R. 1.

112 Eur. Court H.R., Series A, no. 133 (1988).

under protection pursuant to Article 10 (1) and examining individual cases of exclusion under Article 10 (2). This has resulted in a seemingly broad but somewhat perfunctory analysis of the scope of protection, which is quickly corrected once limitations are examined in the second paragraph, as we will see further ahead. Indeed, despite the importance freedom of expression has mustered throughout the judgments of the European Court, it remains that this liberty is restrained by more limitations than any other protected freedom under the *European Convention.*[113] Where freedom of expression is a component of some other protected right, the Court has chosen to view the expression issue in a general fashion as an underlying purpose of the other protected right and to examine the case at bar under this light. For example, in Young, James and Webster, the Court evaluated statutory compulsion to join a union primarily as a freedom of association issue although manifestly freedom of expression was also an important correlated factor. Thus, Article 11 is considered in light of freedom of expression, the latter being one of the purposes of freedom of association.[114]

Amongst the general principles emerging from Strasbourg case-law is the Court's overriding reticence to subscribe to a uniform definition of morals when confronted with delicate issues of expression. This position resembles to a great degree that taken by the Supreme Court of Canada and generally adheres to the broad and inclusive approach adopted by both jurisdictions in defining what falls within the scope of freedom of expression. More than twenty years ago, in Handyside, *supra,* the Court took the following stance regarding "moral" issues, which has been upheld in several judgments henceforth:[115]

> "***In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and***

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113 Although Articles 8-11 all have specific limitation clauses, Article 10 (2) is more explicit in this regard, especially with the reference made to duties and obligations. Since the legislator is deemed to speak with the intention of conveying meaning, this entails that the latter reference necessarily implies an additional source of potential restrictions.

114 See Young, James and Webster, Eur.Court H.R., Series A no.44 §57(1981) and confirmed by Ezelin v. France, Eur. Court H.R., Series A. no.202 §35, 37 (1991).

115 See Otto-Preminger Institut, *supra*, note 111, §50 and Open Door, *supra*, note 108, §68.

> ***continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."***[116]

This apparent subordination of the Strasbourg authorities to domestic courts when addressing so-called "provocative" issues or matters involving public morality which potentially come into conflict with other protected rights constitutes the margin of appreciation afforded to national courts and is one of the guiding principles taken into consideration by the Court under the limitations section of Article 10, which we will examine in the next section. It will be seen that this principle has recently suffered certain exceptions which have created somewhat of an incoherence in the European Court's interpretation of freedom of expression.

- **Law, legitimate aim and necessity: restrictions to freedom of expression**

Similar to the Supreme Court of Canada, the tendency of the European Court has been to adopt a broad purposive approach of inclusion when considering whether a particular form of expression falls under the ambit of the Convention and then to examine individual cases of exclusion pursuant to Article 10 (2). The explicit and precise nature of the wording of this last section has allowed the Court to develop a three-tiered analytical framework that essentially takes into consideration the conditions set forth in the limitative clause. Thus, the alleged interference will be examined to determine whether it was prescribed by law, pursued a legitimate aim and finally, whether it was necessary in a democratic society. It is on this last point that the Court will base the essence of its findings, firstly because the other elements must be satisfied prior to embarking on this last analysis and furthermore because it is the principal subjective element under scrutiny.

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116 *Supra*, note 105, § 48.

The overriding requirement with respect to the condition that a restriction be prescribed by law, which includes both statute and common law,[117] is that it be sufficiently precise "to enable those concerned ...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail",[118] thus precluding arbitrary interference. As for the legitimacy of the aim pursued by the violation, it must further one of the purposes enumerated in Article 10(2) although these are broad enough to encompass a broad array of public interest aims. Logic would entail that once it has been established that the interference is provided for by national law, an international Court would be hard-pressed to consider the infringement devoid of any legitimacy. The Court's categorization of an objective could potentially influence the outcome of a case[119] and could readily be used by the Court to uphold an otherwise unjustifiable interference.

The European Court set the stage early on in its first freedom of expression case, for how it would interpret the 'necessity' requirement of the interference provided for under Article 10(2). Thus, in the Handyside case, *supra*, the Court distinguishes the language used in the freedom of expression clause from other wording throughout the Convention and arrives at the conclusion that the term 'necessary' is not synonymous with 'indispensable' nor with 'absolutely' or 'strictly' necessary nor can it be assimilated to 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable', but rather that a certain discretion would be allowed the national authorities to evaluate the "pressing social need" prevalent in the particular context.[120]

It is surprising therefore that in this context of allowing a wide margin of appreciation to local authorities, especially when called upon to decide what constitutes public morals, that the Court recently rendered two judgments within a three-day period that result in diametrically opposed positions regarding freedom of expression and issues of morality. Thus, in Otto-Preminger-Institut, *supra*, after attesting that the applicant's freedom of expression had been violated following the seizure and forfeiture

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117 See for instance Sunday Times, *supra*, note 106.
118 Wingrove, *supra*, note 111, §40.
119 See Barfold v Denmark, Eur. Court H.R., Series A, no.149 (1989).
120 See Handyside, *supra*, note 105, § 48.

of a film deemed blasphemous by local authorities, the European Court concluded on September 20, 1994, that the Austrian State authorities had not overstepped the margin of appreciation afforded to local entities in deciding what is considered to be morally acceptable. The film in question involved provocative portrayals of religious figures venerated in the Roman Catholic faith. In keeping with the approach adopted in previous judgments, the Strasbourg authorities reiterated that the latitude afforded local authorities is not however unlimited and is subject at all times to European supervision,[121] especially in this case where the exercise of the right to freedom of expression was directed against the religious convictions of others.

In weighing the conflicting values of freedom of thought, conscience, and religion against that of the right to impart and receive controversial views, the Strasbourg Court upholds the decision of the Austrian courts to the effect that the material being communicated constituted blasphemy. The European Court relies explicitly on the content of the expression and moreover makes this troubling statement in its concluding paragraph:

> "***The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such measure in the light of the situation obtaining locally at a given time".***[122]

It is indeed disturbing that the Court has allowed such statements to make precedent for they imply that the viewpoint of the majority should prevail when certainly it is an uncontested fact that human rights legislation was created and has evolved over the years to safeguard against the suppression of minority viewpoints and opinions. To claim that, in this instance, the Austrian authorities rightly upheld the Roman Catholic religion for fear of potential civil unrest at the time supposes that human rights issues are decided in a vacuum with no consideration for future implications Also, it is noteworthy that the Court acknowledges that the applicant

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121 See Otto-Premiinger, *supra*, note 111, § 50.

122 *Ibid*, § 56.

association had taken precautionary measures to ensure that certain particularly vulnerable viewers would not be unduly subjected to the objectionable contents of the film by imposing an age limit and an admission fee as well as advertising profusely the nature of the film to be viewed. Ironically enough, these measures were considered to be an indication of the offensive nature of the film and thus used against the association as proof that it could have easily foreseen the negative impact that the film would have.

Three days later, on a strikingly different note, the European Court was to deliver judgment in a matter involving the propagation of racial discrimination in Jersild v. Denmark, *supra*. The applicant, a television journalist, considered that his right to freedom of expression had been violated by a conviction for aiding in the dissemination of racist statements. The conviction followed the airing of an interview with the Greenjackets, a radically racist group, during which its members engaged in highly offensive and insulting statements against certain ethnic groups. The Danish authorities had, on three separate occasions prior to the application under Article 10, considered the applicant's behaviour as contributing to the propagation of racism.

After elaborately expounding on the virtues of freedom of the press and its important contribution to society as a whole, the Court sets forth to emphasize the distinguishing features that allow it to conclude that there not only has been violation of the right to freedom of expression, but that this interference was disproportionate to the aim of protecting the reputation or rights of others. Surprisingly enough, no weight is given to the long-held contention that the national authorities are in a better position to evaluate the particular circumstances at play when examining issues involving public morality. Indeed, no effort is deployed to justify the Court's total absence of reliance on the judgments rendered by the Danish authorities. In passing reference, the Court appears to actually agree with the national courts when they adduced that the applicant had knowingly encouraged the offensive statements and had edited a taping of several hours in order to retain only the most degrading and objectionable comments.[123] However, other mitigating factors are raised, notably the fact that the journalist had not

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123 See Jersild, *supra*, note 106, § 32.

made the disparaging comments personally but was simply broadcasting the viewpoint of others and the fact that the "purpose" of the applicant's reporting was not racist, to conclude that the violation to freedom of expression could not be justified. It is indeed curious that none of these subjective elements were considered of importance in the Otto-Preminger case, a few days earlier.

How does one reconcile the seemingly disparate positions taken by the Court in these two instances? Indeed, it is inconceivable that, in the context of artistic expression such as the making and viewing of a film, that factors such as those raised in the Jersild case were not taken into consideration. For example, it often occurs in the expression of art that the message being diffused does not necessarily reflect the artist's personal opinion but rather is attempting to communicate a diametrically opposed message through the fostering of public debate on an issue or by generating strong reaction to a seemingly provocative art form. Furthermore, no issue is made of the fact that, considering the chosen medium of communication and the wider audience involved, i.e. television, no preventative measures were taken in the Jersild case to avoid undue exposure to vulnerable viewers, although the insufficiency of such measures appeared to be a deciding factor in Otto-Preminger.

It is simplistic for the Court to superficially address the issue of religious blasphemy by raising the shield of preeminence that must be given to national authorities while simultaneously conferring little or no importance to these same authorities in a different context. Is the European Court sending a message that freedom of the press benefits from quasi-absolute non-interventionism, or rather are the Strasbourg authorities making a judgment call on the *content* of the message being conveyed in the exercise of the freedom of expression? If the Court's recent adjudication in a similar matter is of any indication, it appears that the latter contention reflects the position taken by the European Court.

As in Otto-Preminger, the Court was called upon to decide, in Wingrove v. United Kingdom,[124] a matter involving an allegedly blasphemous exercise of expression

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124 *Supra,* note 111.

in the form of a video depicting offensive images to objects of veneration in the Christian faith. Of particular significance is the fact that the interference involved consisted of prior restraint, that is a restriction enforced in the form of a refusal to deliver a certificate of distribution, that essentially aims to prevent a potential harm to others. This form of interference clashes vehemently with any notion of freedom of expression for it relies on the potential damage of a form of expression and does not weigh conflicting values but rather intervenes to restrict based on worst-case scenarios of projected harm.[125] In the dissenting opinion of Judge de Meyer in Wingrove, this form of interference is deemed to be unacceptable in the field of freedom of expression.[126]

The European Court manifestly based its decision to the effect that the impugned measure was justifiable in a democratic society on the fact that the contents of the video were unacceptably profanatory. Indeed, the subjective nature of the scrutiny involved is evidenced by the fact that the Court explicitly states that the extent of insult to religious feelings must be significant[127] in order for an interference to be maintained. Several references are made to the actual images projected, thus suggesting that the Court is indeed passing judgment on content or, as it had been so reticent to do in the past, attempting to establish some uniform code of morality or at least a threshold of acceptable artistic expression that could be tolerated. Once again, the Court appears to uphold the mainstream Christian ideology and, whether or not it is its intention, seemingly offers protection to a segment of society that has not shown itself to be of particular vulnerability. The Court reiterates the principle set forth in its previous case-law to the effect that "matters liable to offend intimate personal convictions within the sphere of morals"[128] should be left to the national authorities for final scrutiny. It tends

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125 The Supreme Court of Canada engaged in this form of restraint in Dolphin Delivery, *supra,* whereby it concluded that the harm caused by secondary picketing would unduly harm third parties. It arrived at this conclusion although no picket line had actually been set up and no empirical evidence had been made available confirming the eventual damages.

126 *Supra,* note 111, p. 36.

127 *Ibid,* § 60.

128 *Ibid,* § 58.

to forget however that this principle was cast aside in Jersild, *supra*, when the local authorities' judgment did not coincide with its own.

Finally, the Court advances a relatively novel concept in justifying the necessity of a total ban on the distribution of the video in question. In rejecting the various propositions advanced by both the applicant and the Commission to further protect the viewing audience by restricting distribution, the Court refers to the medium of communication involved as precluding any such potential protection. In other words, since a video can be easily reproduced and subsequently widely diffused, the suggested controls would prove to be illusory. The Court is surely not implying that any expression conveyed through the medium of a video projection should *a priori* be subject to greater scrutiny simply because of the potential level of diffusion inherent to the instrument of communication. It has seemingly chosen to overlook the fact that this is true of virtually any instrument of communication nowadays, particularly of television as in the Jersild case, which has a far-reaching and generally uncontrolled viewing public. This did not prevent the Court from concluding in the latter case that it did not "consider the absence of such precautionary reminders to be relevant"[129] to its findings. These recent cases have evidently cast a level of incoherence on the interpretation given by the European Court to the value of freedom of expression encompassed in the *European Convention.*

Although freedom of expression under the *European Convention* and the *Canadian Charter* is subject to limitations thus facilitating cross-references to their respective case-law, it remains that the nature of their restrictive clauses is somewhat diverse. Indeed, the specificity of the European document implies that the restrictions are limited to what is explicitly mentioned whereas the Canadian clause, due to its generality, leaves ample space for interpretation as the state of the law evolves. On the other hand, the balancing act in which the Courts are called upon to engage in on a regular basis is necessarily influenced in the European case by the limitative nature of

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129 See Jersild, *supra*, § 34.

Article 17 which proscribes invoking the Convention to infringe another right or freedom protected in this same document.

However, contrary to the restrictive clauses associated with Articles 8-11 of the *European Convention*, Article 10(2) is set forth in a positive manner similar to Section 1 of the *Canadian Charter*, thus indicating that restrictions in the latter cases should be construed broadly. Finally, we have seen that the end result has produced a similar methodology adopted by both jurisdictions in their approach to freedom of expression adjudication, that is a broad, liberal interpretation regarding the scope of what is protected followed by a more rigorous analysis where the restriction is concerned.

Keeping these general precepts in mind, we now turn to the Strasbourg authorities' treatment of freedom of expression cases involving workplace issues.

- **Applications to the workplace environment**

The paucity of cases emanating from the Strasbourg authorities dealing directly with issues related to the workplace environment is partly explained, as in the case of the *Canadian Charter*, by the necessity of the presence of State action, i.e. the interference of public authority, in order for the complaint to be heard under Article 10 of the *European Convention*. The *Convention* specifically provides that the Commission may only receive applications alleging violation of one of the conditions contained therein by one of the Contracting Parties (Article 25) whereas the European Court may accept jurisdiction in cases referred to it by the Commission or a high Contracting Party (Articles 45 and 48). Thus, since labour matters are often the object of private disputes, it is rare indeed that the issue will reach an international forum such as the European Court. However, similar to the Canadian context where the intervention by a government body in the form of an arbitration award or other judicial order that owes its existence to statute is considered to constitute State action,[130] the Commission has accepted to consider applications of this nature as being the object of government interference.

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130 See Slaight Communications, *supra*, note 4.

In Van der Heijden v. The Netherlands,[131] the Commission accepted to examine a dispute under Article 10 that involved the termination of an employment contract by a national court at the request of the employer. Termination of employment was carried out due to the incompatibility of the applicant's functions as regional director of the Limburg Immigration Foundation and his activities in a political party espousing hostile attitudes towards immigrants. Concluding that the requirements under Article 10 (2) had been satisfied, the Commission determined that an employer has a certain latitude concerning the choice of his workforce and that considerations relating to the reputation of his organization's reputation, or as in this case, to the adverse affects of the activities of an employee on its reputation, were reasonable limits upon the employee's freedom of expression.

In a subsequent case similarly involving a dismissal confirmed by the various national labour boards and courts, the Commission refused to consider that there had been State interference as required by the Convention. Employed as a physician in the hospital of a Roman Catholic foundation, the applicant saw his employment terminated for breach of loyalty for having publicly expressed an opinion on abortion which ran against the stated position of the Church.[132] Contrary to its previous findings in Van der Heijden, the Commission considered in Rommelfanger that the enforcement by State authorities of the applicant's contractual obligation of loyalty did not implicate State interference. The Commission nevertheless goes on to examine whether the State had in this case failed to comply with a positive obligation under Article 10 to protect the employee in question, although it is difficult to determine on what basis this analysis is carried out once it was decided that the Commission had no jurisdiction in a private matter such as the case at hand.

The Commission underlines a positive duty incumbent upon the State to "secure" the rights provided in the Convention to everyone within its jurisdiction as stated by Article 1 of the Convention. This touches upon a long-standing debate in the field of human rights as to whether the rights provided for in legislation confer upon its

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131 No. 11002/84, DR 264 (1985).

132 Rommelfanger v. Federal Republic of Germany, No. 12242/86, 62 DR 151 (1989).

beneficiaries a strictly negative right, that is that the State must ensure an atmosphere free of any impediments to the enjoyment of the freedoms outlined or rather whether the State is also obligated to provide measures based on positive action in order to create an environment conducive to the exercise of these rights and freedoms. In Rommenflager, reference is made to the earlier case of Young, James and Webster, *supra,* which dealt primarily with the right to freedom of association but examined freedom of expression as a component of such a right. In this matter, the Court determined that the State had a positive obligation to protect employees against dismissals resulting from their refusal to comply with the compulsion to join a trade union. With all due respect, we consider that the facts of this affair contain an important distinguishing factor that precludes its application to the Rommelfanger case. The compelling nature of the obligation to join a trade union was provided for in legislation, which necessarily implies State intervention and thus the positive obligation to provide protection.

