Free Speech and Canada's Public School Teachers:  
An Employment Law and Constitutional Law Analysis

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by

Paul Terence Clarke

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of the requirements for the

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by

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FALL 1997

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FREE SPEECH AND CANADA'S PUBLIC SCHOOL TEACHERS: AN EMPLOYMENT LAW AND CONSTITUTIONAL LAW ANALYSIS

In this study, the researcher has attempted to ascertain what counts as legitimate restrictions by the employer on the free speech rights of Canadian public school teachers from the perspectives of employment law and constitutional law.

In the employment context, school boards may restrict: dishonest speech which undermines trust, uncooperative speech which interferes with effectiveness and efficiency or which is abusive, disloyal speech which unjustifiably harms school boards' legitimate business interests, and disobedient speech which defies employers' authority. In other circumstances, however, employment law recognizes and protects teacher expression in spite of teachers' employment duties. Thus, employers are not allowed to interdict: speech solely because it is idiosyncratic or unconventional, appropriate banter with students, teachers who criticize their employers for illegal and negligent behaviour, and direct and forthright speech in the collective bargaining context.

Under employment law, it is still unclear whether teachers can speak out responsibly on matters of public interest without violating their duty of loyalty or whether teachers can exercise some degree of academic freedom without undermining their duty of obedience. In both cases, the researcher argues for increased protection. First, as professionals, teachers possess expertise and a relevant insiders' perspective which have the potential to inform debate on issues of public concern. Second, as educators, teachers are called to prepare our students for citizenship in our democracy by teaching them how to think critically.

Under constitutional law, and generally speaking, the Charter
is unlikely to alter the employment law analysis for three main reasons. First, adjudicators are likely to adopt a reasonableness-based approach to s.1 analysis based on the Supreme Court of Canada’s landmark decision in *Ross v. New Brunswick School District No. 15 (1996)*. Second, when governments act as both employer and state agent, as opposed to state agent alone, adjudicators will be more inclined to accept employer arguments based on pragmatic and utilitarian considerations, like efficiency and effectiveness, as constituting reasonable grounds for restricting teachers’ speech.

Third, adjudicators will examine the nature of teacher expression to determine whether it advances the core values underlying s.2(b) expression: pursuit of truth, political participation, and self-fulfilment/autonomy. As a general rule, one can argue that dishonest, uncooperative, disloyal, and disobedient expression are unlikely to implicate core Charter values.

Yet, the Charter does have the potential to enhance protection of teachers’ free speech rights in two particular areas. First, the Charter may change the analysis when teachers speak out on issues of public concern in a reasonable and controlled way. Second, the Charter may make a difference when teachers attempt to exercise some measure of academic freedom in a professionally responsible manner. In the first scenario, political speech is at stake. In the second scenario, the search for truth (and to a diminished degree political participation self-fulfilment/autonomy) is involved. In both cases, fundamental core Charter values are at issue. Hence, adjudicators may require employers to demonstrate a higher standard of justification, in these specific circumstances, before they accept arguments limiting teachers’ freedom of expression.
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Abstract

In this study, the researcher has attempted to ascertain what counts as legitimate restrictions by the employer on the free speech rights of Canadian public school teachers from the perspectives of employment law and constitutional law. The analysis has been informed by the general and specific duties that teachers owe their employers. Like all employees, teachers are required to be honest, cooperative, loyal, and obedient. Yet, as a special class of employees, teachers must also educate, serve as role models, and act as professionals.

In the employment context, school boards may restrict: dishonest speech which undermines trust, uncooperative speech which interferes with effectiveness and efficiency or which is abusive, disloyal speech which unjustifiably harms school boards' legitimate business interests, and disobedient speech which defies employers' authority. In other circumstances, however, employment law recognizes and protects teacher expression in spite of teachers' employment duties. Thus, employers are not allowed to interdict: speech solely because it is idiosyncratic or unconventional, appropriate banter with students, teachers who criticize their employers for illegal and negligent behaviour, and direct and forthright speech in the collective bargaining context.

Under employment law, it is still unclear whether teachers can speak out responsibly on matters of public interest without violating their duty of loyalty or whether
teachers can exercise some degree of academic freedom without undermining their duty of obedience. In both cases, the researcher argues for increased protection. First, as professionals, teachers possess expertise and a relevant insiders' perspective which have the potential to inform debate on issues of public concern. Second, as educators, teachers are called to prepare our students for citizenship in our democracy by teaching them how to think critically.

Under constitutional law, and generally speaking, the Charter is unlikely to alter the employment law analysis and corresponding protection of teachers' expressive rights for three main reasons. First, adjudicators are likely to adopt a reasonableness-based approach to s.1 analysis based on the Supreme Court of Canada's landmark decision in Ross v. New Brunswick School District No. 15 (1996) - the leading judgment on teachers' free speech rights under the Charter. Second, when governments act as both employer and state agent, as opposed to state agent alone, adjudicators will be more inclined to accept employer arguments based on pragmatic and utilitarian considerations, like efficiency and effectiveness, as constituting reasonable grounds for restricting teachers' speech.

Third, adjudicators will examine the nature of teacher expression to determine whether it advances the core values underlying s.2(b) expression: pursuit of truth, political participation, and self-fulfilment/autonomy. As a general
rule, one can argue that dishonest, uncooperative, disloyal, and disobedient expression are unlikely to implicate core Charter values.

Yet, the Charter does have the potential to enhance protection of teachers’ free speech rights in two particular areas. First, the Charter may change the analysis when teachers speak out on issues of public concern in a reasonable and controlled way. Second, the Charter may make a difference when teachers attempt to exercise some measure of academic freedom in a professionally responsible manner. In the first scenario, political speech is at stake. In the second scenario, the search for truth (and to a diminished degree political participation self-fulfilment/autonomy) is involved. In both cases, fundamental core Charter values are at issue. Hence, adjudicators may require employers to demonstrate a higher standard of justification, in these specific circumstances, before they accept arguments limiting teachers’ freedom of expression.
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CHAPTER 1
THE NATURE OF THE STUDY

The Problem

Some say: "Those who can, do; those who can't, teach."
This simplistic and denigrating view of teaching, however, has not gone unchallenged. Scriven (1994), for instance, reminds us that teachers can indeed change the world:

Great teachers of the past have inspired individuals - and sometimes whole societies - to new and better forms of life, to great inventions, to the saving of lives, cultures, and countries (and to their destruction), to notable discoveries and spiritual revolutions. . . . On the small scale there are examples such as Socrates, the teacher of Plato, Aristotle, the teacher of Alexander; and Brentano who was Freud's teacher. On the grand scale, the teachers who began most of the great religions have their names enshrined in the honor role or the very title of those movements - Buddhism, Confucianism, Christianity, Mohammedanism, Marxism.

(p. 151)

In the service of students, teachers remain the most important actors in the educational process. Consequently, teacher commitment to standards of academic and extra-curricular excellence is necessary to sustain a healthy and viable educational environment.

One avenue for protecting teacher dedication and the integrity of the profession is through the legal system. The need for protection arises from the circumstances of
teachers' employment. They work in a bureaucratic organization which is often powerful and endowed with significant material, economic and political resources. The law, therefore, recognizes the importance of contractual, procedural and civil rights as a means of defending teachers' employment interests and preserving their human dignity in the larger collectivity.

MacKay (1984) provides a useful four-fold system of classification of the sources of teacher rights.¹ These are: 1) the employment relationship; 2) collective bargaining; 3) judicial review; and 4) human rights statutes and the Canadian Charter of Rights and Freedoms.² The first two categories, the employment relationship and collective bargaining, have interested educators, lawyers and scholars for a number of decades. The work of McCurdy (1968) entitled The legal status of the Canadian teacher is a classic and addresses issues such as the legal jurisdiction over teachers, certification, collective bargaining and formation/termination of contracts. The third category, judicial review, refers to the exercise by courts of their

¹Although teacher employment is regulated by specific legislation which varies from jurisdiction to jurisdiction, MacKay (1984) recognizes the commonality of issues which all teachers confront when he announces: "Issues of teachers' rights are similar in all provinces, and while the details of the employment relationship vary from province to province the core issues and basic structure are the same" (p. 246).

inherent common law supervisory power to ensure procedural fairness by governmental agencies and the fair and proper exercise of discretion. As an avenue of protection for teacher rights, judicial review has been available to Canadian teachers for many decades.

The fourth category of protection has been a relatively recent occurrence. In the area of civil rights, for instance, McCurdy's comments in 1968 are indeed illuminating: "... civil liberties are not to be taken for granted, despite the fact that breach of such liberties rarely becomes a public issue in Canada" (p.154). Even a decade later, there was little relevant case law or scholarly comment on teachers' civil rights in Canada. With the promulgation of human rights legislation in the late 1970s and during the 1980s, the

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3In the teaching context, the potential for judicial review is most relevant in cases involving the termination of teacher contracts. Provincial legislation governing education provides for the establishment of an independent body, often referred to as a board of reference, to grant a full-blown hearing (with the right to call witnesses, to cross-examine and to be represented by counsel) to a teacher who has been dismissed. The courts may overturn determinations of such bodies when they fail to comply with the requirements of procedural fairness or otherwise exercise their powers improperly.

language of civil rights in the context of schools began to emerge. Notwithstanding this development, the focus of the discussion in education was initially not directed to teachers but rather towards students. The works of Roberts (1977) - *Children's rights: A teacher manual* - and Ungar (1978) - *Student rights and responsibilities* - illustrate the interest in student rights and education in Canada during this period.

By the end of the 1970s and at the beginning of the 1980s, it became clear that human rights legislation was also applicable to teachers. Hence, issues relating to discrimination on the basis of religion, age and sex made their way before human rights tribunals. In academe, MacKay's (1984) important work *Education law in Canada* devoted a chapter to teachers, and placed particular emphasis on human rights legislation.

In 1982, the passage into law of The Constitution Act and accompanying *Canadian Charter of Rights & Freedoms* heralded a new era for the study of rights. Kelly (1985) offers the following rationale for the Charter's adoption:

The ability to remain free and preserve one's sense of dignity "resides crucially in the ability to secure one's rights even against the political will of the majority." In essence, on the basis of this rationale,

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*Re Essex County Roman Catholic Separate School Board v. Porter et al. (1978), (a case of religious discrimination); Re Gadowsky v. School Committee of Two Hills (1980), (a case of age discrimination); Judith S. Dick and the Manitoba Teachers Society v. Deputy A.G. of Canada (1980), (a case of sex discrimination).*
a liveable society becomes one in which an individual is able to countervail the necessary growth of an impersonal, alienated bureaucratic structure within an impersonal, alienated work and social system. An entrenched Charter of Rights and Freedoms, with the right of an individual to seek redress through an impersonal court system, is an appropriate vehicle within which to build such a process. (p .9)

By virtue of its inclusion in the constitution, the Charter is part of the supreme law of Canada. S.52 of the Constitution Act states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This elevated constitutional status clearly sets the Charter apart from provincial or federal human rights legislation which can be changed by simple legislative amendment. The constitutional entrenchment of the Charter ensures that it is beyond legislative repeal and can only be altered by a complex amending formula involving both provincial and federal governments.

Since the Charter’s proclamation, a number of important issues directly impacting on teachers rights have surfaced. Chief among these are: freedom of religion, freedom of association, and mandatory retirement.'

'Although rarely used, s.33 of the Charter allows the federal and provincial governments to pass legislation which may operate through express declaration notwithstanding the provisions of s.2 and ss.7-15 of the Charter.

'S.2(a) of the Charter guarantees freedom of conscience and religion. In Walsh v. Federation of School Boards of Nfld. (1988), the Newfoundland Court of Appeal upheld the
challenges in these different areas have forced teachers and educators to re-consider teachers’ civil rights as an emerging area of importance in school law.

Although many issues affecting the civil rights of teachers have been resolved in both the employment and constitutional contexts, the notion of freedom of expression and its full application to public school teachers takes one into largely uncharted educational and jurisprudential waters. Hence, it is unclear what constitutes legitimate restrictions which school boards can place on the free speech rights of public school teachers.

In the employment law context, and absent Charter considerations, the Supreme Court of Canada in Fraser v. 

dismissal for denominational cause of a teacher who wed outside the Roman Catholic faith notwithstanding the teacher’s right to freedom of religion. The court based its reasoning on s.29 of the Charter which affirms the denominational nature of education as set out in s.93 of the Constitution Act (1867).

S.2(d) of the Charter guarantees freedom of association. In Re Tomen and Federation of Women Teachers Association et al. (1987), a teacher challenged the absence of membership options in Ontario’s five different teachers’ federations. Every teacher is a member of the Ontario Teachers’ Federation, and bylaw I of the federation mandates the affiliate organization for different classes of teachers. The Divisional Court held that the Charter did not apply because bylaw I could not be characterized as government action.

S.15 of the Charter guarantees equality and specifically prohibits discrimination on the basis of a number of enumerated grounds. In Re Ontario English Catholic Teachers Association et al. and Essex County Roman Catholic School Board (1987), a teacher argued that mandatory retirement violated his equality rights because it amounted to discrimination on the basis of age. Although a s.15 infringement was found, the Divisional Court upheld the constitutionality of the mandatory retirement plan as a "reasonable limit" under s.1 of the Charter.
Public Service Staff Relations Board (1985) described the importance of free speech in these terms:

As Mr. Fraser correctly points out, "freedom of speech" is a deep-rooted value in our democratic system of government. It is a principle of our common law Constitution, inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867. (pp. 168-169)

In the arbitral jurisprudence, there is an extant body of case law governing the free speech rights of public employees including teachers.

In the constitutional law context, the Supreme Court of Canada has also underlined the importance of freedom of expression. In R. v. Keegstra (1990), McLachlin J.' stated that free speech is the "pivotal freedom on which all others depend" (p. 79). She also outlined three theoretical rationales frequently cited to justify free speech. First, freedom of expression is especially valuable because it leads to the discovery of truth. Second, free speech promotes the free exchange of ideas essential to democracy and the efficient functioning of democratic institutions. Third, free speech is important for its own sake because it makes possible individual self-fulfilment. From a theoretical perspective, these core ethical, moral and political values are of utmost importance as they furnish a conceptual and justificatory basis for thinking about free speech.

'Although McLachlin J. wrote for the minority, her comments about the significance of free speech were not in issue. Hence, the researcher is accepting this dissenting view as authoritative for the purposes of this discussion.
In the constitutional jurisprudence, there is only one case to date involving public school teachers and interdictions on their free speech rights by employers. In a landmark ruling, a unanimous Supreme Court of Canada decided in *Ross v. New Brunswick School District No. 15* (1996) that school boards are entitled to restrict racist expression by teachers even when that expression occurs outside the school gates. Nonetheless, the relevance and potential application of *Ross* to other forms of teacher expression remain to be considered.

On the basis of the existing employment and constitutional case law, two fundamental queries emerge concerning employers’ legitimate restrictions on the free speech rights of Canadian public school teachers. First, as a matter solely of employment law principles, in what circumstances and to what extent is it permissible for the employer to limit the free speech rights of teachers? Second, does constitutional law alter the employment law analysis? More precisely, does the Charter enhance protection of free speech for teachers beyond the protective ambit of extant employment law principles?

The response to these important questions depends, in part, upon the duties and obligations that teachers, like all employees, owe their employers. Hence, this will require a review of the relevant arbitral jurisprudence applicable to employees in general. A review of Brown and Beatty (1988),
authors of Canadian labour arbitration, indicates that all employees must act honestly, cooperatively, loyally, and obediently. Hence, absent constitutional consideration, these employment law values may be used by employers to justify legitimate and reasonable restrictions on the free speech rights of teachers. Thus, for instance, teachers can not lie to their employers and defend their actions on the basis of free speech.

On the other hand, employment law per se also recognizes and protects the value of freedom of speech in certain circumstances. Thus, for example, teachers can speak out against their employers if they engage in illegal or negligent behaviour. Hence, in this study, the researcher will take a closer look at the relevant arbitral jurisprudence and literature to determine when employment law will and when it will not protect free speech. The researcher will also have to ascertain whether the legitimate restrictions upon teachers' free speech under employment law will also be taken into consideration for the purposes of constitutional analysis under the Charter. If employers are required to meet a higher justificatory standard before restricting teachers' freedom of expression because we are dealing with a constitutionally protected right, the Charter may enhance the protection of teachers' free speech rights guaranteed under employment law. Yet, if the standard of justification is the same, the Charter is unlikely to change
the protection already afforded to teachers under employment law.

Dimensions of the Teacher Role and Free Speech Implications

Apart from general employment duties relating to honesty, cooperation, loyalty, and obedience, teachers' entitlement to freedom of expression, under employment and constitutional law, may also be influenced by the nature of the work and the status of the position. Teacher employment differs from other types of work because teachers are, above all else, called to educate our youth. In the process of educating, teachers also may influence students in both the formal and informal curriculum. Hence, their position as role models is extremely important. Finally, teachers have the status of being professionals. In sum, although teachers are employees, they are also educators, role models, and professionals.

Teacher as Educator

First, and foremost, teachers have an obligation to teach their students. This duty to educate is clearly set out in legislation. In Alberta, s. 13(a) of the School Act (1988) requires teachers to "provide instruction competently to students." In British Columbia, s. 148(a) of the School Act (1979) requires teachers to "perform the teaching and other educational services required or assigned by a board or the ministry." In Manitoba, s. 96(a) of the Public Schools Act
(1987) requires teachers to "teach diligently and faithfully according to the terms of [their] agreement with the school board and according to this Act and the regulations." In New Brunswick, s. 70(1)(a) of the Schools Act (1990) requires teachers to "diligently and faithfully teach according to this Act and the terms of . . . employment with the school board." In Newfoundland, s. 75(b) of the Schools Act (1990) stipulates that teachers are "to teach diligently and faithfully all subjects [they are] required to teach."

In The Northwest Territories, s. 129(a) of the Education Act (1988) requires teachers "to diligently and faithfully teach the students under [their] care having due regard for their intellectual, physical and social welfare, and their cultural identity, and to perform any other tasks that are assigned to the teacher." In Nova Scotia, s. 54(a) of the Education Act (1989) requires teachers "to teach diligently the subjects and courses of study prescribed by or under this Act or the regulations that are assigned . . . by the school board." In Ontario, s. 264(1)(a) of the Education Act (1990) requires teachers "to teach diligently and faithfully the classes or subjects assigned . . . by the principal." In Prince Edward Island, s. 34(a) of the School Act, (1988) states that teachers "shall diligently and faithfully teach to the best of [their] ability and in accordance with this Act and . . . contract of employment."

In Quebec, s. 22 of the Education Act (1988) indicates
that teachers shall "take part in instilling into each student entrusted to [their] care a desire to learn." In Saskatchewan, s. 227(a) of the Education Act (1978) requires teachers to "diligently and faithfully teach the pupils in the educational program assigned to [them] by the principal."

In The Yukon Territories, s. 72(1)(a) of the School Act (1986) requires teachers to "encourage . . . pupils in the pursuit of learning and teach them diligently and faithfully . . . ."

But what does "to teach" mean? Scriven (1994) suggests that the duty to teach competently in an elementary and secondary setting embraces three essential elements: knowledge of subject matter, instructional competence and assessment competence.'

Knowledge of Subject Matter

There is general agreement that teachers must exhibit mastery of the material being taught. For Scriven (1994): "Knowledge about the topics covered in the curriculum must be current, correct and comprehensive, to the degree appropriate to the grade level" (p. 166).10

'Scriven (1994) defines assessment as: "... any systematic and objective process that leads to either evaluative classification (e.g. identification of learning disability) and determination of the merit of student work" (p. 174).

10According to Scriven, knowledge of subject matter applies both to "fields of special competence" and "across-the-curriculum" subjects.
Instructional Competence

As for instructional competence, Scriven (1994) breaks this requirement down into three sub-categories: communication skills, management skills and course instruction/improvement skills.

Communication skills. Scriven (1994) defines the importance of communication skills in this way:

The teacher must be able to communicate valuable learning to students of the age and ability range that will be encountered in the place of employment. Valuable learning includes information, explanations, evaluations, justifications, expectations, directions, skills, approaches and attitudes. Success in communication requires effectiveness in presentation, sensitivity to the level of listener comprehension, and skill in the creation, maintenance and rekindling of attention with fresh examples and illustrations. (p. 167)

If the teacher is to encourage students in the pursuit of learning, the communication process becomes critical to promoting and maintaining a healthy learning environment. Effective communication implies reaching out to others in a searching, open, honest and caring manner. How does good communication transpire? The use of questioning is one of the most powerful tools at the teacher’s disposition in the act of meaningful communication. Different questions, however, serve different purposes. As Alexander and Eaken (1994) state: "Knowledge level questions do check the content of

\[\text{For Brophy (1994), a model of good subject matter teaching requires the teacher to create "a social environment in the classroom that could be described as a learning community featuring discourse or dialogue designed to promote understanding" (p. 33).}\]
memory, but they are not the same as checking true understanding" (p. 22). True understanding flows from questioning that develops the students' "higher order thinking skills." For Brophy (1994), these skills "call for students to relate what they are learning to their lives outside of school by thinking critically or creatively about it or by using it to solve problems or make decisions" (p. 33).

How does the teacher's use of communication skills to impart knowledge, to offer explanations, to challenge conventional beliefs and to inspire students relate to freedom of speech? The exercise of freedom of expression by teachers in these circumstances is consonant with the view of the teacher as a "lover of ideas." Free speech ensures the intellectual liberty teachers need to explore new ways of thinking with students and the intellectual honesty they must demonstrate while relating to students. Freedom of expression offers teachers the possibility to develop the creative and critical faculties of their students. Chief Justice Earl Warren of the United States Supreme Court eloquently stated the ideal of free speech in a school setting in Sweezy v. New Hampshire (1957) in these terms: "Teachers and students must always remain free to inquire, to study, and to evaluate to gain new maturity and understanding; otherwise our civilization will stagnate and die" (p. 237).
Management skills. Apart from exhibiting strong communication skills, competent teachers have an obligation to demonstrate appropriate management skills. Scriven breaks this requirement down into three sub-categories: management of process, management of progress and management of emergencies.\textsuperscript{12} The management of process relates essentially to maintaining school discipline in the classroom. As Scriven notes:

Teachers must have the ability to control classroom behavior so that learning is readily possible - and can be assisted - for all students at all times, while preserving principles of justice and avoiding excessively repressive conditions. (p. 169)

The duty to maintain order is also clearly reflected in provincial legislation governing education. For example, Saskatchewan's Education Act, s.227(d) specifically states that teachers have a duty to "maintain discipline in the classroom and on school premises."\textsuperscript{13} The need to maintain discipline and to teach students respect for authority are important educational values. It may, therefore, be necessary under certain circumstances to restrict the exercise of teachers' free speech rights to preserve the integrity of the

\textsuperscript{12}Scriven defines the third sub-category, management of emergencies, as follows: "Teachers have moral as well as legal responsibility for preventing disasters that they can prevent by using reasonable care, and for coping with them to the extent reasonably possible if they do occur" (p. 171). The notion of "reasonable care" is relevant in the negligence context but does not involve constitutional questions relating to free speech.

\textsuperscript{13}Similarly worded legislation is found in all provincial and territorial jurisdictions in Canada.
school system as an efficient functioning organization."

With respect to the management of progress, Scriven observes:

Beyond discipline is the need to cover the required or designed curriculum content with the appropriate level of student understanding. This is management of learning progress - achievement management - rather than management of classroom process, usually referred to as discipline. . . . Progress management is time management in the classroom. (p. 170)

Ensuring that the class covers the entire syllabus may also place restraints on a teacher's freedom of expression. Time constraints for covering the material may make unfettered free speech by the teacher simply unworkable. Once again, an appropriate balance between the efficient functioning of the school and the teacher's constitutional right to free speech must be struck. In sum, the management of process and progress are educational values which will tend to pose restrictions on the free speech rights of teachers."

Course construction and improvement skills. The final subcategory under instructional competence is course construction and improvement skills. Scriven further subdivides this into four key areas: course planning, selection and creation of materials, use of available

"In the name of free speech, for example, it would be inappropriate for teachers to encourage their students to disregard school rules governing punctuality.

"According to Scriven: "Managing progress as well as discipline for several groups working on different materials and at different rates is often seen as the most difficult aspect of contemporary teaching" (p. 170)."
resources, and evaluation of course, materials, teaching and curriculum. The area most relevant to freedom of expression concerns the selection and creation of materials. Scriven offers these comments with respect to this aspect of instructional competence:

Teaching materials that are selected or created to fit into the instructional plan should be current, correct, comprehensive, and well designed or well selected from available options. . . .; where possible, they should incorporate a variety of instructional and doctrinal approaches, for the benefit of students who respond better to an approach other than the teacher’s normal approach; alternative viewpoints should be presented fairly, so that students can seriously consider the range of views. . . (p. 173)

The need to present a spectrum of viewpoints is consistent with a healthy respect for the teacher’s free speech rights. However, teachers must ensure that their students learn a predetermined and prescribed curriculum imbued with certain underlying values. What, then, is the appropriate scope of freedom of expression for public school teachers in the classroom? To what extent must teachers follow the curriculum and only discuss matters relevant to the curriculum? To what degree can teachers use controversial methods or materials in the classroom? In the name of free speech, how can we be sure that teachers present balanced viewpoints rather than concealing the truth from their students and indoctrinating them? The selection and creation of curricular materials involving freedom of expression and the teacher’s duty to demonstrate instructional competence raise a number of significant issues which merit further investigation and
clarification.

**Teacher as Role Model**

Teachers have a legal duty to act as role models for their students. The requirement to act as an exemplar is explicitly set out in provincial schooling legislation in two jurisdictions. In Nova Scotia, s. 54(e) of the Education Act (1989) states that teachers must "encourage in the pupils by precept and example a respect for religion and the principles of Christian morality, for truth, justice, love of country, humanity, industry, temperance and all other virtues." In Ontario, s.264(1)(c) of the Education Act (1990) employs similar wording. Teachers must:

. . . inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance, and all other virtues.

Although the remaining jurisdictions do not spell out this duty, it is clearly recognized in the case law. In *Attis v. Board of Education of District 15 et al.* (1994), for instance, Ryan J.A. declared: "A teacher teaches. He is a role model. He also teaches by example. Children learn by example" (p. 35).

The notion of role model is premised on the underlying assumption that teacher behaviour has some effect on student behaviour. The duty to act as a role model for students

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*"Even though Ryan J.A. wrote for the dissent, the majority did not challenge this legal principle."*
underscores the special nature of teaching. Dickinson (1993) frames the issue this way:

What is clear about teaching, however, is what sets it apart from probably every other occupation, save perhaps the clergy, and that is the requirement to serve as an exemplar for one’s "clients," namely one’s students. (p. iii)

Casting teachers as exemplars highlights the inherently moral dimensions of teaching. In this regard, Fenstermacher (1990) observes:

[How is it possible to conceive of teaching disconnected from its moral underpinnings? Like medicine, teaching is a form of skilled practice, and also like medicine, teaching becomes nearly incomprehensible when disconnected from its fundamental moral purposes. These purposes are rooted in the moral development of the young. Children do not enter the world compassionate, caring, fair, loving, and tolerant. Nor do these qualities emerge in due course like hair on the body or hormones in the endocrine system. Rather, moral qualities are learned - acquired in the course of lived experience. If there are no models for them, no obvious or even subtle pressure to adopt moral qualities, no hints, no homilies, no maxims, and no opportunity to imitate moral action, the moral virtues may be missed, perhaps never to be acquired. (p. 132)"

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17 From a sociological perspective, the normative role teachers occupy in society is widely recognized in the literature. MacIntyre (1983), for instance, suggests that the Public School Headmaster in the culture of Victorian England and the Professor in the culture of Wilhelmine Germany incarnate special social roles that he calls "characters": There are then many cases where there is a certain distance between role and individual and where consequently a variety of degrees of doubt, compromise, interpretation or cynicism may mediate the relationship of individual to role. With what I have called characters is quite otherwise; and the difference arises from the fact that the requirements of a character are imposed from the outside, from the way in which others regard and use characters to understand and to evaluate themselves. With other types of social role the role may be adequately specified in terms of the institutions of whose structures it is a part and the relation to those
Fenstermacher (1990) suggests that there are three ways in which teachers serve as moral agents. First, they teach morality through didactic instruction. Second, they teach about morality. Third, they act morally. In comparing the relative powers of each category, Fenstermacher notes that actions speak louder than words:

Neither of the first two forms . . . has the potential to shape and influence student conduct in such educationally productive ways as the third form. Here the teacher acts justly while assisting and expecting just conduct from students; the teacher shows compassion and caring, seeking these traits from his or her students; the teacher models tolerance while showing students how to be tolerant. Nearly everything that a teacher does while in contact with students carries moral weight. (p. 134)

The notion of a teacher as exemplar has far reaching implications for the interrelationship between educational values and the value of free speech. While in school, institutions of the individuals who fill the roles. In the case of a character this is not enough. A character is an object of regard by the members of the culture generally or by some significant segment of them. He furnishes them with a cultural and moral ideal. Hence the demand is that in this type of case role and personality be fused. Social type and psychological type are required to coincide. The character morally legitimates a mode of social existence. (pp. 28-29).

Hence, teachers provide a cultural and moral ideal for our civilization. Manley-Casimir (1993) suggests a second perspective - the teacher as a "cultural custodian":

The perspective of the teacher as a "cultural custodian" goes beyond the embodiment in teaching of cultural and moral ideals. This perspective suggests that the teacher is expected to create cultural continuity by passing on to the next generation the valued aspects of the culture. Such a perspective ascribes to the teacher the responsibility of cherishing the prized aspects of the culture, of nurturing appreciation in young minds of the tradition of the people, their folkways and folk values. (p. 20)
teachers may wear clothing bearing messages like "down with abortion." Outside the school gates, they may be advocates for the rights of gays and lesbians. In these instances, the pursuit of truth and participation in the political process may well motivate teachers. In both cases, the fundamental underlying rationales associated with free speech are raised. Placing controversial teacher conduct, whether in class or out-of-class, in an educational context may ignite a host of different considerations. As public figures, teachers enjoy a high status in our society and have a unique opportunity to influence youthful and impressionable minds. As guardians of a set of special values (e.g. tolerance, respect, honesty) teachers have a duty to act as moral exemplars for their students. They must also maintain the confidence and support of parents, their employer and the larger educational community.

The exercise of teachers' free speech rights through controversial conduct may well clash with their duty to act as role models. How will this conflict be ultimately resolved? For conduct occurring in the private sphere, how can we strike an appropriate balance between the free speech rights of teachers and the legitimate interests of the school board in ensuring that teachers provide a suitable role model for students? What is the relationship between the free speech rights of teachers and their right to privacy? Answers to these important questions require further exploration and
inquiry.

**Teacher as Professional**

There has been some discussion in the literature as to whether teachers are really professionals. Rich (1984) enumerates seven characteristics of a profession. A profession:

1) requires a high degree of general and systematized knowledge,
2) requires a long period of specialized intellectual training,
3) is characterized by work that is essentially intellectual,
4) provides a unique social service,
5) controls its standards of entrance and exclusion,
6) develops and enforces a professional code of ethics, and
7) grants practitioners a broad range of autonomy.

( pp. 8-11)

Under the first two criteria, one can argue that teachers rate reasonably high because of their university training and acquired knowledge in both the cognate area and the art of teaching. Teaching also clearly meets the third criterion because of its focus on educating our youth. Teachers surely comply with the fourth requirement because they help prepare our children for their role in a democratic society.

Generally speaking, teachers do not satisfy the fifth requirement. Provincial Ministries of Education keep tight control of certification requirements including suspension and cancellation of teaching certificates.¹⁹ Teaching fulfils

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¹⁹British Columbia and Alberta are exceptions to this rule. There, the College of Teachers and the Alberta Teachers' Association respectively control certification of teachers.
the sixth criterion since teacher associations have adopted codes of ethics and codes of professional conduct to monitor teacher behaviour. The seventh and final criterion is perhaps the most debatable of them all. It is unclear to what extent teachers are able to exercise independent judgment in their use of teaching materials and methods. One might argue that by virtue of their professional expertise, and to the extent that teachers are committed to a professional ideal of service\textsuperscript{3}, teachers should be able to exercise some degree of autonomy in their profession.

Sockett (1993) suggests that "both learning and teaching involve facing difficulty and taking intellectual and psychological risks; that demands courage" (p. 62). If teachers do not have some measure of autonomy, they will not take risks and be courageous with content and method. Sockett (1993) reminds us of the need for courage among professional teachers:

Courage is a necessary virtue in teaching. The connection between courage and encouraging/discouraging, the fact that learning is difficult, and the continuing opportunities for bravery in dealing with content or struggling with method give it a central place. To seek to make life and learning easy is, I think, simply to ignore the actual human condition and the fact that when things become easy people search for something more

\textsuperscript{3}Sockett (1993) describes this ideal of service: [P]rofessions work within some moral vision of human betterment, some set of professional ideals which describe the moral purpose of the enterprise and to which altruists and others are attracted. Obviously we see this in the Hippocratic oath, in lawyers' commitments to justice, and in teachers' commitments to education. (p. 17)
difficult. The teacher who cannot provide examples of courage, however mild they may look to the professional soldier, cannot exemplify the one virtue that is critical in the life of the intellect and the condition of learning. (p. 77)

On this basis, and in accordance with Rich's (1984) seven enumerated criteria, the researcher will proceed on the assumption that teachers are professionals as well as employees.

As professionals, teachers have a duty to meet appropriate standards of conduct. In defining those standards, Sockett notes (1989):

Professionalism . . . describes the quality of practice; it describes conduct within an occupation - how members integrate their obligations with the knowledge and skills in a context of collegiality and contractual and ethical relations with clients. (p. 2)

Professionalism may be viewed in two ways. From a negative perspective, professionals must refrain from inappropriate conduct which undermines the profession. From a positive perspective, however, professionals might also be expected to embrace and exemplify the ideals associated with the profession.

Restrictions from engaging in untoward behaviour are reflected in provincial legislation and codes of ethics for teachers. For example, under Saskatchewan’s Education Act (1978), s.206 provides for the termination of a teacher’s contract when "unprofessional conduct" has been found. Although the Act does not define the term, employer boards and Boards of Reference look to the case law for assistance
in this area. In addition, provincial codes of ethics for teachers are designed to ensure a proper standard of professional and ethical conduct by each member of the profession. In *Cromer v. British Columbia's Teachers' Federation and Attorney General of B.C.* (1986), the court expounded on the underlying rationale for the existence of codes of ethics in these terms:

> [T]he Code of Ethics is designed to avoid disharmony among teaching colleagues, and to promote professional standards, all in the interests of creating an environment where the children being taught will receive the best educational opportunity possible. (p. 293)

In a positive sense, teachers have a professional obligation to engage in activity which sustains the well-being and integrity of the educational enterprise. Although this is normally reflected in the codes of ethics and codes of professional conduct, Quebec's *Education Act* (1988) makes professional commitment an obligation which teachers must undertake. In particular s.22(6) of the Act states: "A teacher shall take the appropriate measures to attain and maintain a high level of professionalism."

This may even require personal sacrifice of one's own goals and ambitions in favour of commitment, dedication and

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20Criticism of fellow teachers is restricted by statute or regulation in most provinces as well as in the various codes of professional conduct. In our analysis, we will only consider restrictions on teachers' free speech rights from the employers' perspective. Hence, we will not consider limits placed on teachers' expression from the profession itself.

21Quebec is unique in this regard.
service to the profession. It is, indeed, conceivable that this positive aspect of professionalism might be supportive of the value of free speech. If school board policies are sexist and inimical to the interests of female students and teachers, for instance, teachers might well feel professionally and ethically bound to speak out against the injustice. Although doing so may prove to be politically unpopular and may even jeopardize teachers' careers, caring and committed teachers may believe they have no alternative. Other situations may also arise where the professional duty to act positively complements freedom of expression. Hence, additional investigation in this area is required.

Like all employees, teachers must act honestly, cooperatively, loyally, and obediently. By virtue of their position and status, teachers must also act as educators, role models, and professionals. Under certain circumstances, the employment values teachers must espouse will justify employers in restricting teachers' free speech rights. Under other circumstances, however, free speech will be protected in spite of these employment obligations. From both the perspectives of employment law and constitutional law, this study seeks to examine in some detail the complex relationship between teachers' right to freedom of expression and the general and specific duties that arise from their employment.
Purpose of the Study

The purpose of the study was to determine what constitutes legitimate restrictions, from the employers' perspective, on the free speech rights of public school teachers in Canada. More specifically, the researcher wanted to determine first, as a matter of common law employment law principles, and absent consideration of the Charter, what constitutes legitimate restrictions on the free speech rights of teachers. The researcher then wished to consider whether constitutional law and, in particular, the Charter enhances protection of free speech for teachers beyond the protective ambit of the common law principles of employment law.

In some circumstances, teachers' general obligations as employees and their specific duties to act as educators, role models, and professionals will justify employer restrictions on their free speech rights. In other circumstances, however, the law will recognize the importance of free speech and grant it precedence in spite of the employment duties teachers must fulfil. In the study, the researcher examined the relevant cases under employment and constitutional law. He also included relevant scholarly literature and presented arguments concerning limits on and protection for teachers' freedom of expression.
Research Questions

The following research questions guided the development of this dissertation:

1) From a philosophical perspective, what are the underlying theoretical rationales and competing political values which justify protection of freedom of expression?

2) As a matter of employment law principles per se, what are legitimate restrictions by the employer on the free speech rights of teachers?

3) As a matter of constitutional law, does the Charter enhance protection of free speech for teachers beyond the protective ambit of the common law principles of employment law?

   a) Does the Charter even apply to publicly funded school boards?

   b) What specific analytical process do adjudicators follow when a Charter infringement is alleged?

   c) Under s.2(b), to what extent does the Charter protect free speech generally and, if at all, the speech of public school teachers?

   d) Under s.1 of the Charter, to what extent do legitimate employment law restrictions on teachers' free speech rights also justify the government, qua government actor, in restricting teachers' constitutionally protected right to freedom of expression?
Significance of the Study

Prior to the advent of the Canadian Charter of Rights & Freedoms in 1982, the most noteworthy case involving public school teachers and free speech was Keegstra v. Board of Education of Lacombe No. 14 (1983)." A Board of Reference upheld the dismissal of Jim Keegstra for indoctrinating his students with anti-Semitic views. The case generated much publicity and a number of publications including Bercuson & Wertheimer's (1987) A trust betrayed: The Keegstra affair."3

Almost a decade later, the respective Charter decisions of the Board of Inquiry and New Brunswick Court of Queen's Bench in Attis v. New Brunswick District No. 15 Board of Education (1991), and Court of Appeal in Attis v. Board of Education of District 15 et al. (1993) have spawned a number of articles concerning the free speech rights of Canadian public school teachers. Authors writing about this case include Gochnauer (1992), Clarke (1994), and Reyes (1995)."4 These publications have also focused primarily on freedom of expression and the intractable problem of racism.

"Although the decision was rendered in 1983, the facts in Keegstra arose prior to the Charter's adoption.

"In a related vein, Hurlbert and Dynna (1992) considered the issues of racism and teacher speech outside the classroom.

"The Board of Inquiry decision lead to the creation of an interdisciplinary forum on the Attis decision. Participants included: teachers, a journalist, a historian, two theologians, a sociologist, a member of Parliament, and two legal academics. See the University of New Brunswick Law Journal, 41 (1992), pp. 235-353.
In *Traditions, rights and realities: Legal, defacto and symbolic influences of the Canadian Charter of Rights and Freedoms on the administration of education in Canada*, Black-Branch (1993) states in his conclusion:

[O]ngoing legal research regarding court cases is essential to provide updated information of how the judiciary is interpreting the Charter in an educational context. Politicians, experts, and educators alike require an update of court rulings and the implications of these decisions for school practice. (p. 336)³

To date, there has been no systematic attempt to determine what constitutes, from the employers’ perspective, legitimate restrictions on the free speech rights of Canada’s public school teachers. Recent developments in both employment and constitutional jurisprudence, including the Supreme Court of Canada’s recent leading decision in *Ross v. New Brunswick School District No. 15* (1996), suggest that it is time to examine the relationship between free speech and the employment values teachers are expected to espouse.

At a theoretical level, the study attempts to broaden our understanding of freedom of expression as a fundamental construct. From a jurisprudential perspective, the study promises to enrich our appreciation of the complex balancing act between entrenched values and other competing values in

³Black-Branch (1993) devotes three pages (pp. 81-84) to the issue of free speech and relevant case law under the Charter. In *School law under the Charter of rights and freedoms*, Hurlbert & Hurlbert (1992) spend about 20 pages on academic freedom and the free speech rights of Canadian teachers. Although the authors offer useful summaries of relevant Canadian and American law for teachers, there is no serious legal analysis undertaken.
a free and democratic society under employment law and the Charter. On an educational level, the study offers the possibility of showing that the educational duties of teachers raise unique problems and issues with respect to the cornerstone value of freedom of expression. In this regard, the study has the potential to clarify our thinking about the importance of free speech and teachers as employees, generally, and as educators, role models, and professionals, specifically, in our schools.

On a practical level, the researcher hopes that teachers will become more cognizant of the nature and scope of their employment and constitutional rights to freedom of expression within the confines of their obligations as employee, educator, role model, and professional. In addition, other stakeholders in the educational context, such as administrators and school trustees, may benefit from an awareness of teachers' expressive rights. Second, armed with new knowledge, it is hoped that teachers will exercise their right to free speech in an assertive yet professional and competent manner. This should help ensure the protection of teachers' individual dignity and autonomy yet make them accountable to the broader school system and their students to whom they owe a duty of care to act in a responsible fashion. Third, by setting out some guiding principles, this study may shed some light on how educators and the judiciary may address future questions where free speech and Canadian
public school teachers are involved.