In the Rommelfanger case, the Commission examines whether a similar obligation was incumbent upon the State and concludes in the negative based on the fact that the applicants benefitted from the normal recourses available to dismissed employees and this ensured a fair protection of their rights. Fortunately, this decision has not been relied upon by either the Commission or the Court for future adjudication! It goes on to state that for employers such as the Catholic foundation, the Convention must be read in a manner such as to ensure that the freedom of expression of the employer is respected. This implies that "an employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees".[133]

The European Court has dealt with labour issues primarily in the context of civil service employees. There is manifestly a reticence on its part to address these issues as is evidenced by two judgments rendered on the same day, Glasenapp v. Federal

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133 *Ibid,* p. 161.

Republic of Germany[134] and Kosiek v. Federal Republic of Germany[135], involving the revocation of status and dismissal, respectively, of two public school teachers on probation. In both instances, the employees were associated with political parties which were considered to have interests contrary to the oath of allegiance which both employees had signed as a condition of their employment. The Court chose to skirt the issue of the State's obligations by artificially cataloguing the cases as involving the right of access to the civil service, a right expressly excluded from protection under the *European Convention.* Thus, it was determined that there was no violation of Article 10 under the circumstances although the court does allude to the fact that despite the Court's finding, it "does not follow that in other respects civil servants fall outside the scope of the Convention".[136]

Finally, in a recent judgment involving once again a public schoolteacher affiliated with the German Communist Party, the European Court was called upon to address the issue of justifiable limits to a civil servant's freedom of expression. Having professed a similar oath of allegiance as a condition of employment, the applicant in Vogt v. Federal Republic of Germany,[137] had been appointed a permanent civil servant. The Court relied heavily on this last fact to distinguish the matter from the Glasenapp and Kosiek cases.

The Court evidently encountered difficulty in reconciling the applicant's freedom of expression on the one hand and the State's right to impose a high degree of loyalty upon its civil servants on the other, for the final decision that there had been a violation of Article 10 was rendered by a divided Court (10 votes to 9). The Court summarizes the general principles emerging from its case-law and analysed above regarding its position taken regarding freedom of expression. In deciding that the sanction of dismissal was disproportionate in the circumstances, the Court based its findings principally on the distinguishing facts of the case. Thus, the applicant's long-standing record as a teacher, the fact that no complaints had ever been lodged against

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134 Eur. Court H.R., Series A, no. 104 (1986).
135 Eur. Court H.R., Series A, no 105 (1986).
136 *Ibid*, § 35.
137 Eur. Court H.R., Series A, no. 323 (1995).

her due to her political activities or regarding her capacities, that she had never engaged in any unconstitutional behaviour either within or outside the workplace, as well as the fact that the political party in question was a perfectly legal entity all militated in the applicant's favour. The severity of the sanction, especially on Mrs. Vogt's future livelihood to the extent that she probably would not ever be able to work in Germany as a teacher was also taken into consideration. Finally, emphasis was laid on the degree of loyalty demanded by the German authorities in the matter:

> ***"...the absolute nature of that duty as construed by the German courts is striking. It is owed equally by every civil servant, regardless of his or her function or rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life: the duty is always owed, in every context.".***[138]

The judgment in Vogt is somewhat incompatible with the reasoning adopted in the Kosiek and Glasenapp cases mentioned above, especially with regards to the judgment call that the Court makes on the German system of government. The Court attempts to reconcile the different approaches by distinguishing the two issues but it is a feeble effort that does not stand up to serious scrutiny. The fact that in the earlier cases the civil servants were on probation did not preclude that the Court could have pronounced itself on the duties and obligations incumbent upon civil servants. The Court chose to avoid the issue but chose equally to pronounce itself on certain issues that set precedent. It confirmed the wide latitude given to national authorities and furthermore upheld the degree of loyalty required by the German authorities of a civil servant and did not in any way denounce their rigidity. In Vogt, the Court appears to castigate the German courts for their inflexibility although a feeble attempt is made initially to defend the position taken by the national authorities due to the special circumstances and particular history of the Republic.[139] The fact of the matter is that the cases were decided more than ten years apart in two very distinct periods of history, as aptly pointed out by Judge Jambrek in dissent,[140] during which major upheavals in

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138 *Ibid*, §59.
139 *Ibid*, §51.
140 *Ibid*, § 7 of the dissenting opinion.

the social and political structures of the country as well as in the regimes governing its people occurred. Attempting to reconcile or judge the 'rigidity' of the degree of loyalty required of civil servants in this context was certainly a futile task and the Court should have taken this factor into consideration in its final judgment.

Unfair competition by a former employee was the subject of a recent ruling by the European Court in Jacubowski v. Germany[141] involving freedom of expression issues. The applicant was terminated from his employment for financial mismanagement . His former employer subsequently issued a press release explaining the reorganization of the company and notably shedding light on the issues surrounding the applicant's dismissal and criticizing his performance. Mr. Jacubowski chose to respond to this by directly addressing the recipients of the press release who incidentally were clients of his former employer and sending them newspaper clippings critical of his employer's activities and of the treatment afforded the applicant. Furthermore, the tone of the circular manifestly solicited the clients to contact the applicant to discuss the issue as well as other business developments.

Although the Dusseldorf Court of Appeal refused to grant an injunction against the applicant to prevent him from further criticizing his former employer, it did enjoin him from sending any further circulars and informed him that all damages arising from his actions would render him liable for compensation. The Court further determined that the former employee had acted, for all intents and purposes, in a competitive manner in order to further business purposes and this last point would prove to be the decisive factor in determining that the former employee would be responsible for any future damage to the reputation of his employer.

Following a series of unsuccessful attempts to obtain redress within the national courts, the applicant filed a complaint pursuant to the European Convention claiming that his freedom of expression has been unjustifiably curtailed by the prohibition to circulate the mailings in question. The European Court, in deciding that there had been no breach of Article 10 in a 6 to 3 vote, relied heavily on the fact that the domestic

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141 Eur. Court H.R., Series A, no. 291 (1994).

courts had on three occasions unanimously rejected the employee's contentions and rather regarded his actions as unfair competition designed to "poach" his former employer's clientele and entice it to join a new press agency set up by him.

The Court clearly gives precedence to the protection of the reputation of others over freedom of expression in this context and manifestly indicates the low level of priority afforded by European States to what is considered to be commercial expression. That the employee's actions were in large part a response to the press release issued by his former employer criticizing his performance and possibly tarnishing his reputation does not seem to weigh heavily in the Court's considerations. The "essentially competitive"[142] purpose of the applicants's actions dominated the Court's findings as well as the fact that the injunction against the applicant had not been granted, thus implying that he could voice his opinions in any fashion other than through the distribution of the circular. The restrictive measure could therefore not be considered disproportionate.

What has emerged from the analysis above, is that the European courts have encountered difficulties, similar to the ones faced by Canadian authorities, in deciding the priority that should be afforded freedom of expression over other fundamental rights. Above all, as previously mentioned, a similar framework has been adopted in addressing the issue, whereby emphasis is placed on inclusion of a given expression under the protective umbrella of human rights legislation and restrictions dealt with on a case by case basis. As we examine the public sector workplace in the next section, we will note that the American approach to freedom of expression, notably in the public sphere of activities, appears to focus more on defining the scope of the protection, with what is included enjoying quasi-absolute protection whereas no consideration is afforded to excluded forms of expression.

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142 *Ibid*, § 28.

B. THE PARTICULARITIES OF THE PUBLIC WORKPLACE

Public sector employees, due to the fact that they occupy positions dealing directly or indirectly with the public, are subject to special considerations when evaluating the scope and nature of the freedom of expression to which they are entitled. Some may advance that this right is curtailed in the case of civil servants, primarily because the perception of the public is an important, if somewhat subjective, factor considered when determining whether there has been infringement of this liberty. However, we will see that in certain circumstances, public sector employees are afforded greater protection than their private sector counterparts.

1. PUBLIC SECTOR CONSIDERATIONS IN CANADA[143]

Public sector employment does not deprive an individual of the constitutionally protected freedom to express him/herself. Indeed, some may advance that the advantages incurred are even more direct and available since the implication of State authority in employment decisions is unambiguous and thus not subject to preliminary objections related to jurisdiction as often plagues private sector litigation. The standards emanating from the Supreme Court judgments studied above and pertaining to the employment context in general are equally applicable to the public workplace. However, due to the particular characteristics of working for government, especially the notion of "service to the public" inherent in this employment relationship, employees are often subjected to stringent rules of conduct, whether on or off-duty. A landmark Supreme Court judgment, Fraser v. Public Service Staff Relations Board, incorporates into its findings the unique factors governing the exercise of freedom of expression in the public sector, as summed up by the labour adjudicator who initially heard the case:

> ***"[It is] incumbent upon the public servant to exercise some restraint in the expression of his views in opposition to Government policy. Underlying this notion***

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143 Since our paper focuses primarily on the private sector, statutory restrictions of freedom of expression in the public sector will not be examined. However, we refer you to an overview of the matter in P. Garant, "La liberté politique des fonctionnaires à l'heure de la Charte canadienne" (1990) 31 *C. de D.* 409.

> ***is the legitimate concern that the Public Service and its servants should be seen to serve the public in the administration and implementation of Government policies and programs in an impartial and effective manner. Any individual upon assuming employment with the Public Service knows or ought to be deemed to know that in becoming a public servant he or she has undertaken an obligation to exercise restraint in what he or she says or does in opposition to Government policy. Moreover, it is recognized that the exercise of such restraint may very well not be a requirement of employees who work in less visible sectors of Canadian society".***[144]

Although constitutional considerations were not at issue in the adjudication of the Fraser case because the *Canadian Charter* had not yet been proclaimed at the time that events relevant to the case transpired, its extensive analysis of labour relations in the public sector continues to play a governing role in deciding present day matters pertaining to permissible freedom of expression in the civil service.[145] The appellant was dismissed from his functions following the ongoing criticism of government policies unrelated to his job but which nonetheless resulted in an impairment to "perform his own job and his suitability to remain in the public service"[146], according to then Chief Justice Dickson.

Citing the importance and necessity of an impartial and effective public service, the Chief Justice emphasized the broad nature of a job in the public sector as having "two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public"[147] (Our emphasis). Finally, it was deemed that the high level of Mr. Fraser's occupation as a supervisor with Revenue Canada as well as the extreme nature of his criticism of government policies which extended to personal attacks on the Prime Minister were incompatible with his continued employment. In rendering its judgment, the Court cited another characteristic attributed to the public employee and raised by the lower tribunal, that of loyalty to his employer, in this instance the Government of Canada and not the political party in power. This particular factor ensures the smooth functioning of government,

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144 Fraser v. Public Service Staff Relations Board [1985] 2 S.C.R. 455, p. 466.

145 This judgment's instructive value lies also in the reference to freedom of expression as being a principle of the common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act*, 1867 (at pp. 462-463 of the judgment).

146 *Supra*, note 144, p. 474.

147 *Ibid*, pp. 468-469.

but above all satisfies the public interest in both "the actual, and apparent, impartiality of the public service".[148]

Public perception of government employees as well as employer control of off-the-job activities remain, to this day, characteristics of employment within the public sector. The British Columbia Court of Appeal confirmed the special role assumed by those who choose to work for government. In rejecting the complaint of a public school teacher claiming freedom of expression rights under Section 2(b) in Re Cromer and B.C. Teachers' Federation, the Court determined that criticism by the appellant of a colleague violated her Code of Ethics despite the fact that the exchange occurred during Mrs. Cromer's off-duty time and in her capacity as a parent and not as a teacher:

> ***"I do not think people are free to choose which hat they will wear on what occasion. Mrs Cromer does not always speak as a teacher, nor does she always speak as a parent. But she always speaks as Mrs. Cromer. The perception of her by her audience will depend on their knowledge of her training, her skills, her experience, and her occupation, among other things."***[149]

These findings were echoed in subsequent judgments of the Supreme Court[150] and most recently confirmed in Toronto (City) Board of Education v. O.S.S.T.F., District 15, *supra*, whereby Justice Cory, speaking for the majority, stated that a teacher engaging in severe misconduct outside of regular teaching hours and away from the workplace could be disciplined by her employer.

The primary focus of Canadian courts when examining public sector freedom of expression issues seems to lie in actual or perceived impairment either to the employee's actual job or to the efficiency of the workplace in general, this either within or outside the workplace. Although content, form, and context of the form of expression is scrutinized, greater emphasis is given to circumstances surrounding the expression rather than on the message being communicated.[151] These considerations are particular

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148 *Ibid*, p. 470.

149 Re Cromer and B.C. Teachers' Federation, (1986) 29 D.L.R. (4th) 641, 660.

150 See Ross v. New Brunswick School District No. 15, *supra*, note 49; R. v. Audet [1996] 2 S.C.R. 171.

151 In Toronto Board of Education, *supra*, note 43, much emphasis was put on the fact that the wording and opinions expressed constituted severe misconduct. Also, reference was made to the fact that the letters contained threats of violence which appeared to weigh heavily in their categorization as severe, if not extreme misconduct. This is surprising considering the Court's holding that content should not be a basis for evaluation of whether expression is to be considered protected or not. However, an important

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to the public workplace context and go beyond the factors examined earlier that apply to both private and public sector environments. In sharp contrast, the American workplace has developed strikingly different rules and standards for its public employees where freedom of expression is concerned, as will be evidenced in what follows.

2. THE AMERICAN EXPERIENCE

Labour relations in the American workplace are dominated by a theory that states that absent an explicit time-frame provided for in an employment contract, the employer/employee relationship is terminable at will by either of the parties. The employment at will doctrine has historically governed relations in the workplace and constitutional protection[152] of freedom of expression in this context has been restricted to public sector employees. We have thus chosen to focus our study of the state of the law on freedom of expression and the workplace in the United States primarily on the public sector although we will make a brief foray into the private sector by evaluating the extension of constitutional protection to this workplace. Freedom of expression issues in the public workplace are addressed primarily through a free speech provision embodied in the First Amendment of the American *Bill of Rights.*[153] However, as we will note in what follows, this document provides somewhat superficial guarantees even to those employees directly within its sphere of protection.

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distinguishing factor to be kept in mind is that Toronto Board of Education does not address constitutional issues and thus the Court may have applied different considerations in deciding whether appropriate discipline had been meted out.

152 Our analysis of constitutional protection does not examine state constitutional instruments which may afford greater or equal protection.

153 *Supra*, see note 12. Two other human rights documents that contain freedom of expression clauses and that offer regional protection to American countries are the *American Declaration of the Rights and Duties of Man* O.A.S./ Ser.L/V/II.23, doc. 21 and the *American Convention on Human Rights* (1979), 1144 U.N.T.S. 123. Through its adherence to the Organization of American States as of January 8, 1990, Canada is now subject to the *American Declaration of the rights and duties of man* and to the mechanism of individual application provided for therein for any violation of the Declaration. As for the *American Convention on Human Rights*, although there has been political commitment to ratify the Convention in Canada, it had not done so as of January 1, 1997. However, Canadian courts have relied on jurisprudence relating to the Convention on several occasions, notably in Immeubles Ni/Dia Inc., [1992] R.J.Q. 2977 (H.R.T.).

As previously mentioned, Canadian and Québec courts have been reticent to incorporate the conclusions of their American counterparts regarding human rights issues into their respective jurisdictions. However, American case law has aided in circumscribing the issue if not in providing solutions to freedom of expression queries. Nevertheless, it is instructive to keep in mind the following excerpt from Chief Justice Dickson's reasons in Keegstra, *supra*, at p. 740, when evaluating the preponderance to be given to American case-law in this particular area of law:

> ***"Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States."***

(a) First Amendment ramifications on freedom of expression

Contrary to the private sector[154], public employment affords its employees protection from arbitrary disciplinary sanctions imposed following the exercise of freedom of expression. The First Amendment provides a seemingly comprehensive form of relief for employees where state action has intervened to restrict the exercise of free speech:

> ***"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."***

Although an apparently universal right that does not make distinctions based on employment status, the First Amendment has engendered a private citizen/employee dichotomy that has been the source of much litigation before the American courts. In the absence of state action, private sector employees do not benefit from any constitutional protection under the First Amendment, although we will see that efforts have been made to qualify this instrument as public policy in order that it apply

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154 American private sector employment and freedom of expression will be briefly examined in a later section. We have chosen to examine public sector employment first for many of its characteristics heavily influence labour relations in the private sector, notably with respect to First Amendment ramifications.

universally. Originally, this exclusion extended to public sector employees, even though the presence of State action was obvious, on the basis that working in the public domain did not grant additional protection normally afforded only to private citizens. The rights/privilege doctrine essentially advocated that the privilege of working in the public sector stripped one of rights associated with being a private citizen. As succinctly put by Justice Holmes, in an 1892 statement that continues to make headlines, when referring to a policeman's right to free speech and ensuing disciplinary action, he "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman".[155]

Realizing the abrogation of an individual's freedom that took place simply by choosing employment in the public sector, the Supreme Court moved to eradicate this contradiction in Keyishian v. Board of Regents[156] where the rights/privilege theory was cast aside by American courts. According to statute governing public employees, the continued employment of several professors of a State university was conditional upon their signing of a document to the effect that they were not members of the Communist party and that they had duly informed management of any past involvement with the said party. Refusal to comply with this condition implied dismissal. Court scrutiny of the impugned legislation determined that dismissals pursuant to its application were in violation of the employees' First Amendment rights in that mere membership in the Communist Party without any proof of proscribed behaviour barred one from employment in the civil service.[157]

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155 See McAuliffe v. City of New Bedford, 29 N.E. 517, pp. 517-518 (1892). This view was upheld consistently by the courts as illustrated by a 1952 case, Adler v Board of Education, 72 S. Ct. 380 whereby the law stated that anyone advocating the overthrow of the government by force or violence or who belonged to an organization having such a goal was barred from public employment. As summarily put by the Court, at pp. 384-385:

> *"It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."*

156 87 S.Ct. 675 (1967).