Terminology

In this study, the following terms have these designated meanings:

Adjudicators - Adjudicators include courts, arbitrators, boards of reference and any other person or body endowed with legal authority to make decisions affecting the rights, entitlements, and obligations of teachers. This study examines the decisions of various courts throughout Canada. At the provincial level, the decisions of a province's superior court (e.g. in Saskatchewan, the Court of Queen's Bench) and appellate court touching on free speech as it relates to teachers are relevant. As the highest court in the land, the decisions of the Supreme Court of Canada are especially important. We are also interested in the decisions of Canadian arbitrators as those decisions relate to the free speech rights of public employees including teachers. In addition, we will consider Board of Reference cases involving public school teachers and free speech. Where appropriate, we will consider the decisions of American courts. These include federal District Courts, federal Courts of Appeals, and the United States Supreme Court.

Case law - After statutory enactments, this is the second major source of law. It refers to judicial decisions flowing from cases adjudicated by judges in courts of law.
Employment law - Employment law refers to that body of common law principles which arises out of the employment relationship, per se, absent any constitutional considerations of the Canadian Charter of Rights and Freedoms or the American Bill of Rights.

Constitutional law - In this study, constitutional law refers to that body of jurisprudence which arises out of application of the Canadian Charter of Rights and Freedoms and the American Bill of Rights.

Freedom of expression - The Supreme Court of Canada in Irwin Toy Ltd. v. Quebec (Attorney General) (1989) defined "freedom of expression" to include any activity that "conveys or attempts to convey a meaning." The term is also used interchangeably with "free speech" and "freedom of speech."

Teacher - This term designates a person so defined under provincial or territorial legislation who is employed in Canada's primary or secondary school system which is funded entirely by public monies.

Limitations of the Study

1. The doctrine of freedom of expression is controversial, debatable and thus subject to change. The different theoretical approaches to free speech used in this study may evolve with the passage of time which might, in a future analysis, lead to different results.

2. The Canadian Charter of Rights and Freedoms is still
in its infancy. Judicial interpretations of freedom of expression are therefore still forthcoming. This places a limitation upon the long-term interpretation of the research findings of this study. New case law and interpretations will continue to emerge as the Charter becomes an older and more settled part of the Canadian jurisprudential landscape.

3. There is a dearth of cases involving public school teachers and their constitutional free speech rights in Canada. Proclaimed in 1982, the Charter remains a recent constitutional enactment. Consequently, this study is based upon limited constitutional case law.

4. There is a dearth of cases involving public school teachers and their free speech rights under employment law in Canada. Consequently, this study is based upon limited employment case law.

5. While this study attempts to be as exhaustive as possible, cases involving the free speech rights of teachers may remain unknown to the researcher.

6. American case law used for comparative purposes may be useful, but there is no guarantee that Canadian adjudicators will simply follow American precedent.

Delimitations

1. This dissertation is confined to consideration of the fundamental freedom of free speech as it relates to Canadian public school teachers. However, the treatment of the free
speech doctrine by American courts may be utilized for comparative purposes where relevant and appropriate.

2. This dissertation is delimited to an examination of those cases which arise in the employment and constitutional context in Canada and the constitutional context in the United States.

3. In this study, the researcher relies solely on the philosophical justifications for free speech, the relevant case law and the body of critical literature touching on public school teachers and their constitutional free speech rights.

Assumptions

1. The researcher assumes that a critical analysis, the study of existing jurisprudence and the relevant body of scholarly literature, is an acceptable method for studying the nature and ambit of Canadian public school teachers' employment and constitutional rights to freedom of expression.

2. The researcher assumes that a lack of critical analyses in this domain is an incentive to pursue research on this subject in this manner.

3. The researcher assumes that a critical analysis can shed some light on our understanding of the nature and scope of Canadian public school teachers' employment and constitutional rights to freedom of expression.
4. Case law is generalizable to the extent that judges have ruled in the described fashion and their decisions may be binding on other courts. Based on the common law tradition in English Canada, judges are bound by the doctrine of *stare decisis* which means that judges are compelled to follow the rulings of higher courts. Nevertheless, they can and often do distinguish their judgments from prior rulings thus limiting at times the effectiveness of this legal doctrine. Moreover, the law is always open to innovative and new arguments. If supported by cogent reasons, these arguments can be as persuasive as precedent.

**Researcher’s Background & Philosophical Orientation**

The researcher possesses academic and professional backgrounds in both law and education. Hence, he has opted for an interdisciplinary approach in his thesis. The researcher has decided to study a question of interest to educators and jurists, namely the free speech rights of public school teachers, by employing primarily the methods and methodologies of legal scholars.

From a philosophical perspective, the researcher believes that generally speaking and notwithstanding its shortcomings, liberalism, as a political and legal ideology and as reflected in the works of Ronald Dworkin, offers the most comprehensive and justifiable defence of free speech to date. Out of respect and concern for the inherent worth of
the morally autonomous individual, liberalism defends the critical personal space an individual requires when he or she chooses to exercise freely, and within the law, his or her right of free speech in a democratic tradition.

Organization of the Study

The dissertation is composed of six chapters. The first chapter sets out the nature of the problem. The second chapter offers a literature review of the theoretical rationales which underpin the free speech principle. Chapter three examines the methodology that was used in the study. Chapter four looks at the nature of public school teachers' free speech rights under employment law. Chapter five considers the nature of public school teachers' free speech rights under constitutional law. Chapter six contains a synthesis and conclusion, as well as, recommendations for further research.
CHAPTER 2
REVIEW OF THE LITERATURE

Introduction
One has only to scan the literature to ascertain that there exists a myriad of articles, books, reviews and scholarly commentaries on the subject of freedom of expression. Canadian scholars have demonstrated a growing interest in the treatment of this constitutional value, as enshrined in section 2(b) of the Canadian Charter of Rights

As used in this paper, the terminologies "freedom of expression" (Canadian) and "free speech" or "freedom of speech" (American) are used interchangeably. From a definitional perspective, Canadian and American case law offer important insights. In Irwin Toy Ltd. v. Quebec (Attorney General) (1989), the Supreme Court of Canada defined freedom of expression as "activity that conveys or attempts to convey a meaning" (p. 607). This definition appears to embrace more than mere linguistic communications. In the United States, free speech jurisprudence (e.g. flag burning cases like Texas v. Johnson (1989)) also includes activities of a non-verbal nature. Nonetheless, conceptually speaking, the difference between expression and action is critical. As Thomas Emerson (1963) observes:
The essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation of action. The dynamics of the system require that this line be carefully drawn and strictly adhered to.
(p. 955)
and Freedoms,27 especially since the proclamation of the Charter in 1982. South of the border, the First Amendment28 whose existence dates back to 1791 has engendered a large body of free speech jurisprudence which is truly phenomenal.29 Attemping a review of the literature on freedom of expression is indeed a daunting task. Nonetheless, the vast majority of writers who approach the issue theoretically analyze freedom of expression in terms of the underlying rationales advanced to justify this fundamental freedom. The justifications most commonly articulated in defence of a free speech principle30 are: the "search for

27 Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11. (subsequently referred to as the Charter). Section 2(b) of the Charter states:

Everyone has the following fundamental freedoms . . .

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of peaceful assembly.

28 U.S. Const. amend. I. The First Amendment states:

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

Although the First Amendment was adopted in 1791, U.S. free speech jurisprudence has really developed most significantly during the past sixty years in the context of social movements such as the labour movement, the women's movement and the civil rights movement.

29 A computer search on a single legal data base at the University of Saskatchewan for the post-1988 period using the words "freedom of speech" gave a listing of some 929 titles.

30 It is important to distinguish a free speech principle from a "minimal principle" of liberty. As Kent Greenawalt (1989) declares:

A principle of freedom of speech asserts some range of
truth" rationale; the "political process" rationale; and the "autonomy" rationale. Other rationales, less frequently cited but still important, include: the "maintenance of social stability" rationale, the "tolerance" rationale and the "self-realization" rationale.

In the first part of the literature review, the researcher will take a descriptive and critical\(^\text{31}\) look at each rationale proffered. Ideologically speaking, the characterization of the rationales undergirding free speech theory is overwhelmingly liberal.\(^\text{32}\) Canadian scholar Wayne

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protection for speech that goes beyond limitations on government interference with other activities. While a minimal principle of liberty maintains that government should not inhibit communications that pose no legitimate threat of harm, a distinctive principle of freedom of speech posits more robust constraints. (p. 120) Only by analyzing its justifications is it possible to establish a special value for speech.

\(^\text{31}\)For organizational purposes, the critical analysis in the first half of the discussion will be limited to a liberal critique of the existing rationales for freedom of expression.

\(^\text{32}\)Ronald Dworkin (1985), one of the most prominent contemporary liberal legal theorists in the Anglo-American tradition, offers the following definition of liberalism: In economic policy, liberals demand that inequalities of wealth be reduced through welfare and other forms of redistribution financed by progressive taxes. They believe that government should intervene in the economy to promote economic stability, to control inflation, to reduce unemployment, and to provide services that would not otherwise be provided, but they favor a pragmatic and selective intervention over a dramatic change from free enterprise to wholly collective decisions about investment, production, prices and wages. They support racial equality and approve government intervention to secure it, through constraints on public and private discrimination in education, housing, and employment.
MacKay (1989) refers to freedom of expression as a "classic liberal value" (p. 719). American author Kent Greenawalt (1989) not only echoes this conviction but espouses the liberal paradigm in uncritical assumptive terms:

Some claims about the value of speech or about the inappropriateness of certain reasons for prohibition could be thought to be largely independent of wider assertions of political ideology, but many claims bear a distinctive relation to liberal political theory . . . But doubting whether there is a better form of government for large developed countries and strongly believing that no other form is clearly preferable and attainable, I assume in this study that conclusions about freedom of speech that can be drawn from basic premises of liberal democracy are sound, without examining possible competing premises. (p. 123)

Greenawalt’s wholesale endorsement of liberalism reflects the extent to which this ideology has been inextricably linked to free speech theory.

There is, however, great controversy about the appropriateness and pervasiveness of liberal values in the freedom of expression analysis. Will Kymlicka (1990), in his book Contemporary political philosophy, suggests that there

But they oppose other forms of collective regulation of individual decision: they oppose regulation of the content of political speech, even when such regulation might secure greater social order, and they oppose regulation of sexual literature and conduct, even when such regulation has considerable majoritarian support. They are suspicious of the criminal law and anxious to reduce the extension of its provisions to behavior whose morality is controversial, and they support procedural constraints and devices, like rules against the admissibility of confessions, that makes it more difficult to secure criminal convictions. (p. 187)

Although liberalism is in no way a monolithic or cumulative philosophy, this definition offers a "touchstone", to use Dworkin’s phrase, to measure the "liberalism" of one’s position.
are a number of schools of political theory which have challenged the assumptions of liberalism. These include: utilitarianism, marxism, communitarianism, and feminism. In the free speech literature, a host of alternative viewpoints reflecting these different political philosophies has appeared on the jurisprudential horizon in the past two decades to contest the legitimacy of the dominant liberal paradigm. Chief among these are: feminism, Critical Legal Studies and communitarianism. In the second section of the discussion, the researcher will offer a descriptive and critical assessment of these competing ideologies as they relate to freedom of expression. Since the vast majority of those scholars writing about free speech as a theoretical concept are American, the researcher will indicate where appropriate the contributions of Canadian academics.

*Kymlicka distinguishes between "liberal equality" (placing restrictions on the market when it penalizes people for reasons other than their choices) and "libertarianism" (accepting whatever the market happens to dish out). We acknowledge the distinction but for ease of reference have decided to group the two together under "liberalism."

*Critical Legal Studies essentially adopts a Marxist approach in its analysis of free speech. We recognize that the liberal perspective on free speech can be defended on utilitarian grounds. One can argue that free speech is important because it maximizes utility. Kymlicka (1990) notes that utility may take one of four different forms: welfare hedonism, non-hedonistic mental-state utility, preference satisfaction, and informed preferences. (pp. 12-18) Consequently, we do not have a separate section on utilitarianism.
Philosophical Justifications

According to Arnold Loewy (1993), rationales for freedom of speech can be divided into two generic theories:

One theory suggests that freedom of speech is essentially teleological or consequentialist, i.e. it exists to serve some other goal. . . . The other theory, which is deontological or normative, suggests that freedom of speech exists as an end in itself rather than as a means towards accomplishing something else. (p. 427)\textsuperscript{35}

Although this dichotomy exists, it is important to note that these theories are not necessarily exclusive. Like a growing number of authors, Joshua Cohen (1993) suggests that "reasons for protecting freedom of expression are partly intrinsic, partly instrumental" (p. 230). To facilitate the analysis, however, the researcher will maintain the division between these two theories. Firstly, the consequentialist arguments will be considered. Secondly, the non-consequentialist justifications will be examined.

Consequentialist Rationales

From a consequentialist perspective, free speech is valuable because it promotes a number of different purposes. Chief among these are: the search for truth, the promotion of democratic ideals, the maintenance of social stability and the fostering of tolerance.

\textsuperscript{35}Different authors use different terminology. In the literature, one finds the following dichotomies: "instrumental"/"intrinsic;" "teleological"/"deontological;" "means"/"ends;" "consequentialist"/"non-consequentialist."
Search for Truth Rationale

Of all the arguments marshalled to justify a principle of freedom of expression, the most powerful and long-serving is the argument from truth. Simply put, freedom of expression is especially valuable because it leads to the discovery of truth. In 1644, John Milton first articulated a comprehensive defence of free expression in his work Aeropagitica. In support of the truth rationale, one of Milton’s most celebrated and oft quoted passages is:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter. (p. 25)

For Milton, free expression ensures the victory of truth over falsehood.

More than two hundred years later in 1859, John Stuart Mill used the quest for truth as the cornerstone of his plea for liberty of thought and discussion. In his famous treatise, On Liberty, Mill offers four reasons to explain why free expression is necessary for arriving at truth. First, suppression of speech may include suppression of the truth: "First, if any opinion is compelled to silence, that opinion may for aught we can certainly know, be true. To deny this is to assume our own infallibility" (p. 53). Second, suppression of speech may include partial suppression of the truth:

Secondly, though the silenced opinion be in error, it
may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. (p. 53)

Third, truthful opinions themselves must be subjected to rigorous scrutiny. This elucidates their rational structure and dispels any public bias toward them:

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of prejudice, with little comprehension or feeling of its rational grounds. (p. 54)

Last, free expression preserves the vitality of the truth doctrine itself:

... fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct; the dogma of becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience. (p. 54)\[1\]

In the twentieth century, the most forceful articulation of this justification has found acceptance in the "marketplace of ideas" metaphor coined by American Justice Oliver Wendell Holmes. In this marketplace, freedom of expression promotes the competition of ideas which battle for

[1]Frederick Schauer (1982) maintains that Mill's greatest contribution is his focus on the connection between freedom of expression and increased knowledge. By acknowledging that truth may lie in the suppressed opinion, Mill implicitly argues that freedom of expression leads to objective truth even if we are never sure we have found it. (p. 24)
supremacy and ultimately lead to the discovery of truth." In his famous dissent in Abrams v. United States (1919), Justice Holmes states:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. (p. 630)

By relying on the marketplace to evaluate ideas, a test more dependable than the appraisal of any one individual or government emerges. Freedom of expression, thus, ensures that the truth rationale is protected as a process as well as an outcome.

Critique. Notwithstanding the venerable tradition associated with the truth argument, it has engendered a

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"Schauer (1982) offers the analogy to "cross-examination" as the driving force inherent in the argument from truth:

Freedom of speech can be likened to the process of cross-examination. As we use cross-examination to test the truth of direct evidence in a court of law, so should we allow (and encourage) freedom to criticize in order to test and evaluate accepted facts and received opinion."
number of serious challenges." Kent Greenawalt (1989) offers an excellent survey of the four principal critiques levelled against this rationale. They are: i) objective truth does not exist; ii) if truth does exist, human beings cannot identify it; iii) if human beings can identify truth sometimes, free discussion does not necessarily lead to the discovery of truth; and iv) the practice of free speech contravenes the open market of ideas that the truth-discovery justification assumes. In turn, each critique will be briefly considered.

Firstly, does objective truth even exist? Greenawalt states the challenge in this way:

Suppose no objective truth exists outside human experience or that the only truth for human beings is the set of propositions that serves them best or most fully conforms with their experiences at a given stage in history. (p. 132)"

"Schauer (1982) observes that the truth-discovery justification is premised on the initial assumption that the quest for truth is desirable. This assumption seems relatively uncontroversial given its quasi-universal appeal. As Schauer says:

Whether one adopts a Platonic or Aristotelian position that truth is intrinsically and self-evidently good, or a Millian argument for truth on the basis of the principle of utility, or any of the more contemporary arguments for the value of truth, the advantages of truth are almost universally accepted. (p. 17)

"In R. v. Keegstra, McLachlin J. (1990) offers a variation of this critique by stating that certain ideas defy the traditional truth/untruth analysis:

... to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven true or false. Many ideas and expressions which cannot be verified are valuable. (p. 79)
In the context of "factual" truths, Greenawalt rebuts this attack. By way of example, he refers to the earth's shape and the extermination of Jews as proof of the existence of objective truth:

Whatever the ultimate status of the propositions that the earth is approximately a sphere and that many Jews were exterminated, virtually everyone accepts some notion of empirical truth that renders claims of truth something other than wholly subjective or relative. That is a sufficient beginning for the truth-discovery theory. (p. 132)

Greenawalt recognizes, however, that "valuational" truth is inherently subjective. Nonetheless, he argues that rational discourse "certainly can test the coherence of value claims, and can elucidate and clarify the values of a culture and of individuals" (p. 132). He also suggests that value judgments help people resolve social problems and enhance their own understanding of value claims. From this, the possibility of "valuational" truth emerges:

Propositions like these can be extremely important for how people try to resolve social problems, and one can say that such propositions may be true or sound without invoking an objective status for ultimate values. If the idea of truth is broadened a bit further to include people's understanding of the claims of value that best suit them personally, one could speak of truth discovery even in respect to claims of value and other matters as to which one doubted whether there was any interpersonal truth. (p. 133)

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"To obviate the intractable difficulty associated with the objective/subjective dichotomy, Schauer (1982) suggests that "defining truth as a process rather than a standard becomes compelling" (p. 20).

"To illustrate his point, Greenawalt offers the following valuational statement. Racial segregation undermines the principle of moral equality.
Admitting that truth exists, a second critique surfaces. Can people identify truth? Greenawalt concedes that human judgment is clouded by the many uncertainties that infect psychology and the social sciences. In addition, very few judgments about the effects of social practices on the nature of truth can approximate the degree of confidence found in propositions like the earth's roundness. In spite of the frailties immanent in the human capacity to pass judgment, Greenawalt suggests that evidence and arguments make identification of the truth attainable:

But what is important here is that all the uncertainties and needed qualifications do not show that the question of whether free speech promotes truth is somehow beyond our capacities to consider. Relevant evidence and arguments do exist. (p. 134)

Assuming the existence of objective truth and the human ability to identify it, a third problem emerges. If truth and falsehood are placed side by side, will free expression necessarily cause us to choose truth? The apparent causal connection between free speech and the discovery of truth has been the subject of great controversy. According to Greenawalt, the cynic maintains "that people are persuaded to believe what is already dominant or what fits their irrational needs" (p. 135). This assertion seriously questions the progressive Enlightenment view with its unshakeable faith in human reason to solve problems and
distinguish truths from untruths." In fact, the naivete of the Enlightenment has been largely discredited by the weight of historical experience. As David Richards (1987) so starkly puts it:

... the optimism of Victorian technological advance rings hollow from the vantage point of the historical experience of the scientific barbarities of the twentieth century: for instance, the science of racial differences and the mass genocide it rationalized, and the real threat of nuclear annihilation. (p. 1891)

On this account, there is no guarantee that free speech will cause us to choose truth.

Despite the cogency of this critique, it does not undermine the essential role freedom of expression plays in the pursuit of truth. To understand better the vitality of free speech in promoting truth, it is helpful to consider an alternative social scenario where expression is suppressed or greatly diminished. In R. v. Keegstra (1990), McLachlin J. frames the issue this way:

While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such

"As Schauer (1982) observes: "The argument from truth is very much a child of the Enlightenment, and of the optimistic view of the rationality and perfectibility of humanity it embodied" (p. 26).
societies. (p. 79)

In comparative terms, the argument from truth, therefore, becomes quite compelling.

Lastly, in spite of an affirmative answer to the preceding three challenges, does gross inequality among communicators in the marketplace undermine the truth rationale? In response, Greenawalt suggests that this critique "supports a particular understanding of freedom of speech rather than a rejection of the entire concept"

"Libertarians, who represent an extreme form of liberalism, affirm an unmitigated faith in the workings of the marketplace. As McGowan and Tangri (1991) declare: "... the marketplace theory rests ultimately upon the consummately libertarian belief that individuals are better judges of what is best for them than is the government" (p. 838). As for the risks involved in this approach, McGowan and Tangri openly acknowledge that:

... (the marketplace theory) provides no way to defend against a population that willingly adopts objectively destructive and repugnant beliefs, and would prohibit the government from regulating against them. (p. 837)

Organizations like the American Civil Liberties Union (ACLU) have also traditionally espoused a libertarian perspective on free speech. Their absolutist position champions the individual right of each person to speak and the universal guarantee that the message will be heard regardless of its content. David Cole (1992) describes this "individual-universalist" approach as follows:

The concept of an individual right necessarily implies that all individuals hold equal entitlement to its protection. Thus, the ACLU must defend the rights of the Nazis, the Klu Klux Klan, pornographers, and Oliver North; if it did not, its appeal to individualist rights would lose its universalist force. If the majority sees the ACLU selectively defending individual rights, it will see no reason not to be selective, too - by denying to disfavored individuals rights that the majority enjoys. Thus, it is for good reason that the ACLU is best known for its defense of the unpopular; therein lies its moral authority, which is the ultimate source of its influence. (p. 1411)"
(p. 134). If people are reasonably competent to examine statements of truth, a process whereby all relevant claims are given a fair hearing is better than government suppression of alleged falsehood. Acknowledging a disparity among participants' resources, Greenawalt also suggests that the government may redress the imbalance by making available new channels of communication or regulating existing channels to assure more equal access."

Regardless of the innumerable attacks, the argument from truth has for a number of centuries withstood, if not wholly at least in good measure, the test of time. In addition, the inherently fallible nature of individuals and governments when it comes to choosing between truth and falsehood lends strong support to a free speech principle. According to Schauer (1982):

... this focus on the possibility and history of error makes us properly wary of entrusting to any governmental body the authority to decide what is true and what is false, what is right and what is wrong, or what is sound and what is foolish. As individuals are fallible, so too are governments fallible and prone to error. Just as we are properly sceptical about our own power always to distinguish truth from falsity, so should we be even more sceptical of the power of any governmental authority to do it for us. (pp. 33-34)

"Although this might entail restricting the frequency of some messages, no message would be denied an outlet altogether. According to Greenawalt, this approach to speech favours:

... fairness in the dissemination of messages rather than the unrestricted liberty of those who want to communicate and hear, and movement toward that approach might drastically alter the freedom some media presently enjoy to present what they choose. (p. 134)"
Although the quest for truth is a powerful rationale in a viable free speech theory, it is not the only justification for the theory. Other rationales have been advanced and it is toward them that the analysis now shifts.

**Political Process Rationale**

A second instrumental argument frequently mentioned in the literature, as an important justification for free speech, is the "political process" rationale. At the heart of this rationale lies the postulate that freedom of expression promotes the free exchange of ideas essential to democracy and the functioning of democratic institutions. The best known proponent of this justification is Alexander Meiklejohn (1948) who expounded his views in *Political freedom: The constitutional powers of the people*.

Meiklejohn states:

> The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the

"Captivated by the notion of "self-government", Meiklejohn attached great importance to the institution of the "town hall meeting" - a form of government prevalent in small towns in New England. Under this type of polity, all major decisions are taken by the entire adult population who comes together. Ideas are proposed, debated and ultimately adopted or rejected by vote of all the people in attendance. This open debate and public deliberation represents self-government in its purest form. By viewing all democracies as town hall meetings writ large, Meiklejohn extrapolated his notion of popular sovereignty to the larger and more complex American republic. (pp. 11-25)
self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged. (p. 26)

For Meiklejohn, the survival and efficient functioning of democracy depends above all else on a system of free expression.

Schauer (1982) states that the democracy rationale has two essential components that justify a principle of free speech - an informed electorate* and government officials acting as servants, not rulers:

The first is the necessity of making all relevant information available to the sovereign electorate so that they, in the exercise of their sovereign powers, can decide which proposals to accept and which proposals to reject. Because the people are the ones who make the decisions, the people are the ones who need to receive all material information before making any decision. . . . Second, freedom of speech is perceived as the necessary consequence of the truism that if the people as a whole are sovereign, then governmental officials must be servants rather than rulers. (p. 38)

Schauer also notes that the "government as servant" concept has implications for both censorship and criticism of leaders. Censorship is unjustifiable because it requires the servant to pre-select information available to the sovereign

"In the electoral context, Schauer contends that the democracy argument showers greater benefits on the listener as opposed to the speaker:
Under many formulations of the argument from democracy, freedom of speech is valuable because it allows listeners to receive all information material to the exercise of voting rights by members of a sovereign electorate. Indeed, the emphasis on the rights of the listener rather than on the rights of the speaker is one of the most important contributions of the argument from democracy. (p. 42)
people. (p. 39) As for the right to criticize" and, ultimately, reject leaders, Schauer observes: "Under a theory of self-government, this lies at the very core of democracy" (p. 39).

Critique. In spite of its wide spread appeal, the political process rationale has not remained immune from criticism. The key challenges may be summarized as follows. Firstly, it is myopic in scope. In R. v. Keegstra (1990), McLachlin J. intimates:

It justifies only a relatively narrow sector of free expression - one much narrower than either the wording of the First Amendment or s.2(b) of the Charter would suggest. (p. 78)

Secondly, American constitutional law scholar Laurence Tribe (1988) points out that the democracy argument is inherently uncritical* and fails to account for the "emotive" nature

*A variation on the political process rationale is that freedom of expression serves as a check on abuse of authority, especially governmental authority. Articulated by Vincent Blasi (1977), the main thrust behind the argument is that if those in power are subject to public scrutiny, exposure and sanction for their wrongs, they will be much less likely to yield to the inevitable temptation presented to act in corrupt and arbitrary ways. Writing in the context of Watergate, Blasi contends that a critical press affects how officials and citizens regard the exercise of government power. This further supports the notion that government service is a responsibility, not an opportunity for personal advantage. (pp. 529-544)

*In a different light, David Richards (1987) also questions the critical soundness of the democracy justification. He characterizes the scope of democratic debate in "narrow" (i.e. issues of controversy among those striving for majoritarian political power) and "broad" (i.e. questions addressing the very legitimacy of democracy itself) terms. He rejects both interpretations on the following grounds:
of free speech:

Yet when the theory has been thus expanded, it tells us disappointingly little. Indeed, in none of its forms does it tell us a great deal, since it takes for granted the virtues of the self-governance to which it argues that free speech is so necessary. . . . More generally, it must be said that Meiklejohn's conception of the first amendment, and Holmes', were both far too focused on intellect and rationality to accommodate the emotive role of free expression - its place in the evolution, definition, and proclamation of individual and group identity. (p. 787)

Thirdly, the ideal of self-government is premised on the notion of equal participation. This raises questions of equal competence, equal willingness and equal ability to participate which are assumed in Meiklejohn's theory. But can these assumptions be taken for granted? To the extent that participants do not or can not participate as political equals, the strength of this rationale is somewhat diminished."

Regardless of the critiques amassed against the democracy argument, it remains a salient justification for

... the narrow interpretation trivializes the scope of free speech to the measure of consensus politics and thus excludes from free speech protection of the dissenting discourse most crucial to issues central to both justice and the common good. The broader interpretation seems to compromise democratic legitimacy, because it would protect attacks on the very foundations of such legitimacy, including attacks on free speech itself. How can that view protect democracy? This argument is at sea, unmoored by the very protection of democracy it claims to be its basis. (p. 1893)

"A variety of reasons may militate against participants occupying a level playing field. These include: ignorance, apathy, disparity of resources such as money. By way of example, Schauer (1993) suggests it costs $100,000 to run for the Arkansas state senate. (p. 948)
free expression in all Western democracies. In R. v. Keegstra (1990), McLachlin J. even suggests that:

... the political process theory ascribes to freedom of expression a central role as the pivotal freedom on which all others depend. Without the freedom to comment and criticize, other fundamental rights and freedoms may be subverted by the state. (p. 79)

Cast in this light, the political process rationale is indeed formidable. Like the truth argument, however, it can not stand as the solitary pillar of a free speech principle. Other rationales, even if of lesser import, must still be considered.

**Maintenance of Social Stability Rationale**

A third argument sometimes found in the literature to justify freedom of speech is the "social stability" rationale. Teleological in outlook, freedom of expression is viewed in a pluralistic society as a means to accommodate the desires and interests of its varied citizenry. In turn, this accommodation leads to greater social cohesion. As Emerson (1970) explains:

Freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. Moreover, the state at all times retains adequate powers
to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change. (p. 7)

Described in this context, freedom of expression acts as a much needed stabilizing factor.

**Critique.** Attacks on the social stability argument deny the ability of free expression to produce an adequate reflection of the social spectrum of desires and interests. The chasm between the empowered and the disempowered perpetuates a hierarchical society where the frustrations of the dispossessed are granted token consideration. This maintains the status quo and makes effective change impossible. Thomas Kleven (1992) articulates this challenge in a series of questions:

Does free speech in fact facilitate change? Does it benefit the disadvantaged and disempowered by enabling them to organize and advocate reform? Or is free speech largely an illusion which helps perpetuate hierarchy by giving the disenchanted an outlet to release steam and by channelling their disenchantment into relatively polite debate rather than into more intensive and disruptive efforts at fundamental systematic change? (p. 325)\(^5\)

By way of rebuttal, Greenawalt (1989) questions whether

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\(^5\)At a more fundamental level, Greenawalt (1989) states that cultural control by the elites renders the articulation of the dispossessed's interests illusory: The difficulty in respect to "real" interests goes deeper; so great is the control of culture by the privileged that the dispossessed lack even the ability to understand what their real interests are; even the expression of their desires is not a reflection of what they genuinely need. (pp. 140-141)
the government could ameliorate the situation by suppressing the expression of certain desires and interests. Seriously doubting that this method would produce a more accurate account of what is important to citizens, he claims that the social stability rationale cannot therefore be discarded:

Failures of accommodation are often a source of social instability. Those who are resentful because their interests are not accorded fair weight are likely to be doubly resentful if they have been denied the opportunity to present those interests in the political process. If sufficiently frustrated, they may seek to attain by radical changes in existing structures what they have failed to get from officials within those structures. Though liberty of speech can often be divisive, it can, by forestalling this sort of frustration, also contribute to a needed degree of social stability. (p. 142)

Perceived in isolation, the social stability justification can not sustain a principle of free speech. In reality, its influence pales in comparison to the truth and political process rationales. As a member of a constellation of consequentialist arguments, however, the use of free speech as an outlet for the politically and socially dispossessed should not be overlooked.

**Tolerance Rationale**

Another consequentialist rationale for free speech is tolerance. In other words, freedom of expression helps to inculcate attitudes tolerant of others and their differences.” Lee Bollinger (1986), author of *The tolerant*
society, is the most articulate advocate of this justification. Acknowledging the right of detested groups to speak, Bollinger shifts the focus of free speech theory from the value of speech to the troublesomeness of the reactions evoked by speech:

Rather than praising free speech for its protection of works of great merit, and then being forced under the pressure of an extremist speech case to defend the constitutional principle on the supposedly "neutral" basis that it simply protects a "process" from legal intervention, we might instead renew our understanding of the principle by taking a sympathetic look at the feelings behind that intolerance. If we did, in the end we will retain a view of free speech as having a moral dimension, of being one public context in which the society addresses an important aspect of the general quality of mind it seeks. (p. 242)

Bollinger further contends that extremes "become integral to the social meaning of the idea" (p. 248). This ultimately leads to a better society which is cognizant of its inherent limitations. As Bollinger declares: "In the end, we must not fail to see the genuine nobility of a society that can count among its strengths a consciousness of its own weaknesses" (p. 248).

Critique. The tolerance argument has not gone

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the public about "ways of life common in certain segments of the public"; (2) it reassures "those whose ways of life are being portrayed that they are not alone"; and (3) it provides a "stamp of public acceptability" for those ways of life. (p. 311)

"Bollinger was grappling with the issue of free speech in the context of Nazis and their right to march in Skokie, Illinois, a village with a high concentration of Jewish holocaust survivors."
uncriticized. Greenawalt's (1989) twofold criticism attacks the logic and applicability of this justification. Firstly, living in a regime of free speech may help teach tolerance but this in itself does not necessarily compel a tolerance justification for free speech:

... it does not follow either that promoting tolerance is now the primary justification for free speech or that attention to tolerance should play the critical role in decisions whether to restrict speech. (p. 147)

This objection is primarily one of logic. Secondly, and more substantively, Greenawalt demonstrates that Bollinger's justification for extremist Nazi speech does not apply to many other forms of speech:

Given the assumption that broad tolerance of how others live can be encouraged in different ways, it is doubtful that one would introduce and defend a principle of freedom of speech absent other more basic justifications, and it is questionable whether a persuasive argument against particular suppression can be grounded mainly in the tolerance justification. (p. 147)

Richards (1987) maintains that Bollinger's concept of tolerance "is a value in search of a critical theory" (p. 1894). The elasticity of his tolerance, depending upon the circumstances, resonates with overtones of indeterminacy. As Richards explains:

... the appropriate level of tolerance, which controls everything else in the theory, can be manipulated to yield any result. For example, though Bollinger believes acceptable levels of tolerance are not exceeded by the Nazis of Skokie but are by hard-core pornography,

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53Even Bollinger (pp. 140-144) himself recognizes that too much tolerance presents social dangers, notably passive acceptance of injustice.
equally forceful reasons could support exactly the converse levels of tolerance. . . . Tolerance, for Bollinger, comes very close to some indeterminate conception of social acceptability or majoritarian common sense, which hardly seems to reflect the principles of toleration of the first amendment. (p. 1895)

The remedy for Richards is "a critical theory of tolerance to explain its nature and weight" (p. 1895).

The tolerance rationale alone is clearly inadequate to justify a principle of free speech. Nonetheless, in the context of racist and other forms of destructive speech, it is an important factor to consider in the analysis of free speech theory. Considered in conjunction with the truth, political process and social stability rationales, the tolerance argument is also certainly relevant in the larger scheme of consequentialist justifications.

**Non-Consequentialist Rationales**

Not all justifications for freedom of expression are consequentialist in nature. As Greenawalt (1989) states:

Not all arguments for free expression rest on desirable consequences; some liberal conceptions of the relationship between state and citizen may suggest a liberty of citizens to express opinions that is independent of the likely consequences of prohibition. As the phrase "liberal conceptions" implies, these justifications draw more distinctly on characteristic value premises of liberal theory than do the consequentialist justifications. . . (p. 147)

In this perspective, freedom of expression is no longer viewed as simply a means to other ends. Rather, free speech deserves special protection because of its own inherent worth.
Self-Realization Rationale

The "self-realization" rationale is the starting point for a non-consequentialist study of freedom of speech. Thomas Emerson (1963), the best known defender of this approach, declares that "freedom of expression derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being" (p. 878). Accepting self-realization as a laudable pursuit, one can conclude that each person has the right to form her own beliefs and to articulate them. As Emerson states: "For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self" (879). Cast in these terms, the conceptualization of freedom of expression in purely instrumental terms is inappropriate. Once again, Emerson observes: "It is not a general measure of the individual's

"It is sometimes referred to as the "self-fulfilment" or "self-development" rationale.

"Schauer (1982) elaborates on the Emersonian conception of self-fulfilment in the following terms: The argument is based on the proposition that a person who uses his faculties to their fullest extent, who is all that it is possible to be, is in some sense better off, and in an Aristotelian sense happier, than those whose development is stultified. And because it is thinking, reasoning, rationality, and complex interrelationships with others that distinguish humanity from other forms of animal life, then it is the faculties of reason and thinking that are at the core of self-development. What is seen as the ultimate goal for man is the fullest use of the capacity to think, the greatest degree of mental exertion, the exploration of the limits of the mind. (p. 54)
right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of society" (p. 880). Hence, freedom of expression becomes worthwhile safeguarding because of its own intrinsic value.

Critique. Critics have fired two primary volleys at the self-realization rationale. Firstly, its all-encompassing character raises doubts about its capacity to sustain a constitutional freedom. As McLachlin J., in R. v. Keegstra (1990), notes: "On its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle" (p. 80). Secondly, Schauer (1982) demonstrates that the argument from self-fulfilment fails to distinguish why expression merits special constitutional protection while other self-fulfilling activities do not:

The argument from self-fulfilment underscores the importance of communication, but the argument can be deployed with equal force in reference to most human needs or desires. If an argument from inherent goodness supports a right to free speech, so too can it support a right to eat, a right to sleep, a right to shelter, a right to a decent wage... (p. 56)

Schauer, thus, concludes that "arguments from self-fulfilment appear under critical scrutiny to be little more than arguments for general liberty" (p. 56).

In spite of these inherent shortcomings, the self-realization argument expands the ambit of protected speech otherwise covered by purely instrumental justifications. In R. v. Keegstra (1990), McLachlin J. highlights this when she states:
Nevertheless, an emphasis on the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationales, justifying, for example, forms of artistic expression which some might otherwise be tempted to exclude. (p. 80)

Thus, a free speech principle founded on consequentialist and non-consequentialist rationales is more comprehensive.

**Autonomy Rationale**

Integral to an understanding of self-realization is the underlying assumption of autonomy." For Bettina Quistgaard (1993), self-fulfilment:

... is premised on the assumption and ideal of autonomy. Autonomy is defined reactively as self-control and self-mastery, and it implies that individuals, by their nature, are separated from one another - physically and mentally. As Mill states: "Over himself, over his own body and mind the individual is sovereign." (p. 139)

The close association between freedom of expression and autonomy has engendered a growing number of scholarly articles." The following words of Larry Alexander (1989) are

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5"Two comments are worthy of mention here. Firstly, etymologically speaking, the word "autonomy" comes from the Greek terms "autos" meaning self and "nomos" referring to rule. Hence, autonomy literally signifies self-rule. Secondly, some authors adopt a consequentialist approach to autonomy. Schauer (1989a), for example, portrays freedom of expression as permitting individual autonomy in decision-making. (p. 4) The majority of writers, however, espouse a non-consequentialist view of autonomy. Although the author does not believe this distinction is crucial, he favours the latter position because of autonomy's underlying relationship to the self-realization rationale.

6"For example, see: Baker (1989), Human liberty and freedom of speech, pp. 47-51; Fried (1992), "The new first amendment jurisprudence: A threat to liberty", pp. 233-237; Richards (1986), Tolerance and the Constitution, pp. 165-177; and Strauss (1991), "Persuasion, autonomy and freedom of
characteristic of liberal free speech theorists on this subject:

The First Amendment is a feature of liberalism, which gives pride of place to individual autonomy. . . . Enshrined in the First Amendment, it tells us that even when we are convinced we know what is correct, and wish to keep others from falling into errors of belief and value, we may do so only with our own private resources and acting within our own private domain. We are forbidden to enlist the weapons of the state, even to save others' autonomy and the First Amendment itself. (p. 962)

Preventing the government from regulating freedom of speech for fear that citizens may be adversely influenced by the speech's content thereby protects "listener autonomy." 58 A

expression", pp. 353-371. These authors all identify autonomy as a central value underlying the First Amendment's commitment to free speech.

Readers may also wish to consult Fallon's (1994) article entitled "Two senses of autonomy." It represents the most recent and sophisticated work in this area. Fallon maintains that there are two versions of autonomy: "descriptive autonomy" (this "refers to people's actual condition and signifies the extent to which they are meaningfully self-governed in a universe shaped by causal forces" (p. 877) ) and "ascriptive autonomy" (this "represents the purported metaphysical foundation of people's capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered or substantively unwise" (p. 878) ). Fallon admits that his dualistic conception of autonomy is solidly grounded in the First Amendment tradition. The strength of his analysis, however, reflects the tension between these competing senses of autonomy and the tendency to oversimplify autonomy arguments. Fallon thus warns:

If descriptive and ascriptive autonomy are both fundamental but often in competition, and if descriptive autonomy by itself requires complex, multifactored inquiries, then elegantly simple autonomy-based arguments - with which the literature abounds - deserve to be seen as traps for the unwary. (p. 905)

58 Thomas Scanlon (1972) offers a thorough explanation and defence of listener autonomy in his article "A theory of freedom of expression." The principle of listener autonomy
free speech defence of autonomy is ultimately a defence of individual morality. In this regard, Ronald Dworkin (1992) opines:

... freedom of speech is valuable not ... in virtue of its consequences, but because it is an essential feature of a just society that government treat its adult members, except those who are incompetent, as responsible moral agents. (pp. 55-56)

Critique. Within the liberal paradigm, the critics of autonomy argue for a refinement of the concept rather than its outright rejection. Owen Fiss (1986) claims that the state has a duty to preserve the integrity and quality* of public debate and thus should play an interventionist role in protecting listener autonomy. Unlike conventional positions on autonomy which view the state as the enemy, Fiss argues that autonomy justifies state intervention:

Autonomy, in its inflated version, would remain as the key value, but note that while in the received Tradition it operated as a response to government intervention, under this strategy it would serve as a justification of such intervention. Autonomy would be saved, but put to a different use. (p. 1417)

David Dyzenhaus (1991) is highly critical of the denuded notion of "global neutrality" which underlies many autonomy based arguments. According to this view, the only appropriate

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also helps explain American Justice Brandeis' insistence that the "fitting remedy" for harmful speech is "more speech, not enforced silence." See Whitney v. California (1927, p. 372).