157 *Ibid*, p. 687.

The void in public employment jurisprudence that followed the abandonment of the rights/privilege doctrine was rapidly filled by a new philosophy that recognized the duality of the public employer/employee relationship, that is the individual identity of these two entities as well as the public aspect of the working relationship.[158] What ensued was a series of cases that have spanned over three decades, concluding recently with a landmark judgment that confirms the analytical framework initially established for examining First Amendment cases but does not sufficiently clarify the criteria that govern freedom of expression in the workplace.

- **"Public concern" and disruptiveness in the workplace**[159]

At issue in Pickering v. Board of Education,[160] decided a little over one year after the Keyishian case, was the publication in a local paper of a teacher's scathing criticism of the Board of Education's handling of a tax proposal to raise revenue for schools and the ensuing dismissal of the government employee. Considering that teachers were the members of society most likely to have an informed opinion on the debated issue, the Supreme Court determined that "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal".[161] Acknowledging the value of employee free speech, the Court equally recognizes the importance of regarding the public employee as "the member of the general public he seeks to be"[162] and in striking a balance between his interests "as a citizen, in commenting upon matters of public concern and the interest of the State, as an

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158 Coupled with the First Amendment, the Fourteenth Amendment of the American *Bill of Rights* provides a legal foundation to the premise that an individual's rights as a citizen cannot be abrogated due to his employment status. Section 1 of the Fourteenth Amendment reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

159 For an overview of lower court decisions applying these two criteria both for and against the employee in determining freedom of expression issues in the workplace, see T. M. Massaro "Significant silences: Freedom of speech in the public sector workplace" 61 *S. Cal. L. Rev.*, (1987) 3, p. 20, notes 95 and 96.

160 88 S. Ct. 1731 (1968).

161 *Ibid*, p. 1736.

162 *Ibid*, p. 1738.

employer, in promoting the efficiency of the public services it performs through its employees".[163] Thus, the analytical framework which governs freedom of expression adjudication in the public workplace to this day was introduced, although the public/private distinction was to create much debate over the years, for the Court did not clearly qualify what constituted "public concern" expression beyond the facts that were brought before it.

Over fifteen years transpired before the Supreme Court was called upon to address a similar issue involving public employees and freedom of expression. In Connick v. Myers[164], the analysis established in Pickering would be transformed into a two-tiered test, affording preeminence to the "public concern" requirement. Thus, the expression must first fall into the public concern category to be deemed protected *a priori.* The day following the announcement of a job transfer, the aggrieved employee in Connick v. Myers proceeded to distribute a questionnaire at the workplace concerning the question of job transfers and working conditions. Myers was terminated because of her refusal to accept the transfer. However, among the reasons cited for dismissal was the act of insubordination involving the circulation of the questionnaire as the employer claimed it directly questioned the authority of her superior.

The Court reiterated the finding in Pickering to the effect that only matters of public concern constitute protected expression, but went one step further and attempted to circumscribe the scope of what was covered by focussing on three issues: the content, form and context of the expression being evaluated. After examining the questionnaire the Court concluded that the questions raised were "mere extensions of Myers' dispute over her transfer"[165] and thus did not fall within the realm of matters relating to "public concern". However, since one of the questions, dealing with the pressure put upon district attorneys to contribute to political campaigns, could be viewed as being of

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163 *Ibid,* pp. 1734-1735.

164 103 S.Ct. 1684 (1983). Although three other cases involving protected speech of public service employees were brought before the Supreme Court prior to the Connick case, these did not dwell on the public concern requirement. The cases in question are: Perry v. Sinderman, 408 U.S. 593 (1972); Mount Healthy City School District Bd. Of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979).

165 *Ibid,* p. 1690.

interest to the community, the Supreme Court proceeded with the next step of the analysis which involved the balancing of Myers' freedom of expression rights against the government's interest in the efficiency of its public charge.

In concluding that the government's interests should prevail in the present case, the Court relied heavily on the disruptive nature of the impugned questionnaire, and determined that "the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence"[166]in Myers' superiors. Furthermore, the circumstances surrounding the distribution of the questionnaire aggravated employer interests: Myers exercised her right to expression at the office, on company time and in direct retaliation of the job transfer, as the circulation immediately followed the announcement. Thus, the contextual analysis warranted action on the part of Myers' superior and the dismissal was confirmed as justified. In qualifying the factual situation as a strictly private employee grievance that therefore did not merit constitutional protection, the Court nevertheless emphasized its continuing commitment to speech relating to matters of public concern and reiterated its reticence in establishing a general standard applicable to all types of speech.[167]

- **Employer determination of protected speech**

In one of the latest rulings from the American Supreme Court implicating a public employee dismissed from her functions and claiming First Amendment protection, Waters v. Churchill,[168] the employer was given wide latitude in determining the factual surroundings of the speech subjected to a sanction. The plaintiff, an obstetrics nurse in a public hospital, allegedly engaged in lengthy criticism aimed at the department for which she worked as well as at her supervisor, during a private conversation with another nurse. Of particular interest is the fact that the conversation between Churchill and several of her colleagues took place in the employee kitchen during a dinner break and was subsequently reported to a supervisor. The employer

166 *Ibid*, p. 1693.
167 *Ibid*, p. 1694.
168 114 S. Ct. 1878 (1994).

therefore took a decision to terminate Churchill based on strict hearsay, and for an activity occurring during private time, albeit on company premises.

The Court rapidly evaluated the speech involved but did not find it necessary to determine whether it was a matter of "public concern" because the speech was so disruptive that it overshadowed any First Amendment protection it might have had.[169] The result of this, as rightly pointed out by Karin Hoppmann[170] is that the first prong of the test can only be used as an exclusionary rule, a way to dismiss an employee's claim.

Of particular significance in the Waters decision is the power afforded to employers to evaluate the content of employee free speech and to determine whether it is worthy of protection. The facts in the case at bar involved two diametrically opposed renditions of the conversation that took place: that of the employee who claimed that although she had criticized certain policies, she had actually defended her supervisor and that of the employer, based on reports of two other employees, that alleged that the content had been entirely negative and critical of the workplace environment. The Court established that the employer should not face the additional burden of having to comply with the rules of evidence imposed in judicial proceedings when deciding appropriate disciplinary action and that courts should accept the facts as the "employer reasonably found them to be".[171]

Many scholars[172] have seen this statement by the Court as a new procedural safeguard for employees in that henceforth employers would have to conduct an internal investigation before implementing disciplinary action. Thus, an employee would be given a concrete opportunity to uphold his free speech contentions without having to face dismissal and challenging it in court, which was the standard procedure prior to the

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169 *Ibid* at p. 1990.This cursory coverage at the first step of the analysis brings to mind Canadian Supreme Court treatment when deciding whether expression is protected or not.

170 K. B. Hoppmann "Concern with public concern: toward a better definition of the Pickering/Connick threshold test", *Vanderbilt Law Review*, Vol.50, 993, 1006 (1997).

171 *Supra*, note 168, p. 1889.

172 See *supra*, note 170, footnote 71.

Waters decision.[173] However, upon closer scrutiny, this recourse may prove to be illusory. As pointed out by Karin Hoppmann,[174] the requirement imposed by Waters serves as a "delegation of first amendment analysis to the employer" in that it is only in the event that the employer considers that there is a "substantial likelihood that the employee's speech is protected in the first place" that he is mandated to carry out the reasonable factual investigation on which the court will eventually rely. Thus, an obviously biased party is called upon to determine the content of speech which the court will subsequently judge to be protected or not. Furthermore, the employer is not in any way constrained to conduct an internal investigation as no sanctions are provided for the failure to do so prior to imposing discipline and no mention is made of whether the Court will review the employer's decision in the event that he considers that there is not a "substantial likelihood" that the speech in question is protected. Needless to say, it is the employer's interests that have been served with the Waters precedent and at least one subsequent application of the decision has proven this to be true.

Called upon to decide a case remanded to it by the Supreme Court and to consider it in light of Waters, the Court of Appeals for the Second Circuit expanded to an even greater extent, in Jeffries v. Harleston,[175] the power of the government employer in freedom of expression cases. During the course of a conference on black culture given in Albany, New York, the plaintiff proffered several disparaging remarks against Jews. His employer, the City University of New York, decided to restrict renewal of his appointment as chairman of the Black Studies Department to a one year period in response to the content of the conference which they deemed to be against the better interests of the University. Two months later, the Board of Trustees voted unanimously to replace Jeffries as chairman. Claiming violation of his First Amendment free speech

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173 The usual protection offered to public sector employees has been labelled *ex-post* scrutiny of freedom of expression rights, for employees must first suffer adverse disciplinary action before any right of action is open to them. For an example of a recent *ex-ante* decision which calls into play opposition to a statute or regulation rather than to an adverse employment decision. see United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995).

174 *Supra*, note 170, p. 1007.

175 52 F. 3d 9, (1995) (*certiorari denied*) 116 S. Ct. 173.

rights, Jeffries filed suit against his superior, the university and the individual members of the Board of Trustees.

After several difficulties arising from inconsistencies in the trustees' interrogatories, the case was remanded to the Second Circuit with specific instructions to consider the Waters decision even though the latter case had been decided in the interim. The Second Circuit Court interpreted Waters as stating that Pickering/Connick should henceforth be applied in a manner that allowed for substantial deference to be allotted to a public employer's "reasonable prediction of disruption" (rather than actual) arising from an employee's speech when considering disciplinary action.[176] Thus, in Jeffries, the deference shown to employer determinations is even greater than that in Waters. In this last decision, it was the facts resulting from a reasonable investigation that were left to be determined by the employer. In Jeffries, the employer's disciplinary power is strengthened by allowing wrongful discharge cases to be upheld in the event that the employer has concluded that there could have resulted a reasonable prediction of disruption. In this manner, the employer's discretion has become a decisive factor at both levels of the test established by the Supreme Court in freedom of expression adjudication.

Despite affording employers this broad latitude in determining what constitutes "public concern" and more recently in deciding what could cause potential disruption to their workplace, the Supreme Court has not yet provided them with the necessary, objective guidelines for arriving at such a determination. It appears even more imperative now to engage in this exercise considering the wide discretion given to employers by the latest cases and the inevitably arbitrary decisions at which they may arrive if allowed to mete out discipline without clear guiding principles.

- **The content/context dichotomy**

One of the chief problems in discerning a clear standard in the public concern examination that would enable both employers and employees to govern their actions

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176 *Ibid*, p. 13.

or modify their behaviour if necessary is the American Supreme Court's tendency to oscillate over the years between content and context based approaches in determining what constitutes a matter of public interest.[177] Contrary to its Canadian counterpart which has emphatically and consistently rejected an analysis based on the content of the expression involved, the Supreme Court of the United States has applied both approaches on a seemingly ad-hoc basis. For example, in Pickering, the Court opted for a primarily content-based analysis since the content of the letter was examined at length before deciding that the issues raised were matters upon which a teacher was very well-placed to comment upon.[178] On the other hand, the Court explicitly relied on a hybrid analysis based on content, form, and context in Connick[179] whereas a purely content-based approach prevailed in the Waters decision, although, as was previously mentioned, the public concern issue was given scant attention in this last case.

Establishing what constitutes a matter of public concern is, for all intents and purposes, a highly subjective exercise. Several problems arise when a content-based analysis is envisaged. Firstly, the Court is called upon to make value judgments concerning what is being communicated to determine whether it falls into the category of expression relating to a public concern. Moreover, it is difficult to establish standards when judging issues based on speech content. Indeed, it is rather dangerous to apply precedent in these cases, for the findings of the Court would necessarily be relevant only to the particular message being communicated. The principal difficulty however with evaluating public interest considerations based on the content of the speech being pronounced is the extent to which an issue needs to become public before it can be considered of "public concern". Mainstream, popular ideas that retain public attention would necessarily be given preeminence whereas minority opinions not considered

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177 The "public concern" requirement has met with much criticism over the years, calling for a redefinition of the test or an outright abolition of it. See for example, K. B. Hoppmann, "Concern with public concern: toward a better definition of the Pickering/Connick threshold test", *supra*, at note 170; K. L. Sachs, "Waters v. Churchill: Personal Grievance or protected speech, only a reasonable investigation can tell-the termination of at-will government employees" (1996) 30 *New England L.R.*, 779; M. J.K. Schiumo, "A proposal for rethinking the 'Of public concern' requirement of Pickering" [1992] 14 *Communications and Law*, 51; C. K. Y.Lee, "Freedom of speech in the public workplace: a comment on the public concern requirement" [1988] 76 *California L.R.* 1109;

178 Pickering, *supra,* note 160, p. 1736.

179 Connick, *supra*, note 164, p. 1690.

"public" enough would not meet the requirement. This would result in the values of the majority values being instilled into the *Bill of Rights* jurisprudence which clearly goes against the objectives of a document of this nature.

The nature of the message being communicated must be such that it cannot be construed as a grievance relating strictly to a personal matter. In a content-based approach, this would imply that a public employee would have to drum up support for the expression in question in order for it to be considered of sufficient importance. Paradoxically, this might entail that the second part of the protected speech test would not be met, in that vociferous support may result in the speech becoming disruptive to the point where it would be outweighed by government interests of efficiency in the workplace. As aptly put by Prof. Massaro, grievances couched in terms that imply a public employer's responsibility to the public would most likely be deemed to satisfy the public concern requirement. However, the ensuing result would be counterproductive to the interest of the employee:

> ***"On the other hand, if the employee does stir things up, the "disruption"may impair the government interest in smooth office operations. Sheila Myers had to enlist the aid of her co-workers in order even arguably to meet the "public concern" criterion. When she did, however, she became a thorn in management's side and was accused of provoking a "mini- insurrection." If a worker speaks alone at work, about work, the speech might not implicate matters of public concern and will not be protected; yet, if a worker engages others to join in the chorus he or she may pose a threat, and thus can be removed."***[180]

Although it may appear as if speech is judged based on context in the above example, the fact of the matter is that it is because there is a content-based evaluation that has determined that it is strictly a personal interest that entices an employee to then seek support for an issue and thus renders the context of utmost importance. The following example illustrates the point. If an employee complains about a wage freeze or decrease that affects many categories of employees and thus is not entirely a personal grievance, it will nonetheless be considered *a priori* as a matter not relating to a public concern. It is only if the policy is opposed in the larger spectrum of employee relations in general or if employees manage to show that it is part of a broader problem that

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180 T.M. Massaro, *supra*, note 159, p. 24.

affects the majority of workers that it would be considered protected speech under the First Amendment. Thus, this model clearly leads to consideration of values reflecting solely the viewpoints of the majority, for it is not clear when an issue becomes part of the public concern.

Contrary to its American counterpart, the Supreme Court of Canada has systematically proscribed[181] a content-based approach to evaluating freedom of expression cases. Although it has grappled with morality issues over the years, it has emphasized that the content of what is communicated cannot be used to determine the principles guiding adjudication. It recently confirmed this viewpoint in Ross v. New Brunswick School District No. 15, *supra*, whereby Justice La Forest, on behalf of the Court, emphasized the educational, employment and anti-Semitism contexts in his analysis under Section 1.[182]

Despite the apparently relative nature of the protection afforded public employees under the First Amendment and the reigning confusion as to the standards to be applied as to when speech is actually protected, some commentators and courts have lobbied for application of the First Amendment to private sector employees, with mitigated success however.

(b) Extension of First Amendment protection to the private sector

As previously emphasized, the employment at will doctrine prevails in private sector employment in the United States. The proponents of this theory advance that the employment relationship is one regarded as upholding to the strictest degree the liberty of the respective parties when entering into the contract governing them. This implies that if no specific time frame for the duration of the employment contract was provided for, both employer and employee are free to put an end to it without justifying their action. As succinctly put by the Supreme Court in an early ruling that set the stage for decades on the matter "employers may dismiss their employees at will...for good cause,

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181 See for example Irwin Toy, *supra*, note 17, p. 968 and Keegstra, *supra,* note 26 , p. 732.