"By way of example, Fiss advocates a law creating access to shopping centres for demonstrators. Although this might interfere with the owner's property rights, these interest could be sacrificed to fulfil the democratic aspirations underlying the first amendment. (p. 1419)
adjudication among conceptions of the good life is by individuals deciding the question for themselves in an unfettered market of ideas. Embraced most fervently by libertarians, the focus is on formal equality. Dyzenhaus maintains, however, that autonomy is only truly meaningful if exercised in a social context where substantive equality is assured. His call for "egalitarian liberalism" requires the state to create a culture of social and political equality:

... liberalism is an egalitarian doctrine which requires the state to be neutral between conceptions of the good life only insofar as particular conceptions do not aim to support existing inequalities or to create new ones. The state is thus not only permitted but is even required to act to create a public culture of social and political equality, because it is only with such a culture as the backdrop that individuals will be able to lead autonomous lives. (p. 315)

In the context of racist speech, Dyzenhaus argues that hate propaganda should be restricted because it "seeks to deny the possibility of autonomy" (p. 314), and thus equality, to members of the target group.

Other liberal writers are beginning to challenge the conceptual grip autonomy has on free speech theory. Joshua Cohen (1993) argues that the core of the free speech...

"Dyzenhaus describes the relationship between autonomy and the conception of the good life in these terms: Liberals are committed to an ideal of individual autonomy, according to which individuals should be left to decide for themselves both what the good life is and how to pursue it. So liberals require that the state remain neutral on the question of how individuals should live their lives, at least to the extent of refraining from coercively imposing any conception of good on individuals. (p. 301)
principle reflects plural interests which transcend a unitary vision premised on autonomy. He identifies three primary interests protected by free speech: "expressive, deliberative and informational." In Cohen's expressive framework, the preoccupation with the supremacy of autonomy is rejected as being capacious and "sectarian" in nature. For Cohen, the main idea:

"... is that expression always trumps other values because of its connection with autonomy. And this suggests that a commitment to freedom of expression turns on embracing the supreme value of autonomy. But this threatens to turn freedom of expression into a sectarian political position. Is a strong commitment to expressive liberties really available only to those who endorse the idea that autonomy is the fundamental human good - an idea about which there is much reasonable controversy? (pp. 221-222)

Although Cohen does not reject autonomy per se, it occupies a diminished role in his tridimensional framework.

Despite the number of criticisms it has faced and regardless of its categorization as instrumental or intrinsic, autonomy is a crucial value in a liberal free speech theory. It serves as a reminder that free expression is inextricably tied to personal independence, dignity and morality.

"Expressive" interests (p. 224) include the desire to communicate thoughts, attitudes and feelings and, through this route, to influence others. "Deliberative" interests (p. 228) recognize that people have a general social interest in finding out what is best or most worthwhile. This encompasses matters of both a personal and political nature. "Informational" interests (p. 229) allow people to have access to information (e.g. commercial and scientific communications) to pursue their own aims and aspirations.
Summary

In the preceding section, the researcher has examined descriptively and critically the consequentialist and non-consequentialist justifications for a free speech theory. Consequentialist arguments include: the search for truth, the political process, the maintenance of social stability and the tolerance rationales. Non-consequentialist rationales embrace: the self-realization and the autonomy justifications. Although the truth, political process and autonomy rationales figure most prominently, an accurate and comprehensive literature review must account for the secondary rationales which contribute to an overall free speech theory.

It is crucial to remember that this enumerated list of rationales must not be interpreted as closed and immutable. Rather it is an open list that will evolve and expand with time. As McLachlin J., in R. v. Keegstra (1990), so aptly remarks: "... no one rationale provides the last word on freedom of expression. Indeed, it seems likely that theories about freedom of expression will continue to develop" (p. 80). Of equal importance, the analysis has been confined to an inspection of free expression's underlying justifications from within the dominant liberal paradigm. In the following section of the literature review, alternative paradigmatic approaches to freedom of expression will be considered.
Alternative Ideologies

The tremendous influence liberalism has exerted, and continues to exert, on free speech theory is undeniable. Within the past twenty years, however, this leading political theory has come under increased attacks. Calls for new approaches among academics reflect the malaise some experience with liberalism's hegemonic hold in the realm of free expression. MacKay (1989), for instance, asserts that we must "consider alternative perspectives on freedom of expression" (p. 764). To do so, he maintains, requires us "to escape the American straight jacket of liberal theory" (p.764). Taking up this gauntlet engenders one fundamental query. What are these other perspectives?

The researcher has identified the following political ideologies as representative of the most significant challenges to liberalism: feminism, Critical Legal Studies and communitarianism. In this section of the literature review, each competing ideology will be assessed descriptively and critically in terms of its relationship to freedom of expression.

The Feminist Ideologies

Feminism and feminist theories have produced some of the strongest assaults on liberalism and its underlying assumptions for freedom of expression. Before proceeding further, a working definition of feminism is required. Deborah Rhode's (1994) defines the term as follows:
Although feminists differ strongly on many dimensions, they generally share certain basic commitments. At the substantive level, feminism presupposes a commitment to equality between the sexes. At the methodological level, it implies a commitment to gender as a focus of analysis and to approaches that reflect women's perspectives and concerns. (p. 1182)

In sum, substantive equality and a gendered methodology are the hallmarks of irreducible feminism.  

**Feminist Critiques of Freedom of Expression**

According to the literature, there are four primary critiques that feminism has levelled against the liberal view of free speech. These are: the epistemological, equality, autonomy and poststructuralist critiques.

**Epistemological critique.** At the most fundamental level, feminists have questioned the epistemological assumptions of our world views. As Susan Williams (1994) intimates, feminist theorists "have posed a challenge to some of the deepest assumptions of our culture about the nature of truth and human knowledge" (p. 1563). For Bettina Quistgaard (1993), feminist scholars call the predominantly male

"The author recognizes that this over simplified definition cannot even begin to take into account the different types of feminism. Susan Williams (1994), in Feminism's Search for the Feminine: Essentialism, utopianism and community, reminds the reader of the categorical complexity in this area. She employs, for example, the following terminology: "ethical" feminism, "essential" feminism, "liberal" feminism, "relational"/"cultural" feminism and "radical" feminism to denominate some of the main strands of feminist thought.

"Epistemology is the branch of philosophy that studies the theory of knowledge. In other words, it asks about the nature of truth, the components of knowledge, and the means by which human beings can acquire it."
assumptions and ideals into question because "they are not only inadequate and misleading representations of human experience but they are also deeply and profoundly gendered" (p.140).

In the realm of free speech theory, Williams points out that epistemological issues assume great importance when examining the dominant truth and political process rationales. She notes that the truth theory relies explicitly or implicitly on the mainstream tradition in Western epistemology that she describes as "Cartesianism":

Cartesianism is a collection of assumptions that together form a vision of the nature of truth and human knowledge. In the Cartesian view, there exists an external and objective reality that is accessible to individual knowers through the use of their reason, perhaps combined with their sense perception. Knowledge attained through this process is universally true, true for all people, rather than merely true for a particular person in a particular time and place. This traditional epistemology is so widely accepted and so much a part of our social institutions that it becomes extremely difficult even to imagine an alternative view. (p. 1564)"

"Quistgaard (1993) highlights the imprint of reason on Western philosophy in general: Reason is a concept not unique to liberal thought. With its roots in Greek philosophy, Reason has formed the central pursuit of the Western tradition of philosophy and it has had a variety of meanings ascribed to it. In the context of the purposes of freedom of expression, Reason is understood as the distinctly human capacity for abstract and objective thought, uninfluenced by emotion or other subjective factors.

Reason has itself been the subject of feminist analysis. See Genevieve Lloyd (1984) and her work: The man of reason: Male and female in western philosophy. Lloyd observes how reason has shaped the occidental notion of objective knowledge as well as influenced the very nature of personhood: "It is incorporated not only into our criteria of truth, but also into our understanding of what it is to be a
As for the democracy theory of free speech, Williams observes that it too is heavily informed by Cartesianism:

The democracy theory holds that free speech is protected because it is essential to the proper functioning of a democracy. Free and open discussion of issues is indispensable to informed decisionmaking by the people, whether their decisions are based on some utilitarian calculation about how best to satisfy the preferences of a majority or on the search for some common good defined in a nonutilitarian manner. In other words, the democracy theory views free speech as valuable because it leads one to a clearer view of some political truth, however defined. As long as that truth is seen as an objective thing, accessible to individuals through some process of reasoning, and true regardless of one’s perspective, it shares the characteristics of Cartesianism. (p. 1567)

The feminist critique of Cartesianism is threefold. First, feminists do not view knowledge as essentially objective and external to individuals. Rather, they see knowledge primarily as a social construction. According to Williams (1994): "We have no unmediated access to any objective reality; our reality is made, not found, and it is made in culturally specific ways" (p. 1568). Second, knowledge is not simply acquired by individuals through their reasoning faculties. "Instead, emotions and value judgments person at all" (p. ix).

"According to Quistgaard (1993):
The ideal of Reason has been associated with the "masculine" identity, while that which the Man of Reason has sought to transcend, transform, or control - namely, the particularity of life, contingency, disorder, emotion, passion and connection - has been associated with the "feminine" identity and Nature. Within this framework, the masculine identity is equated with superiority, and the feminine identity is devalued. Thus, what have been deemed to be distinctly "feminine"
also inform knowledge construction. As Williams reveals:
"... the social construction of knowledge reintroduces emotion and value judgment as central to the process of acquiring knowledge" (p. 1568). Last, feminists challenge the "universality" of Cartesian epistemology. Context thus emerges as an important consideration. Williams (1994) notes: "Once we recognize the impact of culture, values and emotions on knowledge, it becomes plain that knowledge may be situated rather than universal" (p. 1570). She sums up the triadic critique in these terms:

The feminist challenge offers the seeds of an alternative approach to issues of truth and knowledge. The alternative sees truth as socially constructed, inextricably connected to value judgments and emotions and fundamentally perspectival. (p. 1570)

Having redefined truth on the basis of an alternative feminist epistemology, Williams posits that it still remains a legitimate rationale for free speech. In fact, truth and knowledge are integral to participation in and creation of a "shared social life." This life forms the foundation for a whole range of human goods like "friendship, community, and love" as well as goods like "self-respect, comfort, and

traits have been excluded from the ideal of Reason . . . The philosophical construction of Reason, then, has been central to the conceptualization and institutionalization of gender difference and gender hierarchy. (p. 142)
safety" (p. 1572). "Within this shared social life, the role of speech emerges. For Williams, it makes possible the construction of a new truth together:

Listening to the speech of others makes us more aware of the diversity of views and the limitations of our own perspectives, provides an opportunity to learn openness on all levels, and gives us the materials for self-criticism. Our own speech allows us to contribute to this process of cultural construction and actually to practice honest self-criticism. Thus, speech is a way of pursuing this new truth. Indeed, this model of dialogue - in which the participants come together to create an understanding that neither possessed alone - surely is one of the great hopes and promises of speech. It captures part of the free speech ideal that has long been implicit in our understandings but was never able to be adequately explained by a Cartesian epistemology. (p. 1574)

Within the confines of this feminist epistemology, both speakers and listeners must commit to sensitivity, openness and honesty.

Williams (1994) offers four examples of what a feminist free speech theory might look like in practice. Firstly, characterizing speech as an "inaarticulate grunt" or "no

"Williams amplifies by stating:
One goal of this new epistemology is to ensure the widest possible participation in this shared life. The ability to participate in the process of knowledge formation is one guarantee of being a part of this shared social life, and exclusion from it is a kind of internal exile. A second goal of this epistemology is to provide the conditions under which such a shared life is possible. Without a process of knowledge formation, a society could not long sustain the shared life on which so much depends. That is why, under this new epistemology, truth is still desirable both for individuals and for societies and is still important enough to justify a fundamental constitutional right. (p. 1572)
essential part of any exposition of ideas" is unacceptable. Since knowledge includes personal emotional speech, First Amendment protection ensues. Secondly, lower value categories might be explained in new ways. Commercial speech, for example, does not normally require the openness and honesty inherent in knowledge acquisition. Hence, it deserves less protection. Thirdly, speech does not always facilitate the search for truth. The mass media often denies access to those who lack resources or have an unpopular message. Feminists would thus support a call for greater access rights. Lastly, many free speech issues must be resolved in a contextually sensitive manner. For example, hate speech may occur at work or at school and in private or in public. Context is important because speech that serves the search for feminist truth in one setting may not do so in another. (pp. 1575-1576)

To recap, feminism's epistemological critique of traditional free speech theory challenges the foundational basis of the truth and political process rationales. By viewing knowledge as socially constructed, imbued with personal value judgments and essentially perspectival, a redefinition of the truth doctrine itself becomes necessary. Speech is thus integral to the construction of new truth(s) and must be protected for its ultimate capacity to assist

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"Chief Justice Rehnquist used these terms in Texas v. Johnson, (1989) (Rehnquist, C.J. dissenting, pp. 430-432)."
feminists in building their own vision(s) of social reality.

**Equality critique.** A second feminist critique against free expression is that it fails to take equality seriously. As examined earlier, the truth and political process rationales are often premised on the assumption of equal voice and equal opportunity.⁴⁴ A number of feminists, however, have begun to challenge this assertion. Chief among these is Catherine MacKinnon (1987) who believes that free speech doctrine has traditionally ignored issues relating to equality:

The law of equality and the law of freedom of speech are on a collision course in this country. Until this moment, the constitutional doctrine of free speech has developed without taking equality seriously - either the problem of social inequality or the mandate of substantive legal equality. (p. 71)

For MacKinnon, speech is inextricably linked to power. Current speech theory masks the power imbalance, and corresponding inequalities," by describing the debate as

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⁴⁴"Supra., p. 17.

"Quistgaard (1993) offers this depiction of the marketplace inequalities:
In a society of inequality, members of disadvantaged groups have not had equal access to decision-making processes, politically, economically, or socially. Economic inequalities are particularly serious for freedom of expression, as access to the pervasive, privately-controlled media has become a central means of asserting ideas and alternative visions of society. Disadvantaged groups, then, have not had equal power to express themselves in the supposedly 'free' market-place of ideas. Indeed, it has been argued that such groups are silenced by the overwhelming dominance of the ideas of the ruling group - namely, able-bodied, heterosexual, Christian white males. (p. 141)"
involving the struggle between truth and untruth in the unregulated marketplace. As MacKinnon reveals:

Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true. (p. 78)

MacKinnon (1987) suggests that viewing speech through an equality lens throws critical light on the First Amendment’s position of neutrality toward all ideas:

. . . under the First Amendment, there is no such thing as a false idea. Perhaps under equality law, in some sense there is. When equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis for public policy. This does not mean that ideas to the contrary cannot be debated or expressed. It should mean, however, that social inferiority cannot be imposed through any means, including expressive ones. (pp. 106-107)\textsuperscript{70}

It is no surprise that MacKinnon seeks a reconstruction of the speech right itself. Her vision of free speech is wrested from the current tentacles of social domination. Moreover, she calls on the state to ensure equal access to speech as well as to assist the victims of expressive inequality:

Where is all this leading? To a new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now; in which free speech does not most readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for their victims, as it does now; in which defending

\textsuperscript{70}MacKinnon admits that the distinction between "talking about inferiority" and "verbal imposition of inferiority" is not always clear at the edges. She does maintain, however, that sexual harassment, racial harassment, pornography and hate propaganda are clearly expressive means of practising inequality and thus should be prohibited by the state. (p. 108)
free speech is not speaking on behalf of a large pile of money in the hands of a small group of people, as it is now. In this new model, principle will be defined in terms of specific experiences, the particularity of history, substantively rather than abstractly. It will notice who is being hurt and never forget who they are. The state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed. (pp. 109-110)

MacKinnon (1987) ultimately calls on the state to perform a delicate balancing act. It must show restraint to ensure the exercise of free expression yet must intervene when speech is used to promote social inferiority.

In sum, MacKinnon’s attack on freedom of expression is, at a more fundamental level, an attack on society itself. Current societal structures make free speech the preserve of the privileged and powerful. Only a serious and committed effort to substantive equality will make free expression a vibrant freedom available to the vulnerable as well as the strong.

**Autonomy critique.** A third feminist critique often brought against liberalism’s free speech theory is the autonomy critique. For liberals, autonomy envisions human beings as separate, discrete and self-determining. As Quistgaard (1993) notes, the erection of boundaries associated with autonomy is essential to the conception of free speech as a negative right:

One of the most important forms of boundary our society erects is negative rights, including the right to freedom of expression. . . . freedom of expression guarantees that the autonomous individual is free to
express himself/herself without coercion or restraint from others or society up to the point where that freedom intrudes on the freedom of others. (p. 146)

Feminists, however, have begun to question this liberal view of autonomy.

In *From a broken web: Separation, sexism and self*, Catherine Keller (1986) examines the evolution of autonomy from its roots in Greek mythology and heroic tales to modern times. Rooted in an extensive cultural and philosophical tradition, the "separate self" is an ideal that has been firmly implanted in the Western psyche." Keller believes, however, that the separate self is really an illusion because each person exists in interdependence with her world.

However much the ego feels single and apart, this feeling may represent not truth but denial. It is less precise to call this ego separate than separative, implying an activity or an intention rather than any fundamental state of being. ... Its sense of itself as separate, as over and against the world, the Other, and even its own body, endows it with its identity. It is this, not that. (p. 9)

Thus, relationships are central to constituting the self.

''According to Keller:
To be a self, must I be something separate and apart? How else could I be myself? Myth and religion, philosophy and psychology center our civilization on the assumption that an individual is a discrete being: I am cleanly divided from the surrounding world of persons and places; I remain essentially the same from moment to moment. Common sense identifies separateness with the freedom we cherish in the name of "independence" and "autonomy." The assumption that selfhood requires separation is even rooted in language. The Latin for "self," se meaning "on one's own", yields with parare ("to prepare") the verb "to separate". For our culture it is separation which prepares the way for selfhood. (p. 1)
This position is most fervently held by Robin West (1988), author of *Jurisprudence and gender*. She believes that the portrayal of human beings as discrete and unconnected while "trivially true" of men is "patently untrue" of women." She argues that connectedness is possibly the most significant contribution of feminism in the past ten years:

"... perhaps the central insight of feminist theory of the last decade has been that women are "essentially connected," not "essentially separate," from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life. (p. 3)

Women's connectedness leads to a perspective that differs markedly from a male one infused with autonomy. According to West: "Men value autonomy from the other and fear annihilation by him. Women value intimacy with the other and fear separation from her" (p. 28). For West, the centrality of relationships and connectedness in constituting the self is fundamental."

"In this regard, West draws heavily upon the earlier work of psychologist Carol Gilligan (1982), *In a different voice*. For Gilligan, women principally espouse an "ethic of care" (centered on relationships, responsibility and compassion) while men embrace an "ethic of justice" ( premised on individuality, rationality and universality) in matters of moral reasoning.

"Nonetheless, West acknowledges that not all feminist accept her essentialist views about the importance of connectedness. In reference to radical feminists Catherine MacKinnon and Andrea Dworkin, she states: "For radical feminists, that same potential for connection . . . is the source of women's debasement, powerlessness, subjugation, and misery" (p. 29). These feminists, however, do not embrace autonomy as it is constructed in liberal theory."
A more moderate attack on autonomy has come from Jennifer Nedelsky (1989) in her work, "Reconceiving autonomy." She submits that "liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings" (p. 8). Attempting to reconcile the constitutiveness of social relations with the value of self-determination, Nedelsky reconceptualizes autonomy. Her new vision is "relational autonomy":

The autonomy I am talking about does remain an individual value, a value that takes its meaning from the recognition of (and respect for) the inherent individuality of each person. But it takes its meaning no less from the recognition that individuality cannot be reconceived of in isolation from the social context in which that individuality comes into being. The value of autonomy will at some level be inseparable from the relations that make it possible; there will thus be a social component built into the meaning of autonomy. That is the difference. But the presence of a social component does not mean that the value cannot be threatened by collective choices; hence the continuing need to identify autonomy as a separate value . . . (pp. 35-36)

For Nedelsky, what actually enables people to be autonomous is not isolation but healthy constructive relationships untainted by power and domination. (p. 22)

Although feminist critiques of autonomy may vary, Quistgaard (1993) maintains that a common thread ties them together. The "separate" self is highly underinclusive because it fails to acknowledge the self's inherently relational and interdependent nature:

. . . feminist critiques of autonomy counter the assumption of a separate, fixed, and self-defining
individual in need of protection - through such rights as freedom of expression - against interference by the collective with its selfhood and its freedom. They suggest, instead, that the individual is fundamentally related to other individuals and to society/culture more generally. Moreover, they assert that individual identity is constituted in and by these relationships. (p. 147)

Recognizing the self's intrinsically connected and social character, what implications for a feminist free speech theory arise? First and foremost, autonomy can no longer be viewed as the only dominant value underpinning free expression. Other values, notably equality, must be given due consideration. Secondly, perceiving autonomy simply as a negative right (i.e. freedom from interference) is too restrictive. Freedom of expression must accommodate a positive right of access to resources and the media. As Quistgaard (1993) opines: "Such a positive right would focus attention on questions of media ownership and control, and on the barriers to women's access" (p. 168). For feminists, understanding autonomy in the context of relationships will foster a free speech principle which is less dogmatic and more comprehensive in its application.

**Feminist poststructuralist critique.** A final attack on liberal free speech theory challenges the very nature of language itself on which any notion of expressive rights ultimately depends. In her work, *Feminist practice and poststructuralist theory*, Chris Weedon (1987) draws heavily on the writings of Ferdinand de Saussure, Sigmund Freud, Jacques Derrida, and Michel Foucault to develop a "feminist
Combining the insights of feminist practice with the tenets of poststructuralism, this approach examines the relationship among language, subjectivity, social institutions and power within the framework of patriarchy. Weedon maintains that feminist poststructuralism opens up the possibility of social change.

"Weedon defines the theory in these terms: Feminist poststructuralism . . . is a mode of knowledge production which uses poststructuralist theories of language, subjectivity, social processes and institutions to understand existing power relations and to identify areas and strategies for change. Through a concept of discourse, which is seen as a structuring principle of society, in social institutions, modes of thought and individual subjectivity, feminist poststructuralism is able, in detailed, historically specific analysis, to explain the working of power on behalf of specific interests and to analyze the opportunities for resistance to it. It is a theory which de-centres the rational, self-present subject of humanism, seeing subjectivity and consciousness, as socially produced in language, as a site of struggle and potential change. Language is not transparent as in humanist discourse, it is not expressive and does not label a "real" world. Meanings do not exist prior to their articulation in language and language is not an abstract system, but is always socially and historically located in discourses. Discourses represent political interests and in consequence are constantly vying for status and power. The site of this battle for power is the subjectivity of the individual and it is a battle in which the individual is an active but not sovereign protagonist. (pp. 40-41)

"Weedon defines this term as follows: "Subjectivity [refers to] the conscious and unconscious thoughts and emotions of the individual, her sense of herself and her ways of understanding her relation to the world" (p. 32). Weedon contrasts this with the liberal assumption of an "essence at the heart of the individual which is unique, fixed and coherent and which makes her what she is" (p. 32). Poststructuralism thus de-centres the subject and makes human subjectivity the site of disunity and conflict - the site of struggle over meaning. Hence, the self is subject to ongoing redefinition.
through the study of language." Viewed not merely as a passive medium for the expression of individual personality, language acquires a social character and becomes the site of struggle over meaning which is necessary for political change. As Weedon notes:

Once language is understood in terms of competing discourses, competing ways of giving meaning to the world, which imply differences in the organization of social power, then language becomes an important site of political struggle. (p. 24)"

Drawing on Weedon’s feminist poststructural analysis, Quistgaard (1993) argues: "This conception of language and

"Weedon acknowledges that most poststructural theorists are not concerned with feminist issues:

... most of the theorists who have produced poststructuralist texts are themselves unsympathetic to feminism. However it is important to distinguish between the political potential and usefulness of a theory and the particular affiliations of its author. (p. 13)

Weedon’s contribution stems from her willingness to cast poststructuralism in a feminist context to challenge the pillars of patriarchy.

"Weedon is careful to point out that individual subjectivity, being intimately linked to language, does not preclude individual agency:

Language, in the form of socially and historically specific discourses, cannot have any social and political effectivity except in and through the actions of the individuals who become its bearers by taking up the forms of subjectivity and the meanings and values which it proposes and acting upon them. The individual is both the site for a range of possible forms of subjectivity and, at any particular moment of thought or speech, a subject, subjected to the regime of meaning of a particular discourse and enabled to act accordingly. The position of subject from which language is articulated, from which speech, acts, thoughts, or writing appear to originate, is integral to the structure of language and, by extension, to the structure of conscious subjectivity which it constitutes. (pp. 34-35)
meaning clearly represents a fundamental critique of the view implicit in freedom of expression doctrine" (p. 149). Moreover, Quistgaard maintains that a poststructural approach to free expression makes transparent liberalism’s power in our cultural discourse:

Thus, the dominance of liberal assumptions in the judicial interpretation of the right to freedom of expression and the complicity of feminists in the maintenance of freedom of expression doctrine can be explained by the social power of liberalism in legal and political discourse. (p. 150)

Quistgaard (1993) further contends that dominant liberal values obscure the poststructuralist power struggle within each individual. In the context of freedom of expression, liberalism posits that every individual has an immutable subjectivity:

The purposes defining the right to freedom of expression contain within them the assumptions that individuals have an essential nature. They are rational, equal in their freedom, unified, autonomous, and self-defining. Such individuals stand apart from language, which is external and whose meanings are fixed by an objective, knowable reality. Expression, in conjunction with freedom of thought, is a central means by which individuals realize their inherent personalities as well as ‘truth.’ Importantly, these assumptions also serve as ideals toward which humankind should aspire; they serve as the goals to which the protection of the right of freedom of expression must be directed. (p. 140)

For Quistgaard, these essentialist assumptions "assert their own truth, mask the power of language, and deny the crucial role of language in effecting social change" (p. 153). In essence, they gut free expression of its natural force and preserve the status quo of patriarchy.

Quistgaard claims, however, that a free speech theory
premised on feminist poststructuralism serves two important purposes. Firstly, it enables freedom of expression to promote a more divergent collection of discourses which reflect individual experiences:

An alternative purpose of free expression might be to promote a wider range of discourses and subject positions through which individuals can give meaning to their experiences and consciously live their lives. (p. 168)

Secondly, it allows freedom of expression to foster diversity and pluralism in society through recognition of the different cultural and ideological practices of its members. (p. 168) Quistgaard (1993) warns that this goal will be thwarted if we fail to acknowledge and expose the power of language to construct and differentiate:

This is indeed an important goal of free expression, but . . . without acknowledging that difference is socially constructed through language and meaning in ways that create and re-create hierarchies and the oppression of difference, and without exposing the exercise of power through language, freedom of expression as it is currently interpreted will not promote this goal. (p. 168)

Quistgaard also argues that the articulation of alternative discourses must be accompanied by access to the means of doing so. Although she does not specify how this is to be done, she maintains that freedom of expression "must be understood to encompass a positive right" (p. 169).

Feminist poststructuralism thus refuses to treat language as a neutral medium. For authors like Weedon (1987) and Quistgaard (1993), language is the site of personal and political struggle. The implications for a free speech theory
cannot be ignored. The process of deconstruction exposes the
dominant liberal discourses which inform our understandings
and practices of free expression. In response, each
individual is at liberty to use language to reconstruct
reality which better reflects her own discourses and
lifestyle. It is this promise of language that has lead some
feminists to espouse poststructuralism as a means of
challenging extant free speech theory.

To summarize, the feminist critique against freedom of
expression is fourfold. Firstly, the epistemological critique
recognizes the importance of truth in a free speech theory.
But it redefines the truth doctrine to reflect the socially
constructed, value based and fundamentally perspectival
nature of human experiences. Secondly, the equality critique
holds that free speech is reduced to a shadow of itself when
it neglects the social realities of those who use speech to
their advantage. A more egalitarian approach to free speech
must recognize the underlying inequalities and then make
provision for their eradication. Thirdly, the autonomy
critique demonstrates that individuals are more than bounded,
self-actuated entities. Rather, the self is socially
connected and thus defined by its relationship to others. A
free speech doctrine must thus encompass negative and
positive rights to accommodate the self’s social dimension.
Lastly, the feminist poststructuralist critique examines the
very use of language itself that makes free speech possible.
Deconstruction reveals the liberal discourses that dominate societal discussions. Reconstruction, however, offers the possibility of using language to create a reality which reflects female discourses and personal ways of life.

**Challenges to the Feminist Critique**

Although the feminist epistemological, equality, autonomy and poststructuralist critiques raise important challenges to liberalism's free speech theory, it would be a mistake to treat these critiques as monolithic or immune from challenges themselves both inside and outside feminist scholarship circles.

As for the epistemological critique, feminists like Williams (1994) do not reject the role of reason and rationality per se in the process of knowledge acquisition. Rather, they believe the Cartesian model offers an incomplete explanation because it doesn't properly incorporate the role emotions and value judgments play in defining human truth. Even if truth is redefined, it nonetheless remains vital as a primary justification for free speech. As Williams (1994) herself observes: "...under this new epistemology, truth is still desirable both for individuals and for societies, and is still important enough to justify a fundamental constitutional right" (p. 1572). In other words, the epistemological critique does not displace the liberal view of free speech. Rather, it redefines truth in more inclusive terms yet acknowledges its primacy as a rationale for freedom.
of expression."

With respect to the equality critique, MacKinnon's (1987) views that pornographic expression is used to subjugate women have drawn strong reactions from the feminist and non-feminist camps. MacKinnon (1984) asserts that pornography legitimizes women's subordination at the hands of men:

> With the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the eroticization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. (p. 295)

Hence, MacKinnon goes on to argue that state regulation of pornographic speech is necessary to prevent continuing harms to women."

In juxtaposition, West (1987) postulates that some pornography produced and consumed by women is a liberating experience:

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"Within the confines of her feminist epistemology, Williams argues that both speakers and listeners must commit to "sensitivity, openness and honesty." She offers no evidence, however, to suggest that these values are any less important to liberals, communitarians or members of CLS in the context of free speech.

"MacKinnon and Andrea Dworkin drafted an Indianapolis ordinance documenting pornographic harms and allowing victims of pornography to bring an action on the basis of discrimination. The court, however, struck down the ordinance as censorship of ideas. (See American Booksellers Association v. Hudnut (1986)).
First, according to women who produce pornography, good pornography aims to transform sexual preferences — not satiate them — by producing novel sexual images. . . . Second, according to women who enjoy pornography, the validation of pleasure, desire, and sexuality found in some pornography is not an attack on "virtue." Rather, it is a healthy attack on a stifling and oppressive societal denial of female sexuality. The attack on family and marriage in some pornography is liberating, and something to celebrate, rather than something to condemn. (pp. 691-692)

West would thus perceive state intrusion into the field of pornography as an unjustified violation of freedom of expression. These diametrically opposed positions demonstrate the extent of the conceptual debate among feminists on the issue of free speech and pornography.

Outside the feminist paradigm, Ronald Dworkin (1993) has also challenged MacKinnon's (1992) assertions about the need to censor pornographic speech in the name of equality. MacKinnon (1992) favours a ban on pornography because it "silences" women by making it more difficult for them to speak and less likely that others will understand what they say. According to MacKinnon (1992):

Who listens to a woman with a penis in her mouth? . . . Anyone who cannot walk down the street or even lie down in her own bed without keeping her eyes cast down and her body clenched against assault is unlikely to have much to say about the issues of the day . . . . Any system of freedom of expression that does not address a problem where the free speech of men silences the free speech of women . . . . is not serious about securing freedom of expression. (pp. 483-484)

Yet, Dworkin (1993) suggests that citing the First Amendment as a reason for banning rather than protecting pornography is founded on an unacceptable proposition: "that the right to
free speech includes a right to circumstances that encourage one to speak and a right that others grasp and respect what one means to say" (p. 2).

Dworkin further argues that MacKinnon’s call for a ban on pornography as a means of serving a general egalitarian purpose would have devastating consequences for free speech. He contends that the government would have to forbid expression that might reasonably offend a disadvantaged group. Examples he cites include performances of the Merchant of Venice, films about professional women who neglect their children and parodies of homosexuals in nightclub routines. For these reasons, Dworkin would choose liberty over equality.

So if we must make the choice between liberty and equality that MacKinnon envisages - if the two constitutional values are really on a collision course - we should have to choose liberty because the alternative would be the despotism of thought-police. (pp. 3-4)

Yet Dworkin (1993) refuses to accept MacKinnon’s claim that in the context of pornography an inevitable collision between equality and liberty must occur. He maintains that the First Amendment is fundamentally egalitarian in nature.

From a political perspective, Dworkin states:

... the First Amendment contributes a great deal to political equality: it insists that just as no one may be excluded from the vote because his opinions are despicable, so no one may be denied the right to speak or write or broadcast because what he will say is too offensive to be heard. ... equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections. Equality demands that everyone’s opinion be given a
chance for influence, not that anyone’s opinion will triumph or even be represented in what government eventually does. (p. 4)

In terms of respecting the moral integrity of each person, Dworkin notes:

Exactly because the moral environment in which we all live is in good part created by others, however, the question of who shall have the power to help shape that environment, and how, is of fundamental importance, though it is often neglected in political theory. Only one answer is consistent with the ideals of political equality: that no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust those who have the power to shut him up or lock him up. (p. 4)

Viewing the First Amendment as committed to egalitarian ideals, Dworkin thereby rejects MacKinnon’s contention that "speech will be defined so that men can have their pornography." He suggests that this view is premised on an inadequate and conventional explanation, deriving from J.S. Mill, that pornography merits protection so that truth may emerge:

What is actually at stake in the argument about pornography, however, is not society’s chance to discover truth, but its commitment to the very ideal of equality that MacKinnon thinks underrated in the American community. Liberals defend pornography, though most of them despise it, in order to defend a conception of the First Amendment that includes, as at least one of its purposes, protecting equality in the processes through which the moral as well as the political environment is formed. First Amendment liberty is not equality’s enemy, but the other side of equality’s coin. (p. 5)

For Dworkin (1993), a collision between liberty and equality is replaced with a reconciliation between two important values.
Concerning the autonomy critique, the feminist position is far from united. Radical feminists like Catherine MacKinnon and Andrea Dworkin oppose vehemently Robin West's view of women as "essentially connected." As West (1988) acknowledges: "For radical feminists, that same potential for connection . . . is the source of women's debasement, powerlessness, subjugation, and misery" (p. 29). Even Jennifer Nedelsky's (1989) work on "relational autonomy" recognizes the importance of protecting the uniqueness of each individual: "The autonomy I am talking about does remain an individual value, a value that takes its meaning from the recognition of (and respect for) the inherent individuality of each person" (p. 35).

The autonomy critique also fails to account for growing awareness among many liberals that the conception of the self as a purely atomistic and decontextualized subject is no longer adequate. As expressed by liberal philosopher Joel Feinberg (1988): " . . . liberals should begin by acknowledging the bedrock importance of community to human nature and well-being" (p. 39). Thus, the portrayal of the self as contextually anchored in a community of relationships is important to many liberal thinkers. Feminists like Quistgaard (1993) criticize liberalism's preoccupation with autonomy as accommodating primarily a negative right (i.e. freedom from interference). Nonetheless, Quistgaard offers no viable alternative to preserve the inherent dignity and
respect for each speaker and listener as a morally responsible and autonomous adult.

Weedon (1987) herself acknowledges that "... most of the theorists who have produced poststructuralist texts are themselves unsympathetic to feminism" (p. 13). As for poststructuralism itself, the focus of textual analysis is on language as a social phenomenon and the site of struggle over meaning which is necessary for political change. Poststructuralism certainly rejects the notion of language as a neutral medium. But is this perspective really at odds with liberalism? Do all liberals really maintain that language is merely a neutral medium to be manipulated at will? Do liberals deny the power of language to convince, construct social reality and differentiate? For Ronald Dworkin, legal propositions are fundamentally interpretive, argumentative, controversial and highly debatable. Thus, discourse is to be shaped and moulded by the strength of the arguments advanced.

For Quistgaard (1993), "... the maintenance of freedom of expression doctrine can be explained by the social power of liberalism in legal and political discourse" (p. 150). But why is this necessarily true? Why can't the success of liberalism in legal and political discourse be explained simply by its conceptual power and the force of its argument? If people choose to embrace liberalism's discourse, perhaps many have made a conscious effort to do so after considering the alternative discourses. Even if current
discourse is to be purged of its liberal bias, as feminist poststructuralists like Quistgaard propose, with what shall we replace it? What criteria shall serve to choose its successor? Regrettably, Quistgaard offers no solutions to these basic queries."

In essence, feminist epistemological, equality, autonomy and poststructuralist positions are themselves subject to critiques from inside and outside the feminist paradigm. Nonetheless, each position has enhanced the quality of the debate feminists have made, and continue to make, to our overall understanding of the nature and importance of a healthy free speech theory.

The Critical Legal Studies Ideology

A second wave of attack against legal liberalism has come from the left, in particular from a movement referred to as "Critical Legal Studies" (subsequently referred to as CLS). Its ideas have generated much polemic due principally

"Quistgaard (supra, pp.73-74) suggests that a free speech theory informed by feminist poststructuralism will encourage a wider collection of individual discourses and enhance diversity and pluralism by accepting the cultural and ideological practices of society's members. Yet, she offers no convincing evidence to suggest that liberals are opposed to these goals.

"In a passage from his book, The tempting of America, Robert Bork (1990) states:
Harvard law school is . . . a stronghold of CLS, a nihilistic neo-marxist movement that views all law as oppressive and political. It is nihilistic because its members typically demand the destruction of current doctrine and hierarchies as illegitimate, but they acknowledge that they have no notion of what is to replace this society. To give the reader some flavor of
to the challenges CLS has made to some of the most
fundamental tenets of contemporary liberal thought. In
particular, CLS contends that the rule of law\(^2\) is a myth.

According to Altman, the CLS assault on the rule of law
is threefold. (pp. 13-16) Firstly, liberals allege that legal
reasoning is sharply distinguishable from moral and political
choices. Proponents of CLS maintain that this "law-politics"
distinction is simply untenable. Karl Klare (1982) puts the
CLS position concisely: "This [liberal] claim about legal
reasoning - that it is autonomous from political and ethical
choice - is a falsehood" (p. 347). CLS claims that legal
reasoning is reduced to deciding which party has the best
moral or political argument.

Secondly, the rule of law assumes that there is a

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the mood of these folks, I once attended a lecture by
one of its leading Harvard proponents, which he
concluded by saying: "The first year of law school is
designed to destroy the minds of the students. It does
that by asking them to reconcile the irreconcilable and
to justify an obviously unjust society." He immediately
left, saying he had a train to catch and could not stay
to answer questions. (p. 207)

\(^2\)In Re Manitoba Language Rights Reference (1985), the
Supreme Court of Canada offers the following definition of
the rule of law:
The Rule of Law, a fundamental principle of our
Constitution, must mean at least two things. First, that
the law is supreme over officials of the government as
well as private individuals, and thereby preclusive of
the influence of arbitrary power. . . . Second, the Rule
of Law requires the creation and maintenance of an
actual order of positive laws which preserves and
embodies the more general principle of normative order.
Law and order are indispensable elements of civilized
life. (p. 350)
bedrock of identifiable, underlying principles or norms which provide a framework of ultimate coherence for the judicial system. Members of CLS argue, however, that legal reasoning is riddled with openness, indeterminacy and contradiction. In the context of rights discourse, Duncan Kennedy (1982) declares: "Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate plausible rights justifications for almost any result" (p. 47). For CLS disciples, systemic indeterminacy precludes authoritative rules from dictating a determinate outcome to legal cases.

Closely allied to the first two attacks is the thesis that the rule of law itself serves as an instrument of oppression and domination. In this regard, David Kairys (1982) states:

> The law is a major vehicle for the maintenance of existing social and power relations. . . . The law's perceived legitimacy confers a broader legitimacy on a social system and ideology . . . characterized by domination by a very small, mainly corporatized elite. (p. 5)

Finally, the rule of law affirms that law can and must constrain the exercise of social and political power. CLS followers claim that viewing the law as capable of such constraint amounts to "fetishism." This means regarding a human creation as if it were an independent power capable of controlling those who in fact have created and sustained it. As Altman (1990) states:

> This form of fetishism disempowers human beings; it places them in thrall to forces over which they can and should be the masters. In this CLS view, then, the idea
of the rule of law must be criticized as part of a
general attack on ideas that disempower humans. (p. 16)

In sum, CLS maintains that the law is politics, indeterminate
and unjustifiably reified.

CLS Critique of Freedom of Expression

In the domain of free speech, the CLS movement is
predictably sceptical about the underlying liberal values.
The scepticism is rooted in two grounds; one conceptual, the
other political.

Conceptual critique. Firstly, critics like David Kairys
(1982) maintain that the right to free speech is more open
than most legal standards to the subjective notions and whims
of judges. In the context of the "clear-and-present" danger
test³, Kairys notes:

Since the scope of the dangers referred to has never
been meaningfully defined (or even limited to unlawful
activities), the clear-and-present-danger formulation
amounts to the notion that speech loses its protection
when it becomes persuasive or effective concerning
something a judge views as dangerous. (p. 165)

Kairys also believes that the elastic "public"/"private"
dichotomy - a quintessential liberal construct - emasculates
much free speech theory. In the private realm, essentially
economic, a host of critical issues associated with effective
participation and democracy go unaddressed:

In the public sphere, which includes selection of
government officials and political expression, basic
concepts of freedom, democracy, and equality are
applicable. However, in the private sphere, which

³This is one of the primary American judicial standards
used to restrict speech.
encompasses almost all economic activity, we allow no democracy or equality and only the freedom to buy and sell. . . . The ideology of free speech, basic to this public/private split, is used to validate and legitimize existing social and power relations and to mask a lack of real participation and democracy. Whatever the state of our economy and people, this ideology tells us that we are free and our society is democratic - and therefore better than other societies that place more emphasis, for example, on feeding the hungry, healing the sick, caring for the aged, and educating the illiterate, or on improving the quality of the lives of its working people - because we can all buy and sell, we can vote, and we have free speech. (pp. 163-164)

Mark Tushnet (1984) expresses another concern related to a rights discourse which focuses on reification. He maintains that this precludes conceptualizing speech issues in a political context informed by people’s own experiences:

Having thought of myself as exercising a right to free speech, I will find myself asking whether the Nazis in Skokie or pornographers also have the rights to free speech. Of course one can resist this pressure by defining the right to free speech in one way rather than another. Or one can concede the need to protect the "rights" of Nazis and pornographers as a prophylactic in a society not in general devoted to advancing the cause of the party of humanity. But the problem arises because of the reification of rights in the first instance. If we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues on the appropriate level. (pp. 1383-1384)

For Tushnet, the theory behind the language of rights thus introduces artificial and unjustifiable constraints on a socially impoverished free speech principle.

Political critique. CLS attacks on freedom of expression are not simply confined to the purely conceptual level. A second line of criticism is directed to the actual
practice or politics of free expression. In essence, CLS members claim that free speech practice benefits primarily the privileged and powerful. As Tushnet (1984) declares:

The first amendment has replaced the due process clause as the primary guarantor of the privileged. Indeed, it protects the privileged more perniciously than the due process clause ever did. . . . the first amendment stands as a general obstruction to all progressive legislative efforts. (p. 1387)*

From an economic perspective, Kairys (1982) points to the concentration of resources and wealth in the hands of the political elites. These people, he argues, shut out the poor and politically vulnerable by denying them access to the media:

Technological, social and cultural changes have rendered the fruits of the free speech struggle somewhat obsolete. Television, radio, newspapers (increasingly concentrated and limited in number and diversity), and direct mail now constitute the battleground, but in the absence of mass-based demands, the law has allowed no meaningful inroads into these media for people or groups without substantial money or power. Indeed, accompanying the recent rightward political trend, there will be a decrease in popular access to these media and an increased "privatization" of the means of communication, exemplified by the attacks on the already weak "fairness doctrine" and the apparent acceptance of a highly privatized conception of cable television. (p. 166)

This practice of denying access, therefore, seriously undermines the effectiveness of freedom of expression.

If existing free speech doctrine is theoretically

*Tushnet is highly critical of the court's approach to commercial speech cases. Citing Central Hudson Gas & Electric Corp. v. Public Service Commission (1980), as illustrative, he contends that the judiciary routinely obstructs legislative attempts to regulate much advertising which has an important influence on shaping public consciousness.
unsound and unsatisfactory in actual practice, what does CLS propose as an alternative to the status quo? First, there is commitment, at least among some CLS members, to the notion of free speech. As Kairys (1982) describes it, freedom of expression is a "hard-won principle of liberation" (p. 167). Although this may appear to contradict the earlier CLS critique of rights in general, there is recognition that the practice of some type of free speech by the dispossessed and vulnerable has the potential to ameliorate their social and political status.

Second, CLS is distrustful of increasing governmental intervention to redress the power imbalance inherent in current free speech theory. In general terms, Richard Bauman (1988) summarizes the wariness of the state's role as the guarantor of values:

There is an antipathy on this score to paternalist state intervention into the course of life that individuals or small groups choose to follow. This is not a libertarian sentiment, for Critical Legal objections to such a megalithic role for the state have to do with promoting the ideal of democratic group decision, even down to the level of politics within the family. (p. 314)

In specific terms, Eric Engle's (1992) study of the regulatory policy applied by the American Federal Communications Commission (FCC) to the electoral process is relevant. Engle notes, in theory, that the FCC policy serves two purposes: to protect first amendment values and to maintain procedural fairness in the electoral campaign. Engle
argues that in practice, however, the system generally fails because of its adherence to the "status quo":

First, it unconsciously acquiesces in the maintenance of the privileged position of the wealthy; second, it subconsciously works to maintain the two-party system; and third, it consciously helps to maintain the power of incumbent candidates. (p. 39)

In sum, government intrusion into the free speech arena which espouses the status quo is met with great CLS suspicion.

Lastly, proponents of the CLS movement embrace a vision of freedom of expression which is committed to promoting a more egalitarian polity. The politicization of free speech is, ultimately, related to a broader struggle over competing visions of the good life and the just society. Tushnet (1993) thus issues the following call to political mobilization:

Numerical majorities must realize the strength of their numbers and mobilize themselves before they can offset the political power of those with social power. Uncommon as successful mobilizations of this sort may be, they sometimes occur. Recent efforts to regulate campaign finance, sexually explicit material, and hate speech

"Although Engle admits some success with First Amendment protection, he declares:
While the FCC has been better at implementing First Amendment concerns, when presented with a choice of increasing the amount of speech and defending the status quo, the FCC's policy choices inevitably favor the status quo. (p. 7)

"In highlighting the inherently "political nature" of free speech, Kairys (1982) observes:
The primary periods of stringent enforcement and enlargement of speech rights by the courts, the 1930s and the 1960s, correspond to the periods in which popular movements demanded such rights (e.g. labour movement, women's movement, civil rights movement). (p. 141)
fall into this category. (pp. 897-898)"

For Engle (1992), "the only way to institute radical change" (p. 40) to the Federal Communications Commission regulatory policy is by initiative or referendum."

In the Canadian context, a number of scholars have espoused the basic tenets of CLS. Patrick Monahan (1987), for instance, calls into question the process of judicial review under the Charter whereby the Court defines rights and then balances them against considerations of general welfare. As for defining rights, Monahan observes:

The very process of defining the content of the rights protected by the Charter seems inherently political. Many of these rights . . . contain little or no substantive criteria, they resemble blank slates on which the judiciary can scrawl the imagery of their choice. (p. 89)

With respect to the role of the judiciary when it comes to balancing these rights against the general welfare, Monahan opines:

The question under s.1 of the Charter - whether gains in general welfare justify limits on individual rights - appears no different in principle from the question the legislature asks itself when it enacts legislation. Moreover, the concepts of "freedom" and "democracy" referred to in s.1 are themselves indeterminate and fundamentally contested. Rather than offer any

"Tushnet refers to the media as "those with social power."

"Engle defines "initiative" as:

... legislation presented to the voters for approval in a general election. A petition proposing to present the legislation is circulated, and when the minimum signatures are obtained, the issue is presented in an election. When the legislature presents the legislation to the people for approval, it is called a referendum."
meaningful weights and measures for use in the balancing process, they merely invite the Court to devise its own theory of freedom and democracy. (p. 95)

Once again, notions of politics and indeterminacy undergirding the law ring forth.

Allan Hutchinson and Andrew Petter (1988) harshly criticize what they perceive as the "dominant Canadian ethos" underlying the Charter: liberal legalism. In particular, they maintain that liberalism's defence of the public/private dichotomy is untenable." In the context of free speech, the authors claim that when this fundamental freedom collides with private property rights, the latter emerges victorious:

... the right to freedom of expression, in the words of the Federal Court of Appeal, 'is a freedom to express and communicate ideas without restraint... It is not a freedom to use someone else's property to do so.' The implication is obvious: property is the foundation upon which the Charter rights are conferred, protected, and enhanced. The less property one has, the less one can exercise and enjoy one's rights. There is a strong correlation between finance and franchise. In our technological society wealth is a pre-condition of one's being able to speak broadly and effectively. Although anyone can stand on the street corner, only the rich can have direct access to our homes through the costly channels of the media. When the rights of property

"According to Hutchinson and Petter (1988):
The presumption underlying the public/private dichotomy is that existing distributions of wealth and power are a product of individual initiative, not state action. Conveniently overlooked is the fact that such distributions and the accumulation of wealth generally depend for their very existence and legitimacy upon a panoply of state-supported laws and institutions. Moreover, it is not just that existing distributions of wealth and power are removed from Charter scrutiny; such distributions form the base line, or 'natural foundation,' upon which Charter rights are grounded and against which the constitutionality of state action is to be judged. (p. 95)
owners and speakers collides, speakers stand dumb before the claims of property. (p. 96)

In a separate piece arguing against constitutionalizing commercial speech, Hutchinson (1990) criticizes liberalism for what he views as its portrayal of language as a neutral medium available to all and standing outside the ideas and world it represents. For Hutchinson, language is a form of social action that makes the reconstruction of social reality possible.

Language is not a transparency through which the world is observed nor a catalogue of labels to be attached to the appropriate contents of the world. There is no form of pure communication that merely represents instead of creating. The world is within the language and the language within the world. Language is a social medium. (p. 4)

Characterizing the exercise of language as engaging in the "most profound of political acts", Hutchinson offers his alternative to a liberal approach to free speech - the establishment of a dialogic community.

. . . the need to understand dialogue - the discursive interactions between individuals - as the crucible of social action in which individuals mutually constitute and reconstitute themselves and others is paramount. By accepting that dialogue is both the producer and the product of interacting individuals, it becomes apparent that the challenge is twofold: to ensure that the quality of the dialogue is sufficiently open and fluid so that people might confront each other in the routine practices of daily life as equal participants and, also, that it is sufficiently shared and certain to protect people from its unscrupulous manipulation. It is only by establishing such conditions of face-to-face intimacy and engaging in such dialogic encounters that we will reach and share satisfactory knowledge and truths. (p. 10)

For Hutchinson, this democratic conversation requires us to
abandon the public-private distinction. Just as threats to this democratic ideal may come from the government (and require correction from a strong, private media), at other times the threats may come from the media (and require regulation from a responsive government).

Challenges to the CLS Critique

Although the CLS critique has garnered support among some scholars, it has spawned tremendous controversy. Detractors argue vehemently that while deconstruction exposes possibilities and critique against oppression is liberating, most CLS efforts unfortunately stop there. Societal transformation through mobilization and the politicization of free speech sounds possible, but how specifically do we achieve it? For the most part, the CLS answer has been a disappointing and an anaemic one. Richard Bauman (1988) articulates the case against CLS in these terms:

The CLS attempt to address the shortcomings of liberal institutions has not led to planning a campaign for collective mobilization. Instead, we are left with only adjurations that, owing to the artifactual nature of society and the plasticity of political arrangements, we are free to reshape our existing institutions into whatever we as a group determine are the forms most conducive to our flourishing as independent, yet mutually vulnerable, persons. Such a confinement of the scope of politics to describing the institutional outline that will empower and promote such creative activities leaves large political issues untouched. (p. 353)

Even CLS advocate Mark Tushnet (1988) echoes this sentiment when he states: "Critique is all there is" (p. 318).

In spite of these shortcomings, the CLS movement has
made an important contribution to the free speech theory at both the conceptual and practical/political levels. Its theoretical challenges to mainstream liberalism have forced scholars to revisit the underlying justifications which inform freedom of expression. Free speech practice which reflects social and political inequality has forced academics to confront the flaws inherent in a neutral free speech principle. The ongoing debate among CLS proponents and other members of the academy about the nature and importance of freedom of expression can only further illuminate and expand our understanding of this fundamental freedom. Ultimately, even admitting that there is some truth in the CLS assertion that critique is all we have, a commitment to a vibrant free speech principle is essential to guaranteeing this eternal critique.

The Communitarian Ideology

A third assault on liberalism has come from communitarianism. Wendy Brown-Scott (1994) offers the following definition of this political ideology:

Communitarianism is an interdisciplinary, postmodern rejection of liberalism. Its central doctrinal feature locates the essence of the human being in her relationship to others and to her community. "Community" is the primary value in communitarian theory. Because every individual participates in several communities (political, social, familial, racial, ethnic, gender), we each develop a multiple consciousness influenced by the values of those multiple communities, and we are empowered to act based on respective shares of societal power. (pp. 1218-1219)

In American political theory, "civic republicanism" is a
prevalent and current manifestation of communitarianism. According to Charles Masner (1992), the two key components of this approach are: 1) the need for a vision of the good and a community of do-gooders;" and 2) the promotion of a "dialogic community" as the best way to create a vision of the good and a community of do-gooders." (p. 484) Masner also posits that this ongoing dialogue is constructed and maintained at two levels: the constitutional level by the reasoning of the U.S. Supreme Court and the democratic level in the everyday lives of citizens." (p. 484)

"As Michael Perry (1988) states: "[P]olitical theory that fails to address questions of human good - questions of how human beings, individually and collectively, should live their lives - is finally vacuous and irrelevant" (p. 182).

"The ideal dialogic community requires what Jurgen Habermas (1975) calls an "ideal speech situation." As described by Frank Michelman (1988), this is: "[A] setting in which everyone, free of domination and false consciousness, speaks out, listens, gives and is given reasons to and by everyone else" (p. 1526).

"Masner further contends that indeterminacy, deliberation and participation are the strongest rationales for defending this particular vision of the good: The indeterminacy of our constitutional language . . . , the language of the dialogue in our Dialogic Community, makes it possible for us, and those who live after us, to deconstruct and reconstruct together, through deliberation, visions of the good - visions which are most fundamentally visions of Freedom. [Furthermore] participation in this community, to the extent Habermas' requirements are met, is inclusive, not exclusive; it is fostered, not coerced. This meets the traditional liberal’s objection to the tyranny of coerced community. The vision of the good, of Freedom, of a Dialogic Community, is deconstructed and reconstructed democratically - whether by citizens of Supreme Court Justices - not imposed authoritatively. This could not be the case if the "stuff" of this
To understand the communitarian vision of free speech, one must first appreciate the communitarian approach to freedom in general. This is best understood when compared to liberalism. Liberal and communitarian conceptions of freedom are at loggerheads over the importance of the "right" and the "good." Liberal theorists assign priority to the right over the good. As Mark Crawford (1990) declares:

This typically entails a vision of the pre-constituted self who is free to choose his or her own ends unencumbered by any particular forms of life or conceptions of the good. . . . its individualism causes liberals to downplay the moral significance of social interaction in forming identity or in developing notions of "right" and "good." It also causes them to reject the suggestion that differences between communities should be taken into consideration in defining the scope of rights . . . . (p. 4)

Communitarians, however, do not accept this subservient view of the good. They criticize contemporary liberalism for its indifference to the notion of what a good life is. Communitarian philosopher, Michael Sandel (1982), charges that liberalism's infatuation with individual rights is linked inextricably to a selfish, deontological ethic."

"According to Sandel:
On a deontological ethic, where the right is prior to the good, this means that what separates us is in some important sense prior to what connects us - epistemologically prior as well as morally prior. We are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity. We are barren subjects of possession first, and then we choose the ends we would possess; hence the priority of the self over its ends. (p. 133)
Sandel attacks this ethic for failing to recognize that success in politics, above all else, is a function of the common good:

Liberalism teaches respect for the distance of self and ends, and when this distance is lost, we are submerged in a circumstance that ceases to be ours. But by seeking to secure this distance too completely, liberalism undermines its own insight. By putting the self beyond the reach of politics, it makes human agency an article of faith rather than an object of continuing attention and concern, a premise of politics rather than its precarious achievement. This misses the pathos of politics and also its most inspiring possibilities. It overlooks the danger that when politics goes badly, not only disappointments but also dislocations are likely to result. And it forgets the possibility that when politics goes well, we can know a good in common that we cannot know alone. (p. 183)

Closely related to the centrality of the good is the role of community in constituting the self. Communitarians are staunchly unified in their opposition to what they view as liberalism’s atomistic and disconnected portrayal of the individual. They maintain that community plays a crucial part in the constitution of self. As Sandel (1982) states:

... to be capable of a more thoroughgoing reflection, we cannot be wholly unencumbered subjects of possession, individuated in advance and given prior to our ends, but must be subjects constituted in part by our central aspirations and attachments, always open, indeed vulnerable, to growth and transformation in the light of revised self-understandings. And in so far as our constitutive self-understandings comprehend a wider subject than the individual alone, whether a family or tribe or city or class or nation or people, to this extent they define a community in the constitutive

Sandel traces the origins of the deontological self to Immanuel Kant (1793) who views the self as a "transcendental subject" and to John Rawls (1971) who portrays it as an "unencumbered subject of possession."
sense. (p. 172)"

In sum, the primacy of the good and the constituency of the self through communal definition are integral to a communitarian philosophy.

Communitarian Critique of Freedom of Expression

The communitarian critique of liberalism’s defence of free speech is twofold. First, it challenges the supremacy liberals accord the "right" over the "good." Second, communitarians do not accept the abstract and universal character liberals believe free speech embodies.

Morality of right critique. In the context of freedom of expression, Sandel (1984) maintains that a defence of free speech based on the "right" is very different from one resting on the "good:"

"It is one thing to defend the right to free speech so that people may be free to form their own opinions and choose their own ends but something else to support it on the grounds that a life of political discussion may be worthier than a life unconcerned with public affairs, or on the grounds that free speech will increase the general welfare. Only the first defence is available on the Kantian view, resting as it does on the ideal of a neutral framework. (p. 4)

Communitarians thus reject liberalism’s defence of a free speech principle which simply defends individuals’ unabashed

"Like Sandel, Alasdair MacIntyre (1982) in After virtue (pp. 203-207) and Charles Taylor (1982) in "Sources of the self" (pp. 35-40) are both well-known communitarian philosophers who advocate the virtues of individual connectedness with community as opposed to autonomous individuality. In Three rival versions of moral inquiry, MacIntyre (1990) also argues that rational enquiry demands membership in a specific kind of moral community."
selection of their own neutral objectives. Rather, communitarians view free expression in teleological terms. It serves primarily as a means of promoting public discussion and hence the general welfare.

Cass Sunstein (1993), in his work Democracy and the problem of free speech, is a recent and strong proponent of this approach. He espouses "idealized civic republicanism" as the fundamental basis of his free speech theory. Sunstein thereby maintains that freedom of expression must protect, first and foremost, political speech in the American republican tradition.

... the free speech principle should be understood to be centered above all on political thought. In this way the free speech principle should be seen through the lens of democracy. (p. 252)

Ideally, free speech in a democratic and deliberative setting can produce outcomes better reflecting the public will and also encourage higher levels of public participation in the process itself. As Sunstein states:

A system of free expression should also increase the likelihood that political outcomes will be responsive to the will of the public. . . . It seems clear that a well-functioning deliberative process will increase the likelihood that political outcomes will respond to people's desires and aspirations at the same time that it will help shape them for the better. In these ways as well, it should improve political outcomes. Most ambitiously, we might hope that a well-functioning system of free expression will ultimately encourage a

"Sunstein offers this definition: "Idealized civic republicanism is an inclusive political community of equals striving for a reasoned understanding of the common good in ways that may alter their individual perceptions of selfish need" (p. xvi).
degree of public virtue and produce high levels of participation and genuine deliberation. The achievement of these goals would reinforce the connection between deliberative democracy and better political outcomes . . . (p. 244)

Given the importance he attaches to political speech, it is not surprising that Sunstein favours categorizing speech in terms of its relative value." The version of the good life that Sunstein ultimately argues for in his free speech theory is a commitment to deliberative democracy.

Abstract/universal critique. Although communitarians embrace a free speech principle that promotes the common good, they allege that it may indeed differ from one community to another. This is in sharp contrast with liberalism and its commitment to a free speech principle that is abstract and universal in its application. As Crawford (1990) indicates:

Communitarian philosophers, as part of their general critique of liberalism's abstractness, universalism and individualism, have argued that the scope of the freedom ought to vary between societies . . . because moral standards, including those pertaining to liberty, are most meaningful when rooted in community traditions and notions of the common good which "situate" the self being protected from interference. (p. 4)

In the particular context of pornography, Sandel (1984) offers a similar explanation:

"Sunstein's categories of speech include: "high value" (i.e. political speech), "low value" (e.g. commercial speech) and "no value" (e.g. racial epithets). He argues that the first amendment should thus accord distinctive protection to political speech and allow the government to meet a lower threshold with respect to the regulation of non-political speech."
Communitarians would be more likely than liberals to allow a town to ban pornographic bookstores, on the grounds that pornography offends its way of life and the values that sustain it. (p. 6)

The preservation of community values therefore figures prominently in a communitarian analysis of free speech. In other words, limits on free speech may be necessary to protect overriding values that are community specific.

But, this approach has caused consternation among some communitarians who are sensitive to the difficulty of justifying differences in the scope of free expression according to the context. Referring to this conundrum as the "inter-communitarian" problem, Crawford (1990) maintains that Charles Taylor's (1971) notion of "common meaning" provided a satisfactory resolution of the issue. For Crawford, this criterion provides a defensible limitation of freedom of expression that establishes a much higher threshold than simply community standards or common morality:

"Taylor (1971) defines "common meanings" as follows: [A]lmost everyone in our society may share a susceptibility to a certain kind of feminine beauty, but this may not be a common meaning. It may be known to no one, except perhaps market researchers, who play on it in their advertisements. But the survival of a national identity as francophones is a common meaning of Québécois; for it is not just shared, and not just known to be shared, but its being a common aspiration is one of the common reference points to all debate, communication, and all public life in society. . . . Common meanings are the basis of community. Intersubjective meaning gives people a common language to talk about social reality and a common understanding of certain norms, but only with common meanings does this common reference world contain significant actions, celebrations and feelings. (p. 30)"
Common meanings are distinguishable from both government edicts and whims of transient majorities, and thus help to maintain the separation of civil society and political institutions. Like wealth and power, common meanings can also increase the worth of liberty and make its exercise more meaningful to both speakers and listeners. (p. 17)

As Crawford acknowledges, this raises additional questions. Are all common meanings capable of clear identification? Are they even fundamental to the character of a political community? More specifically, what kind of speech are they to be protected against? In response to the last question, Crawford states:

Common meanings are not to be insulated from the very processes needed to constitute them as both genuine and consistent with morality. They must be open to revision. In my argument, free speech is a condition of morality itself. . . . It may be, however, that the most fundamental characteristic of a particular community ought to be defended against those forms of "speech" that are harder to distinguish from action more generally. We know that a shift of emphasis towards looking at speech as praxis - transformational practical action - invites consideration of such factors as the importance of different kinds of speech to the constitution of community, the appeal speech makes to the agency of listeners, and the power that both speakers and listeners have to influence each other and the development of common meanings. All of these factors can be expected to vary between communities. (pp. 17-18)

Crawford's theoretical approach to free speech is interesting but it still leaves many issues unresolved. When he anchors his theory in practice the equivocation deepens. Referring to free speech and pornography, he declares:

On the one hand, genuine community requires that individuals be free to reflect on the meaning and moral value of erotica. On the other hand, in some communities it may be very clear that pornography threatens the very point of the community . . . (p. 20)
For Crawford, the resolution of the inter-communitarian problem ultimately seems to depend upon a host of factors, including the development of common meanings. Ascertaining the nature and weight of these factors will allow communitarians to delineate the appropriate scope of freedom of expression among varying communities."

In sum, the communitarian challenge to contemporary liberalism's version of free speech rests on the "morality of good" as opposed to the "morality of right." As Sandel (1982) declares:

Where the morality of right corresponds to the bonds of self and speaks to that which distinguishes us, the morality of good corresponds to the unity of persons and speaks to that which connects us. (p. 133)

From this, two important observations arise. Firstly, freedom of expression exists primarily to serve the communal good rather than purely isolated, individual rights. Thus free expression is instrumental in advancing political discussion and ameliorating the general welfare. Civic republicanism is a good example of a current political theory which embraces this view of free speech. Secondly, communitarians reject the universal and abstract nature of liberalism's free speech

"Crawford's general ambivalence in reconciling individual rights with communitarianism is reflected in his own words:
Recognizing community and social interaction to be logically and sociologically prior to rights and morals seems like an ominously slippery slope, even when it is stressed that such an admittedly conventional definition of rights and morals must be the product of the voluntary association of individuals and not government. (p. 21)
theory. Instead, free expression may vary among communities where it becomes necessary to preserve specific communal values.

Challenges to the Communitarian Critique

In spite of its support among a number of scholars, the communitarian approach to freedom of expression has encountered significant criticism. The two most significant challenges concern its doctrinal capacity to support a free speech principle and the lack of critical space it engenders. Firstly, as Schauer (1989b) notes, sensitivity to contextual particularities undermines the very notion of an abstract principle of free speech:

Doctrinal and theoretical analyses of freedom of speech rely especially heavily on techniques of abstraction. . . . Indeed, the very idea of free speech, as an independent principle of law and political theory, necessitates some degree of abstraction. A principle of free speech, according to which the mode of analysis shifts when an occurrence can be categorized as "speech", is incompatible with a principle of maximally contextual evaluation of all aspects of situations in which speech is present. (pp. 397-398)

Theoretical difficulties aside, a second attack on communitarianism arises. Even if the communitarianism assault on liberalism's impoverished conception of the self is well-grounded, this does not ensure the protection of a free speech principle within and among different communities. In fact, opponents claim that the denigration of individual rights jeopardizes the need for critical distance from existing social practices that liberalism defends. As a result, this approach must inexorably tilt towards some form
of totalitarianism. As Carlos Nino (1989) states: "Each one of the distinguishing marks of communitarianism may generate, when it is developed in all its implications, a different aspect of a totalitarian vision of society" (p. 41). In terms of the pivotal "right"/"good" dichotomy, Nino offers the following warning:

The primacy of the good over individual rights allows for the justification of perfectionist policies which intend to impose ideals of excellence or personal virtue, even when individuals do not perceive them as such and thus do not subscribe to them. In effect, if rights are only the means to satisfy a certain conception of the good, why not prescind them when that conception may be more efficaciously materialized through other routes? (pp. 41-42)"

"Some feminists have been equally harsh in their attacks on communitarianism. Donna Greschner (1989), for example, argues that communitarianism is unacceptable to feminists for three main reasons. Firstly, the animus behind much communitarian doctrine is patriarchal nostalgia. Referring to communitarian philosopher Alasdair MacIntyre (1984) and his work After virtue, Greschner states:

He laments modernity and longs for a golden age of morality and traditions, the glory that was classical Athens and its heroic predecessors. . . . Nostalgia is not the impulse that animates feminism. . . . Feminism begins not with a memory of a better time but with a vision. (pp. 128-129)

Secondly, the language of communitarians is inherently anti-feminist. Once again making reference to MacIntyre, Greschner notes that his heroic society promotes human "virtue." For women, this term is unacceptable:

First, the word itself is derived from the Latin root, vir, meaning male. . . . Second, in one of its most common applications to women, virtue has meant virginity and chastity, a meaning it does not have in reference to men . . . . The word virtue reminds us of the double standard of sexual behaviour so often imposed upon women by men. (pp. 129-130)

Lastly, communitarians are not concerned with feminist issues. According to Greschner: "The leading proponents of communitarianism - MacIntyre, Sandel - are . . . ominously silent about the past and present subordination of women" (p. 131).
In the domain of free speech, how does communitarianism protect individual dignity and integrity from the conformist weight of the community? Does the morality of good simply render the free speech principle illusory and subject to majoritarian whims?

Notwithstanding the limitations associated with communitarianism, the challenges it has produced to liberalism’s free speech principle cannot be easily discarded. If indeed moral selves are in large measure socially constituted and contextual differences among communities are relevant, a theory of free speech must address these foundational insights. If the morality of good and the morality of right are but two sides of the same coin, a vigorous free speech theory must account for this special, dual character. Ultimately, even if communitarianism is found wanting for its lack of critical space, the questions it has raised have forced liberals to re-examine their underlying assumptions about freedom of expression. In the end, this can only benefit a healthy principle of free speech.

Summary

In this section of the literature review, three alternative approaches to contemporary liberalism’s theory of freedom of expression have been studied: feminism, CLS and communitarianism. The researcher has presented a descriptive and critical analysis of each world view. For feminists, epistemological, equality, autonomy and poststructuralist
critiques have formed the basis of their attack on liberalism. CLS challenges to free speech have operated at both the conceptual and practical/political levels. With respect to communitarians, the centrality of the good and the social construction of the self have formed the core of their assault. Each perspective has questioned the very foundations on which liberalism stands. Each perspective has made an invaluable contribution to the free speech debate for enlarging, reshaping and indeed changing the frame of reference for theoretical and analytical purposes.

It is important to remember, however, that these different approaches to free expression are not immune to criticisms themselves. Feminists have been questioned for their inconsistency and lack of uniformity. Members of CLS have faced the wrath of opponents for failing to construct a viable alternative to liberalism's free speech theory. Lastly, communitarians meet with much suspicion because of their apparent inability to provide for a personal, critical space. Regardless of these imperfections, the free speech debate is far from moribund. Quite the opposite is true. The variety and intensity of the attacks on liberalism are testament to the incessant throbbing of this fundamental freedom.

Conclusion

Although a number of consequentialist and non-
consequentialist justifications are advanced to defend a free speech principle, truth, democracy and autonomy are its most important rationales. Secondary rationales which must also be considered encompass the social stability, tolerance and self-realization rationales. In the final analysis, freedom of expression is a predominantly liberal value. The reasons for this are varied and complex. They are as much political, and thereby historical, social, cultural and economic, as they are a matter of logic or moral necessity. As Mark Graber (1991) states: "... philosophical and jurisprudential justifications of expressive rights are not timeless verities but reflections of the unique political and legal climate of their era" (p. 216).

Indeed, freedom of expression is not a static value. In recent years, feminism, CLS and communitarianism have appeared as alternative perspectives on free speech. Collectively, these new ideologies have made an important contribution to the free speech debate by requiring us to revisit and rethink the underlying rationales offered in support of this fundamental freedom. In particular, the feminist equality critique and the CLS political equality critique provide the strongest evidence of the existing and unresolved tension between the liberal and non-liberal positions on free speech. From the feminist perspective, MacKinnon (1987) has argued that pornography leads men to commit acts of violence against women. She has also
maintained that pornographic speech promotes sexual inequality because it degrades women and frightens them into silence. Even if pornography does not cause men to treat women violently, does it still not contribute to a misogynist culture that is harmful to women's interests? Faced with male pornographic expression that tends to reduce women to the subordinate and undignified role of provider of sexual services, how can society still treat women with dignity and as equals? The liberal defence of pornography is still grappling with this seemingly intractable dilemma.

In the CLS context, defenders have claimed that free speech principally protects the rights of the wealthy and political elites. In the media context, for instance, Kairys (1982) reminds us that "an increased 'privatization' of the means of communication" has serious ramifications for free speech and political equality. If freedom of expression is to have any value, must it not include some right to the opportunity to speak? Yet, how can the politically marginalized or even the average citizen compete with corporate giants like CBS? In a society where only the rich enjoy access to newspapers, televisions or other public media, is it possible to sustain a genuine right to free speech? Once again, liberalism is struggling to come to grips with this fundamental access issue which remains to be addressed.

Alternative ideological forces have certainly challenged
the liberal paradigmatic vision of free expression. Indeed, liberals are still wrestling with critical values like equality and access which must be accommodated in a viable free speech framework. In spite of this evolving tension, the competing positions have not displaced liberalism as the primary theoretical anchor for the free speech ship. Whether free speech remains an essentially liberal value or not is another question. The answer would appear to depend upon the resolve of its defenders, the incisiveness of its critics and, ultimately, the passage of time.
CHAPTER 3

THE METHODOLOGY

Introduction

The purpose of the study was to ascertain what constitutes legitimate restrictions, from the employers' perspective, on the free speech rights of public school teachers in Canada under both employment law and constitutional law. Toward to this end, the researcher conducted a documentary analysis of educational and legal materials. With respect to the educational values teachers are required to embrace, territorial and provincial legislation governing education and case law require teachers to act as employees, educators, role models, and professionals. Apart from the specific statutory sections and the adjudicators' decisions, relevant scholarly literature which expounds on these employment obligations was collected, analyzed and incorporated into the dissertation to inform the analysis.

From a legal standpoint, the researcher employed a methodological framework which embraces legal research, traditional legal analysis and critical analysis. This approach allowed the researcher to advance arguments and draw
some conclusions about the nature and scope of Canadian 
public school teachers' employment and constitutional rights 
to freedom of expression as informed by their concomitant 
employment duties to act as an employees generally, and to 
act as educators, role models, and professionals more 
specifically.

Legal research involves identifying primary and 
secondary materials. Traditional legal analysis is the 
process of determining the current state of the law. Critical 
analysis is an argumentative and normative interpretation of 
what the law should be or should be seen to be.

Legal Research

Legal research draws from two key sources: "primary" 
materials and "secondary" materials. According to Yegis and 
Christie (1994), primary materials: ". . . are those 
materials which state the law and which are formulated by 
those constitutionally vested with authority to declare law" 
(p. xxiii). As for secondary materials, the same authors 
note: "Secondary materials are preliminary research tools 
that assist in finding, evaluating and understanding primary 
materials" (p. xxiii).

Primary Materials

In this study, the primary materials of most relevance 
were The Canadian Charter of Rights and Freedoms, provincial 
statutes and regulations governing education and the 
decisions of adjudicators relating to free speech and public
school teachers.

**Identification of relevant case law.** All reported and unreported adjudicative decisions related to the free speech rights of Canadian public school teachers under employment law and since the inception of the Charter in 1982 to the present were identified and collected. Since the Charter is part of the Canadian Constitution, it applies to all levels of government in Canada. As explained in Chapter 5, the Charter seems to apply to teachers who are employees of the government. Thus, Charter decisions involving teachers in any province or any territory were canvassed. Relevant rulings by the Superior Courts or the Courts of Appeal of any province or territory along with rulings of the Supreme Court of Canada were considered. Where appropriate and for purposes of comparison, relevant American decisions at the District Court, Court of Appeals, and Supreme Court levels were also canvassed.

The relevant cases were identified and collected by using two main sources:

i) computerized legal databases (e.g. Quicklaw);

and

ii) the case law digest **Charter of Rights Decision Digest**.

Other bibliographical tools included: legal encyclopedia, statute citators, law reports, indexes, periodicals and textbooks.
Secondary Materials

In this study, the secondary materials of most significance involved the body of scholarly literature written on freedom of speech and public school teachers.

Identification of scholarly literature. The researcher attempted to identify that body of scholarly literature which applies to freedom of expression and which may well have implications for the free speech rights of public school teachers in Canada. This served as the main source of secondary materials for the study. Legal periodicals, textbooks and treatises were the principal bibliographical tools used to discover the relevant body of scholarly literature. These secondary materials not only enhanced the researcher’s understanding and thinking in the area of teachers’ free speech rights, but they provided a theoretical and analytical framework within which the researcher could critique the judiciary’s treatment of this fundamental freedom as it pertains to teachers.

Traditional Legal Analysis

A case study of the relevant adjudicative rulings under employment law and under the Charter of Rights and Freedoms involving the free speech rights of Canadian public school teachers was undertaken. Hence, the researcher attempted to ascertain what legal principles govern the free speech rights of teachers under employment and constitutional law. In Canada, the case study approach is an established and
accepted method of legal inquiry which has its origins in the British tradition of common law. (Gall, 1995, pp. 38-39)\textsuperscript{100} This type of research is "designed to collect and organize legal data, to expound legal rules" (CGREL, 1983, p. 65). Since this approach is limited to an examination of the reasons for judgment, it thereby excludes any historical or sociological analysis of facts not revealed in the court's decision and considered legally irrelevant.

Case analysis involves dissecting the legal decisions into their constituent parts: a brief description of the material facts, a statement of the key legal issues, an articulation of the governing legal principle(s), and a final decision by the adjudicator. (Gall, 1995, p. 39) This approach not only provided a systematic analysis of each case but also allowed for a comparison among all cases analyzed. In essence, the identification and analysis of the relevant decisions delineated a body of law pertaining to Canadian public school teachers and their right to free expression.

\textbf{Critical Analysis}

In the context of legal studies, critical analysis takes one into the murky waters of legal theory. At present, there is much debate and controversy about what the law is and should be. One's own jurisprudential world view will,

\textsuperscript{100}Gall also notes that formal case analysis involves dissecting the legal decisions into their constituent parts: material facts, key issues, governing legal principles, and final decision of the adjudicator.
therefore, have a significant influence on how one perceives questions of legal analysis. Legal positivists, for instance, insist on maintaining the distinction between law and morality. Thus, their approach to legal inquiry focuses on ascertaining what the law is as opposed to what the law should be. Proponents of the natural law view may look to reason or theology as the source of objective moral values. This, in turn, will guide their legal research. Disciples of Critical Legal Studies reject claims of legal objectivity and rationality. For them, law is indeterminate, judicial decisions are political and the results are potentially oppressive. Thus, critiques on the dysfunctional aspects of the legal system with regard to underlying purposes, values and assumptions inform the research perspective of the critical theorist. (Gall, 1995, pp. 3-19) This partial and simplistic view of some key legal theories is meant to be illustrative of the various and competing perspectives of what role the law plays and should play in society. One’s theoretical views of the law in turn will shape the methodology one espouses in matters of legal inquiry.

In this study, the researcher adopted a jurisprudential approach to legal analysis informed primarily by the writings of the American liberal legal theorist Ronald Dworkin. In the Dworkin tradition, it is necessary to look to underlying

\[101\] In this regard, see: "Law as Interpretation" (1982), A matter of principle (1985), and Law’s empire (1986).
principles and norms to explain the coherence of the legal system. Given its inherently interpretive nature, the study of law becomes an evolving enterprise which is fundamentally argumentative and highly controversial. Within this framework of legal theory, the researcher conducted a critical inquiry of ascertaining what constitutes legitimate restrictions, from the employers’ perspective, on the free speech rights of Canadian public school teachers under employment law and constitutional law.

From an analytical perspective, the researcher attempted to discern what legal principles emerge from each decision involving Canadian public school teachers’ free speech rights and their attendant obligations as employees, educators, role models, and professionals. By examining, and comparing, teachers’ freedom of expression under employment law and constitutional law, the researcher attempted to determine whether the Charter enhances the protection of free speech afforded to teachers under employment law. This approach enabled the researcher to draw some conclusions in relation to adjudicative decisions already rendered. In addition, it provided an opportunity to offer arguments about issues affecting teachers free speech rights which have not yet been determined.

This analysis was supplemented by a consideration of the extant body of scholarly literature on the subject. From a critical perspective, the contributions of academics and
commentators served to enhance the quality and depth of analysis of the adjudicative treatment of Canadian public school teachers’ free speech rights.

**Approach to the Analysis**

Teachers may face restrictions on their expressive rights from a potentially diverse number of sources. These include the employer, the profession, and the criminal law.\(^{102}\) For the purposes of this analysis, since most cases arise as a matter of employment discipline or discharge, the researcher limited his study to the employment context. Consequently, he attempted to ascertain the extent of legitimate restrictions, by the employer, on the free speech rights of primary and secondary teachers in Canada. In this regard, the researcher considered two distinct yet interrelated avenues of inquiry - the employment context and the constitutional context.

First, the researcher explored the factors that, as a matter of employment law, justify the government, considered simply as an employer, in restricting the freedom of speech of teachers, as employees. He hoped to determine the extent to which the employment context in itself, apart from constitutional considerations, legally justifies employer restraints on teachers’ free speech or, alternatively,

\(^{102}\)In *R. v. Keegstra* (1990), James Keegstra became the first Canadian teacher to face the charge of wilfully promoting hatred against an identifiable group under s. 319(2) of the *Criminal Code of Canada*. 
protects teachers from such restraints. Many of the employment law principles governing teachers’ expression were established prior to the Charter, or in cases in which the Charter was not invoked.

Second, once the researcher established fundamental employment principles, he then examined the potential impact of the Charter, if any, on the free speech rights of Canadian public school teachers. In other words, does the Charter enhance protection of freedom of speech beyond the protection offered by employment law? In this regard, the researcher attempted to ascertain whether the employment law factors which justify the government, qua employer, in restraining the free speech of teachers also justify the government, qua state actor, in limiting the expressive rights of teachers as guaranteed under s.2(b) of the Charter. Hence, he considered the relevance of the employment context to constitutional protection.

In the employment and constitutional analyses, the researcher attempted to ascertain how the special nature of teaching affects the free speech rights of teachers as distinguished from other public sector employees. This required consideration of the unique duties of the teaching position. Teachers are called to educate and to act as role models for their students. The exercise of the right to free speech must accord with these roles. It was also important to consider the status of the teaching position. Since teachers
are professionals, they must be able to exercise in a responsible manner some degree of independent judgment which other employees may not. In this regard, professional freedom may be protected by some measure of academic freedom. The implications of this for the free speech rights of teachers were considered. Although the special nature and status of the teaching position may sometimes argue in favour of restraint of freedom of expression, there may well be other circumstances in which these factors weigh against restraint and for freedom.