182 See Ross, *supra*, note 49, p. 872 and following.

for no cause, or even for cause morally wrong without being thereby guilty of legal wrong".[183]

Strict adherence to the ideology that employment was terminable at will persisted, interrupted briefly by a sole decision in 1959[184] that stood alone for well over a decade wherein it was determined that refusal to perjure oneself could not form the basis for dismissal, by virtue of a public policy exception to the rule of employment at will. In most cases however, the private employer benefitted from quasi-absolute discretion to rule the workplace and courts confirmed employee dismissals involving freedom of expression in various forms ranging from joining a labour union,[185] to refusal to vote for the employer's preferred candidates during a municipal election[186] and the classical case of political expression.[187]

When issues involving constitutional protection are raised, the traditional response of the courts has been that in the absence of state action, a private employee cannot invoke First Amendment rights nor State Constitution clauses regarding freedom of expression. Employees invoking the tort of retaliatory discharge, developed as a narrow exception to the employment at will doctrine, were more often than not refused recovery. In Shovelin v. Central New Mexico Electric Cooperative Inc., the Supreme Court of New Mexico stated the following definition of this new remedy as adopted from a previous judgment:

> "***For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn".***[188]

The Court refused to allow an employee who had been terminated because he had been elected as mayor to invoke the State Constitution as a source of public policy to create the cause of action of retaliatory discharge. This case confirms the reluctance

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183 Payne v. Western and Atlantic Railroad, 81 Tenn. 507, pp. 519-520 (1884).
184 Peterman v. Teamsters Union, 171 Cal. App. 2d 184 (1959).
185 Coppage v. Kansas, 35 S. Ct. 240 (1915).
186 Bell v. Faulkner, 75 S.W. 2d 612 (Mo. Ct. App. 1934).
187 Twentieth Century-Fox Film Corp. v. Lardner, 216 R.2d 844 (1954); Black v. Cutter Labs, 278 P. 2d 905 (1955).
188 Shovelin v. Central N.M. Elec. Coop., Inc., 850 P. 2d 996,1006 (1993).

of American courts to intervene in decisions of private employers for causes relating to public policy.[189] Judging from the prolific caselaw on the matter, it would appear that the First Amendment cannot be used as public policy in the absence of state action. Exceptions have been few and far between and the courts have declined to extend the public policy exception beyond the parameters initially established and on at least one occasion have reconsidered an earlier finding granting public policy status, claiming that state law had been erroneously interpreted. Indeed, the Pennsylvania Supreme Court[190] indirectly refuted a lower court's decision in Novosel v. Nationwide Insurance Company[191] in which the Third Circuit Court had formally recognized First Amendment freedom of expression as public policy in a case involving an employee's refusal to support his employer's political stand in favour of no-fault insurance. Although adopting a minority viewpoint, Novosel is no longer followed since the higher Court's reversal and the lower courts have declined to extend the ruling in Novosel to cases where there is no State action.

Subsequent cases attempting to advance the public policy notion of freedom of expression under the First Amendment have met with similar restrictive interpretations. In distinguishing Vigil v. Arzola[192] and Chavez v. Manville Products Corporation,[193] two decisions that seemingly accepted the public policy contention, the Court in Shovelin, *supra*, refused to consider that these cases were meant to confirm an employee's political expression as public policy:

> ***"...the public policy recognized by the Vigil court was the right to expose misuse of public money by the employer and not, as Shovelin asserts, the right to political expression. In Chavez, we intimated that the right to political expression may have been a clear mandate of public policy. However, we did not address that issue because neither party appealed the trial court's determination that the employer had***

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189 See for example Barr v. Kelso-Burnett Company, 478 N.E. 2d 1354 (Ill., 1985); Rozier v. St. Mary's Hospital, 411 N.E. 2d 50 (Ill. Ct. App., 1980); Chin v. American Telephone and Telegraph Company, 410 N.Y. S. 2d 737 (N.Y. 1978); Pagdilao v. Maui Intercontinental Hotel, 703 F. Supp. 863 (D. Hawaii, 1988); Korb v. Raytheon Corp. 574 N. E. 2d 370 (Mass. 1991).

190 The reconsideration took place some seven years after the Novosel decision, *infra*, note 191, in Paul v. Lankenau Hospital, 569 A. 2d 346 (Pa. 1990).

191 721 F. 2d 894 (3d Cir. 1983).

192 699 P. 2d 613 (N.M. Ct. App 1985).

193 777 P. 2d 371 (N.M. 1989).

> ***violated a clear public policy by allegedly firing the employee for refusing to participate in the employer's lobbying efforts."***[194]

Certain authors would see a court's rejection of a wrongful dismissal charge as state action, thus triggering First Amendment application. This is similar to the approach adopted by Canadian jurisdictions that assimilates for example, an arbitration award to government action thereby subjecting litigation between purely private parties to Charter scrutiny.[195] Claiming that "no logical or doctrinal impediment prevents using the First Amendment as a source of substantial and important public policy in wrongful discharge cases", Professor Bingham strongly advocates assimilating judicial intervention to State action and applying the balancing test adopted in the public sector to private sector employees.[196]

Bingham invokes case-law outside the field of labour relations in support of her contention that a judiciary's decision constitutes State action.[197] However, the courts have been reluctant to apply this reasoning and even more so to treat private sector employment in the same fashion as that of the public sector. It is moreover difficult to conceive that American courts would allow the judiciary's decision to be substituted to that of the employer in qualifying necessary government intervention.[198] Some would claim that this would result in an avalanche of litigation suddenly falling under First Amendment protection although, as Prof. Bingham rightly points out, sufficient limits exist within the employment context itself to ensure that opening the way to adopting

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194 *Supra*, note 188, p. 1009.

195 See *supra*, note 4.

196 L.B. Bingham, "Employee free speech in the workplace: using the First Amendment as public policy for wrongful discharge actions" [1994] 55 *Ohio State L.J.* 341, p. 362.

197 *Ibid.*, pp. 362-363. For example, Shelley v. Kraemer, 334 U.S. 1 (1948) (State court's decision enforcing a racially restrictive covenant in a real estate deed deemed unconstitutional), New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (State court's application of the common law rules on libel and slander resulting in interference with First Amendment's protection of freedom of the press overturned), Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988) (State court decision overturned because it could not interpret the common-law tort of intentional infliction of emotional distress so that it interfered with freedom of the press).

198 The Canadian position is reflected in Dolphin Delivery, *supra*, note 14, where the Supreme Court expressly refutes the contention that acts of the judiciary i.e. decisions or judgments, constitute State action. This is somewhat tempered by Slaight Communications which opens the door slightly and extends the notion of "State action" to decisions of labour adjudicators.

First Amendment as public policy would not result in a "constitutionalization" of the workplace.[199]

At the source of disciplinary sanctions resulting from the exercise of freedom of expression lies the employer prerogative to impose norms and ultimately to control the workplace. In order to better understand the dynamics of the workplace environment, it is necessary to delve into the question of an employer's control over its employees, an exercise which we will attempt in the next section.

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199 *Supra*, note 196, pp. 372-373.

II. THE POWER OF EMPLOYERS TO PRESCRIBE NORMS AND DISCIPLINE AND ITS INFLUENCE ON EMPLOYEE FREEDOM OF EXPRESSION

The subservient nature of the employer/employee relationship is one of its fundamental characteristics and has considerable ramifications on the exercise of freedom of expression in the workplace. Indeed, the primary source of restrictions on this freedom is the generally accepted contention that an employer governs his workplace, and ultimately his workforce as he sees fit. The power of an employer to impose its will on its employees, via the creation of rules and regulations that its subordinates are called upon to adhere to or via the prescription of sanctions to condemn certain types of behaviour, has often been viewed as an innate right, a natural phenomenon to be contended with.

Perhaps this state of affairs is linked to the view that an employer's rights over its employees are often assimilated to property rights over its undertaking[200] and as such, the right to impose norms and sanctions would be seen as a natural accessory to and extension of this right. More likely than not, however, this contention stems from the fact that there has been no serious contestation of these employer rights over the years and that legal scholars and practitioners have been content with a cursory analysis of the situation. If one must judge by the legal literature on the subject, this latter affirmation appears to provide a better explanation for the general acceptance of the seemingly sacrosanct rights of employers to curb certain freedoms of their employees.

Often viewed as accessories to the control over the means of production of its undertaking, an employer's power to impose a certain code of conduct or behavioural standards upon its employees (normative) and/or punitive measures to ensure their respect (disciplinary) are frequently referred to interchangeably as one and the same thing. However, the distinction is an important one and bears mentioning for although

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200 This term has been chosen and used throughout this text to reflect the more precise French term of«entreprise» and refers interchangeably to a firm, business or other regrouping of interests which constitute the employer.

one could argue that the power to discipline, and more particularly to choose a particular sanction for a specific type of misconduct or violation, has as its foundation the norms or rules prevalent in a given workplace, it is difficult to pinpoint the actual origins of the discretion to impose these very norms. The legal literature has focussed, over the years, on the sources of the employer's disciplinary power, and by analogy, has extended the findings to the employer's exercise of its normative powers.[201] This might possibly be based on the assumption that if an employer is recognized as having a legitimate right to impose sanctions for a given violation or misconduct, it must necessarily imply that it has the prerequisite authority to determine a set of standards that its employees must live up to.

The definition of the term «norm» as a "principle of right action binding upon the members of a group and serving to guide, control or regulate proper and acceptable behaviour"[202] clearly invokes what the legal community as a whole more commonly refers to as the disciplinary powers of the employer whereas the dictionary definition of the term "discipline" more befittingly embodies a sense of punishment or "a control gained by enforcing obedience or order".[203] Although both terms imply a notion of control, it is evident that the imposition of norms serves as a prelude to the act of sanctioning the said norms. Nevertheless, nomenclature aside, we are of the opinion that the juxtaposition of conclusions reached regarding the foundations and sources of the disciplinary power of employers to the area of normative powers is acceptable if it is approached with a view to determining where an employer derives (or claims to derive) its right to impose a given set of acceptable behavioural standards. However, we consider that the distinction between these two forms of employer control over its

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201 For a synthesis of the analysis of the employer's normative powers, see D. Mockle, «Ordre normatif interne et organisations» (1992) 33 *C. de D.* 965. Also, see A. Lajoie, Pouvoir disciplinaire et tests de dépistage de drogues en milieu de travail : illégalité ou pluralisme, Collection relations industrielles, Cowansville, Les Éditions Yvon Blais, 1995; M.-F. Bich, «Le pouvoir disciplinaire de l'employeur - fondements civils» (1988) 22 R.J.T. 85 and J -R. Cardin, «Le règlement des différends touchant l'exercice du pouvoir disciplinaire de l'employeur, y compris le renvoi», (1964) 19 *Rel. Ind.* 149, for an overview of the origins and foundations of the employer's disciplinary power.

202 As per Merriam Webster's Collegiate Dictionary, Merriam Webster Incorporated, Tenth edition, 1996.

203 *Ibid.*

workforce provides an interesting reflection upon what is to follow and we invite the reader to consider this duality as we attempt to shed some light on the subject matter.

A. ORIGINS AND FOUNDATIONS OF THE EMPLOYER'S PREROGATIVE TO IMPOSE ITS WILL

In the presence of a collective agreement, it may appear purely academic to question the foundations or the sources of an employer's right or power to oversee the conduct of its employees. Indeed, in the context of collective bargaining, parameters exist that govern the employer's actions, often referred to under the "management rights" umbrella, which would otherwise be considered as quasi-absolute. The issue becomes somewhat more relevant where the employer / employee relationship is governed solely by the rules applicable to general civil matters and, more particularly, by the individual contract of employment.

One may advance that for all intents and purposes, the employer's power with respect to this issue does not stem from any authentic legal basis. Although the exercise of an employer's disciplinary power is generally accepted as a routine part of its management function, this may be based principally on the fact that this power has gone largely uncontested rather than on any empirical study or theory that legitimately serves as a foundation to this power. Moreover, union positions on the matter have not favoured a climate of discussion nor any genuine dissension within the ranks as to an employer's right to impose norms and discipline. As put forth by various commentators,[204] it is not in the union's ultimate interests to contest the employer's unilateral power in this area, because this would imply participating in the actual formulation of the standards of conduct, which would preclude the possibility of contesting the said standards at a later date, once they have been applied.

Over the years, several theories have emerged in an attempt to pinpoint the fundamental elements that serve as a basis for an employer's prerogative over its

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204 J. -R. Cardin, *loc. cit.* , note 201, p. 155, provides an example of one of the earlier studies carried out on this subject.

employees. Amongst these, the institutional theory as well as several variations of the contractual theory merit further attention. However, prior to expanding on these hypotheses, we consider that a more elemental approach, that in all probability served as a precursor to the elaboration of the two widely accepted theories mentioned above, might be in order.

1. Notion of Ownership Rights and their influence

The right of ownership over property involves the unilateral determination, by the beneficiary of this right, regarding all decisions concerning the said good or property. This absolute (and quite rudimentary) conception of ownership rights has oft been extended to and served as a justification for an employer's right to control the activities of its employees. Based on the premise that the institution of ownership confers on the employer absolute management rights over its business, supremacy over its employees is seen as a mere extension of, or accessory to, this far-reaching power. As described by Daniel Mockle in a recent analysis of this hypothesis,[205] this initially appealing contention meets with several obstacles when attempting to apply it to the realm of a relationship between two persons, and not between a person and an object. On the one hand, ownership implies control over property, necessarily an object, as more specifically set forth at article 947 of the *Civil Code of Québec* (S.Q. 1991, c. 64) (hereinafter referred to as the C.C.Q.):

> ***"Art. 947. Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law. Ownership may be in various modes and dismemberments."***

Furthermore, amongst the characteristics that typify ownership rights are those related to its absoluteness and exclusiveness.[206] This latter trait involves the upholding of an owner's right over a given property against third parties and necessarily implies a defensive approach that tends to ward off social interaction. In and of itself, this phenomenon precludes the notion of ownership rights as a foundation to establishing

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205 D. Mockle, *loc. cit.*, note 201, pp. 975-981.
206 *Ibid,* pp. 978-979.

a complex system involving the administration of relations in a setting such as the workplace. Moreover, the essence of ownership rights dictates spatial limitations related to the property concerned. It is thus difficult to conceive this notion outside of its purely theoretical context.

Despite the obvious barriers imposed by the very characteristics essential to the development of the notion of ownership rights, this theory has nonetheless served as a natural reference for the proponents of the concept of the employer as an absolute and autocratic authority over its employees, endowed with innate powers of control and direction.

2. Institutional and Contractual Theories

(a) Institutional Theory

Developed essentially as a response to shortfalls detected in the contractual theory, the institutional theory has met with limited success in the Quebec civil law system. Indeed, following its initial adoption into Quebec law by the Superior Court in 1978 in the frequently cited Bernatchez v. Conseil des ports nationaux,[207] this doctrine has rarely been invoked as the foundation for an employer's right to implement norms or discipline.[208]

According to this tenet, an undertaking must be viewed as an entity endowed with a centre of control, of natural direction in the person of the employer. As "head of state" of the company, the employer naturally assumes a central, controlling role, based strictly on an inborn power associated with its position. One can easily detect the influence of the ownership rights phenomenon in this theory, for the source of power of the employer is not subject, in any way, to a particular contract of employment, but solely to the requirements of the undertaking. The employer is thus considered as a

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207 [1978] S.C. 410, p. 417. An earlier reference in Quebec law to this concept Ville de Montréal v. Syndicat professionnel des ingénieurs de la Ville de Montréal, [1967] R.D.T. 513, has not been retained, over the years, as an actual introduction of the theory into internal law.

208 The most recent reference, to our knowledge, is the Superior Court decision of Beaulieu v. Services financiers AVCO, D.T.E. 85T-17 (S.C.) (Justice Mackay).

caretaker of the institution, an organization that essentially grants powers to the employer to sanction behaviour viewed as precarious to its smooth functioning. Indeed, this theory envisages a degree of control that would bypass the contract of employment to create a parallel source of disciplinary power.

The reticence to incorporate this theory, originating from and developed by the French civil law system,[209] into Quebec law is largely due to the fact that employees find themselves virtually at the mercy of their employers. It becomes apparent that this doctrine is not functionally viable in the current context of labour relations. For all intents and purposes, in the absence of a collective agreement, it offers no beneficial aspects to the employee governed strictly by an individual contract of employment. On the contrary, advancements made in the field of industrial relations renders this theory virtually obsolete and offers no feasible arguments to its proponents, considering its regressive nature.

(b) Contractual Theory

The contractual theory purports to analyse the actual existence of and obligations related to an employer's disciplinary power through the content of the individual contract of employment which, it claims, governs employer discretion. However, several approaches to this theory have been advanced by authors over the years that lead to diametrically opposing results.

Strict adherence to this theory implies that the disciplinary power of the employer is not embodied in any known legal structure, in other words, this power is non-existent on the purely contractual level. This leads to the conclusion that the only remedy available to the employer when an employee fails to fulfill its obligations or does so in an unsatisfactory manner, is that provided for pursuant to the legal regime of performance of obligations, primarily under article 1590 C.C.Q.[210]

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209 For an overview of the French authorities on the subject, we refer you to works cited by Professor Bich, *supra* note 201, p. 88, footnotes 10 and 12.

210 Further rules pertaining to the performance of obligations, formerly contained under the general article 1065 C.C.L.C., can be found at articles 1458, 1601, 1602 and 1604.C.C.Q.

> ***"Art. 1590. An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay. Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence,***
>
> ***(1) force specific performance of the obligation;***
>
> ***(2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;***
>
> ***(3) take any other measure provided by law to enforce his right to the performance of the obligation."***

In the particular context of a contract of employment, this article implies that an employer would be able to claim damages for the prejudice incurred, a reduction of his own obligations towards the contracting party (newly introduced by the *Civil Code of Quebec*) and finally, the resolution or resiliation of the contract, which translates into the action of dismissal. Thus, in the case of non-performance by the employee of the obligations flowing from the contract of employment, the simplistic structure of this approach to the contractual theory does not provide a legal structure whereby the employer can resort to the array of disciplinary measures that fall short of dismissal and that are traditionally available to it, such as demotion, salary cut and suspension.

A rigorous analysis of this approach reveals that it encounters serious shortfalls that preclude it from constituting an appropriate model on which to base management rights of the employer.

Firstly, resiliation of an employment contract is hardly what an employer seeks when he wishes to communicate his dissatisfaction with a particular action (or inaction) of an employee. On the contrary, discipline is often the means used by the employer to establish a workforce that can provide it with long-standing and loyal service. It is by no means beneficial to either the employer or employees to carry out their respective functions in an environment where dismissal is the only possible remedy available to the employer as a measure of its dissatisfaction.

Moreover, this purist model does not reflect, once again, the state of modern labour relations. The creativeness inherent in the range of disciplinary measures available to the employer reflects a desire, on the part of both parties, to avoid the ultimate punishment of dismissal, as witnessed by the multitude of arbitration awards that denote that the particular context of labour relations and employment contracts

militates against this philosophy of terminating the contractual relationship when one of the parties fails to fulfill its obligations.