The researcher studied the expressive rights of teachers in both the employment and constitutional contexts primarily through the presentation of relevant jurisprudence, encompassing court, board of reference and arbitral decisions, and scholarly literature. Given the paucity of constitutional case law in Canada concerning the free speech rights of public school teachers, the researcher also considered, where appropriate, the leading American constitutional jurisprudence to inform the analysis. He attempted to ascertain whether or not the principles enunciated in the American context provide an appropriate conceptual framework for the analysis of Canadian public school teachers' free speech rights under the Charter.

Judging the Quality of the Research

The juridical nature of the enquiry undertaken required and justified an approach to scholarship based primarily on
the methods and methodologies of legal research. Hence, it would be inappropriate and erroneous to judge the quality of the dissertation by employing social science standards such as trustworthiness, validity, and reliability normally connected with quantitative and/or qualitative educational research.

Rather, the thesis must be judged by the scholastic canons of legal research. Hence, the assertion of its premises, the development and cogency of its theses, the rigour of its corresponding arguments, and the strength and logic of its conclusions must serve as the appropriate criteria with which to judge the quality of the work. Since the researcher recognizes that law is argumentative and highly debatable, it is highly unlikely, and even less desirable, that any other scholar, of any philosophical persuasion, would merely duplicate the results produced in this thesis.
CHAPTER 4

TEACHER FREE SPEECH: AN EMPLOYMENT LAW ANALYSIS

Introduction

Under employment law, all employees have a legal obligation to act honestly, cooperatively, loyally, and obediently. To protect these employment values, the courts, arbitrators, and boards of reference have been willing in a wide range of circumstances to restrict the free speech rights of public school teachers. Under other circumstances, however, employment law recognizes and protects the value of freedom of speech. Adjudicators have ruled that the employment context, and its four corresponding duties of honesty, cooperation, loyalty, and obedience, can not in every case serve as a legitimate trump on the free speech rights of teachers.

In many respects, public school teachers are like all other public sector employees. Yet, they differ from other employees in two important ways. First, they have the status of being professionals. Second, they must educate our children in a democratic tradition. On this basis, the researcher will argue in favour of increased protection under employment law for the free speech rights of teachers. Teachers should be able to speak out responsibly on matters
of public interest because they have an important and highly relevant contribution to make. Teachers should also have some measure of academic freedom in their classrooms so they can help prepare our students for their roles in a democracy by teaching them how to think critically.

**Duty to be Honest**

Brown and Beatty (1988) explain the rationale behind the duty of honesty employees owe to their employer:

> [I]n a very general sense, honesty is a touchstone to viable employer-employee relationships. If employees must be constantly watched to insure that they honestly report their comings and goings, or to insure that valuable tools, material and equipment are not stolen, the industrial enterprise will soon be operated on the model of a penal institution. In other words, employee good faith and honesty is one important ingredient to both industrial democracy and the fostering of a more co-operative labour relations climate. (p.7:77)

In the employment context, honesty is absolutely critical. Dishonest expression is harmful because it destroys the trust which cements the employer-employee relationship. If employers cannot have confidence in the veracity of what teachers tell students, colleagues, and superiors, distrust and animosity will make the employment relationship unworkable. In the education context, the need for honesty is especially compelling.

Deceitful expression undermines the three special duties associated with being a teacher: the duties to educate, to act as a role model and to act as a professional. As educators, teachers are leaders who encourage students to seek and pursue the truth. Dishonesty runs counter to the
basic purpose of a liberal, democratic education. As role models, teachers must embrace virtuous conduct and set the appropriate standard of behaviour. In Ontario and Nova Scotia, we saw earlier\textsuperscript{103} that school legislation specifically requires teachers to exhibit truthfulness and, by extension, honesty. If teachers practise the art of deceit, they will be engaging in vicious conduct. If students uncover their unscrupulous behaviour which goes unchecked, they may be encouraged to do the same. Thus, if we want our students to be honest and forthright in their dealings with one another, teachers must lead by example. As professionals, teachers must live up to higher standards. Professionals must endorse honesty because it is the right and honourable thing to do. Generally speaking, dishonest expression is morally wrong and unethical.

In Re Fearon (1980), two New Brunswick teachers delivered to Fearon, their principal, letters of resignation. Each letter was mildly critical of the school environment. Fearon, apparently believing that the letters reflected on his own abilities, falsified substitute letters which he forwarded to the board of education. While drafting the substitute letters, he omitted certain sections that he did not want the board to see and substituted other wording. Prior to sending the substitute letters to the board, he also forged the names of the original authors. The adjudicator

\textsuperscript{103} supra., p. 18.
upheld his dismissal:

The School Board and the superintendent are entitled to have as principal a person they can trust and rely upon to fulfill his duties to them and the school. Fearon demonstrated that he cannot be trusted in a dishonest, even criminal, way, which must cast doubt on him, not only to the Board, but to everyone concerned, including the school staff, students and the community. It was not such a thing as mere neglect or lack of competence, which would not have such drastic and permanent effects on his credibility. (p. 370)

Thus, falsification of employment records or other manifestations of dishonest expression will not be protected.

Exceptional and rare circumstances might exist where teachers may be justified in lying. For instance, teachers might conceivably lie out of compassion to protect a vulnerable minority student who has been subject to verbal harassment. Teachers might deny the utterance of an especially pernicious epithet even though they know it has been said. They may also make similar denials to protect colleagues or superiors who have been subject to unfair and cruel comments. Yet, it is only in the most compelling situations that employment law may allow free speech to take precedence over the duty of honesty.

Duty to Co-operate

The employer has a legitimate expectation that employees will be able to get along with each other. Brown and Beatty (1988) articulate the duty to co-operate in these terms:

Should it be established that a person is incapable of getting along with his customers, fellow employees or students, or persists in subjecting his fellow workers to practical jokes, bullying or intimidation, or sexual harassment, the employer’s productive processes and the
well-being of other employees may be prejudiced, and accordingly, such an employee may properly be disciplined.\(^{104}\) (p. 7:130)

Hence, according to Brown and Beatty, it seems that there are two primary rationales which can be advanced to justify a duty to cooperate.\(^{105}\) First, there is the need to promote an effective and efficient work environment. This ensures that the employer’s "productive processes" are not interfered with. Second, there is the need to protect other workers and clientele from abuse. This ensures that the "well-being" of others is respected.

**An Effective and Efficient Work Environment**

Like embracing honesty, the need to foster congeniality and harmony in the interests of a healthy and functioning educational enterprise goes to the heart of the employment

\(^{104}\)Brown and Beatty further add:

Indeed, if an employee’s attitude clearly demonstrated that his continued employment would present a serious risk to the employer’s property or to the safety or well-being of his fellow employees, or if his behaviour persisted over such a period of time so as to conclusively confirm his inability to alter his unco-operative attitude, his discharge might be found to be just and reasonable. (p. 7:130)

In the realm of education, Givan (1986) notes:

It is recognized generally in office work, and specifically in teaching, that co-operation with colleagues, students and parents is essential to satisfactory performance, and therefore a legitimate employer concern to the point of discharge. (p. 956)

\(^{105}\)It is conceivable to suggest that there is a third rationale which undergirds the duty to cooperate - the general need or desirability to maintain a harmonious workplace. We suggest, however, that this rationale is exhausted by the two rationales offered by Brown and Beatty.
relationship. School boards have a legitimate interest in ensuring that the day to day operations of the educational enterprise proceed in an effective and efficient manner. This is critical in the field of education where there exists a great deal of social interaction among teachers, students, supervisors, and parents. Given the range of different values and beliefs in the school community, the potential for conflict and disruption is great. Nonetheless, the "business" of education must be able to proceed. It is therefore incumbent on teachers, as school employees and professionals, to promote the shared values or common ethos of the educational enterprise. By attempting to transcend differences which may degenerate into unresolvable tensions, teachers commit themselves to making sure that the school continues to function on a daily basis in a relatively orderly and harmonious atmosphere.

A teacher who has difficulties getting on with students, colleagues, and supervisors or whose language is continually negative, critical, and highly divisive may well interfere with the educational enterprise simply because nobody can work with the vocal and obnoxious teacher. If the behaviour persists, the school board may place some restrictions on the teacher's expressive rights to ensure that productive processes are not jeopardized.

Schools are often organized along bureaucratic lines where individual teachers are assigned specific teaching and
administrative tasks according to their qualifications and expertise. In a large school, for instance, different departments will require teachers to work closely with colleagues who teach similar or related subjects. In an English department, a chairperson and vice-chairperson may have specific responsibilities. In conjunction with the principal, these designated people may be responsible for assigning teaching duties to all the English teachers. They may also have the power to call regular meetings to address departmental concerns.

During the course of a departmental meeting, a common agenda may have to be established. Different topics for consideration might include setting the curriculum, approving a marking scheme, establishing an alternative reading list and related matters. Here, it is essential that a minimal collective commitment to the educational tasks at hand exists to ensure that the school’s component parts function properly. Thus, a teacher who objected to every single effort to advance the educational agenda, continuously interrupted to hijack the process, and constantly complained about his or her teaching assignment could legitimately face expressive restrictions from the employer. Muting this teacher’s disruptive expression would arguably further the school’s legitimate goal of effectively delivering an educational product.

Likewise, a teacher who verbally challenged every order
or decision of his or her superiors, even if the challenge was articulated in civil and reasonable discourse, could have a negative and disruptive influence on school administration. If left unchecked, the teacher could affect staff morale, set a bad example for other teachers to follow, and generally make it difficult to promote cooperation and harmony in the school community. In these circumstances, and insofar as purely employment law principles are concerned, the court would likely find that interdictions on the teacher’s speech would be justified because the teacher failed to cooperate with others. Failure to censor the delinquent teacher would undermine the school’s ability to operate in an efficient and effective manner.

But, muting a teacher who has an "attitude" which may interfere with the school board’s concerns for effectiveness and efficiency is also problematic. In *Re Continuous Colour Coat Ltd.* (1975), the arbitrator offered this warning:

> [A]rbitrators should be very cautious when "attitude" is put forward as the justification for the discharge of an employee. In the first place, "attitude" is a subjective factor. Its existence can only be determined from its outward manifestation in objective behaviour. The employer must show that the proven behaviour of the discharged employee does indeed manifest the purported attitude. The employer then must show that the attitude is essentially one which disables, or is likely to disable, the employee from the proper performance of his job. Finally, the employer must show that discharge is the appropriate response to that attitude. (p. 331)

In *Re Algonquin College of Applied Arts & Technology and Civil Service Association of Ontario* (1972), the employer dismissed a language teacher for failing to co-operate with
colleagues. Some evidence indicated that the employee had had a number of personality clashes with other colleagues. At one point, the employer assigned the employee a French course in the School of Commerce to teach with two less experienced teachers. During the course of the term, their relationships deteriorated. One of the teachers thought that the grievor was directing the way the course should be taught; the other considered that the grievor took a rather insulting attitude towards him personally. The arbitrator reinstated the employee and made the following evidentiary findings:

As to his attitude towards his colleagues, it may be that the grievor lacked sensitivity to the effects which his manner may have created in the minds of others. The evidence is, however, that certain of the grievor's colleagues felt that he behaved toward them in an insulting or condescending way. There is no evidence, however, of any actions or words which an independent observer could reasonably describe as insulting or condescending conduct. (p. 101)

The arbitrator then concluded:

It cannot be said that the grievor deliberately conducted himself in such a way as to alienate his colleagues nor can it be said that his conduct, even if unconsciously determined, was so outrageous as to make it impossible for his colleagues to work with him. Let it be assumed (for this is what underlies the college's case in this respect), that the grievor considered himself better qualified than most of his colleagues; let it be assumed as well that from time to time he let this show; while this would be a fault on his part, the question is whether it would be such a grievous fault or so grievously exhibited as to justify the dismissal of a teacher with the experience of the grievor. (p. 101)

This case illustrates the difficulties inherent in human relations. Insensitivity and oversensitivity to verbal expression can be varied and problematic. One might argue
that there is less tolerance for a teacher with an "attitude" in the public school system. Apart from colleagues and superiors, teachers must also be able to get along with much younger students and parents. Perceived much more as team players, and less as rugged individualists, public school teachers must be committed to working together with the educational community's different members to enable the educational enterprise to function and to meet its daily objectives. Trained as professionals, teachers are expected to have strong people skills. Nonetheless, caution must be exercised. Creative and unorthodox teachers may be excellent educators. In their verbal dealings with others, they may at times demonstrate insensitivity, immaturity, or poor judgment. Yet, unless there are outward manifestations of objective linguistic behaviour (e.g. obscenities or threats) that reflect a disabling attitude, it will be difficult to prove that the quirky teacher has failed in his or her duty to cooperate.

Protection from Abuse

School boards also need to protect students, fellow teachers, and supervisors from abuse. This is an issue about the rights of others. Hence, school boards may legitimately restrict teacher speech which is abusive because such speech fails to treat others with respect. One might argue that this aspect of the duty to cooperate is part of a more general duty to behave with civility to all persons one comes in
contact with in the work place.\textsuperscript{106}

In \textit{Hogan v. Commissioner of the Northwest Territories} (1986), the board of education dismissed a teacher following students' allegations of sexual harassment, use of profane language, and uncharitable and derogatory remarks. On appeal, a Board of Reference substituted the termination with a reinstatement and a severe reprimand. Commenting on the teacher's ability to get along with students, the Board held that occasional horseplay and teasing are acceptable conduct:

Drawing upon one's own personal experience, few would disagree that there is nothing wrong with a teacher engaging in occasional "horseplay" with students, as the appellant did with Murray M., or with a teacher occasionally teasing students, as the appellant did with Shelly S. Many of the complaints I find to be minor and of a trifling nature. (pp. 328-329)

As for the other allegations, the Board remarked:

The accusations of . . . swearing and having made derogatory remarks are, however, of considerable concern. . . . Teachers, entrusted with a special responsibility for the social and moral development of children, should in no way encourage the use of profanity or by its use in the classroom indicate to students that profanity is an acceptable way of talking. . . . From all of the evidence I have heard, I am not satisfied that he used the words "assholes", bitch", "bastards" or "f____ing". (pp. 329-330)

The Board found, however, that the teacher did on occasion use the words "shit" and "bullshit" in front of students ranging in age from 16 to 21 years. In this regard, the Board stated: "This board can, I think, take judicial notice of the

\textsuperscript{106}Arguably all employees, whether in the public or private sectors, must behave with civility to members of the public. For instance, a sales clerk must treat customers with civility.
fact that profanity amongst older teenagers is rather commonplace" (p.330). Although students 16 and older may well be acquainted with these terms, it still seems questionable to condone the use of this type of language in the teaching context. The school is called on to demonstrate higher linguistic standards and to encourage an atmosphere of respect and civility. The use of words like "shit" and "bullshit" would seem inappropriate in the public school context.

With respect to the derogatory remarks, the teacher told one of his students "to put a cork in it" in response to the student's repeated flatulence. The Board upheld the teacher's choice of language:

I accept that this particular student had the distasteful propensity to flatulate in the classroom and that perhaps the time had come to embarrass him in front of his peers. The appellant might have employed a better choice of words in chastising him, but I am not prepared to find that what occurred amounted to verbal abuse. (p. 331)

In Re Vancouver Community College and Faculty Assn. (1994), the Vancouver Community College disciplined one of its art instructors, Fred Grimann, for abusive conduct towards a number of students. The incident occurred in the shop area of the auto collision program with four students. The grievor walked up to a group of students who were completing an assigned task and began berating them in a loud voice. Mistakenly believing that the students had no authorization to work on one of the vehicles, and in
particular to transfer the axle from one truck to another, he demanded that they replace the original axle in the truck from which it had been removed. In response, one female student said humorously: "We put it in; we don't take it out". Grimann then grabbed the collar of this student and said to the other students: "This a.....e doesn't understand". The female student pulled Grimann's arm away and screamed: "Don't touch me. I don't like to be touched." He also said to her: "You're an a.....e, quote, unquote. You can put that into your report."

Following an investigation, the employer suspended Grimann for five days. Upholding the suspension, the arbitrator found that Grimann's conduct ran afoul of the College's harassment policy and violated the student's fundamental rights. The policy defined "objectionable behaviour" to include: i) verbal abuse or threats; ii) offensive remarks, jokes, innuendoes, or taunting; iii) display of pornographic, racist, or other offensive or derogatory material; iv) persistent unwelcome invitations or requests, whether direct or indirect; v) psychological abuse such as leering, badgering and intimidating actions. (p. 77)

The arbitrator concluded that teachers are held accountable to a higher standard:

Arbitrators have long accepted the principle that acceptable standards of employee conduct vary among occupations. . . . More specifically, employees whose job requires them to deal with members of the public are held to a higher standard than those persons who do not work with the public. . . . In this case, the students
are in the place of members of the "public" in that they are clients of the college. (p. 80)

Thompson also added that: "The role of a teacher is especially important when dealing with impressionable (and potentially vulnerable) pupils" (p. 80). Although this incident occurred in a community college, the arbitrator's finding would be equally applicable in public schools where teachers are required to treat their students with respect.

Verbal abuse of students may also appear in other forms. Suggestive or flirtatious language may reveal subtle or not so subtle forms of sexual harassment. In Re Kings County District Board and N.S.T.U., (1995), a board of education discharged a high school teacher, Bruce Buntain, for exhibiting inappropriate physical and verbal behaviour towards a number of female students. An arbitrator substituted a lengthy suspension (20 1/2 months) for dismissal.

According to the evidence, Buntain told a student about a dream he had and asked her: "what is love?". He told another female student: "remind me never to sleep next to you". On another occasion, he told a student that her top was too revealing and that she was "showing lots of flesh". Students testified that Buntain talked to them about personal matters in a way which made them feel uncomfortable. He talked to students about things unrelated to school on a regular basis. The arbitrator noted that Buntain directed all his comments to females who were less than half his age. The
arbitrator also highlighted the special nature of the teacher/student relationship:

The fact that Mr. Buntain is a teacher is also a very relevant factor in judging the appropriateness of the conduct and behaviour in which he is alleged to have engaged. He was in a position of trust to these students, and had obligations to them beyond those which might exist between friends, acquaintances or co-workers. Actions which might be acceptable in a work or social setting might well be unacceptable where the relationship of the parties involved is that of teacher and student. (pp. 307-308)

The arbitrator also ruled on the use of the teacher's language:

The language and conversation that occurred here could be described variously as personal, sexually suggestive, flirtatious, but in all incidents inappropriate and improper. Mr. Buntain’s suggestion of "misinterpretation" of these comments shows complete lack of judgment as to knowing what is or is not acceptable. In my view, his comments to Student E (asking in the dream "what is love"), Student F ("remind me never to sleep next to you") and Student H (showing "a lot of flesh") are openly suggestive. His comments to Student A ("nice teeth") and Student B (re "sweetheart"/"date") are flirtatious. All of them are demeaning to the students, in that they indicate that he may well be thinking of them in some way other than as his students. This is unacceptable. (p. 314)

The arbitrator then decided to impose a lengthy suspension:

His behaviour cannot be explained away by reference to a personal style of teaching. Far from creating an "atmosphere conducive to learning" (art. 11.01(ii)), it had a destructive consequence, causing the complainants to skip classes, to distrust male teachers, and to avoid him. Far from maintaining an "attitude of active and sympathetic concern", Mr. Buntain’s approach has been to seek out opportunities for personal contact with female students, and to take advantage of those opportunities when they arose. Considering the relationship of power he held over these students, it is understandable that the students were uncomfortable, reluctant to come forward, and concerned about their marks if they reported his behaviour. Mr. Buntain has abused the students’ trust. (p. 316)
In the final analysis, teachers are in a position of power and authority over their students. Although they can be friendly, they must keep their "professional distance" and maintain the integrity of the learning environment. Free speech can never be accepted as a legitimate defence for teachers who engage in sexual innuendo or sexually harass their students. Abusive linguistic conduct by teachers is unacceptable. It involves an abuse of power and it undermines the obligation of teachers to act as role models.

Not only must teachers co-operate with students, but their relationships with their colleagues and superiors must likewise be free from abusive and unacceptable discourse. In *Wheaton v. Flin Flon School Div. No. 46* (1980), a board of education terminated a teacher for exhibiting insolent and insubordinate conduct. During a heated conversation, Wheaton called the superintendent an "ass-hole", a "pompous windbag" and told the superintendent to go "f___ himself". Justice Huband of the Manitoba Court of Appeal upheld the termination: "The insulting comments directed towards the Superintendent in particular, would be enough, under the circumstances, of this case, to warrant termination for cause" (p. 437).

It is obvious that teachers cannot threaten their superiors and then seek shelter for their acts behind the protective wall of free speech. As inappropriate linguistic conduct, threats not only reflect an inability to co-operate
but, more important, they are an affront to authority. In *NTA and Port au Port Roman Catholic School Board* (1979), the arbitrator observed:

> The grievor lied to his superiors about his sentence. . . . While we do not find in these circumstances an instance of insubordination as that term is understood in the field of labour relations, we do agree with the employer that the grievor was guilty of an affront to the authority of his superiors. . . . The matter of threats made to [the principal and superintendent] is more serious. . . . [H]is expression of intent to reveal criminal conduct within the school might have been interpreted as indicative of a desire to promote the interests of his employer. However, in the context in which his statement was made, [the superintendent] had every reason to interpret it as an attempt to intimidate. Yet, the terms in which the grievor’s statement was couched (‘If I go, I’ll take six with me’) indicate that the grievor already understood that his employer was to consider dismissal on the grounds of his conviction and sentence, and of his having lied about the nature of his sentence. (pp. 18-20)

**Duty to be Loyal**

Not only must employees demonstrate honesty and cooperation, but they must be loyal. In *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees’ Union* (1981), Weiler describes this duty of loyalty:¹⁰⁷

> What is this duty of fidelity? In general terms, an employee must display a certain degree of loyalty to his employer. Malcontents and troublemakers can be so disruptive of normal production in the work place that they thwart the desires of both employer and fellow employee to get on with the job. These kinds of employees have no constructive role to play in a productive work place and their disloyalty destroys their usefulness as employees. (p. 158)

¹⁰⁷Arbitrators use the terms "fidelity" and "loyalty" synonymously.
Brown and Beatty (1988) explain when employees violate their duty of loyalty:

[A]rbitrators have held that public servants and indeed all employees violate their duty of loyalty if they engage in public criticism which is detrimental to their employer's legitimate business interests. 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. (7: 94)108

If employees engage in "whistleblowing", they must first avail themselves of internal avenues of redress before resorting to public criticism. In Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union (1981), Weiler states:

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. In other words, while an employee in some circumstances may be forced to "go public", e.g., concerning an unsafe chemical or machine which his company produces, before doing so, he should attempt to get all the facts and give his employer an opportunity to explain or correct the problem. Most employers have a variety of mechanisms, 

108Brown and Beatty further observe: Applying these factors, it has been held that employees may be disciplined, and indeed even discharged, for public criticisms of their employer's administration where such attacks involved a concerted effort to provoke the employer and disrupt operations, vitriolic denunciation, or gross misrepresentations of the truth and which were not channeled through internal mechanisms which were designed for such purposes. And where their criticisms compromise their credibility, public servants may be transferred to alternate duties. (p. 7: 94)
formal or informal, under which an employee may lodge a complaint about the manner in which the enterprise should be operated. Only if no satisfaction results from these channels, then and only then, may an employee "go public". . . . 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. (pp. 161-162)\(^{109}\)

**Truthfulness of Information**

School boards have a legitimate interest in ensuring that teachers do not divulge inaccurate information. One can imagine a situation where a teacher, in public, speaks out critically about a board decision to close a local school. If the teacher intentionally or carelessly misleads a segment of the population about the board’s motives for the closure, then the criticism may damage the employer’s reputation in the school community by calling into question the integrity of its motives and decision-making ability. A school board whose motives are improperly impugned may not be able to

\(^{109}\)In Re Treasury Bd. (Employment & Immigration) and Quigley (1987), a federal immigration officer criticized a new policy of his department on the grounds that it compromised public safety. Quigley took his concerns to management, but did not give management a chance to respond before he disclosed the policy to a member of Parliament. Although Quigley was right in going to management, he was wrong in not allowing his employer to answer his concerns:

He in my mind reacted too strongly and showed a serious lack of judgment in not waiting for an answer to his memorandum of June 5, 1986 and in going so quickly to a Member of Parliament. There was no need for it as the problem could no doubt have been satisfactorily resolved "internally". (p. 177)
function effectively without an adequate base of public trust and support. Since teachers occupy a position of trust and responsibility and thus have a pronounced public profile, they must exercise even greater caution, when criticizing their employer, than most other categories of public servants. Employment law principles of free speech will not shelter teachers who wilfully or carelessly mislead in their criticism.

Confidentiality

Employment law principles will also justify limits on teacher speech when teachers improperly disclose confidential information. Confidentiality is founded on trust. If the employer cannot trust individual teachers, then this will have a significant and detrimental impact on the day to day operations of the school. An atmosphere of mistrust is a substantial barrier which impedes the school's ability to run itself effectively. In addition, betraying work-place confidences can also create an unhealthy atmosphere where teachers may be unwilling to share their relevant professional stories and experiences. In a related vein, confidentiality is essential to protect an individual's right to personal privacy and dignity. Thus, it would be improper for a teacher to divulge the contents of a student or fellow teacher's personnel file unless illegality, negligence or some other compelling reason were involved. In essence, restricting teacher expression which violates confidentiality
furthers legitimate business interests because the restriction allows the employer to maintain the integrity of the working environment. Without a teacher commitment to trust and respect for the privacy rights of others, this is impossible.\footnote{We note that these first two factors, truthfulness and confidentiality, that arbitrators use to determine whether an employee has breached the duty of loyalty have also been considered \textit{(supra., pp. 5-8)} under the duty of honesty. Hence, it is important to remember that there may be overlap among the different obligations teachers owe their employers.}

\textbf{Manner of criticism}

The Supreme Court of Canada’s 1985 decision in \textit{Fraser v. Public Staff Relations Board} is the leading case on the right of public employees to criticize their employer. It is significant that \textit{Fraser} is a pre-Charter case. Even though the Supreme Court rendered its decision in 1985, three years after the Charter had been adopted, the facts which gave rise to the case occurred before the proclamation of the Charter. Accordingly, \textit{Fraser} sheds light on the extent to which employment law principles, \textit{per se}, justify employer restraint on the free speech of an employee, when the employer is the government, and the public interest in protecting freedom of expression comes into play.

Neil Fraser, a tax audit manager for the federal government, became embroiled in the public debate over the government’s metrification programme and its intention to adopt the \textit{Charter of Rights and Freedoms}. He criticized the
government by sending a letter to the local newspaper and appeared on radio and television stations in defence of his views. The criticism became more vocal and vitriolic in spite of warnings, directives, and two suspensions. Failure to halt his continued attacks on the government’s policies led to his dismissal. In reconciling the free speech rights of Fraser with the legitimate interests of the government, the Supreme Court struggled with the imperative of finding:

... the proper legal balance between the right of the individual, as a member of the Canadian democratic community, to speak freely and without inhibition on important public issues and the duty of the individual, qua public servant, to fulfill his or her functions properly. (p. 163).

While upholding the Government’s decision to terminate Fraser’s employment, the Supreme Court of Canada focused on the duty of loyalty:

As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. ... But ... it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government. (p. 178)

Dickson C. J. concurred with the adjudicator’s findings

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111 The Supreme Court offered the following rationale for the duty of loyalty: "As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service" (p. 178).
that Fraser's conduct impaired his ability to perform his job properly:

Indeed he (the Adjudicator) found impairment in two senses: first, impairment to perform effectively the specific job because of the inferred effect on clients; secondly, and in a wider sense, impairment to be a public servant because of the special and important characteristics of that occupation. (p. 180)

Although public servants must exercise caution when it comes to making criticisms of the government, the Supreme Court made it clear that some speech by public servants on public issues is permitted. As Fraser argued, public servants cannot be "silent members of society". Chief Justice Dickson acknowledged that there are times when criticism is justified:

[I]n some circumstances a public servant may actively

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112 From an evidentiary perspective, the court noted that direct or indirect evidence may be advanced to prove actual impairment:

As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. (pp. 180-181)

As for demonstrating impairment through public perception, the court observed:

It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. ... In order to answer that question it becomes relevant to consider the substance, form and context of Mr. Fraser's criticism of government policy. (p. 181)

The court concluded that Fraser had actually impaired his ability to perform his specific job and that he had impaired the public perception of his ability to do the job.
and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant’s criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. (p. 178)

At first blush, one may wonder whether Fraser applies to Canadian public school teachers. A restricted reading of the case might suggest otherwise. After all, the judgment upholds restrictions on expression by federal civil servants "because of the importance and necessity of an impartial and effective public service" (p. 177). Nonetheless, Canadian courts are unlikely to adopt a narrow interpretation of the judgment which excludes teachers. The decision contains numerous references to the larger public service. For instance:

Can anyone seriously contend that a municipal bus driver should not be able to attend a town council meeting to protest against a zoning decision having an impact on her residential street? Should not a provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a provincial government decision cutting off funding for a day care centre or a shelter for single mothers? And surely a federal commissioner could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. (p. 174)

The references to "bus drivers" and "commissionaires" imply that the ruling has the potential to encompass all public sector employees, including public school teachers.

In the literature, Stushnoff (1992) argues: "The Supreme

113 Throughout the judgment, however, the court uses the terms "public sector" and "civil service" interchangeably. Arguably, the two are different since "civil service" suggests a narrower term.
Court of Canada’s decision in Fraser will apply to teachers on the basis that all employees owe a duty of loyalty to their employer" (p. 47). In the jurisprudence, as well, Fraser has been imported into the educational context. In Re Wainwright School Division No. 32 and C.U.P.E. (1984), the school board issued a letter of reprimand to a school secretary (the grievor) for alleged insubordination. A member of the local home and school association, the grievor wrote a letter to the members of her association. In her missive, she stated that the association had failed to take positive and appropriate steps to resolve the ongoing controversy within the school community. In particular, there was conflict between the principal and staff at the grievor’s school, and one or more school board members. A number of contentious issues including budgeting decisions of the school board, the reduction of teaching and support staff, and the effectiveness of delivery of educational services at the school generated the circulation of petitions, letters to the editor, and public meetings. The grievor’s letter came to the attention of the board of education. It found the following excerpt to be both defamatory and insubordinate: "It is time to insist that the Board of the Wainwright School Division came clean, explain why they are making the cut, and give real, believable reasons, not a blizzard of double-talk as has been done in the past."

The arbitrator upheld the grievance. Although the
grievor made the comments about the school board as a parent and as a member of the Home and School Association, the arbitrator noted:

However, the grievor was, at the same time as being a concerned parent and taxpayer also an employee of the very entity which she was publicly criticizing, the school board. Clearly, some of the rights and freedoms that a person may otherwise exercise with impunity, may well be lost to him or her by virtue of an employment relationship. (p. 348)

In ascertaining whether the employee's conduct was incompatible with the employment relationship, the arbitrator framed the issue this way:

[Employees may be disciplined for "off-duty" conduct where such conduct is sufficiently injurious to the business interest of the employer, or is incompatible with the due and faithful discharge of his duties, or is likely to be prejudicial to the reputation of the employer. (p. 350)

The arbitrator's decision considered the grievor in her dual capacity as a citizen and employee. The free speech rights she exercised, as a citizen, fell within the realm of fair comment:

[While the words complained of might be somewhat intemperate, they do not trespass the standard of fair comment that the law affords to a citizen speaking publicly about elected officials relative to the latter's performance in public office. (p. 348)

But, the board found that the grievor had breached, albeit so slightly, her duty of loyalty:

It is the decision of this board that the grievor

114 In making her comments, the grievor was motivated by the potential impact the unfortunate state of affairs in the school community might have on the education of her child and others.
marginally transgressed the bounds of proper conduct which is to be expected of a faithful and loyal employee. The board does not find any particular fault in the grievor in the single instance, taking issue with and speaking out in respect of a school board decision of general public concern and concern to the grievor as a parent. However, the particular language used by the grievor relative to the school board was intemperate and inappropriate having regard to the fact that she was an employee. (p. 351)

The arbitrator took care to distinguish the case from Fraser:

Aside from the one instance, there is no evidence before this board that the grievor engaged in commenting adversely about the school board on any other occasion or in any other forum, either before or after the letter. This was a one-time incident with no persistent course of conduct. It is noteworthy that in the Fraser case . . . the employee had been disciplined on three separate occasions for a continuous course of conduct, the last culminating in dismissal. (pp. 351-352)

Although the board upheld the grievance and directed that the letter of discipline and all reference to the incident in

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115 As for penalty, the arbitrator declared: Nevertheless, this board also finds that the disciplinary letter issued by the employer was inappropriate as well as it constituted an over-reaction with long-term effect on the employment record of the grievor to what can be described as a one time indiscretion. (p. 351)

116 Other factors that influenced the board were:
a) The letter was written by the grievor as a concerned parent and was not intended to protect or further her interest as an employee.
b) The remarks made about the school board . . . can be seen to be the outpourings of a concerned and somewhat distraught parent and read and understood in that light.
c) The comments relating to the school board are directed to elected officials as a collective entity and elected officials must be considerably less sensitive to criticism than private persons or entities.
d) The grievor acted honestly and in good faith in writing the letter and making the subject comments. (p. 351)
question be struck from the employment record of the grievor, it offered the following warning:

It is obvious, however, that in so doing this board is not to be taken as having condoned the language used by the grievor nor to have afforded employees governed by the collective agreement in question any particular licence to speak out against their employer in respect of matters of general public interest. Each case has to be judged on its merits and we urge all employees to be governed by common sense and not to lose sight of their fundamental obligation of loyalty to their employer. (p. 352)

If the grievor had been a teacher, would the results have been different? On the one hand, teachers are employees and they owe a duty of loyalty to their employer. In addition, a teacher has a stronger community public profile than a secretary and thus might be called on to exercise even greater caution when criticizing the employer. Unless the teacher could show that the board had committed an illegal act or otherwise acted negligently, then comments similar to those made by the secretary in Wainwright would arguably be inappropriate. In essence, the school board would contend that the teacher’s remarks had compromised the employer’s reputation and ability to conduct its business.

Public Interest in Information

On the other hand, teachers have specialized knowledge and insights about the "workings" of the educational system. When public school boards make tough and controversial decisions, the general public must have the requisite information with which to evaluate the decision-making capacity of its elected representatives. Here, the focus is
on the public interest in the right to know. In this regard, one can posit that the public interest is more likely to be engaged when the employer is a public employer. And, therefore, this argument for protecting some degree of free speech from employer imposed restraints has particular relevance in the context of public sector employment.

In Fraser, the Supreme Court of Canada recognized the importance of the individual "as a member of the Canadian democratic community, to speak freely and without inhibition on important public issues . . . " (p. 163). In particular, the Chief Justice offered three reasons for this position:

First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion. Secondly, account must be taken of the public sector - federal, provincial, municipal - as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people. Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. (p. 174)

The court also stated that the class of qualifications (e.g. illegality) on the general rule of avoiding public criticism was not necessarily exhaustive and that "there may be others . . . " (p. 178).

By virtue of their position and expertise, teachers might be able to make a unique contribution to the public debate when important matters such as changes to the curriculum are in the public eye. They might present a
relevant "insider's" perspective for parents, students, and other community stakeholders which could otherwise go unnoticed. In this regard, responsible and careful criticism by teachers would be welcomed. Support for the proposition that public criticism may be justified in cases which involve conduct other than illegal or negligent behaviour comes from *Re Simon Fraser University (1985)*:\(^{117}\):

> Experience shows that, except in the most unusual circumstances, such as in the case of academics, public criticism of the employer almost inevitably leads to a deterioration of working relationships with bad consequences for the employer, the employee, or both. Only when some higher purpose is served such as to expose crime or serious negligence, or to serve the cause of higher learning, to fairly debate important matters of general public concern related to the employer or those in authority over him, as examples, can the employer be publicly criticized about the employer's conduct without breaching the duty of loyalty. (p. 368) (emphasis mine)

Since this case involved free speech at the tertiary level, it is unclear as a matter of employment law, *per se*, whether the right of free speech will protect teachers who wish to "fairly debate important matters of general public concern."

**Extent to Which Employer's Reputation is Compromised**

Even if teachers engage in controversial expression, they cannot be disciplined for the expression *per se*. The employer must demonstrate that the speech harmed its interests or somehow is incompatible with the due and faithful discharge of the employee's duties. In *Re*

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\(^{117}\)In this case, the university successfully disciplined employees for criticizing the employer's open-door policy in respect of the periodicals reading-room.
Metropolitan Separate School Board and O.E.C.T.A. (1994), the Metro Toronto separate school board disciplined a teacher, Joanna Manning, by prohibiting her from teaching religion and from becoming the head of a department of religion. Manning was a founder of the Coalition of Concerned Canadian Catholics (CCCC), a group of Roman Catholics who have taken up certain issues relating to the church. Manning had published a number of articles in the press critical of the Roman Catholic Church's position on women and rights, ordination, communion, altar services and contraception.

A concerned Roman Catholic wrote a letter to one of the board trustees complaining that Manning was a "radical feminist" and admonishing the member "to see to it that this public detrimental behaviour be put to an end swiftly." The director of education met with Manning to express board concerns. He told her that she could write the articles provided she did not identify herself as an employee of the separate board or as a teacher of religion. The director was concerned that the public could not distinguish Manning's own personal views from those of the board of education. When Manning refused to change her conduct, the board disciplined her. An arbitrator held that the board had unjustly disciplined Manning.

In the absence of evidence, the arbitrator rejected the school board's claim that Manning had used the board to advance her own controversial views. As for the controversial
views themselves, the arbitrator noted:

[He (the director of education) agreed that Jesus, Galileo, Pope John II and Cardinal Ambrozie were all controversial; indeed, he agreed that many others can be viewed as controversial. He agreed that the Grieveor did not represent an extreme view within the church, though she is not in the centre core. The centre core, he said, is determined by the church and there are many contentious issues in the church, including women’s rights, human sexuality and contraception. He also agreed, according to Gallup polls in the U.S. and Canada, that 90% of catholics disagree with the church’s position on contraception. . . . Dr. Baronne agreed that all of these issues are hotly debated in the church at all levels and that such a debate is healthy for the church as there is more than one point of view. (pp. 362-363)

In spite of the controversy surrounding her opinions, the board of education could not prove that Manning’s expressive conduct had interfered with her ability to teach. In fact, the board had been motivated by improper political purposes:

There was no evidence that the board was in any way concerned about the way in which the Grieveor taught religion and they did not have religious or denominational concern in mind when they removed her from teaching religion. The fact that the board permitted the Grieve’s religion classes to be taught by a non-catholic while she supervised spares is the most telling evidence that what was at issue here was not a denominational concern but rather a political concern. (p. 394)

Collective Bargaining

In the context of collective bargaining, special considerations concerning the right to criticize apply. Commenting on the right of a union employee to criticize the employer while carrying out trade union activities, arbitrator Picher in Re Burns Meats Ltd. and Canadian Food & Allied Workers, Local P 139 (1980) notes:
If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. . . . The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute licence or an immunity from discipline in all cases. A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of a collective agreement . . . Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management: . . . (pp. 386-387) 

118In Re Brampton (City) and A.T.U., Loc. 1573, (1989), the city of Brampton suspended one of its employees for one day without pay. The employee, Andre Monette, was president of the local Amalgamated Transit Union. Monette sent a letter to the local Mayor and council members to express his dissatisfaction with the city’s transit policies. He also sent a copy of the letter to two local newspapers. In his letter, Monette alleged that the employer had made it known that it did not fear a transit strike because only 10% of the population of Brampton used the buses. Monette also stated that during recent negotiations the city had indicated that it might consider privatizing the transit system and contracting it out. Monette asked the city to come "clean" on this issue. Monette accused the city of "patronage" although evidence suggested that he meant to say that the city had adopted a "patronizing" attitude. The City felt Monette’s letter was unfair and derogatory. It also believed he had not exhausted available internal channels before embarking on his course of action. The grievance was upheld. In applying the test set out in Re Burns Meats, the arbitrator concluded that the allegations about the city’s willingness to strike and plans for privatization were factually incorrect and made carelessly:

[I]t is sufficient to conclude that the grievor had crossed the line from what could be accepted as fair comment by a union executive to that which was a scurrilous attack on management of Brampton Transit without a factual basis for some statements and with careless disregard of the factual basis of others. (p. 324)
Applied to the educational context, where public school teachers bargain collectively, union leaders would appear to be given wide latitude to criticize in strong and extravagant language provided the criticism is not made maliciously or in bad faith.

Rank-and-file union members also appear entitled to speak freely and openly about the terms and conditions of their employment in the collective bargaining context. In *Stewart v. Public Service Staff Relations Board* (1978), the Federal Court of Appeal quoted with approval the reasoning of the adjudicator:

There is no doubt that employees entitled to bargain collectively are entitled to speak their minds about the subject matter of their negotiations and to criticize the position taken by the employer's negotiators. It does not follow that they are entitled to attack publicly any Minister, Deputy Head, or Department in respect of matters remote from collective bargaining and closely associated with political controversy. (p. 136)

Applied to teachers, it would appear that ordinary union members have the right to express themselves in strong language about the terms and conditions of their employment in the collective bargaining process. Prudence must still be exercised, however. For instance, personal attacks on the Minister of Education or language that is defamatory, false or malicious will not be protected under the aegis of free speech. In addition to honesty, cooperation, and loyalty, teachers are called to be obedient employees.

**Duty to be Obedient**

Employees are expected to follow the orders of their
superiors. Failure to do so may lead to a charge of insubordination. In *Re Mount Sinai Hospital* (1978), arbitrator Brandt stated:

> It is a recognized principle of arbitral jurisprudence that, in order to succeed in a claim of insubordination, an employer must establish that the employee has wilfully refused to carry out a work instruction. (p. 245)\(^{119}\)

Brown and Beatty (1988) offer the following rationale for this fundamental employment concept:

> The rationale for this general principle is said to lie in the employer's need to be able to direct and control the productive process of his operations, to ensure that they continue uninterrupted and unimpeded even when controversy may arise, and in its concomitant authority to maintain such discipline as may be required to ensure the efficient operation of the plant. Arbitrators have taken the position that their recognition of the employer's right to maintain production and to preserve its symbolic authority is neither inconsistent with, nor prejudicial to, the legitimate contractual rights of employees because in the vast majority of circumstances they can secure adequate redress for any abuse of authority by the employer through the grievance and arbitration process. (p. 7: 133)\(^{120}\)

\(^{119}\)As for the essential elements which comprise a charge of insubordination, Brown and Beatty remark: Arbitrators generally insist that to sustain an allegation of insubordinate conduct, "the employer must prove that an order was in fact given, that it was clearly communicated to the employee by someone with the proper authority, and that the employee actually refused to comply". (p. 7:137)

\(^{120}\)To maintain control over the efficient and effective operation of one's enterprise, arbitrators have generally upheld the notion of "work now, grieve later." In *Ford Motor Co.* (1964), the arbitrator observes: [A]n industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on
In sum, insubordination is a direct affront to the employer's right to manage, and as such, is a breach of the employee's duty to obey.

As applied to teachers, the specific common law language of insubordination has been set out in the provincial schooling legislation of five jurisdictions: British Columbia, Saskatchewan, the Yukon, Newfoundland, and Quebec. In Saskatchewan, for instance, s.206(a) of the Education Act states that a board of education may dismiss a teacher for "refusing or neglecting to obey any lawful order of the board." The remaining jurisdictions have implicitly incorporated the employment notion of disobedience into the single broad concept of cause in the dismissal or disciplinary context. Nonetheless, these jurisdictions draw on the same understandings of insubordination at common law. In Alberta, for example, McPayden J. upheld the school board's right to issue orders as part of its mandate to

until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision. (p. 785)

Applying this logic to the educational context, Givan (1986) notes:

While the tendency might be to respond, "yes but debate is the essence of education and the school's product is an inquisitive mind", it would merely be a digression. What has evolved from this view is a simply stated rule - "work now, and grieve later". (p. 946)

The rule has been also been applied to professionals such as nurses. (See Re Mount Sinai Hospital (1978))
direct and control its educational operations in Bozynski v. St. Albert Protestant Separate School District No. 6 (1982):

At common law an employer has the right to direct what work shall be done by his employees provided that the work directed is lawful and reasonable within the terms of the contract of employment. (p. 100)\textsuperscript{121}

In Re Board of Education and O.P.S.T.F. (1984), an elementary school teacher sent student "R" to the principal’s office for disruptive behaviour. R had already been excluded from class on three prior occasions. Following another reprimand by the vice-principal, the principal directed R to return to the teacher’s class. The teacher refused to admit R to the class and sent him back to the principal. The vice-principal then accompanied R to the teacher’s class-room and instructed the teacher to admit R to the class. In front of the class, the teacher responded: "I don’t care what you say. I don’t like the way the whole thing has been handled so out" and the teacher waived R out of the classroom.

Next, a meeting transpired involving the principal, vice-principal, and the teacher. The teacher still refused to admit R to his class unless the student was strapped. The teacher also told the principal: "Now Krever (the Director of Education) must either fire me or support me. He must s____ or get off the pot."\textsuperscript{122} The principal reported the matter to

\textsuperscript{121}Here, the school board fired the teacher for refusing to teach the subject assigned to him.

\textsuperscript{122}Given the teacher’s confrontational manner and language, one could also argue that this conduct violated the duty of cooperation he owed his employer.
the board of education. When an area supervisor could not
convene the teacher to allow R to return to class, the board
suspended him for a period of 19 1/2 days. The teacher
grieved the suspension but an arbitration board rejected his
grievance. The board held that the teacher violated his duty
of obedience:

The grievor, in his opposition to the specific direction
from the principal and vice-principal, was extremely
confrontational in his approach and challenged their
authority in front of a class of students. It is clear
that the authority in this matter rested with the
principal and that, in the event of a difference of
opinion between a principal and a teacher in this area,
its the opinion of the principal that must prevail.
. . . Whatever are the merits of the respective
positions as to appropriate educational philosophy, the
final resolution must rest with the board and the
board's representative on the scene being the principal.
. . . The confrontation was intentional on the part of
the grievor, and was carried on and pursued by him in
front of students and after he had been given several
opportunities voluntarily to correct his conduct. He
deliberately pushed the board to take the action which
it did. (p. 30) 133

Although the arbitration board referred to the first and
foremost statutory duty in every piece of provincial and
territorial schooling legislation, namely the duty to teach,
this case was not concerned with the specific nature of

133 In Wheaton v. Flin Flon Division No. 46 (supra),
(1980), Monnin J.A., of the Manitoba Court of Appeal, reminds
us that abusive language which challenges the authority of
the employer amounts to insubordination irrespective of the
employment context:
It would not be tolerated in ordinary commercial
enterprises, in government sectors, in public
corporations and in non-profit or benevolent
associations. I see no reason why school boards should
have to accept that kind of insubordination from
teachers. (p. 428)
teachers' obligations as educators. Yet the duty to educate is linked intimately to what teachers can and can not legitimately say. As professionals, teachers are in some measure responsible for the subject matter and teaching methods employed in their classes. Assuming teachers bring to bear some measure of professional judgment into how they educate their students, they may claim that they are ultimately entitled to exercise some degree of academic freedom. In response, employers may argue that the duty to obey is invoked by employment restrictions on what is said and taught in the classroom. In this context, the duty to obey may well conflict with the right of teachers to follow their own professional judgment.

**Defining Academic Freedom**

Any serious discussion about academic freedom must first begin by defining the term. According to the Canadian Association of University Teachers (1977):

> Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the university and faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. (p. 3-1)\(^\text{12}\)

\(^{12}\)Malloch (1987) offers four distinguishable yet interrelated senses in which the term is used:

- First, academic freedom as the capacity of the academy itself to function freely within a world larger than itself; second, academic freedom as the capacity of the body academic, that is, the *corps professoral*, to function freely within the corporate institution; third,
In essence, academic freedom provides teachers with the critical space to seek and disseminate the truth. In McKinney v. University of Guelph (1990), the Supreme Court of Canada stated that academic freedom entails "free and fearless search for knowledge and the propagation of ideas" (p. 282).\footnote{123} In the context of higher education, the principle of academic freedom has a long and established tradition. In recent years, the explicit recognition of academic freedom, as a fundamental intellectual norm, has typically been set out in the collective agreement between university faculty and administration.\footnote{126} Yet, the phrase academic freedom as the capacity of the individual faculty member to function freely within the life of the academy; and fourth, academic freedom as the capacity of the student to function freely within the academy in which he or she is registered. (pp. 6-7) Malloch (1987) also suggests that "academic freedom makes it possible for the world we inhabit to be subjected to all forms of critical examination" (p. 7). As to why this is a valuable activity, Malloch declares:

For some academics a critical examination of the world we inhabit is grounded in a collective version of the old Platonic adage, that an unexamined life is not worth living: the activity is valuable in itself, and offers a safeguard against complacency and delusion. For other academics the world which is to be critically examined is understood to be that world which can be subjected to forms of quantitative analysis and report: here the justification lies in the discoveries which emerge, and which may - if wisely used - improve the quality of human life. (p. 7)

\footnote{123}More recently, Chatalia (1995) has noted: "The purpose of academic freedom is to ensure that the truth, no matter how unpleasant, is discovered and disseminated" (p. 606).

\footnote{126}For instance, article 6.1 of the collective agreement between the University of Saskatchewan and its Faculty Association states:

Institutions of higher education are conducted for the
academic freedom does not appear in any school act, regulation, or collective agreement involving public school teachers. Must one, therefore, conclude that academic freedom does not exist in Canada's primary and secondary school system?

Do Public School Teachers Enjoy Academic Freedom?

In practice, the cynic might say that the bureaucratic morass in which teachers work makes the exercise of academic freedom virtually impossible. Consider, for example, the limitations placed on the curricular freedom of teachers in Saskatchewan. Under s.9(c) of the province's Education Act (1978) (subsequently referred to as the Act), the Minister of Education has a duty to provide "courses of study or curriculum guides pertaining to courses of instruction authorized under the regulations with respect to kindergarten, elementary and secondary schools". Further restraints are imposed at the local level. Regulation 37, pursuant to the Act, authorizes boards of education to establish policies concerning "the selection of learning resource material and instructional material." Under s.91(j) of the Act, the board is also responsible for "authorizing

common good, and the common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in teaching and in research is fundamental to the advancement and dissemination of truth.

12 These provisions are typical of those found in all Canadian provinces and territories.
and approving the courses of instruction for each school in the division". Lastly, a Saskatchewan teacher is obligated to follow the curricular directives by virtue of s.227(a) of the Act. This section states that a teacher must "diligently and faithfully teach the pupils in the educational program assigned to him by the principal." These statutory restrictions have led Hurlbert and Hurlbert (1992) to conclude: "The chances, therefore, of a teacher offending parents and students with teaching materials or methods is not that great" (p. 233).

Given the highly regulated nature of the public school curriculum and the absence of any Canadian cases which have directly addressed the issue of academic freedom, one might be tempted to conclude that the issue of teachers' academic freedom is

\[128\] Notwithstanding that the legislation and regulations impose curricular limits on teacher speech and that the legislation imposes a duty to follow the principal or board of education's instructions, one cannot assume that these are conclusive and absolute limitations on academic freedom. Rather, one can argue that these sources of limitation on academic freedom might themselves be subject to challenge. As far as statutes are concerned, the doctrine of parliamentary sovereignty suggests that this challenge could only be raised as a constitutional challenge (see Chapter 5) to the legislation, perhaps based upon Charter recognition of the value to be accorded to academic freedom under s.2(b). Although regulations and orders of the school board or principal are also subject to challenge under s.2(b) of the Charter, unlike statutes, they can be challenged on other than constitutional grounds for they constitute exercises of statutorily delegated authority in administrative law terms. Thus, one could conceivably challenge the regulations and orders on the basis that they exceed the implied limitations to that authority. Here, one might argue that the statutory authority could be read as impliedly limited to furthering the purpose of the statute and this, in turn, might require some minimal protection of academic freedom.
freedom in Canada rarely arises. From this, one might further argue that the matter is unimportant or irrelevant to teachers and other educators. At best, it seems to be a theoretical problem of interest only to academics. Yet, recent developments might suggest otherwise.

Media coverage in Saskatchewan, for example, suggests that teachers' academic freedom is still a relevant and controversial topic of concern. On November 25, 1995, the Saskatoon paper, The StarPhoenix carried an editorial (p. A8) entitled "Film policy deprives students". It was highly critical of the local school board's decision to pull important movies like Macbeth and Schindler's List from the schools because they have a restricted rating. On December 4, 1995, the C.B.C. Radio (Saskatchewan) programme "First Edition" carried live interviews with the president of the local teachers' association in Saskatoon and the Director of Education for the Saskatoon Public Board of Education on censorship in the classroom. The president expressed concern that the board's policy had a potentially chilling effect on teachers' professional right to choose appropriate materials for the students. The director, on the other hand, felt the policy was a responsible board response to a number of parental complaints.

Should Public School Teachers Enjoy Academic Freedom?

At a theoretical level, there is support in the literature for the contention that academic freedom has no
legitimate place in the public schools. Byrne (1989) states the case against academic freedom at the primary and secondary levels in these terms:

Throughout this article, I treat cases involving elementary and secondary school teachers as marginal, citing or discussing them only when they bear directly on the law as it pertains to universities. This distinction is appropriate for several reasons. First, academic freedom was conceived and implemented in the university, and any role it plays in the lower grades is derivative. Second, . . . academic freedom makes sense only for teachers who are also researchers or scholars — work not generally expected of elementary and secondary school teachers. . . . Third, when lower courts sometimes use the term academic freedom in defending the classroom speech of schoolteachers from sanctions by principals or school boards, they appear to mediate between the often-affirmed power of school boards to inculcate "American values" in young pupils . . . and the values of individual expression and diversity. . . . Universities do not "inculcate" ideology; their transmission of cultural values is an explicitly intellectual process that permits the student to reach her own conclusions. The rights of schoolteachers are important, but they are articulated in such a different educational context that they should be kept distinct. (p. 288, note 137).

In terms of arguments for and against academic freedom for public school teachers, how might we respond to Byrne's triadic critique? First, Byrne maintains that any role academic freedom has in the lower grades is derivative. It is true that academic freedom is a given in the tertiary context. As already indicated, academic freedom is a principle which universities point to as having a long-standing and cherished past. By its very definition, a university is an open forum where individuals are free to continuously push the borders of truth and knowledge. Academic freedom ensures that this critical ongoing inquiry
takes place.

In contrast, public schools do not have the same tradition. One might argue that academic freedom, if it exists at all, has a much more diminished role at the elementary and secondary levels. Since public schools impart information and inculcate values, some might suggest that there is arguably less room for the free play of academic freedom. In this sense, Byrne may be correct when he states that "academic freedom in the lower grades is derivative". In a lesser form, academic freedom in the public schools derives from a more robust, full-fledged, and free-standing notion of academic freedom in the tertiary setting. But does the argument end there? Although academic freedom has traditionally been most forcefully articulated and embraced in the tertiary context, it is unclear why this critical value should continue to have a diminished or simply derivative status in the public school context. Logically, there does not appear to be any valid reason why academic freedom must be relegated to an inferior position at the primary and secondary levels.

Second, Byrne asserts that academic freedom is only appropriate for teachers who are also scholars. Although Byrne does not expand on this, he has touched upon a critical distinction. Academic freedom is normally associated with the pursuit of truth and knowledge. By its very nature, research challenges the scholar to go beyond our present
epistemological boundaries. In essence, an unmitigated commitment to scholarship is most consistent with the practice of academic freedom. As a fundamental component of their employment, professors in Canadian universities are clearly expected to engage seriously in scholastic endeavours. In this regard, they are given tremendous latitude to pursue whatever line of research interests them within, and even sometimes outside, their field of specialization. Academic freedom, backed by tenure, makes this intellectual pursuit possible.

Generally speaking, public school teachers are not engaged in scholarly pursuits like their counterparts at the university. They are normally not hired to conduct research. First, and foremost, public school teachers are expected to teach a pre-determined curriculum. Hence, in terms of what they teach, public school teachers face much tougher constraints on their curricular freedom than do university professors. As we saw earlier in our analysis, the bureaucracy in which teachers work exerts considerable control over the content that they teach. The presence of provincial schooling legislation, Ministers of Education, provincially approved curricula, local school boards, and individual school policies all suggest that there is a stronger sense that a specific and specified content must be

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129Byrne admits the possibility that some public school teachers may be engaged in scholarly activities.
taught. There is clearly much more administrative, and even state, control of curricula content than would be tolerable at the university level.

Nonetheless, it is fair to note that the need to comply with external curricular demands is also a recognized and legitimate limit on academic freedom at the university level. There, control over the curriculum is in the hands of faculty, whether it be at the committee or faculty council level. And individual instructors must to some degree conform to course descriptions, exam requirements, grading policies and related matters which have been approved by individual departments. Consequently, this tension between academic freedom and legitimate externally imposed curricular demands is always there, even at the tertiary level. Byrne would argue, and rightly so, that the external imposition is much greater where public school teachers are involved.

In spite of more stringent restrictions over curricular content, must one conclude that academic freedom has no place in our public schools? If teachers find provocative and well-written articles in Canada’s national newspaper, The Globe & Mail, might they not share the contents with their high school English or Social Studies class? If the National Film Board produces a documentary of high quality that is relevant to the study of history, must teachers be precluded from bringing this alternative source into the classroom because they do not have prior approval? The same could be said for
other pedagogically valid sources of information which are not part of the formal prescribed curriculum. Not only might teachers supplement the core curriculum where appropriate, but they might also challenge it when it is no longer acceptable. For instance, the use of prescribed materials which are biased towards women, Aboriginals, or other minority groups need to be called into question and even replaced by something which is educationally more sound. Likewise, pre-approved materials that are out-dated or factually incorrect have to be supplanted by relevant and accurate texts. In these circumstances, without some measure of academic freedom, public school teachers will be very reluctant to come forward to challenge the status quo as it relates to curricular content. In other words, just as the academic freedom of public school teachers is legitimately restrained by external curricular demands, so too should curricular design be restrained by the need to leave some room for academic freedom.

In terms of pedagogy, or how the material is taught, there could be an even stronger argument for granting public school teachers some measure of academic freedom. We recognize that governments may tell teachers what they must teach. But do they also want to tell them how to teach it? If teachers are no more than bureaucratic employees who are programmed to use pre-approved teaching strategies, then the need for academic freedom in public schools is non-existent.
Viewed as professionals, a different result ensues. Teachers are hired because they know how to teach. They must be entitled to exercise some degree of independent judgment. To perfect their craft and to improve on existing methods, teachers should be allowed to experiment within the bounds of reasonableness and appropriateness with different pedagogical practices. Academic freedom should protect unconventional or creative teachers who are able to stimulate and challenge students because they are willing to follow independent judgment as to what constitutes the best pedagogical approach in a given situation. If we do not have confidence in our teachers' ability to teach, the case for academic freedom is greatly diminished. On the other hand, if we trust our teachers, acknowledge their expertise, and respect their decision-making capacities within the parameters of professionalism, the argument for some degree of academic freedom in the public school context is quite compelling.

As previously stated in the definition offered by the Canadian Association of University Teachers, academic freedom protects not only the right to conduct research but the right to teach. Although one may argue that the two are related, they are still separate activities and the C.A.U.T. lists them as such. In university institutions, some professors may do very little or no publishing and yet be excellent teachers. Does this mean that they are not protected by academic freedom in their teaching? As educators, if public
school teachers are concerned with promoting truth by encouraging their students to become independent learners, then the argument for some degree of academic freedom seems quite strong. As Hurlbert and Hurlbert (1992) suggest, academic freedom in public schools is necessary "to teach children by example about the constitutional value of unfettered speech in the search for truth and thereby encourage their 'liberal' education" (p. 221). If Byrne is claiming that we are not interested in the pursuit of truth in the public schools or that public school teachers cannot facilitate the quest for knowledge through creative and stimulating teaching, then there would indeed be no need to assert academic freedom as desirable and necessary for teachers.

Third, Byrne believes that academic freedom is inconsistent with the inculcation of values. Although public school teachers are called to inculcate values such as tolerance, respect, and honesty, is there any valid reason why the promotion of these values must preclude the exercise of academic freedom? Even at the university level, education is not value free. In fact, the search for truth is an inherently value-based activity itself. Academic freedom is not a license for professors to plagiarize, to falsify research results, to lie to administrators, or to verbally abuse students. In many respects, professors are called to inculcate by example the values of intellectual integrity,
such as truth and honesty, and respect for others through
civility and good manners. This obligation is in no way
inconsistent with the exercise of academic freedom.

**Teaching in a democracy: Academic freedom & critical thinking.** At a more profound level, if we wish to argue that
academic freedom is necessary in public schooling, we must
look more closely at the purpose of education and the special
position of teachers in the teaching process. Since these
considerations are inherently of a foundational or
philosophical nature, they merit further scrutiny. If
education is the means by which society continues and
reproduces itself, what then is the role of education in a
democracy? According to Scheffler (1985):

The democratic ideal precludes the conception of
education as an instrument of rule; it is antithetical
to the ideas of rulers shaping or moulding the mind of
the pupil. The function of education in a democracy is
rather to liberate the mind, strengthen its critical
powers, inform it with knowledge and the capacity for
independent inquiry, engage its human sympathies, and
illuminate its moral and practical choices. This
function is, further, not to be limited to any given
subclass of members, but to be extended, in so far as
possible, to all citizens, since all are called upon to
take part in processes of debate, criticism, choice, and
cooperative effort upon which the common social
structure depends. (p. 124)\(^{10}\)

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\(^{10}\)In non-democratic societies, Scheffler sees the role
of education in these terms:
In traditional authoritarian societies, education has
typically been thought to be a process of perpetuating
the received lore, considered to embody the central
doctrines upon which human arrangements were based.
These doctrines were to be inculcated through education;
they were not to be questioned. Since, however, a
division between rulers and the ruled was fundamental in
such societies, the education of governing elites was
Within the context of a democratic tradition, John Dewey (1916) posited an evolving view of education in which progressive communities "endeavor to shape the experiences of the young so that instead of reproducing current habits, better habits shall be formed, and thus the future adult society should be an improvement on their own" (p. 79). But, how can we best prepare students to take their rightful places in today's world? For Dewey, a seminal figure in the philosophy of democratic education, this preparation is ultimately linked to the most important goal in education - training students to think.\textsuperscript{111} Thus education "is vitally concerned with cultivating the attitude of reflective thinking, preserving it where it already exists, and changing closer methods of thought into stricter ones whenever possible" (1933, p. 248).

Dewey's call to critical thinking has been embraced by a number of philosophers and education theorists.\textsuperscript{112} Yet, sharply differentiated from the training and opinion-formation reserved for the masses. Plato's Republic, the chief work of educational philosophy in our ancient literature, outlines an education for the rulers in a hierarchical utopia in which the rest of the members are to be deliberately nourished on myths. (pp. 123-124)

\textsuperscript{111}In the context of thinking and learning, Dewey (1916) observed: [T]he aim of education is to enable individuals to continue their education. (DE, p. 100).

\textsuperscript{112}Although educational philosophers like Dewey have been instrumental in expounding the virtues of the role of critical thinking in contemporary American thought, this tradition has been rooted in philosophy and dates back to the time of Greek civilization. In this regard, Thayer-Bacon
critical thinking is not universally accepted as an educational ideal. As Siegel (1988) notes:

[T]he simple assumption that critical thinking is a worthy educational goal is contentious, and masks enormous allied assumptions concerning the nature of education and the educated person. Many educational theorists have denied and would deny not only that critical thinking is a fundamental educational ideal, but that it is a worthwhile ideal at all. For many such theorists have favored educational ideals which are not only alternatives to, but incompatible with, the ideal of critical thinking. Such alternatives include the production of docile citizens or good workers; the maximization of individual happiness; the fostering of ideological purity and commitment; and so on. In short, the aims of education are controversial and contentious. It is not obvious that the fostering of critical thinking is a good thing or a worthy aim of our educational endeavors. (p. 50)

(1993) notes:
Philosophers have always relied on critical thinking as their main tool for reasoning and attempting to find truths. . . . Since the Greeks, especially the days of Aristotle, with his categorizing of knowledge and systemizing ways of judging arguments through logic, critical thinking has relied upon a paradigm that presents critical thinking as a process based in logic, where facts are separated from opinion. (p. 325)

13"Siegel remarks that there are both practical and theoretical opposition to critical thinking. From a practical perspective, he observes:
[V]arious defenders of "scientific" creationism deny that science education should strive either to expose students to scientifically legitimate alternative theories, or to help students to become capable of objectively evaluating evidence for, and of fairly assessing the merits of, those alternatives. While some only implicitly deny this, and pay lip service to critical evaluation, others explicitly suggest that science education ought to conform, not to the ideal of critical thinking, but rather to basic religious tenets. (p. 48)

From a theoretical perspective, he states:
[T]here are theoretical objections to taking critical thinking to be a fundamental educational ideal. For example, many feminist scholars distinguish between "male" and "female" thinking, label rational thinking
In spite of its controversial status, we believe that Siegel offers four compelling reasons for accepting critical thinking as a fundamental educational ideal. First, morality and respect for person call for critical thinking:

This first consideration is simply that we are morally obliged to treat students (and everyone else) with respect. If we are to conduct our interpersonal affairs morally, we must recognize and honor the fact that we are dealing with other persons who as such deserve respect - that is, we must show respect for persons. This includes the recognition that other persons are of equal moral worth, which entails that we treat other persons in such a way that their moral worth is respected. (p. 56)

Second, self-sufficiency and preparation for adulthood justify critical thinking:

The second reason for taking critical thinking to be a worthy educational ideal has to do with education's generally recognized task of preparing students to become competent with respect to those abilities necessary for the successful management of adult life. We educate, at least in part, in order to prepare children for adulthood. . . . That is, we seek to render the child self-sufficient; to empower the student to control her destiny and to create her future, not submit to it. (p. 57)

Third, initiation into the rational traditions provides support for critical thinking:

If we can take education to involve significantly the . . . as "male", and decry it as incomplete, biased, sexist, or worse. . . . Similarly, in literary theory deconstructionists such as Derrida deride rationality as "logocentric". . . . some Marxists and other ideologues reject critical thinking as biased and bound up with unacceptable hegemonic interests. In addition, a surprising number of contemporary epistemologists and philosophers of science endorse views which favor one or another form of epistemological relativism, which undercut the ideal of critical thinking, or more directly disparage rationality. (p. 49)
initiation of students into the rational traditions, and such initiation consists in part in helping the student to appreciate the standards of rationality which govern the assessment of reasons (and so proper judgment) in each tradition, then we have a third reason for regarding critical thinking as an educational ideal. (pp. 59-60)

Fourth, democracy requires critical thinking:

The fundamentality of reasoned procedures and critical talents and attitudes to democratic living is undeniable. Insofar as we are committed to democracy, then, that commitment affords yet another reason for regarding critical thinking as a fundamental educational ideal, for an education which takes as its central task the fostering of critical thinking is the education most suited for democratic life. (p. 61)

Although Siegel's points all reflect "liberal" values of equality, autonomy, self-responsibility, and democracy, these values are in large measure both assumed and embraced by our political society.

Yet, it is important to remember that to develop critical thinking is not free from risk. Passmore (1980) states:

The critical spirit which a teacher is interested in developing is a capacity to be a critical participant within a tradition, even if the effect of his criticism is profoundly to modify the operations of that tradition. (p. 173)\textsuperscript{13}

\textsuperscript{13} Some think that critical thinking is essentially destructive and that teachers should not encourage destructiveness in their students. To this Passmore (1980) replies:

The person who is an especially gifted critic will often, let us grant, be destructive. But destructive, one hopes, of cant, pretence, hypocrisy, complacent conservatism and fanciful radicalism. A child is going to find himself surrounded during his entire life by persons who will attempt to defraud him, impose upon him; he is going to be surrounded by charlatans, cheats of every description, self-deluded prophets, hypocrites,
Teaching students to think for themselves implies that the school system and the larger society to which they belong will be subject to rigorous scrutiny. In the classroom are we prepared, as teachers, to release this potential? Passmore indicates that there are three principal barriers which militate against critical thinking in public education:

The difficulty with encouraging critical discussion is that the teacher will almost certainly have many beliefs, which he is not prepared to submit to criticism, and he will be enforcing many rules of which the same is true. . . . Secondly, even if the teacher is himself critical, there may be social pressure upon him not to admit that certain beliefs, certain practices, certain authorities, can properly be examined in a critical spirit. . . . A third difficulty arises from the fact that the teacher’s training is very often not of a kind to encourage in him a willingness to participate in critical discussion. (pp. 171-2)

In spite of the risks involved in embracing critical thinking and the obstacles that may prevent critical thinking from gaining a foothold in our schools, does a viable alternative exist? Educational philosopher, Alfred North Whitehead (1929), warned that the absence of thinking in education would lead to stagnation through "inert ideas":

In training a child to activity of thought, above all things we must beware of what I will call "inert ideas" - that is to say, ideas that are merely received into the mind without being utilised, or tested, or thrown into fresh combinations. In the history of education, the most striking phenomenon is that schools of learning, which at one epoch are alive with a ferment of genius, in a succeeding generation exhibit merely pedantry and routine. The reason is, that they are overladen with inert ideas. Education with inert ideas mountebanks. If, as a result of his education in criticism, he can help to destroy them before they destroy human society, so much the better. (p. 174)
is not only useless: it is, above all things, harmful. (p. 90)

Critical thinking is surely the antidote to "inert ideas." As Whitehead so eloquently reminds us: "Every intellectual revolution which has ever stirred humanity into greatness has been a passionate protest against inert ideas" (p. 91).

During the past decade, Ennis (1985), Siegel (1988), Paul (1990), and Thayer-Bacon (1993)\textsuperscript{13} have all argued in their own way that being a critical thinker essentially requires mastery of two different capacities. First, logical skills must be learned. Second, proper dispositions to use those skills must be fostered. If we are serious about teaching students how to think critically, we must be committed to developing their abilities and dispositions to make the endeavour a successful one. Teaching methods and curricula must encourage students to learn to evaluate claims and opinions, to analyze arguments, to judge the credibility of a source, to identify assumptions and to challenge received dogma to see if it is sound. At the same time, cultivating the appropriate disposition for critical thinking must also be fostered. We need to help students to keep an open mind, to be sensitive to the opinions and values of others, to keep well-informed and to change their belief

\textsuperscript{13}From an epistemological perspective, Ennis, Siegel and Paul ground their critical thinking theories in strategies for knowing which are primarily individualistic, universal and objective. In contrast, Thayer-Bacon embraces a feminist approach to critical thinking which is relational, contextual and subjective.
structures when there is evidence and good reasons for doing so.

Recognizing the value of critical thinking, can we still teach the skills and dispositions that underlie them to our public school students? Are they ready for them? Are they intelligent and sophisticated enough to grapple with these higher order levels of thinking? Current educational theory certainly does not suggest that public school teachers should shield students from critical and creative thinking. Canadian educational philosopher William Hare (1990) frames the issue in these terms:

The common assumption is that academic freedom has application only in the university system. But if an open forum for discussion is appropriate at any level, then progressively there must be an anticipation of the practice during earlier stages of education. A rigid division between different levels is arbitrary. The "not yet fully fledged minds" include those of 18-year-old adults in grade 12 or equivalent, who will be university students within three months. We might label this the fallacy of the magic transition. (p. 380)

Noddings (1989) advocates that teachers "must provide far more opportunities for students of all ages to plead each other's cases ..." (p. 173). Passmore (1980) admonishes those who wish to teach critical thinking to university students only:

[Even if the teacher wholly fails in his attempt to encourage this or that child to be critical, it is a fatal policy to restrict the encouragement of critical thinking in learners to the university level. If from early childhood a child is taught to do whatever he is told to do, if he is discouraged from asking questions, except in order to elicit information or receive instruction, he will completely flounder when he is suddenly called upon to make up his own mind, to face a
situation where 'authorities' disagree. (p. 177)\footnote{Prior to introducing children from an early stage to the practice of critical discussion, Passmore acknowledges that it is important to build up a body of knowledge, a set of habits, from which criticism can take its departure. Nonetheless, a critical approach can be embraced from the beginning: 
[If]formation can be imparted in an atmosphere in which the child is encouraged to question it, rather than discouraged from questioning it, in which he is not only permitted, but encouraged, to ask questions about its sources, its reliability. (p. 177)}

Hence, critical discussion of accepted rules can begin at a very early stage in a child's life and thus pave the way for greater criticism over time. As Passmore explains: "What happens later as he begins to enter into the great traditions, is that the area of discussion widens and the difference between types of discussion more clearly emerges" (p. 180)

But how does critical thinking relate to academic freedom? Simply put, academic freedom is the life blood of critical thinking. Academic freedom is a necessary condition for the development of critical thinking. Hence, if we wish to take education seriously, we must ensure that teachers have academic freedom in the classroom to fulfil the democratic state's mandate as educator. Even the origins of the word educate compels this reasoning. Derived from the latin educare, educate means "to cause to grow." If public education is a constantly evolving, growth oriented endeavour, then critical thinking, within the bounds of academic freedom, is the engine that drives the process. It
ensures that teachers and students are free to question tradition, explore alternative solutions and grapple with the problems that we as a society face today and in the future.

In sum, one can argue that critical thinking is the most important lesson that we can teach our students in an educational system that embraces liberal values. Hence, academic freedom is essential. It is the *sine qua non* for critical thinking. As indicated earlier, Siegel (1988) posits four rationales for accepting critical thinking as a fundamental educational ideal: equality, autonomy, self-responsibility, and democracy. One might argue that academic freedom, and its central preoccupation with the pursuit of truth, also entails similar values. Academic freedom is especially concerned with autonomy and self-responsibility as these core values make freedom of enquiry possible. Both academic freedom and critical thinking embrace a view of truth that is dynamic. The search for truth is enhanced by challenge and growth and requires rejection of stagnant and stale orthodoxies. Academic freedom and critical thinking are inherently anti-authoritarian.

In the professional context, part of what academic freedom is is respect for professionalism. Encouraging the exercise and reliance on professional judgment can be justified as contributing to excellence. Academic freedom makes critical thinking an attainable goal because it grants teachers the freedom to follow their professional judgment.
Even though we have advocated the virtues of critical thinking, we recognize that academic freedom will not always and inexorably lead to this conclusion. In other words, a teacher exercising academic freedom may make a professional judgment that allows him or her to conclude that teaching by rote, for instance, is the best way to proceed. Although learning by heart seems hardly compatible with critical thinking, professional freedom must offer some protection for the teacher who embraces this teaching method.

**When is Academic Freedom Engaged?**

It is important to remember that the exercise of academic freedom is not an exercise in licence. Academic freedom is not a boundless abstraction. Teachers are not free to do whatever they wish in the name of academic freedom. Hence, it is critical to attempt to distinguish those activities which may properly be considered to engage academic freedom from those that do not. Malloch (1987) sets out the contextual factors which may limit the exercise of a university professor’s academic freedom:

The individual faculty member’s academic freedom will . . . be conditioned by the immediate context of the academic unit in which he or she holds appointment. His freedom will be conditioned by the nature of his teaching assignment - the subject matter of his courses, the size of enrolment, regulations concerning evaluation, duration of the semester, timetable, and so on. And there will be conditioning elements beyond his teaching assignment, such as laboratory and library facilities, the availability of research grants, the academic support services available, and all those factors comprehended in the phrase, terms and conditions of appointment. At the start of the faculty member’s career his academic freedom is bound to be conditioned
by the fact that the appointment itself is for a specific term. (p. 10)

From a contractual perspective, the terms and conditions of public school teachers' employment will likewise have a direct bearing on the issue of academic freedom. Teachers have certain contractual obligations that they are bound to fulfil as employees. Of necessity, these duties will curtail teachers' academic freedom. Teachers can not jettison an approved school or departmental marking regime, refuse to teach the prescribed texts, change the hours of class, or require students to attend school on Saturdays under the guise of academic freedom. Likewise, teachers hired to teach French cannot unilaterally decide to teach history and justify the decision in the name of academic freedom. Yet, the issue of relevance, or teaching what one should be

137 Malloch suggests that these kind of "limits imposed are simply corollaries of certain factors conditioning the exercise of academic freedom" (p. 11).

138 Nonetheless, Malloch (1987) is mindful of the dangers to academic freedom when "these same conditioning factors can all be abused so as to transform acceptable limits into unacceptable limitations" (p. 11): The fact that a student is subject to regular evaluation by instructors does not authorize instructors to use evaluation to enforce a uniformity of opinion among those they teach. The fact that courses of instruction must be approved before they can be offered does not authorize departments or faculty councils to reject course proposals as a means of excluding methodologies or orientations which they find uncongenial. (p. 11)

In the public school context, for instance, a teacher might be required to teach a prescribed text. This should not, however, silence the teacher from speaking out in a reasoned and appropriate manner if the text is used to propagate sexist, racist, or otherwise injurious attitudes in the educational setting.
teaching, can be problematic.

In Re Foothills Prov. General Hosp. and U.N.A. (1989), the Foothills Hospital, in Alberta, disciplined four instructors at the school of nursing for allegedly engaging in improper classroom behaviour. One instructor, Ms. Abbott, was suspended for two weeks and the other three were issued letters of warning for their participation. Prior to the incident, there had been a province-wide strike by the United Nurses of Alberta which closed the school of nursing for three weeks. To make up the time lost, management decided to extend the school term by two more weeks. Management announced its decision to the students upon the recommencement of classes on February 29, 1988.

On March 1st, two students from the student association came into a class immediately preceding Ms. Abbott's class and initiated a discussion on the two-week extension and the accompanying schedule changes. Ms. Abbott's class began at 10h30 but the class did not fill up until approximately 10h45. Students arrived late because of the preceding discussion about the extension of the school year. Sensing "anxiety in the air" and a lot of noise in the class, Ms. Abbott asked a student if she were angry with the four instructors in the class because they had not worked during the strike. The students informed her that they were not angry with the instructors but were angry with the administration for extending the term. Students then started
asking questions about the strike and extended school year. Ms. Abbott and the other three instructors attempted to answer the students' questions. During the discussion, the students specifically asked Ms. Abbott for her opinion as to "what to do" about the extension. She stated that she could not help them and that they had to find a solution themselves. The discussion ended at about 10h50 when Ms. Abbott asked the students to vote on whether they wished to meet after class to continue the discussion on the two-week extension.

Despite starting late, the class ended on time. Ms. Abbott covered all the material she had intended to cover and the class proceeded uneventfully from 10h50 to its conclusion. The employer argued that Ms. Abbott breached her duty of fidelity since the class discussion and, in particular, the vote amounted to public criticism of the employer. The arbitrator upheld all four grievances. On the issue of relevance, the arbitrator noted:

First, the board cannot accept the proposition that permitting a 20-minute class discussion to occur that is not strictly "on point" in terms of the formal lecture can be construed as an inappropriate use of class time. There was no evidence presented that this type of behaviour had been a persistent problem of Ms. Abbott's in the past or that a clear rule existed that nothing beyond the formal lecture material be permitted during class time. Moreover, Ms. Abbott provided sound reasons as to why use of class time for an extraneous topic was not inappropriate in the circumstances: (1) many students arrived late and the class did not fill up for almost 15 minutes, and (2) the discussion was on an issue about which many students were concerned and upset. In addition, Ms. Abbott did keep her eye on the time and was obviously cognizant of the time-limits for
such an "off-topic" discussion. (p. 50)

Although this case arose in a tertiary institution, the facts are relevant to the exercise of academic freedom in public schools. We all know of teachers who have wandered off topic. Yet, the critical question must focus on why the discussion has taken a different turn. If there is a legitimate reason for the diversion, then academic freedom should afford protection to the teacher who is not strictly always on point. A physics lesson on the structure of the atom may prompt a student to question the ethics and the politics of using nuclear weapons and nuclear energy in contemporary society. Some might suggest that the query is irrelevant to the teaching of pure science. Others, however, might view the question as an ideal entry into the field of applied science and technology. It may also afford the teacher an opportunity to discuss the interconnectedness of disciplines (science, ethics, and politics) with the students. Nevertheless, academic freedom should not be seen as a licence to teach whatever one deems relevant. In the public school context, shorter classes (usually one hour) require teachers to keep a vigilant eye on the clock to ensure that adequate material is covered.

Academic freedom will also not protect teachers who are incompetent. As Brooks (1995) observes: "Academic freedom, as a theory and a right, assumes that the scholar is both competent and active" (p. 332). The idea that academic
freedom presupposes a commitment to competence is dramatically illustrated by the Alberta case of *MacDonald v. Red Deer (County)* (1986). MacDonald taught in a Junior High for 11 years. Over a period of four years, the board evaluated him 26 times. The evaluation indicated that he failed to plan his lessons, failed to teach effectively, and failed to differentiate between groups of students with differing learning abilities. MacDonald’s practices ran contrary to the board’s publicized policy on teaching methods. Following warnings and opportunities to improve, the teacher did not improve. The board decided to terminate his contract and a board of reference upheld the termination.

As for his failure to prepare lesson plans, the Board of Reference noted:

MacDonald was given a teacher’s daily plan and record book with specific instructions to set out on a daily basis, in advance, the instructional objective of the lesson, the resources, and the topic being covered. On many occasions, MacDonald wrote nothing or, if anything, little of the general topic or topics he intended to cover. As a general rule, the evaluators did not see any plan in the plan book. It is obvious that planning techniques can and will differ from teacher to teacher, but the evaluators asked for evidence of planning by MacDonald. The evaluators consistently saw no evidence of planning. It is obvious that MacDonald was not properly planning the lessons for the classes. (p. 139)

With respect to effective teaching, the Board observed:

Almost without exception, the evaluators repeatedly found that, in the classroom, MacDonald was not, in fact, teaching the students. The evaluators did not see any direct teaching as a general rule. MacDonald generally appeared to use worksheet teaching as a primary teaching method and the evaluators found that unacceptable. The evaluators found that MacDonald used too much teaching time in reviewing worksheets. They saw
no evidence of MacDonald ever looking in the students' notebooks. On one occasion, an evaluator found MacDonald reading a newspaper at his desk in the classroom during class, and the newspaper was open at the classified ad section. On another occasion, MacDonald was at the back of the classroom operating a mini-computer, putting in students' marks during teaching time. On another occasion, MacDonald was showing an entertainment film to the class instead of teaching. Those acts and omissions and others were given as examples of failure on the part of MacDonald to teach effectively. In my view, the complaints of the evaluators in this regard were justified. (p. 139)

Lastly, MacDonald failed to differentiate between the core group of learners, who needed extra attention, and the other students:

Almost without exception, MacDonald failed to differentiate between the core students and the other students in his teaching. He had up to three core students in number, and it was necessary to employ different teaching methods for those core students. The evaluators suggested separate questions in assignments, and separate lessons. The core students were not shown in MacDonald's plan book or mark book. There was no evidence that he did not separate planning for teaching them or even gave de facto recognition that they existed as a separate group. The evaluators never saw any specific help given by MacDonald to the core students. In my view, the complaints of the evaluators were justified. (pp. 139-140)

In sum, teachers' academic freedom will not be threatened when they are asked to comply with the bona fides terms and conditions of their employment. Furthermore, academic freedom cannot be advanced as a defence to incompetent teaching.