The principal weakness however, of this model, is that it fails to take into account the disciplinary or punitive value of the measure imposed by the employer for a given conduct. Instead, this approach to the contractual theory analyses the employment relationship in a vacuum: a series of reactions to a breach of contract devoid of the other characteristics of the employment relationship, which go beyond the mere respect of basic contractual obligations. In order for the employer to instill a certain company philosophy, it is necessary that it be given the flexibility to allow for milder forms of sanctions for reproachable behaviour. The punitive factor inherent in a disciplinary measure allows the employer to establish a code of conduct particular to his company or undertaking.

This initial approach to the contractual theory, although logically founded on the respect of the civil contract between the parties is devoid of practical application in the context of Quebec labour law. Certain sanctions, such as a warning or reprimand, are permitted in this model, to the extent, however, that they do not in any way modify the contractual relationship between the parties. However, the employer is severely limited in its management rights in the event of a strict adherence to this theory. Moreover, with the advent of the new *Civil Code* and more particularly, the faculty of either party to a contract to reduce its obligations in the face of non-performance by the other party, it appears that the inflexibility of this approach will diminish its prevalence.

This does not necessarily imply that the contractual theory as a whole should be categorically discarded, for variations of the purist model, in conjunction with the necessary adjustments following the coming into force of the new *Civil Code*, provide for an interesting background for the basis of an employer's normative and/or disciplinary powers.

The contractual theory model based on the element of subordination present in the traditional master/servant relationship refers to disciplinary power as a natural

derivative of this subordination.[211] The essence of this tenet is that the faculty of exercising discipline and imposing norms falls within the sole discretion of the employer, who can explicitly or implicitly enact certain rules of conduct for its employees and similarly ensure the respect of these rules by sanctions which he deems appropriate. Therefore, rather than invoking the contract of employment as a source of the employer's disciplinary power, this approach relies solely on the necessary subordination inherent to all employer/employee relations and which is more often than not expressed through the imposition of internal rules and regulations, specific to the particular organization of the employer. Thus, the power to discipline is incorporated into the employment contract via the relation of subordination. This approach is evidently interrelated to the one analysed above, in that the parameters of the disciplinary power are determined, in both cases, by the rules governing civil law relationships. The main distinction is that in the second approach, the power to discipline becomes part of the employment contract via another component, i.e. the element of subordination. Authority is of the essence.

By permitting disciplinary powers to be incorporated into the employment relation through the notion of subordination, it is evident that many of the weaknesses detected in the elementary form of the contractual theory disappear. For example, the employer has at its disposal varying degrees of sanctions rather than having to rely on the sole instrument of dismissal. The reason for this is based, according to certain scholars,[212] on the premise that the power to dismiss includes the lesser sanctions of reprimand, demotion, suspension, etc. We however are of the opinion that the inclusion of disciplinary powers into the employment contract necessarily refers to all forms of discipline, without exception, and without necessarily attaching these rights to the prerogative of dismissal available to the employer.

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211 M.-F. Bich, *op. cit.*, note 201, at page 85; C. D'Aoûst, L. Leclerc, G. Trudeau, Les mesures disciplinaires jurisprudentielle et doctrinale, Université de Montréal, École des relations industrielles, monographie no. 13, 1982, at pp. 52-55; D. Mockle, *loc. cit.*, note 201, pp. 992-997.

212 M. -F. Bich, *op. cit.*, note 201, p. 94 and more extensively R. Doucet, «La résiliation du contrat de travail en droit québécois», (1974) 9 *R.J.T.* 249, p. 293.

However, this model is not without its shortfalls. The principal one resides in the fact that, similar to the previous variation of the contractual model analysed above, the present one also presents an archaic vision of employer/employee relations. By basing the power to impose norms and discipline on the relation of subordination, the normative/disciplinary faculty acquires the characteristics and properties of this last notion. Thus, by accepting the element of subordination when concluding the employment contract, the employee concurrently accepts to be subjected to the employer's conception of discipline. This initial acceptance evidently precludes any possibility of contesting the measures imposed in the future, constituting the very reason why unions prefer to abstain from participating in the elaboration of internal rules and regulations of the organization, as previously mentioned.

Although this second approach to the contractual theory offers somewhat more flexibility when compared with the initial model proposed, we feel that certain provisions of the new *Civil Code* coupled with the general contractual theory provide for a more functional organizational structure that furthermore takes into account the evolution and realities of contemporary labour relations.

- **Impact of the *Civil Code of Quebec* on the Contractual Theory**

A third variant of the contractual theory analyses the employer's power in the broader context of contractual obligations, and more particularly of article 1434 C.C.Q.:[213]

> ***"Art. 1434. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law."***

Applicable to the employment contract by reference of article 1377 C.C.Q., this provision fully stipulates the obligations of the respective parties and furthermore offers the advantage of incorporating into the contract the implicit obligations, that henceforth constitute the law between the parties. In the spectrum of labour relations, this is of

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213 Previously section 1024 C.C.L.C.

particular interest since the situation is rare indeed where the parties have explicitly outlined all the conditions governing their relationship in a contract.

A study of the various elements expressly mentioned at article 1434 C.C.Q. reveals an interesting portrait of a potentially viable structure from which the employer's disciplinary power can legitimately derive its source.

By stating that the "nature" of a given contract must be taken into account when defining the obligations of the parties of an employer / employee relationship, the legislator has potentially provided the necessary link lacking in the traditional association of subordination and disciplinary power. Thus, the notion of the authority of the employer over its subordinates, which is the fundamental basis for most of the ensuing relations necessarily includes the power to set norms and ensure their enforcement. This latter faculty is thereby incorporated into the employment contract via article 1434 C.C.Q.

This provision similarly states that the contractual realm encompasses the law, usage and equity. Although no particular statute serves as a foundation[214] for the disciplinary power exercised by an employer, examples abound in the law that systematically enforce the premise that the employer incontestably possesses this prerogative. Hence, section 32 of *An Act Respecting Industrial Accidents and Occupational Diseases* (L.R.Q., c. A-3.001, as amended) specifically proscribes disciplinary measures against an employee who has declared an employment injury:

> **"32.** ***No employer may dismiss, suspend or transfer a worker or practice discrimination or take reprisals against him, or impose any other sanction upon him because he has suffered an employment injury or exercised his rights under this Act. A worker who believes that he has been the victim of a sanction or action described in the first paragraph may, as he elects, resort to the grievance procedure set down in the collective agreement applicable to him or submit a complaint to the Commission in accordance with section 253.***"

This example illustrates, *a contrario*, the general principal that an employer can impose discipline and reinforces this contention implicitly due to the fact that the legislator feels the need to restrict this seemingly absolute power. Indeed, the majority of provisions that refer to disciplinary powers tend to limit or impose parameters on

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214 We will examine later the impact of the newly-enshrined management rights under section 2085 C.C.Q.

their exercise by the employer. Another similar illustration lies in section 122 of *An Act Respecting Labour Standards* (L.R.Q., c. N-1.1, as amended).

> ***"122. [Dismissal prohibited] No employer or his agent may dismiss, suspend or transfer an employee, practise discrimination or take reprisals against him, or impose any other sanction upon him***
> ***(1) on the ground that such employee has exercised one of his rights, other than the right contemplated in section 84.1, under this Act or a regulation;***
> ***(2) on the ground that such employee has given information to the Commission or one of its representatives on the application of the labour standards or that he has given evidence in a proceeding related thereto;***
> ***(3) on the ground that a seizure by garnishment has been or may be effected against such employee;***
> ***(4) on the ground that such employee is pregnant;***
> ***(5) for the purpose of evading the application of this act or a regulation;***
> ***(6) on the ground that the employee has refused to work beyond his regular hours of work because his presence was required to fulfil obligations relating to the care, health or education of his minor child, even though he had taken all reasonable steps within his power to assume those obligations otherwise..."***

Although these provisions do not necessarily serve as a source or foundation of the power to discipline, they do emphasize that a general practice appears to have been established that takes for granted the employer's innate authority over its employees.

This practice, or usage, equally constitutes a source of obligations, pursuant to article 1434 C.C.Q. Although not traditionally considered as a primary source of the contractual relation, habits and customs play a central role when determining the source of an employer's disciplinary powers.[215] Article 1426 C.C.Q. provides further reinforcement of this pivotal element when it states that:

> ***"Art. 1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has always been given to it by the parties or which it may have received, and usage, are all taken into account."*** (Our emphasis).

Although difficult to establish a definition that encompasses all the notions generally associated with the concept of usage, suffice it to say that for a particular

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215 According to M.-F. Bich, *op. cit.*, note 201, p. 99, usage is the most solid foundation on which an employer can base its disciplinary powers in the contractual model.

practice, habit or custom to be considered as a source of an obligation, it must be viewed as a commonly accepted, general, public and frequent occurrence.[216]

It appears that the disciplinary power of an employer is firmly entrenched as a usage in the current labour relations context. Widely accepted and practically taken for granted as witnessed by the abundance of collective agreements and legislation that refers to it, the scope of an employer's disciplinary power is limited only by the control imposed by these very instruments. Thus, a collective agreement will define the parameters of the employer's power to impose discipline and authority, but will rarely establish or set forth the employer's faculty to impose the said discipline and authority. Furthermore, in the absence of a collective agreement or application of a particular statute, the authority of an employer over its employees becomes even more apparent.

The other criteria that must be fulfilled in order for the power to discipline to be considered a widely accepted habit or custom are equally met. Hence, even a cursory look at the multitude of decisions rendered following the imposition of discipline confirms that the practice is of frequent occurrence and widely publicized. The criterion of uniformity is respected in that, even though the sanction imposed varies according to the degree of severity of the breach or violation of an obligation, the actual forms of discipline available are numbered. Moreover, a certain uniformity prevails to the extent that an employer generally follows a pattern of proportionality and progressiveness of sanctions.

Finally, with respect to the element of equity, also incorporated into the employment contract by article 1434 C.C.Q., it appears at first glance that this concept does not provide a potential basis on which to found disciplinary powers.

However, the stipulation that equity or the classical element of good faith forms part of the employment contract gives credence to a theory that has gained popularity in the evolving field of labour relations, that is the notion of abuse of rights in the manner in which discipline is carried out. Inadvertently, the incorporation of this essentially contractual notion into the realm of the workplace and more particularly its

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216 We refer you to a citation of M. -F. Bich's work, *op. cit.*, note 201, p. 100, footnote 59, which provides an overview of the concept in Quebec civil law.

application to the manner in which sanctions are meted out serves to reinforce the notion that the actual power to discipline is similarly based on the employment contract.

The notion of abuse of rights has been accepted in Quebec labour law,[217] in particular by the courts in the oft-cited Houle v. Canadian National Bank,[218] which reflects the state of the law on the matter. As put forth by Justice Heureux-Dubé, of the Supreme Court of Canada, at page 164 of the judgment, the abuse of contractual rights is assuredly a concept to be contended with by employers:

> ***"To summarize, then, it appears indisputable that the doctrine of abuse of contractual rights is now part of Quebec law. The standard with which to measure such abuse has expanded from the stringent test of malice or bad faith, and now includes reasonableness, as expressed by reference to the conduct of a prudent and diligent individual. This test could encompass a number of situations, including the use of a contract for purposes other than the ones contemplated by the parties. Consequently, the proper approach can be formulated as follows: were such rights exercised in the spirit of fair play? With regard to the foundation for the doctrine, as both Quebec doctrine and jurisprudence hold, the rules of contractual liability do govern the abuse of contractual rights since implicitly, in every contract, according to the civil law, parties undertake to act in the prudent and diligent manner of a reasonable individual and within the confines of fair play when exercising their contractual rights. If this implicit obligation is breached, then contractual liability is engaged with regard to the other contracting party."***

Thus, we can clearly affirm that the control imposed on an employer on the manner in which it exercises its will on its employees definitely acknowledges, albeit implicitly, that the prerogative to impose its will does exist. Ironically enough therefore, the incorporation of the element of equity into the employment contract thus serves as a source of the employer's normative power.

The advent of the *Civil Code of Québec* in January 1994 codified a series of rules governing employer / employee relations which were previously elaborated and upheld by the courts as well as maintaining certain aspects of the law stated in the former *Civil Code of Lower Canada*. A provision that is likely to generate significant impact on the subject matter at hand, that is the source of an employer's normative and

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217 For an update of this notion in Quebec labour law, we invite the reader to consult the following cases: Domtar Inc. v. St-Germain [1991] R.J.Q. 1271; Compagnie Canadienne d'équipement de bureau v. Blouin, D.T.E. 94T-563; Standard Broadcasting Corporation Ltd. v. Stewart, D.T.E. 94T-815.

218 [1990] 3 S.C.R. 122.

disciplinary powers, is certainly article 2085, which essentially codifies management's right to govern the workplace:

> ***"Art. 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer."***

One may be inclined to find in this provision the actual legal structure and source of an employer's right to impose authority on its employees. Indeed, the mention of control and direction of the employer over the employee clearly acknowledges the element of subordination formerly addressed in a previous section. The question remains however as to whether this relation of subordination is sufficient to establish and enshrine in the *Civil Code of Québec* the employer's right to impose norms and discipline. The issue will, to a great extent, depend on the courts' interpretation of this particular provision.[219]

Although the various facets of the contractual theory examined above demonstrate a clear evolution in the state of the law regarding the issue of an employer's normative/disciplinary right over its employees, it becomes apparent that article 2085 C.C.Q coupled with the extended contractual scope expressed in article 1434 C.C.Q., provide a viable, and certainly the most comprehensive, framework on which to found the employer prerogative over its employees.

Suffice to say that article 2085 uncontestedly codifies the classical "management rights" and the subservient relationship of the employee to its employer. In this regard, the *Civil Code of Québec* merely incorporates into written law what had previously been accepted and applied by the courts. The fact that the legislator, however, has chosen to describe in detail the employment contract in such terms indicates the characteristics inherent in this type of contract. Emphasis is placed on the element of control and direction and specific reference is made to an employer's

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219 See Corp. d'Urgences-santé de la région de Montréal Métropolitain v. Rassemblement des employés techniciens-ambulanciers du Québec, (C.S.) J.E. 94-1356.

instructions.[220] Could these terms, in and of themselves, refer to the normative rather than the disciplinary component of an employer's power? It is too early yet to state the impact that this provision will have on the issue of the sources of certain powers of an employer, but we will venture to advance that possibly management will finally be able to resort to the *Civil Code* as a primary source of its powers without necessarily having to attach these powers to some other fundamental right.

Regardless of how one chooses to view an employer's right to impose a certain line of conduct, it remains that this power manifests itself primarily through the establishment of internal rules and regulations, instructions and memos, which an employee is called upon to adhere to.

3. Internal Rules and Regulations of the Undertaking

Often seen as a means of communicating to employees the administrative set-up of their workplace, the internal rules and regulations of a given undertaking constitute the concrete manifestation of an employer's exercise of its normative power. Since they touch upon practically every aspect of an employee's relation with the workplace, ranging from norms on health and safety to pre-established disciplinary measures for certain types of violations, these internal regulations play a central role in the employer/employee relationship. A case in point is the policy involving the prohibition of wearing earrings at the workplace. Although certain arbitration awards[221] deemed that this type of control over an employee's freedom of expression is unjustified if objective proof has not been submitted that indicates harm to an employer's general reputation, the issue demonstrates the extent of the employer's power to impose certain internal rules that impact greatly on the individual employee.

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220 Strangely enough, the notion of instructions is absent from the French text of the *Civil Code*. Although this term could be assimilated to that of direction and control, we can question it's actual meaning, considering the fact that the initial French version of the Bill included the term "instructions" (article 2144) and that this term was subsequently deleted.

221 See for example Re International Simultaneous Translation Services Inc. and National Association of Broadcast Employees & Technicians (1993) 33 L.A.C. (4th) 179.

Furthermore, these rules and regulations are often brought to the attention of the employee after the employment contract has been entered into, in the form of a book or pamphlet which an employer hands over to the employee for his/her perusal and with the instruction that the employee signal his acceptance and approval of the said rules by signing a document to this effect. This obviously creates a situation whereby an employee is not necessarily in a position to negotiate his actual conditions of employment. Indeed, it is through the mechanism of these rules and regulations that an employer can exercise its will to the fullest.

In this context, the issue addressing the origins of the employer's power to impose a standard of conduct becomes of paramount importance. It is one thing to establish that due to a firmly entrenched principle of law, an employer has far-reaching powers that are only limited by statute or in collective bargaining. It is quite another to make the same affirmation concerning this employer prerogative without being able to pinpoint where this power emanates from.

This contention becomes even more relevant when one considers the potential ramifications of such an internal code of conduct. Often, the fact that an employer issues a booklet outlining the various benefits to which an employee is entitled is seen as a positive confirmation of the advantages of working for a given employer. However, the elements of an internal code of conduct are frequently concealed and interspersed in the employee manual, thereby creating a situation whereby the actual title and general content belie the fact that the employee is concurrently agreeing to abide by the rules contained therein.

A further complication is created when this code of conduct sets forth rules and regulations that are not necessarily restricted to behaviour at the workplace. For example, rules relating to medical examinations in connection with personal injury or sickness, those imposing a dress code or rules prohibiting certain behaviour or conduct, whose scope extend beyond an employee's presence at the workplace, imply that an employer's control can go over and above that which is related to the employee's performance of his actual work to include control of his comings and goings.