Are Academic Freedom and Free Speech Related?

Having offered a theoretical defense of academic freedom for public school teachers, the researcher will now consider the relationship between free speech and academic freedom. Are the terms simply synonymous? We have already seen in
Chapter 2 that the search for truth rationale is arguably the most compelling justification for free speech. In other words, free speech is vitally important because it leads to the discovery of truth. Thus, to the extent that academic freedom and free speech are both fundamentally concerned with the pursuit of truth, the concepts are interrelated.

Yet, when teachers criticize the board of education for closing a local school, this might raise a free speech issue but does not typically engage teachers' academic freedom. Hence, academic freedom is a more restrictive concept. It relates primarily to the degree of autonomy that teachers exercise within the confines of the established curriculum. Therefore, the selection of teaching materials and the use of teaching methods would go to the heart of academic freedom. One might also argue that academic freedom affords protection to teachers who engage in scholarly research related to their field of teaching expertise. Practically speaking, this exercise of academic freedom rarely arises since primary and secondary educators are full-time teachers who may have little or no time for research and writing.

It is axiomatic that the exercise of academic freedom must, of necessity, invoke some measure of free speech. Without the freedom to communicate ideas and thoughts that free speech makes possible, academic freedom can not be realized. Thus, academic freedom is actualized through academic speech. The more important question, though, is not
whether academic freedom requires freedom of speech but whether freedom of speech requires academic freedom. To respond to this query, the legitimacy of including academic freedom within the constitutional scope of s.2(b) of the Charter will be considered in the next chapter. First, however, it will be discussed in the context of employment law.

**Academic Freedom and Employment Case Law**

To date, there exists no employment case law in Canada which has directly addressed the question of academic freedom in our public schools. Nonetheless, the highly publicized case of James Keegstra in Eckville, Alberta raises important issues associated with the scope of academic freedom. In *Keegstra v. Board of Education of Lacombe No. 14 (1983)*, a Board of Reference upheld the board of education’s decision to terminate Keegstra’s employment contract on the grounds of insubordination.¹³⁹

Keegstra taught social studies to students in grades nine and twelve. In class, he presented his view of history founded on an international Jewish conspiracy. Keegstra sincerely believed that Jews were responsible for undermining

¹³⁹In separate proceedings, the state also successfully prosecuted Keegstra under s.319(2) of the Criminal Code of Canada for wilfully promoting hatred against an identifiable group. In *R. v. Keegstra* (1990), the Supreme Court of Canada determined that although s.319(2) violates the free speech rights of individuals under s.2(b) of the Charter, the law is still constitutional because it is a "reasonable limitation" under s.1 of the Charter.
Christianity and Western civilization. Social chaos and turmoil including the French Revolution, the American Civil War, and the First World War were the fruits of this conspiracy. Following parental complaints, the superintendent conducted an investigation of Keegstra’s teaching practices. As a result, Keegstra received oral and written warnings to amend his ways by teaching the prescribed curriculum. When he did not conform to the superintendent’s directives, the board of education held a hearing and decided to fire Keegstra.

McFadyen J. upheld Keegstra’s dismissal for failing to obey:

Either a persistent and wilful refusal to follow the curriculum prescribed by the Minister of Education pursuant to the School Act, or a wilful refusal to comply with a lawful and reasonable order or directive of the board of trustees is such sufficient cause for summary dismissal; each showing a disregard by the employee of an essential term of the contract of employment. (p. 372)

On the evidence, McFayden J. found that Keegstra’s in-class racist opinions amounted to unjustifiable contractual violations. Keegstra not only used methods contrary to the provincial curriculum but he refused to remedy his ways after he had received a number of warnings. From this perspective, one is tempted to conclude that the issuance of an order from one’s superiors will always trump whatever interests teachers may have in academic freedom.

But McFayden J.’s remarks elsewhere in the judgment reflect an underlying concern for teachers’ academic freedom. While condemning Keegstra for presenting a one-dimensional
version of history in class, McFayden J. noted that his approach precluded the teaching of social studies through critical inquiry:

While the appellant may have prefaced his presentation of the material by a general statement that these were only theories, I am satisfied that the students did not have before them any contrary views or any contrary source material which may have led them to conclude that the theories being presented were in error. This lack of opposing views and opposing source materials, combined with the appellant’s assertion of his personal belief based upon research of the accuracy or correctness of the information, led to the acceptance by the students of the information as historically accurate and as fact. This is clear from the evidence of Paul Maddox who testified that he and his fellow students believed the appellant and did not question the accuracy or truth of the information and facts presented to them. (pp. 380-381)

Even the superintendent who conducted the investigation into Keegstra’s teaching practices acknowledged the importance of academic freedom. In one of his early letters of warning to Keegstra, he declared:

I am not giving you this directive to muzzle your academic freedom or to limit your intellectual integrity, but simply to insist that all sides of a historical question must be presented in as unbiased a way as possible, so that students can judge contradictory points for themselves. (p. 374)

The concern for reaching balanced and substantiated conclusions, by presenting alternative and perhaps conflicting theories of history and allowing students to make informed choices for themselves, goes to the heart of academic freedom. If school boards are concerned about enlightening their students, they must ensure that teachers are allowed to exercise some degree of academic freedom while
fulfilling their duties as educators. This will help in ensuring that the pursuit of truth remains an important educational goal through the presentation of unbiased and various opinions.

From the perspective of critical thinking, teachers who indoctrinate fail to engage in the very qualities and characteristics that they are called on to model. In other words, uncritical thinking demonstrates an unfitness to teach and undermines the very tenets of openness and inquiry upon which academic freedom ultimately rests. William Hare (1993) suggests that Keegstra fails to qualify as "an honest heretic" in the classroom because he subverted the critical approach to teaching:

The decisive point is that Keegstra cut the ground from under the feet of any opposition by making his theory immune to counter-evidence. Potential counter-evidence was taken as further evidence of the conspiracy portrayed as controlling the sources of evidence, namely textbooks, the media and so on. Conspiracies can occur, of course, and it is doctrinaire to dismiss such claims a priori. But to accept that one exists we need evidence, and refutation must in principle be possible. By frustrating the falsification challenge, Keegstra revealed the disingenuous character of this teaching. (p. 379)

**Employment Law & Teacher Free Speech: Conclusion**

Under employment law, teachers are called to demonstrate honesty, cooperation, loyalty, and obedience. As a result of these obligations, school boards may place legitimate restrictions on the free speech rights of teachers. Thus, school boards may curb dishonest expression which undermines
the trust that makes the employment relationship workable. They may also interdict uncooperative speech to promote effectiveness and efficiency in the work place and to protect others from abuse. They may likewise restrict disloyal expression which causes unjustifiable harm to school boards' legitimate business interests. Finally, school boards may limit disobedient expression which undermines their ability to control the work place.

Under other circumstances, however, employment law recognizes and protects the value of freedom of expression in spite of the duties of honesty, cooperation, loyalty, and obedience that teachers owe their employers. Idiosyncratic and quirky teachers can not be disciplined simply because they annoy or are politically unpopular. Teachers who tease students in a friendly and appropriate manner can not be accused of verbal abuse. Under the rubric of disloyal expression, teachers can speak out without fear of reprisals when their employers engage in illegal or negligent activities. They can also employ strong and direct language in the context of collective bargaining.

There are, however, a couple of important areas which remain problematic. It is unclear whether teachers are entitled to criticize their employers in a responsible manner by speaking out on matters of public concern. For instance, a school closure or important curricular changes are matters of significant interest to many stakeholders in the
educational community including parents and students. Teachers are professionals and, thus, possess special knowledge, skills, and insight which make them especially qualified to speak to matters of public concern. If teachers cannot speak out responsibly on these issues, without fear of retaliatory dismissal, we lose an important voice in the educational debate. Those called to evaluate the effectiveness and decision-making ability of their boards of education may be denied an important "insiders’" perspective.

It is also not certain whether employment law will protect teachers who exercise academic freedom in a wise and judicious manner. In practice, the bureaucratic and curricular control that teachers are subject to seem to militate against any meaningful degree of academic freedom. In the literature, scholars like Byrne (1989) suggest that academic freedom has little relevance for public schools. At present, we have no clear precedent in employment law concerning the extent to which teachers carry the right to academic freedom into the classroom. Nonetheless, the Board of Reference in Keegstra v. Board of Education of Lacombe No. 14 (1983) acknowledged the importance of presenting students with "opposing views" and "opposing source materials" so they can make up their own minds.

In spite of the weight of current practice and scholarly opinion, there are compelling reasons why we should now embrace academic freedom, if even in a limited sense, for
public school teachers. As guardians of a democratic culture, teachers must help students to think. Learning to think means thinking in critical, creative and caring ways. Teachers must assist students to challenge authority in responsible ways, to call into question hidden assumptions and to seek reasons and evidence for their modes of thinking. In short, teachers must strive to help their students become divergent, as opposed to convergent, thinkers.
CHAPTER 5

TEACHER FREE SPEECH: A CONSTITUTIONAL LAW ANALYSIS

Introduction

In the previous chapter, the researcher studied the legitimate restrictions that school boards may place on the free speech rights of teachers as a matter, solely, of employment law and the extent to which employment law recognizes and protects the value of freedom of speech. Hence, this study was independent of Charter considerations. Now, the researcher wishes to explore the Charter's possible influence on teachers' right of freedom of expression. In particular, he wants to ascertain whether the Charter extends or enhances protection of free speech for teachers beyond the protective ambit of extant employment law.

Prior to the analysis of teachers' constitutional claims of free speech, a number of preliminary matters must be addressed. First, does the Charter even apply to Canadian public school boards and teachers? Second, what specific analytical process does the judiciary follow when a Charter infringement is alleged? Third, what salient legal points are reflected in Ross v. New Brunswick School District No. 15 (1996)? This is the leading Supreme Court of Canada decision

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involving public school teachers and their right of free speech under s.2(b) of the Charter. The case is a critical one as it will be used to inform our entire constitutional analysis of teachers' right to freedom of expression. Fourth, how, if at all, does the American constitutional approach to free speech differ from the approach the Canadian courts espouse? Since the researcher will make reference to relevant American constitutional jurisprudence for comparative purposes, it is important to consider the conceptual analysis of free speech adopted by the United States judiciary.

The Applicability of the Charter to School Boards and Teachers

At an elementary level, one must first decide whether the Charter even applies to public school boards. If school board action is not subject to Charter scrutiny, then teachers will have no claim to constitutional protection of freedom of expression, from employment restrictions, under s.2(b) of the Charter. The test for "applicability" is set out in section 32 which states:

(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In sum, section 32 provides that the Charter applies to "the
Parliament and government of Canada" and to "the legislature and government of each province." According to Hogg (1992):

This is an exhaustive statement of the binding application of the Charter. It follows that the Charter applies only where there has been governmental action of some kind, that is, action by the Parliament or government of Canada or by the Legislature or government of a province. The rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights. (p. 34:20)

But what is included in the term "government"? Speaking on behalf of the majority of the Supreme Court of Canada in Retail, Wholesale and Department Store Union v. Dolphin Delivery (1986), McIntyre J. observed: "I am of the opinion that the word 'government' is used in s. 32 of the Charter in the sense of the executive government of Canada and the Provinces" (p. 598). Hogg (1992) provides the following clarification:

Obviously, it includes action taken by the Governor General in Council or the Lieutenant Governor in Council, by the cabinet, by individual ministers and by public servants within the departments of government. Also included are those Crown corporations and public agencies that are outside the formal departmental structure, but which, by virtue of a substantial degree of ministerial control, are deemed to be "agents" of the Crown. (p. 34:13)

In Dolphin Delivery (1986), the Supreme Court of Canada has also made it clear that although the Charter regulates the relations between government and private persons, it does not regulate the relations between private persons and private persons. As McIntyre J. stated: "I am in agreement with the view that the Charter does not apply to private litigation" (p. 597). Hogg (1992) contends that this is the
appropriate role of constitutions:

In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people. (pp. 34:20-21)

Even all conduct in which some "public" body is involved may not necessarily constitute "government action." Yet as Hogg (1992) points out, it is not always easy to determine in the public context which governmental activity is subject to the Charter and which is not:

There is no principled way to classify the functions of public bodies into "governmental" (or "public") and "commercial" (or "private") categories. The only useful question is whether government has assumed control of the function. The existence of control is the only sure guide to whether the function is one of government to which the Charter should apply. (pp. 34: 13-14)\textsuperscript{146}

\textsuperscript{146}Hogg wisely underlines the limitations associated with using a rigid "public"/"private" dichotomy in the application context:

The terms "public" and "private" are no doubt convenient labels, but they reflect a rather complex body of law, and they can be seriously misleading. Much "public activity" is not covered by the Charter because there is no statutory or governmental presence that would make the Charter applicable. Much "private" activity has been regulated by statute, or been joined by government, and if so the statutory or governmental presence will make the Charter applicable as well. If the Parliament chooses to give a power of arrest to private citizens, a citizen's arrest will be subject to the Charter.

... Therefore, when it is said that the Charter does not apply to "private" action, the word "private" is really a term of art, denoting a residual category from which it is necessary to subtract those cases where the existence of a statute or the presence of government does make the Charter applicable. Without this understanding, the claim that the Charter does not apply to private action would be grossly misleading. (p. 34: 21)
The Supreme Court of Canada examined these issues in Douglas/Kwantlen Faculty Assn. v. Douglas College (1990). It held that a community college in British Columbia was subject to the Charter given the substantial degree of government control. The Lieutenant Governor in Council appointed all the members of the governing board who held office at pleasure. As well, the Minister of Education had power to issue directives to the college. By way of contrast, in McKinney v. University of Guelph (1990), the same court ruled that the Charter did not apply to universities even though they are state funded and created by statute.\footnote{This case involved a challenge by eight faculty members and a librarian to the mandatory retirement policies of four Ontario universities. The Plaintiffs argued that the universities’ policies violated the equality guarantees set out in s.15 of the Charter by discriminating on the basis of age.} In this regard, La Forest J.\footnote{Dickson C.J.C. and Gonthier J. concurred with La Forest J. Both Sopinka and L’Heureux-Dubé JJ. wrote separate reasons concluding that universities were not part of government.} declared:

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\text{[T]here is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of the government, the universities’ action here cannot fall within the ambit of the Charter. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that}
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are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. (p. 269)

In rejecting the "public purpose" test, La Forest J. noted:
"A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty. It is simply not the test mandated by s.32 . . ." (p. 269) Applying next the "control" test, La Forest J. concluded that universities were essentially autonomous institutions. Thus, they did not fall within the scope of government:

The government . . . has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources. . . . The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. (p. 273)

What, then, can be said about public schools and public school teachers? Does the Charter apply to them? In the context of ascertaining the constitutionality of an Ontario public school board policy on mandatory retirement, the High Court of Justice in Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board (1987) declared:

The respondent board is a body corporate. The Education Act is a comprehensive statute dealing with virtually all aspects of elementary and secondary education in the
province, whether in public or separate schools. School boards have their existence under the Education Act, and their duties and powers are defined and provided by it. A board has power to expropriate (s.171) and to levy rates (s.224). It has, by virtue of s.26 of the Interpretation Act, R.S.O. 1980, c. 219, power to sue and be sued, and to contract. In my view, it is fair to conclude that a school board is created under a comprehensive statute dealing with education and has a clearly defined role within the scheme of the statute, and to conclude in consequence that the actions of a board may properly be said to be, for the purposes of the Charter, the actions of the "legislature" or "government" of Ontario. (pp. 130-131)\textsuperscript{143}

Thus, unlike universities but like community colleges\textsuperscript{144}, public school boards would appear to fall within the ambit of "government actor" and, accordingly, their actions are

\textsuperscript{143}In R. v. J.M.G.,(1986) Grange J. assumed that the Charter applies to school systems, principals and teachers:
I am prepared for the purposes of this appeal to assume that the school board directing the affairs of the school and the school itself, including the principal and the other teachers, are subject to the Charter in their actions and dealings with the students under their care. (p. 708)

\textsuperscript{144}In distinguishing school boards from universities, MacKay and Sutherland (1992) note:
There are some important distinctions between universities and school boards that we suggest "tip the scales" in favour of a Charter application to school boards. . . . [C]hildren are required by compulsory attendance laws to attend school up to the age of 16, in most provinces. Children are not required to attend university. The school board is delivering an educational service that is controlled through provincially developed and approved curriculums. Universities are entitled to set their own curriculums. In many provinces, the school boards are publicly elected similar to municipalities and have taxing powers in some instances. For these reasons, we conclude that although there may be some questions with regard to a school board's ostensibly non-governmental activity, they will generally be held subject to the Charter. (p. 36)
arguably subject to Charter scrutiny. As for public school teachers, they are employees of school boards. Thus, any attempt by the employer board to restrict the expressive rights of teachers might be met with the argument that the restriction is a *prima facie* infringement of teachers' constitutional right to free speech as protected by s.2(b) of the Charter.

**Chartter Analysis: A Two-Step Approach**

Accepting that the Charter applies to restrictions imposed by school boards (as government actors) and school officials on teachers' freedom of speech, we must now consider how the courts proceed specifically with a Charter analysis. This requires us to look to section 1 of the Charter which provides as follows:

*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.

Elaborating upon the nature of s.1 in *R. v. Oakes* (1986), Dickson C.J.C. remarks:

It is important to observe at the outset that s.1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s.33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. (p.135)\(^{145}\)

\(^{145}\)In *Oakes*, Dickson C.J.C. also refers to a contextual element of interpretation for s.1 that is provided by the words "free and democratic society." Inclusion of these words as the final standard of
This duality in s.1 has led to the establishment of a two-step approach in Charter cases. As Hogg (1992) observes:

In the first stage, the court must decide whether the challenged law has the effect of limiting one of the guaranteed rights. If the challenged law does have this effect, the second stage is reached: the court must then decide whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society. The first stage involves the interpretation and application of the provisions of the Charter that define the guaranteed rights. The second stage involves the interpretation and application of s.1 of the Charter. (p. 35:2)

In essence, the two-step approach may be summarized as follows. First, has a Charter right or freedom been infringed? Second, does the infringement amount to a reasonable limit under s.1? It is important to remember that these are two distinct questions and thus call for two distinct analytical processes.\[^{146}\]

[^146]: Justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (p. 136)

\[^{14}:\text{In Charter cases, the burden of proof varies depending on the stage of analysis. In the first stage, Hogg (1992) reminds us that: "[T]he burden of proving all elements of the breach of a Charter right rests on the person asserting the}
In the first step, the Supreme Court of Canada in *Irwin Toy v. Quebec (Attorney General)* (1989) enunciated the specific test necessary to determine whether a violation of a person’s free speech rights has occurred:

When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the Plaintiff’s activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. (p. 978)

If the activity falls within the protected sphere of conduct, the court engages in an additional analysis to determine whether the purpose or effect of the government action is to restrict free speech. With respect to purpose, the court in *Irwin Toy* declared:

If the government’s purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government’s purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. (p. 977)

breach" (p. 35:8). At the second stage of analysis, the onus shifts to the government. According to Dickson C.J.C. in *Oakes*: "The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation" (pp. 136-137). As for the requisite standard of proof, it remains the same under both stages - the civil standard, being proof on a balance of probabilities.
Even if the government's purpose is not to control meaning, the court must still decide whether the effect of the government action is to restrict the plaintiff's free expression. While demonstrating such an effect, the plaintiff must show that his or her aim is to convey a meaning associated with the principles underlying freedom of expression: "[T]he plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing" (p. 977).

Once the plaintiff establishes that a violation of a Charter right or freedom has occurred, the analysis proceeds to the second question. At this stage, the onus shifts to the government to show that the infringement is a reasonable limit on the basis of s. 1 of the Charter. If the court decides that there is no infringement of a Charter right or freedom, the analysis ends at stage one.

As a preliminary matter, the court must ensure that the limit under s.1 is "prescribed by law." In R. v. Therens (1985), Le Dain J., speaking for the Supreme Court of Canada, offered the following explanation as to the meaning of the phrase "prescribed by law":

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s.1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation from its operating requirements. The limit may also result from the application of a
common law rule. (p. 645)

In *Irwin Toy*, Dickson C.J.C set out the test of "intelligibility" for the interpretation of "prescribed by law": "Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work" (p. 983).

On the question of whether the limitation imposed is a "reasonable limit in a free and democratic society," the Supreme Court of Canada in *R. v. Oakes* (1986) set out the judicial approach to s.1. Under "the Oakes formula", the reasonableness test in s.1 is composed of two branches. The first branch addresses the objective of the impugned law and the second addresses the means by which the law achieves the objective. To meet the requirements of the first test: "It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a true and democratic society before it can be characterized as sufficiently important" (p. 138). In cases where the government is unable to establish that the legislative objective is "pressing and substantial", it is estopped from proceeding with the proportionality test and thus must abandon its s.1 argument altogether.

The second prong of the *Oakes* test attempts to ascertain if the means chosen to achieve the law's objectives are proportional to the ends advanced by the government. It
consists of three parts:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.147 (p. 139)

If the government fails to meet the requirements of all three tests - rational connection, minimal impairment, and deleterious effects - then its entire justificatory argument under s.1 of the Charter also falters.


To date, the leading Canadian Charter case on free speech and Canadian public school teachers is the recent Supreme Court of Canada's decision in Ross v. New Brunswick School District No. 15 (1996) (subsequently referred to as Ross).148

Relevant Facts

Malcolm Ross taught elementary mathematics in Magnetic Hill, New Brunswick. While off-duty, he published various writings including: Web of Deceit, The Real Holocaust (The

147The third element of the proportionality test is often referred to as a "cost/benefit" analysis.

148Prior to reaching the Supreme Court of Canada, the decision is referred to as Attis v. Board of Education of District 15 et al.
attack on unborn children and life itself), Spectre of power and Christianity vs. Judeo-Christianity (The battle for truth). He also sent three letters to New Brunswick newspapers and made one public television appearance to defend his controversial views. Like James Keegstra, in Alberta, he argued that Western Christian civilization is being undermined and destroyed by an "International Jewish Conspiracy." The following passage from one of Ross' letters captures his thinking: "My whole purpose in writing and publishing is to exult Jesus Christ and to inform Christians about the great Satanic movement which is trying to destroy our Christian faith and civilization" (Attis, 1994, p. 24).

Public concern about Ross' views prompted the school board to commence disciplinary action. This consisted of repeated reprimands and warnings for him to stop making anti-Jewish statements. Failure to mute Ross caused a concerned Jewish parent to file a complaint with the New Brunswick Human Rights Commission. Since disciplining Ross proved ineffective, the complainant felt the school board condoned Ross' conduct and thereby discriminated against his children and other Jewish students because of their religion or ancestry. The alleged discrimination, involving public facilities and services, violated s.5(1) of the Human Rights Act:

s.5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall
(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex."

The complainant's daughter and a Jewish friend, both enrolled at another school in Ross' district, testified that their fellow students subjected them to anti-Jewish remarks and actions. The complainant's daughter also stated that she was frightened while attending a gymnastics event at Ross' school. The complainant believed that Ross' continued employment "would detrimentally affect the type of education his children would receive as well as their emotional well-being" (Attis, 1994, p. 9). Unable to resolve the dispute, the Human Rights Commission recommended to the Minister of Labour that a Board of Inquiry be set up to investigate the complaint.

Board of Inquiry

The Board of Inquiry held that Ross' actions violated s. 5 of the Human Rights Act and could not be justified. Although the school board did not intend to discriminate, it did so by failing to address the numerous complaints against Ross and by continuing his employment. In this manner, the Board endorsed his out of school activities and writings. An atmosphere where anti-Jewish sentiments flourished led to a "poisoned environment" within the school district. In turn,

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this "greatly interfered with the educational services provided" to the complainant and his children. Although the Board of Inquiry found no evidence of any direct classroom activity by Ross on which to base a human rights complaint, it held that teachers influence children through their general demeanour in the classroom and through their off-duty lifestyle.

In support of its findings, the Board of Inquiry made a twofold order. First, it ordered the New Brunswick Department of Education to modify its curriculum to accommodate Holocaust studies. As for the second part of the order, it stated:

(2) That the School Board:

(a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;

(b) appoint Malcolm Ross to a non-teaching position, if, within the period of time that Malcolm Ross is on leave of absence without pay a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified. The position shall be offered to him on terms and at a salary consistent with the position. At such time as Malcolm Ross accepts employment in a non-teaching position his leave of absence without pay shall end.

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

(d) terminate Malcolm Ross' employment with the School Board immediately, if, at any time during the eighteen month leave of absence or if at any time during his employment in a non-teaching position, he:

(i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or
(ii) publishes, sells or distributes any of the following publications, directly or indirectly:

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

In sum, the second clause of the order removed Ross from his teaching duties and placed him on a leave of absence without pay for eighteen months. During this period, the Board had to offer him a non-teaching position if one became available. If nothing came open, the Board had to release Ross without pay. A "gag order" also prohibited him from writing or publishing anything that mentioned a Jewish conspiracy. Even if the school board continued Ross' employment on a non-teaching basis, the "gag order" would remain in effect.

*Court of Queen's Bench*

Ross applied for judicial review before the Court of Queen's Bench. Creaghan J. allowed the application in part, ordering that clauses 1 and 2(d) of the order be removed and quashed. The court held that the Board of Inquiry had "no jurisdiction" to require the Department of Education to change its curriculum or to make a "gag order". Creaghan J. also concluded that clause 2(d), the "gag order", violated Ross' ss.2(a) (freedom of religion) and 2(b) Charter rights and could not be saved by s.1 of the Charter. The court did, however, uphold Ross' removal from the classroom.
Ross then appealed to the New Brunswick Court of Appeal. In a two-one split, the majority quashed clauses 2(a), (b) and (c) of the Board of Inquiry's order. It also rejected the Human Rights Commission's request to re-instate clause 2(d) of the order. Speaking for the majority, Hoyt C.J.N.B. concluded that Ross' s.2(b) rights had been violated. Turning next to the first arm of the Oakes test, the Chief Justice found that the removal order's objective did not constitute a "pressing and substantial" concern so as to override Ross' constitutional guarantee of freedom of expression. La Forest J. of the Supreme Court of Canada summarized Hoyt C.J.N.B.'s argument as follows:

He emphasized that it was the respondent's activities outside the school that attracted the complaint. In such circumstances, he did not find the remedy met a "specific purpose so pressing and substantial" as to override the respondent's constitutional guarantee of freedom of expression. To find otherwise "would, in [his] view, have the effect of condoning the suppression of views that are not politically popular at [sic] any given time". . . . The denial of an individual's freedom of expression should, he stated, be restricted to the clearest of cases and the evidence in this case did not meet that test. (p. 842)

With this finding, the Court did not have to consider the second arm of the Oakes judgment - the "proportionality" test. Since Ross never used the classroom to expose his racist views, the Board of Inquiry could not relieve him of his teaching duties for simply expressing unpopular opinions. The appellants - Attis, the Human Rights Commission and the Canadian Jewish Congress - then appealed to the Supreme Court
of Canada, seeking to have clause 2 of the Board of Inquiry's Order upheld.\textsuperscript{150}

\textbf{Supreme Court of Canada}

After concluding that the school board, by passively condoning Ross' anti-semitic actions, had discriminated against Jewish parents and students under the New Brunswick's \textit{Human Rights Act}, the court then examined the constitutionality of the Board of Inquiry's order.\textsuperscript{151} The court initially had to determine whether the order infringed Ross' right to free speech. Adopting the approach set out in \textit{Irwin Toy} (1989), the court made two findings. First, La Forest J. (speaking on behalf of the court) held that Ross' expressive activity conveyed meaning: "The writings, publications and statements of Malcolm Ross constitute expression within the meaning of s.2(b). They clearly convey meaning" (p. 865). Second, La Forest J. determined that the purpose and effect of the order was to restrict Ross' freedom of speech: "On its face, the purpose of the Order is to restrict the respondent's expression; it has a direct effect on the respondent's freedom of expression, and so violates s.2(b) of the Charter" (p. 867).

\textsuperscript{150}The parties did not appeal clause 1 of the order in relation to curricular changes by New Brunswick's Department of Education.

\textsuperscript{151}In the constitutional context, Ross alleged that the order violated both his free speech rights under s.2(b) of the \textit{Charter} and his right to freedom of religion under s.2(a). In our study, we will not consider the arguments relating to freedom of religion.
Having found a *prima facie* infringement of a Charter right, the court had to consider whether the infringement could be upheld under s.1. It is worth noting that the court did not expressly consider whether the order amounted to a "limit prescribed by law". Either the court overlooked this preliminary part of the s.1 analysis or felt it was unnecessary to deal with it. In any event, the order was issued under the statutory authority of the Board of Inquiry. As for the wording of the order, it amounted to an "intelligible standard" and would appear to meet the requirements of this initial test.

The court then considered the two elements of the Oakes' formula: the "pressing and substantial" test and the "proportionality" test. Under the first test, the majority acknowledged that the order's purpose was to remedy the discrimination found to have poisoned the school board's educational environment. Here, La Forest J. borrowed from the opinion of Dickson C.J. in Canada (*Human Rights Commission* v. *Taylor* (1990) who "found that the objective of promoting equal opportunity unhindered by discriminatory practices based on race or religion was pressing and substantial" (p. 879).

La Forest J. noted that Dickson C.J. considered a number of factors in reaching his decision. These included: the
harmful nature of hate propaganda\textsuperscript{132}, the international community's commitment to the elimination of discrimination (including international conventions to which Canada is a signatory)\textsuperscript{133}, and ss. 15 and 27\textsuperscript{134} of the Charter which

\textsuperscript{132}In R. v. Keegstra (1990), Dickson C.J. concluded that hate propaganda causes two sorts of injury. First, there is harm to target group members:
It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. . . . The derision, hostility and abuse encouraged by hate propaganda . . . have a severely negative impact on the individual's sense of self-worth and acceptance. (p. 36)
Secondly, there is injury to society at large:
It is . . . not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted: . . . (p. 37)

\textsuperscript{133}In 1966, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination ("C.E.R.D."). In force since 1969, this convention includes Canada among its signatory members. Article 4 of the C.E.R.D. provides:
States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination . . .
Furthermore, the United Nations adopted the International Covenant on Civil and Political Rights ("I.C.C.P.R.") in 1966. In force in Canada since 1976, article 20(2) of the I.C.C.P.R. states:
Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
embrace, respectively, the values of equality and multiculturalism. (pp. 879-880). La Forest J. then concluded:

In my view, all the above factors are relevant in assessing the importance of the objective of the impugned Order. In the first place, they assert the fundamental commitment of the international community to the eradication of discrimination in general. Secondly, they acknowledge the pernicious effects associated with hate propaganda, and more specifically, anti-Semitic messages, that undermine basic democratic values and are antithetical to the "core" values of the Charter. The Board's Order asserts a commitment to the eradication of discrimination in the provision of educational services to the public. Based upon the jurisprudence, Canada's international obligations and the values constitutionally entrenched, the objective of the impugned Order is clearly "pressing and substantial". (p. 880)

Next, the court considered the second prong of the Oakes formula - the "proportionality" test. In turn, this involved a threefold determination: rational connection, minimal impairment, and deleterious effects.

In the context of measuring whether the order was rationally connected to the objective, the court stated:

As noted by Ryan J. in the Court of Appeal, the Act in question is conciliatory in nature and makes no provision for criminal sanctions. It is, therefore, well suited to encourage reform of invidious discrimination. The Board focused on providing relief in crafting its Order, and sought, as much as possible, to avoid

"Section 15(1) of the Charter states:
Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27 of the Charter states:
This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
punitive effects. (pp. 880-881)

Although no direct evidence had been proffered, the court concurred with the Board of Inquiry that Ross' unabashedly public statements of anti-Semitism contributed to the "poisoned environment" in the school system. In turn, it was reasonable to anticipate that his statements and writings had influenced the anti-Semitic sentiment in the schools. La Forest J. based his reasoning on the nature of the teaching position:

The reason that it is possible to "reasonably anticipate" the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove the respondent from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that the educational services are discrimination-free. (pp. 881-882)

Since the order sought to remove Ross from his teaching position through clauses 2(a), (b) and (c), the court found that: "These clauses are rationally connected to the objective of the Order" (p. 57). As for clause 2(d), La Forest J. had reservations as to whether it met the rational connection test but preferred to deal with the matter under the minimal impairment test.

In assessing whether the order impaired as little as possible Ross' free speech rights, the court considered alternative approaches taken by the Board of Inquiry:

In arriving at its Order, the Board considered the alternatives available to remedy the discrimination. It concluded that the removal of the respondent from the classroom was "the only viable solution". In the course
of examining alternative solutions, the Board found that the situation could not be corrected through an apology and renunciation of his views by the respondent. Nor could it be corrected through continual monitoring of the respondent's classroom as the Board considered the influence of a teacher to be "so much more complex than the formal content of any subject matter taught by the teacher". The Board also rejected the exclusion of Jewish children from the respondent's class or school, emphasizing the importance of accessibility to schools within a public school system. Finally, it concluded that the situation could not be dealt with through monetary compensation to Attis for pain and suffering. (p. 883)

Given the absence of viable alternatives, La Forest J. held:

The Order, in clauses 2(a), (b) and (c), was carefully tailored to accomplish its specific objective, i.e. "to remedy the discriminatory situation in School District 15 created through the writings and publications of Malcolm Ross". . . . Any punitive effect is merely incidental. In my view, clauses 2(a), (b) and (c) minimally impair the respondent's freedom of expression and freedom of religion. (p. 883)

Yet, the court reached a different conclusion concerning the "gag order" in clause 2(d) which placed a publication ban on Ross even if he occupied a non-teaching position. La Forest J. noted that:

The Board did not find that the respondent's presence in a non-teaching position would compromise the ability of the School Board to create a discrimination-free environment. Indeed their Order made provision for the possibility that the respondent would occupy a non-teaching position. (p. 884)

Although the court acknowledged that the continued employment of Ross, even in a non-teaching position, could continue to poison the school environment for some time, it refused to uphold clause 2(d):

Given the respondent's high profile and long teaching career, I acknowledge that the problem in the School District could remain for some time. However, the
evidence does not support the conclusion that the residual poisoned effect would last indefinitely once Ross has been placed in a non-teaching role. For that reason, clause 2(d) which imposes a permanent ban does not minimally impair the respondent's constitutional freedoms. Clause 2(d) is not justified under s. 1. (p. 884)

Next, La Forest J. examined the final rung of the proportionality test - deleterious effects:

The deleterious effects of clauses 2(a), (b) and (c) of the Order upon the respondent's freedom of expression and freedom of religion are limited to the extent necessary to the attainment of their purpose. The respondent is free to exercise his fundamental freedoms in a manner unrestricted by this Order, upon leaving his teaching position. These clauses only restrict the respondent's freedoms to the extent that they prohibit the respondent from teaching, based upon the exercise of his freedom of expression and freedom of religion. The respondent is not prevented from holding a position within the School Board if a non-teaching position becomes available; furthermore, he is to be offered a non-teaching position if it becomes available on terms and at a salary consistent with the current position. In my view, the objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on the respondent produced by these clauses. (pp. 884-885)

Since clause 2(d) had failed the minimal impairment branch of the s. 1 analysis, the court did not have to consider it under the deleterious effects test. Thus, on the basis of the s.1 analysis, La Forest J. held:

My conclusion, with respect to s. 1., is that clauses 2(a), (b) and (c) of the Order are a justified infringement upon the freedom of expression and the freedom of religion of the respondent. (p. 885)

With respect to clause 2(d) of the order, the "gag order", the court decided that it was "an appropriate case in which to apply severance" (p. 885).
American Constitutional Approach To Free Speech

Although Ross is the leading Supreme Court of Canada decision involving public school teachers and their free speech rights, it is the only high court judgment in Canada on the subject. In addition, the decision does not tell us much about free speech when the speech occurs on school property while teachers are on duty. More important, the decision does not address key questions such as teachers’ right to criticize their employer and whether teachers have any claim to academic freedom under the Charter. In contrast, there exist a number of important United States Supreme Court decisions involving public school teachers and students and their constitutional claims of freedom of speech. Given this body of relevant jurisprudence, the researcher will make reference where appropriate to American authorities to determine whether the legal principles south of the border may inform the constitutional analysis of Canadian public school teachers’ free speech rights under the Charter.

It is worth noting, however, that the American constitutional approach to free speech, under the First Amendment\textsuperscript{15}, differs from the approach taken by the Canadian judiciary. American constitutional scholar Laurence

\textsuperscript{15}The First Amendment reads: 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. (emphasis mine) (U.S. Const., amend. I.)
Tribe (1988) describes the traditional approach adopted by the American Supreme Court (1988) as follows:

The Supreme Court has evolved two distinct approaches to the resolution of first amendment claims; the two correspond to the two ways in which government may "abridge" speech. If a government regulation is aimed at the communicative impact of an act, analysis should proceed along what we will call track one. On that track, a regulation is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny. If a government regulation is aimed at the noncommunicative impact of an act, its analysis proceeds on what we will call track two. On that track, a regulation is constitutional, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas. On track two, the "balance" between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be articulated. (pp. 791-792)

Hence, the purpose of the two tracks is to vary the standard of scrutiny. Under the first track, a higher standard is required because the government restriction is focused on the "communicative impact of an act". Under the second track, a lower standard is demanded because the government restriction aims at the "noncommunicative impact of an act".

We have already seen that the Canadian courts engage in a two-step analysis of free speech cases under the Charter. First, does the impugned law infringe s.2(b)? Second, if an infringement arises, can the government justify the infringement as a reasonable limit under s.1 of the Charter? Thus, Canadian courts do not embrace a "two-track"
perspective like their American counterparts. Nonetheless, the concern for the "communicative" and "noncommunicative" impact of speech is still reflected in the first step of the constitutional analysis. As part of the s.2(b) analysis, the courts in Canada must ascertain whether the purpose or effect of the government action is to restrict freedom of expression. In Irwin Toy v. Quebec (Attorney General) (1989), the Supreme Court of Canada described the purpose test in these terms:

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. (p. 974)

To illustrate the point, the court makes reference to a hypothetical case involving the handing out of pamphlets and littering:

Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content," even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails restricting its content. By contrast, a rule against littering is not a restriction "tied to content." It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose
is to control attempts to convey a meaning. (pp. 974-975)

Thus, under the purpose test, restricting the content reflects a concern for the "communicative" impact of expression while regulating the physical aspects of the expression reflects a concern for the "noncommunicative" impact of the act.

From a balancing perspective, the American judiciary does not formally employ a s.1 analysis (like Canadian courts) to ascertain what constitutes a reasonable limit on free speech. The balancing approach espoused by the United States' courts is somewhat different. As Tribe explains:

A recurring debate in first amendment jurisprudence has been whether first amendment rights are "absolute" in the sense that government may not "abridge" them at all, or whether the first amendment requires the "balancing" of competing interests in the sense that free speech values and the government's competing justifications must be isolated and weighed in each case. The two poles of this debate are best understood as corresponding to the two approaches, track one and track two; on the first, the absolutists essentially prevail; on the second, the balancers are by and large victorious. . . . [D]eterminations of the reach of first amendment protections on either track presuppose some form of "balancing" whether or not they appear to do so. The question is whether the "balance" should be struck for all cases in the process of framing particular categorical definitions, or whether the "balance" should be calibrated anew on a case-by-case basis. (pp. 792-793)\(^{156}\)

\(^{156}\)The U.S. Supreme Court, unlike its Canadian counterpart, has decided that certain types of speech are beyond the ken of constitutional protection. See, e.g., Miller v. California (1973) (obscenity); Beauharnais v. Illinois (1952) (libelous utterances); Harisiades v. Shaughnessey (1952) (advocacy of force or violence); Chaplinsky v. New Hampshire (1942) (fighting words); Frohwerk v. United States (1919) (seditious utterances).
In the Canadian analysis, a very wide net is cast initially. Provided the activity conveys or attempts to convey meaning, and is not communicated through physical violence, it will constitute expression and fall within the ambit of section 2(b). The balancing act, or refinement as to what constitutes legitimate restrictions on free speech, will occur under the s.1 analysis. Here, the government must demonstrate that the law serves a pressing and substantial objective and that the means chosen by the government are proportional to its objective.