Few barriers exist to an employer's abuse of its position in this particular perspective. In the absence of a collective agreement, one would tend to perceive the employer's power to be absolute, or somewhat tempered by the limited protection offered by public order legislation and other statutes. Daniel Mockle proposes in his analysis of the situation,[222] that we adopt a model similar to that existing in France, where the employer's disciplinary power as well as his prerogative to impose internal regulations, are limited and controlled by statute. In 1982, the French government adopted legislation[223] that essentially modified the existing *Labour Code* by adding several provisions that specified limits to an employer's internal code of conduct and its disciplinary system.

We will examine in what follows the effective limits, or rather the boundaries imposed on the employer's broad power to impose a particular line of conduct on its employees.

B. LIMITS IMPOSED ON THE EMPLOYER'S NORMATIVE AND DISCIPLINARY POWERS

1. Limits inherent to the employer-employee relationship

Regardless of the model chosen to explain or justify the source of an employer's right to govern its employees, limits arise that impose certain barriers to an employer's absolute authority. Indeed, even if one adheres to the school of thought that considers an employer's rights to be inherent to the employer / employee relationship, that is that these rights are a natural accessory of this relationship, boundaries to these powers nevertheless exist.

Other than the limits imposed by the scope of international agreements and human rights considerations, both amply examined in previous sections, the seemingly unlimited and absolute discretion of the employer over its employees is impeded by

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222 D. Mockle, *loc. cit.*, note 201, p. 989.

223 *Loi No. 82-689.*

restrictions which are a direct consequence of the nature of the relationship binding an employer to its employees.

Firstly, the legal entity that constitutes the "employer" is itself governed by parameters that are not within the control of the employer. The undertaking which represents the employer derives its powers and obligations from the legislator. In Quebec, companies look to the *Civil Code of Quebec* or to particular statutes, depending on whether they are incorporated provincially or federally, for direction when establishing the parameters within which they will carry on business. As rightly pointed out by Professor Lajoie,[224] these legal entities do not benefit from any powers that naturally flow to them, but rather are rigidly circumscribed in general by the prescriptions of the *Civil Code* and more particularly by their constitutive act:

> ***"Les corporations ne poussent pas non plus dans la nature, et sont créées par ou en vertu de la loi; les personnes physiques, fussent-elles employeurs, doivent aussi leur capacité juridique au législateur, et ni les unes ni les autres n'ont par elles-mêmes de pouvoir de contrainte sur les tiers : elles ne peuvent en détenir qu'en vertu de leur texte constitutif ou d'une délégation de la loi."***

The *Civil Code of Québec* attributes, at article 303, a general legal capacity but nevertheless imposes, by this same provision, certain constraints:

> **Art. 303.** ***Legal persons have capacity to exercise all their rights, and the provisions of this Code respecting the exercise of civil rights by natural persons are applicable to them, adapted as required. They have no incapacities other than those which may result from their nature or from an express provision of law."***

This general capacity, coupled with the individual rights and obligations conferred upon a particular undertaking in its constitutive act, outline the parameters and/or limits which the employer must respect. Indirectly therefore, the purely theoretical model of the employer's absolute authority over its employees encounters limits which are imposed by the precepts of a given constitutive act and which render the employer's power to govern its workplace quite relative.

The constitutive act of an undertaking normally sets forth the specific purposes for which a business entity was created as well as establishing the acts which it can

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224 A. Lajoie, *op. cit.*, note 201, p. 6. We have chosen to retain the original French version of the excerpt to follow, in order to reflect with precision the author's position.

execute, which must necessarily correspond to its purposes. The *Civil Code* grants the legal entity the unlimited power to carry out the necessary operations to its smooth functioning, subject however to the purposes set forth in the constitutive act. Furthermore, certain restrictions are provided for at article 303 C.C.Q., that is those imposed by the "nature" of the legal person or by law.

Hence, this general capacity does not include an employer's control over third parties, a power essentially reserved for certain public authorities, as dictated by a specific statute. The employer's power of authority over third parties is limited to those parties who are legally subordinated to it via an employment contract. In other words, rather than referring to a general power over its workforce, the scope of an employer's power should be analysed on an individual basis, for the existence of the employer's prerogative is contingent upon an existing relation between itself and a given employee. The employment contract, individual or collective, is conditional to a relationship being formed and is restricted to the employee in question.

Other than this limitation qualified as *rationae personae*, [225] rigid boundaries are imposed by the terms of the constitutive act itself. By describing the purposes for which an entity is formed, it thereby limits the acts to be executed by the corporation to those necessary to carry out the said purposes. Logic entails then that only those acts which are directly construed as contributing to these purposes come under the realm of the employer's authority. Furthermore, in order for the employer to be justified in imposing certain norms, a relation must be established between the conduct and/or behaviour involved and the tasks required of a given employee. It is only in this context, when as Professor Lajoie refers to it,[226] the standard of behaviour can be related to the «nexus» of the enterprise, that the normative power can be legitimately exercised.

Certain commentators,[227] relying on arbitration awards rendered on the matter, have attempted to circumvent the restrictions inherent to the employer's status as a corporate entity, by extending employer rights to encompass all «legitimate interests of

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225 *Ibid*, p. 10.

226 *Ibid*, p. 11.

227 We refer you to the authors and arbitration awards cited in Professor Lajoie's work, *op. cit.*, note 201, p. 14, footnote 28.

the employer». Automatically transforming employer interests into employer rights goes far beyond the scope intended by the legislation governing corporations. Indeed, if a mere interest could be the source of the employer's right, there would be no purpose for a constitutive act that specifically outlines the extent of its powers. As Andrée Lajoie points out,[228] in order for a simple interest to be converted into a right of the employer, it must be enshrined and protected by law as well as meeting the requirement of being closely linked to the tasks of the given employee, and, more generally, to the overall purposes for which the undertaking was constituted. Any sphere of activity that does not satisfy these criteria does not fall within the realm of the employer's legitimate authority and the unwarranted support of the employer's exercise of this authority is not founded on a legal basis, but rather on a perception, often reinforced by the courts, that it is natural for an employer to manage the workplace in the manner in which it sees fit.

Associated with this conception that somehow normative and disciplinary rights are innate to the employer's position, is the notion of ownership rights, analysed above in a previous section. However, even proponents of this theory that contends that employers have authority over their employees quite simply because they form part of the business under their control, recognize its limitative nature. As previously mentioned, this concept, due to its spatial barriers, does not serve as a feasible explanation or basis justifying the employer's control over employee activities outside of the workplace. As an antidote to this apparent obstacle imposed by the very nature of the approach, arbitration awards have introduced the principle of the necessity of protecting the reputation of the business as a viable justification for the extension of employer control over the freedom of its employees outside of the physical limits of the workplace.

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228 A. Lajoie, *op. cit.*, note 201, pp. 14-15.

A series of key arbitration awards[229] have confirmed that the sacrosanct rule to the effect that an employer cannot interfere with an employee's private life in his off-duty time can only be tampered with in rare circumstances that affect the core of the employer/employee relationship and that touch directly upon the tasks of the employee as well as the purposes of the business. The same conditions have been deemed to apply equally to the use, by the employer, of the protection of the reputation of the business as a justification for its meddling in an employee's private affairs, including the right of the employee to express himself on issues not related to his work. Hence, the mere fact that the corporate image of the employer has been tarnished does not suffice for the employer to sanction a particular employee's conduct. The employee's behaviour must be such that it directly affects the commercial interests of the business, by touching upon its products or services, the focus of the undertaking.

The evolution of arbitration awards, although not allowing for a firm rule to be established with respect to an employer limiting an employee's activities outside of the workforce on the sole basis of upholding the reputation of the business involved, does permit us to confirm that the employer is severely restricted in its employ of this motive. However, certain exceptions do exist as evidenced by arbitrators Shime, Clancy and Linton in Re City of Niagara Falls, *supra*, note 229, where the employee's off-duty conduct was sanctioned on the sole basis of affecting the general reputation of the employer:

> ***"The right of an employer to discharge an employee for off-duty conduct depends on the effect of that conduct on the operations of the employer. In general the employer is not the custodian of the grievor's character or personal conduct and off-duty criminal conduct must impact adversely on an important business interest of the employer before the employer may justifiably discharge an employee: Re U.A.W., Loc. 524 and General Spring Products Ltd. (1968), 19 L.A.C. 392 (Weatherill); Re Oshawa General Hospital and O.N.A. (1981), 30 L.A.C. (2d) 5***

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229 Re Millhaven Fibers Ltd., Millhaven Works and Oil, Chemical and Atomic Workers International Union, Local 9-670 (1967) 1 (A) Union Management Cases 328 (Anderson); Re Air Canada and International Association of Machinists, Lodge 148, (1973) 5 L.A.C. (2d) 7 (Andrews); Re Bell Canada and Communications Workers of Canada, (1979) L.A.C. (2d) 154; Re Niagara Falls (City) and Canadian Union of Public Employees, Local 133, (1992) 24 L.A.C. (4th) 124; Re Air Canada and International Association of Machinists & Aerospace Workers (Beaulieu), (1994) 40 L.A.C. (4th) 80; Re The Crown in right of Ontario (Worker's Compensation Board), Local and Canadian Union of Public Employers 1750, (1995) 45 L.A.C. (4th) 257; Re Langley (Townships) and C.U.P.E., Local 404, (1995) 46 L.A.C. (4th) 30.

> ***(Adams). An employer's legitimate business interest that is worthy of protection would include its general reputation: Re Dorr-Oliver-Long Ltd. and U.S.W., Loc. 4697 (1973), 3 L.A.C. (2d) 193) (O'Shea).***
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> ***(...)***
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> ***Thus to maintain the grievor in the position at the arena, in my view, creates a perception problem in the community sufficient to affect the corporation's reputation and on that basis we determine that there is just cause within the meaning of the collective agreement for the employer to take some action against the grievor.*** (Our emphasis).[230]

2. Employee whistleblowing: an extrinsic restriction on employer discretion

Amongst the obligations incumbent upon an employee when entering into the employment relationship, second in importance only to that of carrying out the work for which he was hired,[231] is that of the loyalty owed to his employer. Of the many facets that are included in this obligation, the one most relevant to our discussion is the quasi-absolute prohibition imposed upon an employee to publicly denounce his employer. This flows from the duty to protect the reputation of the employer, an aspect that we will examine in this section.

The general obligation of loyalty, or fiduciary duty as it is sometimes referred to for higher level employees, is broad in nature but not absolute. Thus, an employee who perceives a situation at work that involves illegal or corrupt activity would be deemed justified to publicly denounce the employer and "blow the whistle" on him. However, the employee is often caught between the loyalty owed to the employer by virtue of his employment contract and the somewhat more abstract obligation to the public interest to denounce behaviour or policy that may be harmful. Freedom of expression is of the essence in such a context, for the employee who fears retaliation is

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230 At pp. 127-128 of decision. See also Port-aux-Basques Integrated School Board and Newfoundland and Labrador Teachers' Association, Re [1996] 55 L.A.C. (4th) 335, p. 353.

231 F. Hébert, Contenu de l'obligation de loyauté du salarié en vertu du contrat individuel de travail en droit québecois, mémoire de maîtrise, Montréal, Université de Montréal, Faculté des études supérieures, 1994, p. 3. The author's assertion is based on the following doctrine: C. D'AOUST, L. LECLERC et G. TRUDEAU, Les mesures disciplinaires: étude jurisprudentielle et doctrinale, monographie no. 13, Montréal, Université de Montréal, Ecole de relations industrielles, 1982, at p. 36 and A. Rousseau, "Le contrat individuel de travail", dans Noel MALLETTE (dir.), La gestion des relations de travail au Québec, Montréal, McGraw Hill, 1980, p. 22;

put in a position where he must choose between his own personal wellbeing or the welfare of society. In what follows, we will examine the concept of whistleblowing and its application in Québec. The paucity of decisions in this jurisdiction attests to the fact that arbitrators have reluctantly accepted this phenomenon into Québec law, in many instances preferring to resort to the natural deference traditionally shown to employers pertaining to matters involving the everyday management of their workplace that have no implications on their employees or only indirect consequences. Nevertheless, employers have had to contend with the influence of whistleblowing by their employees and this has translated into an impediment to the way management runs its business as well as to the way discipline is meted out.

Finally, we have advanced a proposal for reconciling the dichotomy faced by the employee as to whom loyalty is primarily owed to, the public or the employer, by suggesting that a sector by sector analysis be conducted to determine which issues constitute a public concern and thus specifically circumscribe that which can be the subject of a public denunciation.

(a) Obligation of loyalty and incidence of public denunciation

Coupled with the honesty, integrity and fairness that must be manifested at all times during the course of his employment, the employee must also see to it that he does not engage in any activity that could be detrimental to the interests of his employer. Traditionally, the obligation of loyalty, based on the subservient nature of the employment relationship, has played a major role in employer/employee relations. The importance of this duty of utmost "fidelity" is evidenced by its inclusion in the *Civil Code of Québec* in the following terms:

> ***"2088: The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work. These obligations continue for a reasonable time after cessation of the contract, and***

> ***permanently where the information concerns the reputation and private life of another person.***[232]

Despite its explicit wording, the *Civil Code of Québec* does not define the scope or breadth of the notion of loyalty. Needless to say, it is impossible to envisage an all-encompassing definition and the courts have on numerous occasions reiterated the difficult task of establishing set parameters to this obligation. On the contrary, the preferred stance has been to adopt a flexible approach, as evidenced by Justice Bergeron's comments in Improthèque & St-Gelais et als:

> ***"Il n'est pas facile de définir, dans l'abstrait, ce que doit être la loyauté lorsqu'il est question de rapports entre un salarié et son employeur ou son ex-employeur. Sans doute peut-on parler de probité, droiture, honnêteté, bonne foi et fidélité à tenir ses engagemens, mais encore faut-il placer ces notions dans le cadre concret où se déroule l'action, particulièrement lorsque le lien d'emploi est terminé".***[233]

Prior to its incorporation into the *Civil Code of Québec,* the obligation of loyalty was implicitly at the base of the contract of employment. An employer cannot efficiently carry on its operation without being able to rely fully on its employees' complete fidelity. Manifestations of the obligation of loyalty are numerous and far-reaching, ranging from avoidance of situations of conflict of interest of all types, to the exclusivity offered to the employer, to not engaging in personal relationships that would create conflict and finally to the prohibition to compete with one's employer during the course of employment or following its termination. The legislator has specifically provided for the protection of the interests of the employer in this regard although leaving it to the discretion of the parties whether they want to be bound by this type of agreement.[234]

Although often employed interchangeably with the obligation of loyalty, the common law notion of "fiduciary duty" habitually refers to a duty owed by a senior

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232 Strangely enough, the term "loyauté" has been translated by "faithfully and honestly" in the English version of Article 2088.

233 [1995] R.J.Q. 2469, p. 2473.

234 See Article 2089 C.C.Q.

employee.[235] As pointed out by E. Aust and L. Charette, the fiduciary duty implies a notion of trust and is transposed to the employment context as follows:

> ***"The concept of a fiduciary duty came about to protect the interest of the party who had entrusted the other to act on his behalf with respect to all matters within the scope of a particular activity. Thus, a fiduciary duty is owed by the employee to the employer because one of the fundamental terms of their special relationship is that the employee undertakes to act in the best interest of the employer".***[236]

According to the authors, the concept has met with much confusion in Québec owing to the fact that the courts have inconsistently either accepted or rejected the common law notion into our domestic law. Regardless of how it is defined, the level of loyalty that must be shown to one's employer increases in proportion to the position held within a given organization.[237] Upper-level management employees can thus be expected to demonstrate a superior degree of loyalty due to the higher degree of trust conferred upon them by their employers. The void created by the lack of a legislative definition of the status of "upper management" has been filled by the jurisprudence. As pointed out by F. Hébert, the following criteria have emerged in defining an upper-level employee: the employee in question must occupy a high level position in the hierarchical scale, must receive his orders from the president of the company or the board of directors, as well as participating in the decision making and strategic planning of the company. Furthermore, he must benefit at all times from a high level of discretionary power.[238]

Although it appears from past arbitration awards that the principles surrounding violations of the duty of loyalty in the context of public denunciations or criticism of

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235 See Canadian Aero Service Limited v. O'Malley, Zarzycki, Wells, Surveys, [1974] S.C.R. 592; Bank of Montreal v. Leong Ng., [1990] 2 S.C.R. 429.

236 E. Aust and L. Charette, The employment contract, 2nd ed. Cowansville, Les Editions Yvon Blais, (1993), p. 136.

237 The following Superior Court cases affirm this principle:Ziade c. Services immobiliers Royal Lepage Ltée. D.T.E. 92T.1048; Koné Inc. v. Dupré, J.E. 91-1392; Brunet Insurance Inc. v. Mancuso, 500-05-008530-873. February 17, 1988; Montour Limitée v. Jolicoeur, [1988] R.J. Q. 1323. Arbitration boards have also confirmed that upper management must proffer a higher degree of loyalty to their employers than would a simple employee: Lucien Mekhael c. Collège Charles Lemoyne de Longueuil Inc., D.T.E. 88T-483; Cie Marconi Canada c. C.A.W.-T.C.A. Canada, D.T.E. 89T-149; See also Peso Silver Mines (N.P.L.) v. Cropper, [1966] S.C.R. 674 and Industrial Development Consultants v. Cooley, [1972] 2 All E.R. 162.

238 *Op. cit.*, note 231, p. 66. The author refers us to a series of cases from which these criteria were derived in footnote 10 of the text.

the employer were not overridden by the advent of the *Canadian and Quebec Charters*,[239] at least two recent decisions have stated the preeminence of freedom of expression over the obligation of loyalty.

In Gauvin v. Tribunal du Travail, Justice René Hurtubise of the Superior Court states, in overturning a Labour Tribunal decision, that freedom of expression must be given preeminence when opposed to an employee's obligation of loyalty.[240] In this instance, the employer had suspended certain employees for participating in a boycotting of company products by allowing their pictures to be taken and posted throughout the premises of the employer. At issue, was whether the activities engaged in by the employees constituted a union activity according to the *Labour Code*, and whether they were subject to protection under article 3 of the *Quebec Charter*. In confirming the employees' rights to publicly show their disagreement with company policy through a boycott of its products, Justice Hurtubise concluded that a legal and controlled manifestation of the sort was a protected activity pursuant to the *Labour Code* and furthermore, that it was to be given priority over the obligation of loyalty as it constituted an exercise of employees' rights under the *Quebec Charter*. In a context such as this one whereby the employer does not suffer any damages, the economic pressure imposed by employees in a unionized environment cannot be the subject of discipline. This decision was subsequently confirmed by the Labour Tribunal in Longpré v. Bridgestone/Firestone Canada Inc.[241] In this matter, it was determined that the discipline imposed by the employer in the form of suspensions for having drawn caricatures of management personnel in the union newspaper contravened the fundamental freedom of expression and was to be revoked.

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239 Simon Fraser University (1985), 18 L.A.C. (3d) 361 (Bird). See also Foothills Provincial General Hospital Board (1985), 23 L.A.C. (3d) 42 (Malone); Health Labour Relations Ass'n on behalf of Surrey Memorial Hospital (1985), 18 L.A.C. (3d) 369 (Dorsey). See also Millar et al v. The Queen, [1988] 3 F.C. 219 (F.C.A.), affd [1991], 2 S.C.R. 69, subnom. Osborne v. Canada (Treasury Board), and OPSEU v. Ontario (Attorney General) (1988), 52 D.L.R. (4th) 701 (Ont. H.C.J.), 105 D.L.R. (4th) 157 (Ont. C.A.), for a discussion of the constitutional validity of electoral laws which impose limits on the political activities of public servants; See also OPSEU v. A.-G. Ont., [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1 (S.C.C.), as cited per Brown and Bearry, *infra*, note 242, footnote 26.

240 Gauvin v. Tribunal du Travail, *supra*, note 7, p. 1612.

241 D.T.E. 96T-956.

- **Protection of the reputation of the employer**

Inherent to the obligation of loyalty is the notion of safeguarding the reputation of one's employer. Indeed, since an employee often represents a business's primary contact with its clients, it is of paramount importance that the reputation of the employer be protected at all times through the intermediary of the employee. In determining the extent to which an employee's public denunciation of its employer constitutes a breach of its duty of loyalty and a motive for discipline, several criteria have been considered by the courts as exposed by Brown and Beatty in the following excerpt:

> "***In determining whether an employee has behaved improperly, arbitrators have considered such factors as the accuracy or truthfulness of the criticism or information, the confidentiality of the information, the manner in which the criticism was made public, the extent to which the employer's reputation and ability to conduct its business was compromised, the interest of the public in the information, etc.***".[242]

In Quebec, several other factors have been detected in the jurisprudence by Aust and Charette as being of importance when establishing the parameters of the obligation of loyalty where the employer's interests and reputation are concerned. Thus, the type of business, the nature of the employee's duties, the degree of public visibility, the extent of responsibility for the offensive acts, the significance of any public policy affected by the conduct, the foreseeability or actual adverse economic impact on the employer, whether malice or carelessness motivated the conduct, the right of the employee to engage in self-expression, the extent of authority or of confidence placed in the employee by the employer, are all elements that have been taken into consideration by the courts.[243]

The variety of factors to be considered in deciding whether an employee has violated his obligation of loyalty has resulted in jurisprudence that is equally varied.

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242 Brown, D.J.M. and Beatty, D.M., Canadian Labour Arbitration, Canada Law Book, updated to December 23rd, 1997, 7:3330, p. 7-103.

243 Aust, A.E. and Charette, L., *op. cit.*, note 236, p. 122.

Thus, sanctions ranging from a simple reprimand[244] for a municipal employee that publicly criticized the decisions taken by municipal council, to a suspension[245] meted out to an employee that participated in a radio debate and publicly denounced the policies of its employer regarding immigration, have been maintained. In several cases, dismissal has been considered the proper discipline for publicly criticizing one's employer.[246] The extent of harm caused to the reputation of the employer has been a deciding factor in nearly all the cases where discipline has been maintained.

Furthermore, the fact that an employee chooses to publicly denounce an employer without first going through the proper internal channels weighs heavily in favour of confirming the discipline meted out by the employer.[247]

Upholding the employer's reputation and defending its interests are deemed to be of paramount importance, and justify in many ways the high degree of loyalty imposed upon an employee. Public denunciation of one's employer constitutes, at first glance, a violation of the sacrosanct duty of loyalty. Indeed, publicly exposing an employer's failure to comply with laws and regulations or alleging wrongdoing related to a "moral" code of conduct can have serious ramifications on the employer's undertaking. However, we will see in what follows, that a significant exception to the duty of fidelity exists in the event that public criticism of the employer involves a potentially illegal or unethical activity. Much remains to be done, nonetheless, in order

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244 Syndicat des salariés(es) de la Ville de Sept-Îles, section local 1930, SCFP v. Ville de Sept-Îles, SA 95-04065 (April 3, 1995).

245 Syndicat des professeurs de l'état du Québec and Québec (Ministère des communautés culturelles et de l'Immigrataion, D.T.E. 97T-646. See also Centre d'hébergement Saint-Georges et Union des employés (ées) de service, local 298 F.T.Q., A.A.S. 96A-166 whereby the suspension of an employee for making negative comments overhead by the public regarding the service rendered by her employer was maintained.

246 See for example Syndicat des travailleurs et travailleuses de la Caisse populaire de Donnacona and Caisse populaire Desjardins de Donnacona, DTE 97T-1141; Centre communautaire juridique Laurentides-Lanaudière and Syndicat des employés du bureau du Centre communautaire juridique Laurentides-Lanaudière (C.S.N.), D.T.E. 86T-194. In Union des chauffeurs de camions, homme d'entrepôt et autres ouvriers, section locale 106 v. Imbeau, D.T.E. 96T-726 (Superior Court), the plaintiff has broadcast defamatory and slanderous comments regarding the employer on shortwave radio. Although the Superior Court considered dismissal to be too severe of a sanction in this particular case because of other mitigating factors, it nevertheless concluded that the employee had committed serious offences against the employee and returned the matter to a labour arbitrator for adjudication on the sanction.

247 Government of Alberta, 1996, 57 L.A.C. (4th) 400, p. 417; City of Brampton, 1989, 7 L.A.C. (4th) 294, pp. 321-322; Re: Ministry of Attorney General, Corrections Branch and B.C.J.E.U., 1981 3 L.A.C. 140, pp. 162-163.

that this concept serve its purpose as a watchdog to the illegal activities of an employer rather than a retaliatory mechanism available to the employee for his/her personal interests.

(b) Whistleblowing: a component of freedom of expression

The concept of "whistleblowing" became firmly established after a conference given by the American Ralph Nader in 1971 on the subject. The term has suffered a pejorative connotation from the very beginning as it refers to "one who reveals something covert or who informs against another".[248] Essentially, it refers to the practice of exposing an employer's "practices or policies, with or without critical commentary, for the purpose of exposing to public view the illegality, impropriety or danger which those practices or policies create".[249] This public denunciation of the employer is of a very delicate nature. Due to the privileged position occupied by an employee within an organization, he is the most apt to possess information that may be of public interest. Oftentimes, a good-willed employee will find himself in the difficult position of having to choose between the better interests of his employer and/or the public's interest in being made privy to certain information. In other cases, however, the employee may be motivated by malice, greed, or retaliation for an action imposed by the employer that he may consider to be unfair. It is easy to see that even in the very best situations, blowing the whistle on one's employer leads to serious consequences.

The phenomenon of whistleblowing has been allowed to develop largely uncontrolled in the Canadian and Quebec contexts. Statutory intervention has been sparse at the provincial level and thus its application in the realm of labour relations has been governed essentially by the principles established regarding the obligation of loyalty incumbent upon the employee. The theory has evolved and been developed primarily through the public sector of employment in Canada, quite possibly due to the more "visible" nature of the information involved. The private sector is however

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248 As per Merriam Webster's Collegiate Dictionary, *supra*, note 202.

249 K.P. Swan, "Whistleblowing employee loyalty and the right to criticize: an arbitrator's view point", *Labour Arbitration Yearbook*, (1991) Vol. 2, Toronto, Butterworths, 191, p. 192.

replete with examples where an employee would be justified to publicly expose company information that he deems to be illegal or unethical. The situation is more ambiguous for the private sector employee as he is not normally governed by a pledge or oath of allegiance.[250] Nevertheless, we are of the opinion that principles regarding whistleblowing in the public sector are easily transposable to the private sector.

One of the earliest Canadian cases involving the concept of whistleblowing is W.M. Scott & Co. Ltd. and Canadian Food and Allied Workers Union, Local P-162. In this instance, the plaintiff had publicly condemned his employer in a newspaper article making reference to the company's inefficient management. President Weiler raised the following questions in deciding the issue, which set the standards for future litigation involving whistleblowing:

> ***"(1) Was the employee's conduct sufficiently injurious to the interests of the employer?***
>
> ***(2) Did the employee act in a manner incompatible with the due and faithful discharge of the employee's duty?***
>
> ***(3) Did the employee do anything prejudicial to the interests or reputation of the employer?".***[251]

The Board responded to these questions in the affirmative and thus maintained the plaintiff's dismissal. These principles were reiterated in a subsequent case involving two public servant employees of the British-Columbia Corrections Branch.[252] The landmark decision in B.C.G.E.U. emphasizes that the aim in exposing an employer is correction of the illegal activity and not the public ostracization of the employer. The employee must resort to internal avenues of conflict resolution before addressing the issue publicly. The difficult position with which an employee must contend with in these situations when he must decide between the duty of loyalty to his employer or a similar duty towards society is also highlighted. In B.C.G.E.U., two prison guards participated in an open line radio show during which they publicly criticized the

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250 Oaths of Allegiance Act, R.S., c. O./1, S.1.

251 [1977] 1 C. L.R.B.R. 1 (P.C. Weiler), p. 5.

252 Re: Ministry of Attorney General, Corrections Branch and British- Columbia Government Employees' Union, (1981) 3 L.A.C. (3d) 140.

administration of the detention centres for which they worked. They were subsequently dismissed for violating their oath of office and furthermore for adversely affecting the reputation of their employer. In motivating his decision, J.W. Weiler applied the principles established in W.M. Scott & Co. Ltd. and illustrated the difference between blowing the whistle for purposes of public interest as opposed to those of purely private interests:

> ***"While an employee's duty of fidelity to an employer does not prevent him in every circumstance from publicly criticizing his employer, it is recognized that public criticism is not the first step that should be taken in order to bring wrongdoing within the enterprise to the attention of those who can correct it. (...) What is clear is that an employee will be in breach of the duty of fidelity owed to his employer if he makes false public statements which the employee either knows to be false or is reckless as to the truth of the statements. When an employee fails to use the available resources to determine the accuracy of critical comments about one's employer, or when the employee refuses to use other means to bring his criticisms of the employer to the attention of those in a position to rectify the problem, he is, in my view, in breach of the obligation of loyalty which he owes his employer".***[253]

Whistleblowing made its way to the Supreme Court of Canada in a case involving a public employee who vociferously criticized government policies unrelated to the work he carried on in the Revenue Canada Department. In Fraser v. Public Services Staff Relations Board,[254], *supra*, the employee in question was specifically asked to refrain from his continued attacks on his employer. He was dismissed after a series of progressive sanctions had already been imposed. The highest court of the land determined that Mr. Fraser had breached his duty of loyalty due to his vitriolic and persistent accusations against his employer's policies. Despite the fact that the Supreme Court clearly applied the principles put forth in B.C.G.E.U., to the case at bar, the jurisprudence has not been consistent in similarly applying the said principles in subsequent decisions, as rightfully pointed out by France Hébert.[255] Indeed, it appears that Quebec arbitration awards involving whistleblowing focus on the notion of

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253 *Ibid.*, pp. 161-162.
254 *Supra*, note 144.
255 F. Hébert, *op. cit.*, note 231, p. 141.

prejudice caused to the employer as the primary consideration in determining whether the actions of the employee merit discipline.[256]

One would think that the case of a union representative would differ substantially from that of a simple employee in whistleblowing situations since part of a union representative's duties consist of acting as a watchdog of employer actions. It appears that as long as the public accusations involved refer to general working conditions or those set forth in the collective agreement, the union officer will generally be spared discipline.[257] However, in the event that the statements made are unfounded and furthermore adversely influence the reputation of management, the union representative will not benefit from immunity.[258]

Protection afforded by the *Canadian and Quebec Charters* to freedom of expression becomes imperative in the context whereby an employee is reluctant to denounce improper or illegal behaviour on the part of its employee for fear of retaliatory action. As pointed out by Mel Myers and Valerie Matthews Lemieux,[259] an employee owes a duty to its employer but also to society at large. In their view, society in turn has an analogous duty to put the proper mechanisms in place in order to ensure that an employee will not lose his/her livelihood as a consequence of actions carried out for the benefit of society in general. The incidence of the Charters in protecting the employee in a context involving whistleblowing remains yet to be fully examined by the judiciary. At first glance, it would appear that by virtue of the constitutionally protected freedom of expression, an employee would be justified in denouncing the illegal activities of its employer. The Court of Appeal of Quebec has manifestly stated that freedom of expression is not limited by the sheer fact that it causes damage to

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256 *Ibid*, p.136.

257 Tétrault v. Québec (Ministère de la Justice), D.T.E. 97T-1100; Burns Meats, [1980], 26 L.A.C. (2d) 379; Robertshaw Controls, (1982), 5 L.A.C. (3d) 142; St-Catherines General Hospital, [1982] O.L.R.B. Rep 441.

258 Desmarais v. Centre d'Accueil Pierre Joseph Triest, D.T.E. 82T-591 (L.C..), p. 6; Canadian Union of Public Employees and Wardair Canada Inc., D.T.E. 90T-200, p. 36.

259 M. Myers and V.J. Matthews Lemieux, "Whistleblowing employee loyalty and the right to criticize: the employee's perspective", *Labour Arbitration Yearbook*, (1991), Vol. 2, Toronto, Butterworths, 211, p. 212.

another party.[260] However, we have observed that the obligation of loyalty has in the past superseded that of the right to freedom of expression, although recent decisions appear to have reversed this tendency. In Simon Fraser University,[261] arbitrator Bird maintains that the *Canadian Charter* has not cast aside the duty of loyalty owed by employees, as illustrated by the following excerpt:

> "***In my opinion, the Charter has not made unlawful the jurisprudence which supported the hierarchical industrial organization contemplated by the collective agreement... I am reinforced in my opinions by the analysis of Jackett C.J. in*** **Stewart v. Public Service Staff Relations Board,** ***[1978] 1 F.C. 133, ... that reasonable limitations on the right of free speech, and inferentially s. 2(b) of the Charter, are assumed when a person voluntarily enters employment***".[262]

It is noteworthy that this decision was delivered prior to the judgements rendered by the Supreme Court of Canada to the effect that the *Canadian Charter* does not apply to universities or hospitals[263] nor to litigation between private parties exception being made, as earlier pointed out, for orders rendered by a labour adjudicator named pursuant to statute.

We are of the opinion that, despite decisions such as Simon Fraser University mentioned above, freedom of expression will be upheld in cases where it is clearly established that the employee was well-intentioned and had the interests of the public at heart when publicly exposing its employer for violation of the law. Restrictions to this fundamental freedom would be difficult to justify in this context. On the other hand, the employee motivated by malice or acting in a vindictive fashion would do so at his own peril as the restriction to this type of behaviour could easily be upheld if the criteria developed by the early arbitral jurisprudence and later by the Supreme Court are applied. However, the inconsistency that the courts have demonstrated with respect to the said criteria denotes a difficulty on the part of the judiciary in balancing the competing factors in an equitable fashion. Thus, the time is propitious for statutory intervention, as we will examine in the next section, in order that an employee can be

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260 Larose v. Malenfant, *supra*, note 23, p. 2646.
261 *Supra*, note 239.
262 *Ibid*, pp. 367-368.
263 McKinney v. Bd. of Governors of the University of Guelph, [1990] 3 S.C.R. 230.

guided by clear parameters in determining when he can appropriately bring his viewpoint to the public arena where his employer is concerned.

(c) Proposal for reconciliation of employer/public interest

Many commentators have called for legislative intervention to resolve the ambiguity surrounding the protection of "genuine" whistleblowers who denounce employer activities in the name of public interest.[264] However, although we are of the opinion that this is the route that must be taken in order to arrive at a whistleblowing policy that effectively governs this employment issue, we feel that a blanket legislation applicable to all spheres of employer activity would not be a sufficient tool in rectifying the situation. Moreover, the matter is not one that can be left to individual bargaining tables nor to provincial Labour Standards Act. Considering the eclectic nature of labour relations in each Canadian province, as well as the variety of potentially affected areas of operation within an organization, what we propose is a sector by sector analysis of what are deemed to be areas of priority so that corresponding legislation can be enacted. The employee must have recourse to clear guidelines that govern his behaviour. We will take the example of Quebec in order to illustrate our proposals.

Protection of a general nature is offered to the Quebec employee indirectly through article 1472 C.C.Q:

> "***A person may free himself from his liability for injury caused to another as a result of the disclosure of a trade secret by proving that considerations of general interest prevailed over keeping the secret and, particularly, that its disclosure was justified for reasons of public health or safety.***"

No specific reference is made to whistleblowing activities and it is clear that this disposition aims at protecting primarily trade secrets in a limited context. This general provision does not, in our opinion, constitute in any way a sufficient framework to

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264 F. Hébert, *op. cit.*, note 231; K.P. Swan, "Whistleblowing employee loyalty and the right to criticize an arbitrator's view point", 191; R.L. Heenan and C. De Stefano, "Whistleblowing employee loyalty and the right to criticize: a management perspective", 199; M. Myers and V.J. Matthews Lemieux, "Whistleblowing employee loyalty and the right to criticize: the employee's perspective", *Labour Arbitration Yearbook*, *loc. cit.*, note 259.

review retaliatory actions taken against employees who blow the whistle[265] and does not provide for a simple recourse for the aggrieved employee. Although some authors would argue for a general legislation that would apply to all spheres of activity, similar to the American model, we believe that areas of priority should benefit from individual legislation. The American experience[266] is a result of amendments made to earlier legislation that proved to be inadequate. According to F. Hébert, collective agreements in the United States do not sufficiently protect whistleblowing employees from retaliatory measures taken by their employers.[267]

At present, Quebec law does not impose any obligation, as is the case in other jurisdictions, to disclose information that might prejudice public interest. Accordingly, no specific statutory protection is offered to employees who voluntarily disclose information that might potentially be harmful to others. Limited protection is afforded to employees who exercise rights under the *Occupational Health and Safety Act*.[268] Amongst the employee's obligations pursuant to this Act, is that of participating in the identification and elimination of risks at the workplace which may imply denouncing the said risks.[269] As mentioned above, article 1472 C.C.Q. can hardly be considered to provide immunity for an employee who takes the initiative to reveal company information unrelated to trade secrets. Indeed, one could argue that in the absence of a legislative framework, the only element to be considered is the obligation of loyalty to which an employee is held, which would prevail in the circumstances.

An overview of legislation in the environmental field, which is a sector of activities that would normally provide for some type of mechanism that would allow the public at large and in particular employees to safely report to authorities incidents that adversely affect the environment, reveals that Quebec employers are not prohibited

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265 Our research has detected a single case involving Article 1472 as of its inclusion in the Civil Code as of January 1, 1994. In St-Romuald (Ville de) et Syndicat des pompiers du Québec, section locale St-Romuald, D.T.E. 96T-568, a municipal employee's suspension was overturned because the information he revealed involved the bad state of municipal vehicles, a matter that could be considered of public interest and justified disclosure.

266 *The Whistleblower Protection Act of 1989*, Pub. L. 101 to 112, enacted on April 10th, 1989.

267 F. Hébert, *op. cit.*, note 231, p. 146.

268 R.S.Q., c S-2.1, article 227.

269 *Ibid.*, see article 49(5).

from taking disciplinary action against an employee in this context. Thus, although the *Quebec Environment Quality Act* provides that anyone responsible for the presence in the environment of a contaminant has the duty to notify authorities,[270] the employee who is not bound by this obligation but nevertheless proceeds to disclose prejudicial information is not in any way protected under Quebec law. On the federal scene, despite the fact that the *Canadian Environmental Protection Act*[271] provides for a similar obligation to report by parties responsible for wrongdoing, limited protection is offered in the form of anonymity at the time of disclosure.[272] Specific protection for whistleblowing is limited to government employees who blow the whistle, in the form of a prohibition imposed upon employers to not subject these employees to retaliatory measures.[273]

Broad protection is offered to the whistleblower under Ontario provincial legislation, both under the *Ontario Environmental Protection Act* (O.E.P.A.)[274] and the recently enacted *Ontario Environmental Bill of Rights* (O.E.B.R.).[275] We propose that the Ontario model should serve as a basis for future statutory intervention in Quebec for it provides the comprehensive coverage necessary to resolving the problems faced by whistleblowers. Although the O.E.B.R. is a relatively new instrument, the provisions of the O.E.P.A. have been protecting employees for over a decade. Although the clauses pertaining to whistleblowing have been infrequently used, this is not necessarily an indication of their inefficiency, but rather may denote employers' respect for the obligations provided therein. The *Ontario Environmental Bill of Rights* does not benefit from constitutional status nor from any express paramountcy provisions that would make it overrule other legislation. It nevertheless sets "certain minimum rules for public participation with respect to government ministries and statutes subject to the

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270 L.R.Q., c. Q-2, at section 21.
271 R.S.C. 1996, c. 16 (4th Suppl.).
272 *Ibid.*, section 36.
273 *Ibid.*, Sections 37 (4) and 58 (4).
274 R.S.O. 1990, c. E-19.
275 S.O. 1993, c. 28.

law".[276] Part VII of the O.E.B.R. is specifically aimed at employer reprisals and sets out the grounds on which employers are prohibited from undertaking these measures. Hence, Section 105 offers the following protection:

> "***(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:***
>
> ***1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.***
>
> ***2. Apply for a review under part IV.***
>
> ***3. Apply for an investigation under Part V.***
>
> ***4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.***
>
> ***5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.***
>
> ***6. Give evidence in a proceeding under this Act or under a prescribed Act***".

Coverage is similar to that set forth in the O.E.P.A., except for two significant differences. The O.E.P.A. appears to provide for a broader protection as it applies to a series of statutes in connection with the O.E.P.A whereas the O.E.B.R. is limited to reprisals for actions taken in connection with or related to the Act in question. However, upon further analysis, section 105(3) refers to "enforcement of a prescribed Act, regulation or instrument", thus opening the way to protection pursuant to a series of other statutes.[277] Hence, practically speaking, there does not appear to be a great difference in the spectrum of activities protected under both pieces of legislation. Another difference, in this case more substantive, between the two documents lies in the fact that the O.E.P.A. not only sets forth a complaint procedure for employees as is the case for the O.E.B.R., but furthermore creates an offence pursuant to which employers may be prosecuted even though they comply with an order of the *Ontario Labour Relations Board.* This added protection is not found in the O.E.B.R., but it is

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276 P. Muldoon and R. Lindgren, The Environmental Bill of Rights: a practical guide, Emond Montgomery Publications Ltd. 1995, p. 3.

277 Regulations provide for over nineteen statutes of this nature as pointed out by Muldoon and Lingrin in their work, *ibid,* p. 180.

to be noted that the O.E.P.A. provisions continue to operate and apply concomitantly with those of the O.E.B.R.

Of paramount importance in the *Ontario Environmental Bill of Rights* are the parameters that have been imposed surrounding whistleblowing activities. An employee must be in "good faith" when he resorts to public denunciation. Due to the subjective nature of this element, employee protection is extended to those situations whereby the employee may be incorrect about allegations of illegal conduct provided that he has acted at all times in "good faith". Therefore, it is only in instances where ulterior motives can be demonstrated that the employee will not be covered under this legislation.

Our proposal for implementation of a comprehensive legislation similar to the Ontario model on environmental activities extends to similar legislation for other sectors of activity as determined by the legislator. In this way, it is society that would determine what constitutes areas of priority, such as the environment or white collar crime for instance, and not the individual employee who might, according to personal convictions consider actions of the employer to be contrary to an ethical or moral standard of behaviour, although they may not be in violation of any actual law. Discretion of this nature should not be left to employees for then the workplace would effectively become unmanageable. Furthermore, an employee must clearly be aware of what its duties and obligations are towards society and not be made to personally determine where the duty of fidelity towards its employer ends and where that owed to society begins.

III. CONCLUSION

The objective of the present study was to provide an overview of the state of the law regarding freedom of expression in the workplace environment in a comparative perspective. In this context, we have attempted to expose the nature of the employer's prerogative over its employees as well as to examine an important limitation to this power, that is the phenomenon of employee whistleblowing in light of freedom of expression considerations.

An analysis of the leading Supreme Court cases addressing freedom of expression in general and more particularly, within the workplace environment has allowed us to delineate the general parameters within which the various intervening parties to the employment contract must interact. Several guiding principles have emerged following our perusal of freedom of expression adjudication as pertaining to the employment context. It is noteworthy to underscore the reality that much of what transpires between a private employer and its employees is not examined in the light of the *Canadian Charter* due to the absence of state action. Thus, the relevance of examining general freedom of expression issues in order to transpose the precepts to labour relations matters.

It has been determined that freedom of expression under section 3 of the *Quebec Charter* is to be assimilated, for the purposes of interpretation, to that under the *Canadian Charter*.[278] The two-tiered framework that was developed by the Supreme Court to address Charter issues was established in 1989[279] and has been used ever since to analyse freedom of expression under section 2(b) of the *Canadian Charter*. An initial appraisal thus serves to determine whether the scope of activity concerned falls under the breadth of section 2(b). Once this has been established in the affirmative, the Court will then proceed to examine whether the contested restriction is justified in a free and democratic society. Freedom of expression has certainly benefited from a very broad and inclusive approach to date. Indeed, only one exception has been explicitly

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278 *Supra*, note 7.

279 Irwin Toy Ltd. v. Quebec, *supra*, note 17.

stated by the Court. Violence, in its strictest physical sense, has been proscribed and deemed not to fall within the scope of section 2(b) of the *Canadian Charter*. With respect to other forms of expression, any activity that conveys meaning has been determined to fall within the confines of protected activity.

The analysis regarding the actual protection offered by the Charters is largely carried on in the second part of the Supreme Court's analysis. At this level, the Court determines on a case by case basis what society deems to be acceptable as restrictions to the highly cherished freedom of expression. In this manner, the Court maintains a liberal approach and promotes freedom of expression as a fundamental overriding right. At the same time, the applicable criteria in the latter part of the Court's analysis prevent the widespread diffusion of the motives underlying adjudication for they are factually based and thus applicable to the particular case at bar. Nevertheless, certain principles have emerged throughout these judgements that permit us to effectively state the current law on the issue.

Compelled expression has been condemned by the Court as defying the very purposes for which expression is protected under the Charter. As aptly put by Richard Moon, compelled expression is unjust "because an individual's communication (what he/she says or writes) is closely linked to his/her sense itself and to his/her place in the community".[280]

Unpopular opinions or issues considered to be "morally" wrong in the public's view have been deemed to be included in the wide conception of constitutionally protected expression. Thus, although society may consider certain expressions such as obscenity to be reprehensible, communications cannot be judged based on their content. This would result in a universal code of morality which the Court has been very reticent to establish. Furthermore, reserving protection to those matters which the majority consider to be appropriate, would lead to excluding minority viewpoints which would go contrary to the very essence of the Charters.

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280 R. Moon, "R.J.R.-McDonald v. Canada: on the freedom to advertise", *(1996) Constitutional Forum Constitutionnel*, 7:1, 1, p.5.

The classical distinction to be found in arbitral jurisprudence concerning activities carried on by an employee within as opposed to outside of the workplace appears to have been cast aside by the Supreme Court. Normally considered as a mitigating element where the meting out of discipline is concerned, the fact that the conduct at the source of discipline occurred outside of the workplace has been given little consideration by the highest court of the land.

The bulk of decisions pertaining to collective employer/employee relations that have been addressed by the Supreme Court involve the freedom of expression inherent in picketing. On at least two occasions, the harm caused to third parties has been raised as a barrier to overturning restrictions to this activity. Conflicts arising between the carrying out of union activities and that of job performance have given pre-eminence to employee freedom of expression in the context where an employee was forced to choose between his job and the union activities.

This overview permits us to conclude that the Supreme Court is very reluctant to restrict the broad and inclusive nature of the freedom set forth in the *Canadian and Quebec Charters*. The Court has taken great measures to not exclude in principle any activity from the scope of section 2(b) but does so indirectly when it allows restrictions to these activities to be maintained. One may advance that by not allowing these limitations to constitute precedent as they are judged on a case by case bases, the Court's official position is to the effect that the Canadian approach to freedom of expression is liberal and all encompassing.

International human rights law and its application by the various jurisdictions has greatly influenced the development of our subject matter. We have chosen to focus, in the present study, on the *European Convention* since it has greatly contributed to setting standards which are respected worldwide concerning human rights. The Supreme Court of Canada has demonstrated a very open approach to incorporating these international instruments into our domestic law, perhaps because human rights issues are a relatively new concept to be contended with and that there is a need for guidance in this area. The fact that international covenants and agreements must, in most circumstances, harmonize a variety of domestic laws and customs, permits their

jurisprudence to reflect a much broader view point rather than a purely local approach. This provides for an interesting feature of these international instruments, for the Canadian judge will necessarily incorporate into his decisions a broad vision that goes beyond that which is the standard when including these documents into his motives.

The European Court of Human Rights, the judiciary arm of the *European Convention*, has consistently upheld freedom of expression as a fundamental right that is the foundation for many other equally important rights and freedoms. This has been manifested above all in decisions involving freedom of the press and political expression. Similar to their Canadian counterparts, the Strasbourg authorities have had to balance competing rights when determining the scope of freedom of expression and have also rejected the notion of a uniform conception of morals. Restrictions to freedom of expression in the European context are governed by elements set forth in a restrictive clause related to freedom of expression. Thus, restrictions must be prescribed by law, have a legitimate aim and must be necessary in a democratic society. We have exhaustively examined the European Court's interpretation of these criteria and their applications to the workplace environment in order to provide a comparative viewpoint.

The American experience regarding freedom of expression in the workplace has been examined in the public sector context, principally because this sector of law has developed essentially within this framework. The employment at will doctrine has governed labour relations in the United States over time and still prevails in private sector employment. This theory advances that the employment relationship is terminable at will by both parties if not otherwise specified in the employment contract. Public employment grants its employees some form of protection from the employer prerogative to impose discipline through the First Amendment of the American *Bill of Rights*. It has been determined that this legislation does not apply in the absence of state action, although the American *Bill of Rights* does not explicitly exclude application to private parties. The evolution of freedom of expression issues related to labour matters has established two principal criteria that are taken into consideration when determining the extent of this fundamental freedom. An adjudicator must first determine whether

the matter in question is of public concern and then examine whether the exercise of the said expression causes disruptiveness in the workplace. Despite the fact that the Courts have systematically applied these principals which were initially put forth in the landmark decision of Connick v. Myers, the determination of what is embodied by these terms has been transformed immensely over time. Considerable latitude has been given to the employer in recent cases in determining the factual context of the expression as well as referring to it in considering what constitutes disruption of its workplace.

Over the years, a movement has emerged that would assimilate First Amendment freedom of expression as public policy and thus consider it state action when restrictions are imposed upon it. However, the Courts have consistently rejected this extension of protection to the private sector of employment.

We have provided the reader with an overview of Canadian public sector considerations involving freedom of expression as a background to the analysis of the private sector. Of paramount importance in this context appears to be the adverse effect on the employee's actual job performance or the efficiency of the workplace that results as a consequence of the exercise of freedom of expression. In contrast to the American workplace where a content/context dichotomy has persisted for years, the Canadian courts have evaluated freedom of expression issues in the public workplace essentially based on the circumstances surrounding the expression rather than on the message being communicated.

The employer's prerogative to impose its will may potentially constitute a substantial impediment to an employee's exercise of its freedom of expression at the workplace. We have therefore considered it relevant to examine the origins and foundations of this power and to provide a brief overview of the different theories that have been advanced concerning the pre-eminence afforded management rights. In certain circumstances, these rights extend beyond the workplace to control an employee's conduct on off-duty time. There is no unequivocal and convincing theory that has been proposed that justifies the power that has been put in the hands of employers to oversee their employees. One can only conclude that the traditional element of subordination present since time immemorial in employee relationships is

an accepted fact that has gone largely uncontested over the years. The advent of organized labour movements has somewhat tempered the seemingly absolute power of employers, however it still prevails to this day.

An important exception to the overbearing power of the employer is the phenomenon referred to as whistleblowing, a notion that has been incorporated into Canadian and Quebec law but that has not yet been clearly circumscribed by the Courts. As a background to the study of this concept, we have examined the employee's obligation of loyalty to its employer and qualified the incidence of public denunciation in this context. Protection of the reputation of the employer has been given priority by the Courts when issues of public criticism of the employer are addressed. A series of criteria have been developed over the years but have been applied inconsistently. Thus, we consider that statutory intervention is necessary in order that an employee is made aware of the parameters surrounding disclosure of company information for public interests. By the same token, an employee should not have to choose between his own interests with respect to his livelihood and the interest of the public to be made aware of certain prejudicial information to the employer. On the other hand, he must not be allowed to use this mechanism for purely personal reasons or as retaliation against the employer for actions taken against him. Indeed, the ground is fertile for abuse of this mechanism, thus our proposal for legislative intervention.

An approach that addresses specific areas of intervention is favoured. Rather than viewing this as a piecemeal solution, we are of the opinion that specific areas of priority should be determined by the legislator and slated for intervention. This is in opposition to a global approach which we feel would not address the matter adequately for it would result in broad legislative measures that would be difficult to apply considering the subjective nature of the notion of matters pertaining to public interest. Thus, the employee should not be left with the obligation or the power to determine what constitutes matters that are of sufficient public interest to be disclosed, but should rather be governed by precise rules setting forth the actual type of information in a particular sector of activities that is apt to be considered of importance to the public and furthermore to benefit from a procedural forum where he can present his concerns

without fear of retaliation. We have proposed the Ontario legislative framework pertaining to environmental protection as an appropriate mechanism against employer reprisals, that could be used as a model for Québec in the context of employee whistleblowing.

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