In some circumstances, American and Canadian courts may well arrive at the same conclusion even if there is not perfect symmetry in the analysis. In other cases, the results will be different. Consider for example the approaches the respective courts take to hate speech. The United States courts have embraced a more absolutist tack in their constitutional analysis of this form of expression holding that it is protected by the first amendment. In Levin v. Harleston (1992), the Second Circuit Court of Appeals upheld a university professor’s right to write articles containing comments denigrating the intelligence and social characteristics of blacks under the protection of the First Amendment.157 In contrast, Canada’s Supreme Court has

157In Jeffries v. Harleston (1993), the United States District Court held that the university had violated Professor Jeffries constitutional right of free speech by removing him as chairman of City College’s Black Studies Department for making anti-Semitic and racist remarks in
reached a different result. Although hate mongering qualifies as expression within the ambit of s.2(b), our highest court has used s.1 in R. v. Keegstra (1990) to uphold the constitutionality of laws forbidding this type of expressive activity.

In recent years, there has been a move away from the two track analysis in American jurisprudence. Once again, Tribe observes:

[In the place of a dual-level theory composed of two types of speech - that which enjoys full, although not absolute, constitutional protection and that which enjoys no such elevated status - the Court is beginning to construct a multi-level edifice with several intermediate categories of less-than-complete constitutional protection for certain kinds of expression. These new categories include commercial speech, near obscene and offensive speech, non-obscene child pornography, defamation, and possibly the speech of public employees. (pp. 929-930)

Public employee speech appears to belong to an "intermediate category" which receives "less-than-complete constitutional protection". As reflected in the case law, American teachers (as public employees) indeed do not enjoy "full constitutional protection" of their free speech rights. Since the United States has an established tradition of constitutional jurisprudence where employment law factors and principles have been invoked to limit the free speech rights of public sector employees, including teachers, the germane decisions may shed some light on how our own courts will approach the issues.

public speeches.
Charter Analysis and Public School Teachers

A constitutional analysis of public school teachers' s.2(b) free speech rights is necessary to determine whether the Charter enhances protection of freedom of expression beyond the protection recognized by employment law. Under employment law, the respective duties of honesty, cooperation, loyalty, and obedience allow school boards to place reasonable restrictions on teachers' freedom of expression. In our analysis, we will try to determine whether these same employment law values which justify the government, qua employer, in restricting the free speech of teachers, justify the government, qua state actor, in limiting teachers' constitutionally protected expressive rights.

Under the Charter, teachers may now argue that disciplinary sanctions which attempt to restrict dishonest, uncooperative, disloyal, and disobedient forms of expression violate their s.2(b) rights of free speech. Adjudicators will have to address two fundamental inquiries to resolve these claims. First, is there an infringement under s.2(b)? Second, can the infringement be upheld under s.1? The adjudicators' responses to these two questions will determine whether the Charter goes further to protect teachers' free speech rights than employment law does.

S.2(B) Analysis

On the basis of Irwin Toy (1989), teachers will normally
have little difficulty satisfying the "conveyance of meaning" and the "purpose and effects" tests to establish an infringement of s.2(b).

"Conveyance of Meaning" Test

Provided the impugned dishonest, uncooperative, disloyal, or disobedient conduct conveys or attempts to convey meaning, it would meet the requirements of the "conveyance of meaning" test. At first blush, it seems implausible that placing restrictions on dishonest expression (e.g. deliberate lies) by teachers would prima facie infringe s.2(b). This would suggest that laws against perjury, false advertising, fraud and the like would also be caught.

Nonetheless, the Supreme Court of Canada in R. v. Zundel (1992) dealt with a constitutional challenge to the false news provisions of the Criminal Code in s. 181. The Crown charged Ernst Zundel under this section for publishing deliberate and wilful lies which were extremely damaging to members of the Jewish community. In holding that Zundel's expressive activity fell within the ambit of s.2(b), the court stated: "[C]onstitutional protection under s.2(b) must ... be extended to the deliberate publication of statements known to be false which convey meaning in a non-violent form" (p. 223). On this basis, one can conclude that even deliberate lies by teachers will fall within the expressive
ambit of s.2(b).  

Under the rubric of disobedient expression, it is unclear whether academic freedom falls within the ambit of s.2(b) of the Charter. One might argue that employer restrictions on the choice of teaching materials (e.g. books, films, magazine articles) and methods (e.g. question/answer, lecture, group discussion) used violate s.2(b) in a special way if they infringe upon academic freedom. Thus, including protection of academic freedom under s.2(b) might broaden the range of activities protected. In Canada, the judiciary has yet to state whether public school teachers have a constitutional right to academic freedom. In both the American jurisprudence and the literature, however, there is support for the contention that academic freedom merits constitutional protection under the first amendment of the United States Constitution.

In the United States, the Supreme Court in Sweezy v. New Hampshire (1957) stated: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will

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158As a normal rule, the form of the expression is irrelevant in determining the scope of s.2(b). Nonetheless, the Supreme Court of Canada in R. v. Keegstra (1990) has articulated the following exception: "Stated at its highest, an exception has been suggested where meaning is communicated directly via physical violence, the extreme repugnance of this form to free expression values justifying such an extraordinary step" (p. 26). Consequently, teachers who choose to express themselves through physical violence would receive no constitutional protection for this kind of expression.
stagnate and die" (p. 250). A decade later, in *Keyishian v. Board of Regents* (1967), the same court expressed in strong language its view that academic freedom is "a special concern" of the first amendment. In these terms, the court declared:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." (p. 603)

Both Sweezy and *Keyishian* concerned academic freedom in the university context. American judicial support for constitutional protection of academic freedom in the public schools is somewhat more problematic. In fact, there is conflicting jurisprudence in this area. Earlier cases offer support for the contention that academic freedom is constitutionally protected. In *Parducci v. Rutland* (1970), for instance, the District Court in Alabama stated:

> Since the defendants have failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of this school, this Court concludes that plaintiff's dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom. (p. 356)

A year later, the Massachusetts District Court in *Mailloux v. Kiley* (1971) justified a limited right for public school
teachers to academic freedom in these terms:

In support of a qualified right of a teacher, even at the secondary level, to use a teaching method which is relevant and in the opinion of experts of significant standing has a serious educational purpose is the central rationale of academic freedom. The Constitution recognizes that freedom in order to foster open minds, creative imaginations, and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and social growth. (p. 1391)

Yet, more recent jurisprudence indicates that secondary teachers do not have a constitutionally protected right to academic freedom. In *Miles v. Denver Public School* (1991), the District Court stated: "[T]he case law does not support Miles' position that a secondary school teacher has a constitutional right to academic freedom" (p. 779).

It is uncertain what position the Canadian courts will adopt concerning constitutional protection for academic freedom, *per se*. It is highly unlikely that adjudicators would conclude that showing a film in class, for instance, does not fall within the ambit of s.2(b). One can argue quite strongly that exercises in academic freedom would almost always be "expressive" activity and thus qualify for Charter protection. The more troublesome question is whether the fact that a restriction infringes academic freedom enhances the constitutional protection.

Even if the courts ultimately reject the proposition that academic freedom has special protection under s.2(b), the discussion of the concept may not necessarily end there. Under s.1, school boards will have to demonstrate why in-
class teacher speech should be restricted. If the courts recognize academic freedom as an important educational value deserving enhanced constitutional protection, it will be more difficult for school boards to justify restrictions on valid academic speech under the pressing and substantial objective and proportionality tests.

"Purpose and Effects" Test

Under the purpose and effects test, teachers must show that the state action impugned has either the purpose or the effect of limiting the protected activity. Normally, they will have little difficulty complying with the exigencies of this part of the infringement analysis. An employment sanction for expressing oneself dishonestly, uncooperatively, disloyally, or disobediently would have the clear purpose and effect of forbidding dishonest, uncooperative, disloyal, and disobedient types of expression. Thus, on both the conveyance of expression and the purpose and effects branches of Irwin Toy, teachers will most likely be able to demonstrate a prima facie infringement of their s.2(b) rights.

S.1 Analysis

Since s.2(b) is so inclusive in scope, one might be tempted to conclude that the protection of teachers’ free speech rights has been increased immeasurably. Yet, this conclusion would be premature. The real impact of the Charter on teachers’ freedom of expression, as guaranteed by employment law, can only be assessed by a careful
consideration of s.1 which makes the rights protected by the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Under the second phase of Charter analysis, adjudicators are required to take a close look at the justifications offered for restricting freedom of speech.

They must consider, as a preliminary matter, whether an employment requirement stipulating that teachers refrain from dishonest, uncooperative, disloyal, and disobedient expression amounts to a "limit prescribed by law." This is a relatively minor issue and is unlikely to raise any significant issues. More important, adjudicators must determine whether the order restricting teachers' free speech complies with the two prongs of the Oakes (1986) formula - the pressing and substantial test and the proportionality test. Under the first test, they must ascertain whether the employment rationales undergirding the duties of honesty, cooperation, loyalty, and obedience will automatically translate into pressing and substantial objectives for the purposes of s.1 analysis. Under the second test, even if legitimate employment interests amount to pressing and substantial concerns, adjudicators will still have to determine whether the restrictions comply with the requirement of proportionality. More precisely, school boards must demonstrate that the means adopted to advance the pressing and substantial objectives are a proportional
response. Hence, the restrictions must satisfy the demands of rational connection, minimal impairment, and deleterious effects.

Apart from the specific exigencies of the s.1 analysis—limit prescribed by law, pressing and substantial, and proportionality tests—the Charter’s potential impact on teachers’ expressive rights in the employment context will be shaped primarily by three considerations. First, the Charter’s capacity to extend free speech guarantees to teachers will depend on whether adjudicators adopt a strict or deferential approach to constitutional analysis of s.1. Second, the Charter’s potential to enhance the free speech protection afforded to teachers will depend on whether adjudicators adopt a different standard of constitutional review given that the government is acting as an employer, as well as a state actor, when it restricts the free speech rights of teachers as employees. Third, the Charter’s possible influence on teachers’ freedom of expression will depend on the nature of the expression in question. The further the expression "strays from the core values" undergirding free speech—truth, political participation, and self-fulfilment/autonomy—the easier it will be to justify restrictions on that expression.

**Approach to S.1 Analysis**

If the courts adopt a stringent view of s.1, or what some authors call a "rights-based" approach to constitutional
analysis, one might argue that the Charter will enhance the protection afforded to teachers' freedom of expression in the employment law context. Under a "rights-based" approach, courts will stress the importance of free speech as a fundamental constitutional norm and limits on free speech will be more difficult to justify. Limitations on freedom of expression will only be allowed in exceptional circumstances. In addition, the limitations themselves must further Charter values as reflected in the rights protected. In R. v. Oakes (1986), Dickson C.J.C. stated:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (p. 136)

School boards could be required to present a higher standard of justification under the Oakes formula when restricting the free speech rights of teachers. Compliance with a stricter application of the "pressing and substantial", and "proportionality" tests could preclude school boards from simply relying on arguments of reasonableness and administrative efficiency for silencing teachers.

If, on the other hand, adjudicators embrace a more liberal or "reasonableness-based" approach to constitutional
analysis, it is less clear whether the Charter will provide additional protection to teachers' free speech rights as they currently exist under employment law. Under a more flexible approach, adjudicators will show greater deference to legislative and common law measures which restrict free speech provided those measures are reasonable in nature. Hence, adjudicators are more likely to accept legitimate employment goals, such as efficiency and harmony in the workplace, as pressing and substantial objectives. School boards, therefore, may justify restrictions on teachers' free speech by complying with a more liberal application of the s.1 analysis.

Even if school boards meet the requirements of the pressing and substantial test under a rights-oriented or reasonableness-oriented approach, the proportionality test may still afford more protection to free speech than employment law. In the employment context, one can argue that some notion of implicit proportionality is at play. Under the Charter, however, school boards will have to demonstrate that an order curbing teacher expression meets the specific exigencies of rational connection, minimal impairment, and deleterious effects as these are measured against the constitutionally protected right. If the test of implicit proportionality used in the employment context is weaker than the explicit test of proportionality under the Oakes formula, the Charter may offer enhanced protection for teachers' free
speech rights. If the tests are identical, then the Charter will not change the employment law analysis.

The early Charter cases adopted a rights-based approach to s.1 analysis. MacKlem et al. (1994) explain:

Oakes culminated a trend in earlier cases, in which the Court rejected the view, pressed upon it by attorneys general defending against Charter claims and by commentators, that s.1 limitation was an open invitation to judges to balance rights claims against all other values that a legislature might pursue. In rejecting some values as inappropriate for s.1 justification purposes, the Court began to set down a relatively narrow view of s.1 strictures... The pre-Oakes cases set out the view that rights were the norm, limits the exception, and that limits were to be subject to stringent, principled justification by their proponents. (p. 173)

In Singh v. Minister of Employment and Immigration (1985), Wilson J. rejected the utilitarian arguments of administrative convenience and cost advanced by the Attorney General of Canada as valid grounds for a s.1 justification:

Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s.1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. (pp. 218-219) 159

159 In the context of Singh, MacKlem et al. (1993) observe: "The issue of limitation was not simply whether the impugned law was reasonable, but whether it was reasonable to
In R. v. Big M Drug Mart (1985), the Supreme Court of Canada found that the federal Lord’s Day Act (1970)\(^{160}\) violated s.2(a) of Charter guaranteeing freedom of religion because it prohibited certain commercial activities on Sunday in order to promote observance of the Christian Sabbath. Dickson J. (as he then was) refused to accept the Attorney General of Alberta’s submission that the legislation could be saved under s.1 for mere reasons of expediency:

It can be urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s.2(a). (p. 352)

In Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), the Supreme Court of Canada stated that administrative expediency could only be used by the government as a successful justificatory argument under s.1 in extraordinary circumstances. As Lamer J. (as he then was) observed:

Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the

infringe the Charter right in issue" (p. 107). In Singh, the court had to determine whether an oral hearing by a body with decision making power had to be afforded to every person who arrived at Canada’s borders and claimed to be a refugee. The Attorney General of Canada argued that this procedure, if applied to the many thousands of refugee claimants who arrive each year would impose an "unreasonable burden" on the resources of government.

\(^{160}\)The act has since been repealed.
outbreak of war, epidemics and the like. (p. 518)\textsuperscript{161}

In \textit{R. v. Schwartz} (1988), Dickson C. J. stated that "administrative convenience... is rarely if ever an objective of sufficient importance" for the purposes of s.1 of the Charter.

The approach to s.1 in the earlier Charter cases is a principled one. The protection of rights and freedoms, absent rare and unusual conditions, will always trump legislative policy considerations. MacKlem et al. (1994) summarize the initial judicial tack to s.1 in these terms:

The view of s.1 emerging in these early cases is stringent, one that cedes the protection of the rights and freedoms only in rare circumstances - e.g. prohibitive cost (\textit{Singh}) or emergency conditions (\textit{Motor Vehicle Reference}). (p. 175)

Although the \textit{Oakes} decision has become the authoritative statement for s.1 analysis, subsequent cases have moved away from the rights-oriented approach to embrace a reasonableness-oriented approach in assessing restraint on Charter rights. Some commentators see the genesis of the Supreme Court's reasonableness-based interpretation of s.1 in

\textsuperscript{161}In this case, the highest court held that the absolute liability offence of driving with a licence under suspension (coupled with the possibility of incarceration following a conviction) violated the accused's right to fundamental justice as guaranteed by s.7 of the Charter. This section states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Edward Books and Art Ltd. v. The Queen (1986). In the context of balancing the business interests of large corporate retailers with the interests of economically vulnerable retail employees seeking a day of rest with family and friends, Dickson C.J.C., for the Supreme Court of Canada, declared:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged groups. (p. 779)

In Irwin Toy (1989), the highest court suggested that different approaches to s.1 justification were appropriate in different contexts:

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only to be substitute one estimate for another. (p. 990)

These cases represent a move away from the rights-based approach embodied in the Oakes decision. They embrace

162 A group of retailers, charged with opening on Sunday contrary to the Ontario Retail Business Holidays Act R.S.O. 1980, c.453, s.2(1) (as amended), challenged the Act as violating their right to freedom of religion pursuant to s. 2(a) of the Charter. The Act prohibited retail sales on holidays, defined to include Sunday, with some exceptions for small retailers with seven or fewer employees. Although the legislation infringed s.2(a), the Supreme Court of Canada found the infringement justified under s.1
judicial interpretation that is significantly more deferential to the wishes of parliament and to practical, policy goals. This deference is most noticeable in regulatory cases but has even surfaced in the criminal context. MacKlem et al. (1994) explain:

The trend in the cases has followed Edwards Books and Irwin Toys towards a more deferential, flexible, reasonableness based approach to the various strands of the Oakes test. Initially this trend was most noticeable in cases characterized as "regulatory," i.e., involving socio-economic considerations and lacking the tension between the individual and the state as "singular antagonist." More recently, this approach is also evident in the criminal law context, the paradigm example of the individual versus the state which according to Irwin Toy was to remain in the stringent, rights oriented mode of analysis. (p. 180)

MacKlem et al. refer specifically to R. v. Chaulk (1990). The case involved a constitutional challenge to s.16(4) of the Criminal Code which establishes a presumption of sanity and requires an accused to prove insanity on a balance of probabilities. The Supreme Court of Canada held that the provision infringed the presumption of innocence guaranteed by s.11(d) of the Charter. Speaking for the majority, Lamer C.J.C. then had to consider the s.1 limitation arguments. The Chief Justice found that the government had satisfied the "pressing and substantial" part of the Oakes test even though Parliament's objective in enacting the impugned section was "to avoid placing on the Crown the impossibly onerous burden of disproving insanity and to thereby secure the conviction of the guilty" (p. 1337) even in the context of a doubt as to insanity.
A more deferential approach to s.1 analysis is also reflected in the courts' application of the proportionality test. In Lavigne v. Ontario Public Service Employees Union (1991), Wilson J., in dissent, described the rational connection test as follows:

The Oakes inquiry into "rational connection" between objective and means to attain them requires nothing more than a showing that the legitimate and important goals of a legislature are logically furthered by the means the government has chosen to adopt (p. 291).

Here, we move away from the language, in Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), requiring a "tight fit" between means and ends which characterized the stringent application of proportionality. Instead, "rational connection" is reduced, in later cases, to "logically furthered."

The greatest opportunity for deference to legislative policy-making arises under the minimal impairment test. The Oakes test acknowledged a justified limit only where the state could establish that it had chosen "the least intrusive means" to an objective. In contrast, subsequent cases defer to the policy choices of a reasonable legislature. In Irwin Toy (1989), for instance, our highest court declared: "This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups" (p. 999) Even in the criminal context, as in R. v. Chaulk (1990), the court has made it clear that
Parliament can choose from a "range of means" that impair the rights as little as "reasonably possible." Hence the language of "least intrusive means" is once again tempered by reasonableness measured in relation to "legitimate" policy goals, and deference to Parliament or the Legislature.

In theory, the deleterious effects test offers an opportunity to balance the detrimental effect of the impugned legislation with the importance of its objective. In Oakes (1986), Dickson C.J.C. states:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. (p. 140)

To date, the Supreme Court of Canada has never used the deleterious effects sub-test alone as a reason for striking down legislation restricting freedom of expression. If this trend continues, it is unlikely that the test by itself, although analytically distinct, will be responsible for finding laws unconstitutional. For MacKlem et al. (1994), this part of the proportionality test has lost much of its significance:

Since the "pressing and substantial" nature of the objective has been relaxed to the point where there is often only minimal review, this test has little function. The analytic bite of the test is not clear and in most cases the discussion is conclusory. (p. 184)

When courts adopt a deferential view of s.1, the test of deleterious effects will be relatively easy to satisfy.

The judiciary's interpretive approach to s.1 is an
evolving one. In the early Charter cases, culminating in Oakes, the Supreme Court of Canada favoured a rights-oriented approach to the pressing and substantial objective, and proportionality tests. In recent cases, the same court has espoused a more deferential reading of s.1. Since the Charter is still in its infancy, adjudicative interpretation will likely continue to reflect the ongoing tension between these two approaches. Nonetheless, the Charter's capacity to enhance protection of teachers' free speech rights beyond the protective ambit of employment law will ultimately depend on which approach adjudicators embrace. If adjudicators favour a strict application of s.1, limits on free speech will be harder to justify. This could lead to increased protection for teachers' s.2(b) rights. Yet, when adjudicators adopt a more deferential reading of s.1 based on reasonableness, school boards will have an easier time curbing teacher expression. In these circumstances, the Charter is less likely to change employment law protection of teachers' free speech rights.

The Government as Employer

On the basis of the existing jurisprudence, adjudicators are generally unlikely to adopt a rights-based approach even when the rights of citizens are involved. When the free speech rights of teachers, as employees, are implicated, adjudicators will probably demonstrate a much stronger propensity for embracing the reasonableness-based approach
given the specific nature of the employment law context. Under these circumstances, different considerations of a pragmatic nature arise.

In a much more utilitarian vein, governments must employ teachers and ensure that they carry out their contractual obligations in an employment setting where specific objectives must be attained. In the American constitutional jurisprudence, the distinction between government as employer (as well as state actor) and government as state actor alone is absolutely critical. In Pickering v. Board of Education (1968), the American Supreme Court noted: "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general" (p. 568). Some twenty-five years later, the same court in Waters v. Churchill (1994) stated:

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. (p. 1888)\(^{143}\)

\(^{143}\)In a related vein, the Court added: [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will
In Canada, it also seems unlikely that the courts will equate the speech of public employees, including teachers, with the speech of citizens in general for the purposes of Charter analysis. Hence, the context in which the expression occurs is critical. In fact, the Supreme Court of Canada in Ross (1996) has embraced the reasoning in Irwin Toy (1989), subsequently espoused in a growing number of cases including RJR-MacDonald Inc. v. Canada (Attorney General) (1995), that different approaches to s.1 justification are appropriate in different contexts. In Ross, La Forest J. indicated:

The next consideration under a s.1 analysis . . . is the nature of the legislation and of the right(s) infringed. To this end, McLachlin J. in RJR-MacDonald stated that "greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state" . . . In this appeal, the Board's Order, like its constituent legislation, is concerned with the competing interests of different individuals and attempts to balance the eradication of discrimination against the rights of other individuals. . . . The Board balanced the respondent's freedoms against the ability of the School Board to provide a discrimination-free environment and against the interests of Jewish students. (p. 876)

On the basis of Ross, one can now argue that the courts will be called to "mediate between the competing claims" of teachers, as employees, and school boards, as employers. Hence, a lower standard of constitutional scrutiny may ensue. This can be distinguished from the criminal context, for contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. (pp. 1887-1888)
instance, which traditionally pits the individual against the state and consequently requires a higher standard of constitutional scrutiny to justify Charter infringements.

In *Ross*, the Supreme Court of Canada also specifically stressed the importance of the employment setting in its overall contextual approach to s.1 analysis: "[T]he employment context . . . is relevant to the extent that the State, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence" (p. 874). Furthermore, it stated:

More than being solely employees of the State, teachers are also employees of a particular school board. As such, a teacher’s freedoms must be balanced against the right of the school boards to operate according to their own mandates. (p. 874)

In both the American jurisprudence and the Supreme Court of Canada’s decision in *Ross*, the judiciary has highlighted the importance of the employment context when assessing teachers’ claims for constitutional protection of their free speech rights. The courts recognize that, as an employer, the government must ensure that school systems in which teachers work are able to accomplish their educational goals in an efficient and effective manner. These same considerations do not arise in a constitutional analysis when the government, as state actor but not as employer, is attempting to silence its citizens. The special nature of the employment context is likely to enhance the weight of legitimate employment goals
in determining what counts as pressing and substantial objectives for the purposes of the s.1 analysis.

The Nature of the Expression

Notwithstanding the interpretive approach to s.1 that adjudicators adopt and the recognition of the significance of the employment context, the Charter's ability to increase the employment law protection of teachers' free speech rights will also be governed by the nature of the expression in question. In Ross, the Supreme Court indicated that state action limiting expression which invokes the core values of freedom of expression - pursuit of truth, political participation, and self-fulfilment/autonomy - will attract "a searching degree of scrutiny" (p. 876). This exacting standard, however, does not apply in all circumstances. In Ross, La Forest J. declared:

This [searching degree of] . . . scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinging lies further from the "core" values of freedom of expression, a lower standard of justification under s.1 has been applied. (pp. 876-877)

From an employment perspective, one can posit as a general rule that dishonest, uncooperative, disloyal, or disobedient speech is less likely to advance the underlying rationales associated with the constitutional value of free speech. However, the Charter may enhance free speech protection for teachers in two specific areas. First, the Charter may make a difference when teachers decide to criticize their employers when they comment on matters of
public concern such as a school closure or reduction in teaching personnel. Second, the Charter may offer additional protection when arguments about academic freedom are raised. In both cases, core values of freedom of expression are implicated.

By virtue of their professional status, teachers are qualified to speak out on matters of public concern such as budgetary cutbacks, staff reductions, school closures and a host of other important issues. This ability to speak out responsibly and intelligently on matters of public concern goes to the heart of the free speech values that undergird s.2(b). The political process rationale ensures that a wide variety of perspectives is possible when important public decision-making matters are at stake. Since school boards are composed of elected officials, these officials may have their own personal, political agendas that may conflict with the larger educational interests of the school system. These officials may not always encourage open debate or dissent which challenges their positions of power.

Given their unique situation as informed insiders, teachers have a privileged position from which to speak. In theory, they have a better chance of standing above the partisan, political fray to defend the educational interests of the unelected. Hence, their voice becomes a critical one. In these circumstances, silencing teachers who speak out on matters of community importance, even when the comments do
not relate to illegality, negligence, or collective bargaining may not be constitutionally defensible because of the nature of the expression in question. Simply put, teacher comment on public issues is a special form of political expression which raises fundamental constitutional values. Valuable teacher criticism may help to root out unsound employer practices which are detrimental to the goals of the school system itself. Thus, if we wish teachers to contribute constructively to policy formulation and critique within the larger school system, then characterizing every expressive challenge as an act of disloyalty will not advance this goal.

In the United States, two Supreme Court decisions have shaped the jurisprudential approach to the analysis of claims involving constitutional protection, under the First Amendment, for public school teachers who criticize their employers on matters of public concern. These cases are Pickering v. Board of Education (1968) and Connick v. Myers (1983). In Pickering, a high school teacher sent a letter to the local newspaper criticizing the school board and superintendent of schools for funding athletic programs at the expense of academic excellence. This criticism led to Mr. Pickering's dismissal. On appeal to the Supreme Court, the teacher claimed that the board had unjustifiably violated his

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14 Although Connick did not involve a school teacher, its relevance to educators is significant. As Ryan (1988) declares: "Connick set the contemporary tone of first amendment analysis in teacher employment cases" (p. 701).
First Amendment rights of free speech. The Supreme Court upheld his claim. Even though Pickering's letter contained errors about the amounts expended by the board of education on athletics, there was no evidence to suggest that he had made the statements "either with knowledge of their falsity or with reckless disregard for their truth or falsity" (p. 573).\(^\text{165}\)

In *Pickering*, the Court rejected the notion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . ." (p. 568). Rather, the court acknowledged the special role teachers play in informing the public and chose to give this constitutional protection. Hence, the court recognized and protected the teacher's right to speak as a citizen and the public's right to know:

> [T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration . . . cannot, in a society that leaves such questions to popular vote, be taken as conclusive.

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\(^{165}\)In this regard, the Superintendent and Board of Education had initially attempted to argue that Pickering's letter was libelous. The Court refused to comment on "whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment" (p. 574). In dissent, Justice White held that the issue of harm was irrelevant: "If Pickering's false statements were either knowingly or recklessly made, injury to the school system becomes irrelevant, and the First Amendment would not prevent his discharge" (p. 584).
On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. (pp. 571-2)

In Pickering, the special nature of the expression and teachers’ specialized knowledge and expertise provided a justification for their participation in educational debates of a public nature. Hence, the public interest may not necessarily lie in blind faith being accorded to the school board by its employees.

In a related vein, Canadian courts may struggle with deciding what qualifies as a subject of public interest for the purpose of Charter analysis. In both Pickering v. Board of Education (1968) and Fraser (1985), the respective American and Canadian Supreme Courts focused on the interests of an employee, as a citizen, in commenting on "matters of public concern." It is not always easy to ascertain what constitutes a matter of public concern. In Connick v. Myers (1983), the United States Supreme Court addressed this question. Sheila Myers, a lawyer with the district attorney’s office, circulated a questionnaire among office workers subsequent to finding out that she was to be transferred. Myers designed the questionnaire to gauge employee opinions about transfer policies, office morale, the need for a grievance committee, the level of confidence in superiors, and whether employees felt pressured to work on political
campaigns. Upon learning of the questionnaire's circulation, Myer's superior fired her for insubordination. She appealed claiming a violation of her first amendment rights.

The Court held that expression relating to "any political, social, or other concern to the community" (p. 149) would meet the requirements of the public concern test. The Court also noted that arriving at this determination would require the following consideration: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" (pp. 147-8).

With the exception of one question, the Court held that the questions posed by Myers to her co-workers did not fall under the rubric of matters of "public concern." For the Court, the questions related to Myers' dispute about her transfer to another section of the criminal court: "These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre" (p. 148). However, the Court held that the question of whether assistant district attorneys are pressured to work on political campaigns was a matter of interest to the community and thus a matter of public concern. The Court then applied the Pickering balancing test to uphold the dismissal. It found there existed "close working relationships" between Myers and her superiors and thus granted to her employers "a wide degree of deference" in disciplining her.
In Connick, the Court split 5-4 in its ruling. In dissent, Brennan J. rejected the majority's "narrow conception" of what comprises matters of public concern. The Justice argued that the First Amendment protects the dissemination of Myers' questionnaire so that people, and not the courts, may evaluate its usefulness:

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent. (p. 170).

In the literature, the Connick test has been criticized by a number of American scholars. Chief among these are Tribe (1988) who states: "This approach invites the Court to engage in standardless and subjective, content-based determinations of the social importance of speech, a mode of analysis that the Court has rightly rejected in other contexts" (p. 931).

Even if the Connick test is problematic in its application, it may still provide a useful way of categorizing teacher speech. Teacher speech which is critical of employer policies or practices on matters which are of relevance and importance to the local community (e.g. a school closure or discontinuation of certain courses) is arguably worthy of a higher standard of constitutional protection. Interdicting this type of political expression deprives the community of an important and educated voice
which educational stakeholders may require to assess the decision-making capacities of their elected public officials.

Comment on matters of public concern might be distinguished from the case in which a teacher is overtly critical about the teaching complement that he or she has been assigned. Although important to the individual teacher, it does not appear to raise the same kind of public concerns that a school closure would. The individual complaint appears to take the form of an employee grievance which will not necessarily raise a constitutional question. Hence, the nature of this type of speech should make it easier for school boards to restrict.

Apart from issues of public concern, the Charter may also offer special protection for academic freedom that employment law is unwilling to concede. We have already seen that the exercise of academic freedom will normally fall within the scope of expressive activity encompassed by s.2(b). Furthermore, one can argue that some measure of protection for academic freedom per se is essential because teachers' exercise of academic freedom raises fundamental constitutional values. To understand the argument, we must return to the underlying rationales that the Supreme Court of Canada has embraced to justify the constitutionally protected value of free speech - the pursuit of truth, political process, and autonomy/self-realization rationales.

In the tradition of political liberalism, free speech is
extremely important because it fosters the search for truth. Pavela (1995) notes that the truth justification is "probably the most frequently cited purpose of academic freedom" (p. 360)." Even if the pursuit of truth in an open marketplace does not always lead to the truth, the process seems worth pursuing. As Pavela declares: "Few adherents to the "marketplace" theory . . . believe that a marketplace of ideas provides a direct and unerring pathway to truth. It is, instead, a process that seems more likely (over time) to discover truth than any other process we know" (pp. 360-361)."\(^{14}\)

In many respects, the pursuit of truth is an ideal which we continuously struggle to attain. In this regard, Byrne (1989), while acknowledging that the First Amendment protects speech that "is vulgar, pernicious, incomprehensible, and mad" (p. 260), suggests that the First Amendment should also protect speech that aims higher:

The First Amendment ought also to be aspirational. Society ought to strive toward speech that is truthful, gracious, well-considered, and generous to opponents. It

\(^{14}\)Pavela also observes that other reasons for protecting academic freedom "include fostering the common good, protecting a free society, encouraging creativity, challenging stale orthodoxies . . . " (p. 359).

\(^{14}\)Pavela also adds: If academic freedom is grounded in a marketplace of ideas (the "multitude of tongues" mentioned in Keyishian), the marketplace is further enhanced by encouraging certain ways of thinking, and qualities of character. Those attributes must be fostered in students, and should be highly developed in professors. (p. 361).
ought not to settle for, though it must often permit, speech that is ignorant, self-interested, manipulative, hateful or vapid. Without some such ideal, actively pursued, speech loses its value as communication, and thought loses its power to persuade through appeal to reason. When discourse becomes debased, conflict of interests within democratic society cannot be resolved or lessened through debate or deliberation (because no one will take them seriously) but only through the parlay of money, numbers and force. Speech should be protected because it is beneficial. (pp. 260-261)

According to Byrne, academic speech is the quintessential form of aspirational expression:

Preeminent among the systems of discourse within our diverse society, academic speech holds expression to high standards. For all the notorious faults of jargon and circumlocution associated with scholarship, academic speech provides our most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational. (p. 261).

One may argue that the pursuit of truth argument seems more relevant to academic freedom when scholarship, as opposed to teaching, is implicated. Yet, the Massachusetts District Court in Mailloux v. Kiley (1971) reminds us that affording some measure of constitutional protection to the teaching methods employed by secondary school teachers is extremely important:

We do not confine academic freedom to conventional

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148Byrne (1989) also recognizes the social value of academic expression: [M]uch of its value is social - it contributes profoundly to society at large. We employ the expositors of academic speech to train nearly everyone who exercises leadership within our society. Beyond whatever specialized learning our graduates assimilate, they ought to be persuaded that careful, honest expression demands an answer in kind. The experience of academic freedom helps secure broader, positive liberties of expression. (p. 261)
teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options for which there is any substantial support will increase his intellectual vitality and his moral strength. (p. 1391)

The creative and adventurous teacher who has the courage to challenge stale orthodoxies and inspire students to question the human condition may ultimately encourage learners to seek truth and move beyond the extant boundaries of knowledge.

Although the argument from truth is the most powerful and commonly cited justification for academic freedom, it is not the only one that has been put forward. Meiklejohn (1961) maintains that academic freedom is crucial for the preservation of democracy:

I believe, as a teacher, that the people do need novels and dramas and paintings and poems, "because they will be called upon to vote." The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. (p. 263)

From the jurisprudence, Mailloux v. Kiley (1971) again tells us that some form of constitutional protection for the academic freedom of secondary school teachers is essential if we want our teachers to personify the values of democracy:

The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth. (p. 1391)

Hence, the political process rationale, which is a vital justification for free speech, also offers a relevant warrant
for academic freedom.

In addition, the practice of academic freedom advances the goals of self-realization and autonomy which are routinely offered as justifications for free speech. Through expression, the self-realization rationale allows us to discover who we are. This is important for both teachers and students. In the context of academic freedom, if teachers encourage their students to express their opinions in a respectful manner, the students may be encouraged to share their thoughts and inner feelings with others. Daring to speak the truth, articulating the difficult or painful, or helping to draw out shy learners may well help those individuals to self-actualize and thus realize their full potential. Teachers who are open and honest with students have a unique opportunity to create a special classroom atmosphere in which they experience personal and professional fulfilment.

If the first and foremost goal of education is to make students think, and to think independently, then the goal of autonomy is crucial. In the realm of academic freedom, where students are challenged through various means (e.g. question/answer, problem-solving) by their teachers, then their experience as learners will be a progressive and evolving one. If we wish to make students the leaders of tomorrow's democracy, they must become their own persons. They must be able to take control of their own lives and make
decisions on their own. An in-class atmosphere that allows students to say "this is what I think and these are my reasons" will encourage students to become emotionally secure and independent, autonomous learners.

In essence, the most frequently cited rationales advanced to defend free speech - the pursuit of truth, the political process, and self-realization/autonomy rationales - are equally applicable to an understanding and defence of academic freedom. Since the state has a duty to educate its young in a democratic tradition, one might expect that the state will make special allowances to ensure that teachers are able to fulfil this mandate. Consequently, the Charter may extend protection to teachers' exercise of academic freedom beyond that guaranteed by employment law because of the special constitutional values that academic freedom invokes.

The importance adjudicators attach to a strict or deferential reading of s.1, the employment context, and the nature of the expression will all influence the degree to which the Charter enhances the protection of teachers' free speech rights under employment law. In addition, the Charter's impact will be gauged by the application of the particular tests under the s.1 analysis: limit prescribed by law, pressing and substantial, and proportionality tests. These are examined in turn below.
Limit Prescribed by Law

Adjudicators must decide, as a preliminary matter, whether an employment requirement stipulating that teachers refrain from dishonest, uncooperative, disloyal, and disobedient expression amounts to a "limit prescribed by law". One might argue that the words "honesty", "cooperation", "loyalty", and "obedience" are controversial and subject to varying interpretations. Nonetheless, it is unlikely that adjudicators will decide that a legal requirement for these employment duties, whether founded in statute or common law and whether articulated in a specific order or in a more general sense, fails to meet the test of "intelligible standard" set out in Irwin Toy (1989). In Osborne v. Canada (Treasury Board) (1991), the Supreme Court noted:

This Court has shown a reluctance to disentitle a law to s.1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials. . . . [I]t is preferable in the vast majority of cases to deal with vagueness in the context of a s.1 analysis rather than disqualifying the law in limine. (p. 326)\(^{169}\)

\(^{169}\)In Slaight Communications Inc. v. Davidson (1989), the Supreme Court of Canada acknowledged that an order by an adjudicator requiring an employer to write a specific letter of recommendation for an employee amounted to a "limit prescribed by law". Even though the adjudicator was exercising discretion, the exercise flowed from statutory powers.

As we saw in the previous chapter (see note 128, p. 164), limitations on teachers' academic freedom may take various forms including statutes, regulations, and orders from a principal or school board. Under constitutional law,
Pressing and Substantial Objectives

The critical issue under the pressing and substantial test is to determine whether the rationales undergirding the duties of honesty, cooperation, loyalty, and obedience will automatically be translated into pressing and substantial objectives for the purposes of s.1 analysis. Hogg (1992) reviews the strict standards, set out in Oakes (1986), to qualify as a pressing and substantial objective under the Charter:

According to R. v. Oakes (1986), the only kind of law that can serve as a justified limit on a Charter right is one that pursues an objective that is sufficiently important to justify overriding a Charter right. When does an objective achieve this degree of importance? Dickson C. J. in his Oakes judgment attempted to provide some guidance on this question. First of all . . . the legislative objective must meet the standards implied in the words "free and democratic society" in s.1. Only objectives that are consistent with the values of a free and democratic society will qualify. Second, he suggested that the objective must "relate to concerns which are pressing and substantial", rather than merely trivial. Thirdly, the objective must be directed to "the realization of collective goals of fundamental importance." (p. 35-20)

In spite of these strict analytical exigencies, Hogg notes that the case law reflects the relative ease governmental authorities have in meeting the requirements of the pressing and substantial test:

These phrases all indicate that a reviewing court should engage in a rigorous scrutiny of the legislative objective. In practice, however, the requirement of a

limitations to academic freedom in any form (save limitations which restrict communications expressed via physical violence) are subject to challenge if they are seen to conflict with the Charter right of free speech under s.2(b).
sufficiently important objective has been satisfied in all but one or two of the Charter cases that have reached the Supreme Court of Canada. It has been easy to persuade the Court that, when the Parliament or Legislature acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance. (p. 35-20)\textsuperscript{179}

In addition, Macklem et al. (1994) observe:

The test of objective, the first part of the Oakes test, is almost always satisfied in either the original Oakes application or in the more flexible, deferential mode of Charter review. Few cases offer a discussion of the nature of what is "pressing and substantial in a free and democratic society." The benchmark is increasingly one of reasonable importance and, because the underlying stance of review is deferential, few legislative undertakings have difficulty leaping this first hurdle. (p. 180)

In Osborne v. Canada (Treasury Board) (1991), the Supreme Court of Canada considered the constitutionality of federal legislation which limited the free speech rights of civil servants. In assessing the objective behind the government legislation, the court simply extracted and embraced its earlier reasoning articulated in the non-Charter decision of Fraser v. Public Service Staff Relations Board

\textsuperscript{179}More precisely, Hogg observes: Despite the vigour of these strictures, there has so far been only one case in which the Supreme Court of Canada has unequivocally rejected the legislative objective. In R. v. Big M Drug Mart (1985), the Court held that the Lord's Day Act, which was a federal Sunday-closing law, infringed the guarantee of freedom of religion. Its purpose, the majority of the Court held, was "to compel the observance of the Christian sabbath". . . . That was a purpose that was directly contradictory of the Charter right, and could not be a purpose that justified limiting the right. (p. 35-22)
(1985):

The importance of the government objective is not contested in this case. It is quite properly conceded to be the preservation of the neutrality of the civil service to the extent necessary to ensure their loyalty to the Government of Canada and hence their usefulness in the public service. The importance of this objective was fully canvassed in Fraser v. Public Service Staff Relations Board . . . and in view of the consensus on this issue it is not necessary to elaborate on it. (p. 341)

On the weight of existing case law and the scholarly literature in Canada, one can argue that where the government actor is also the employer all legitimate employment concerns will normally be accepted by the courts as pressing and substantial objectives for the purposes of the s.1 analysis.

In the American context, the United States Supreme Court in Pickering v. Board of Education (1968) stated that certain employment concerns will trump the first amendment value of free speech. These are: 1) the need to maintain discipline and harmony among superiors and co-workers; 2) the need for confidentiality; 3) conduct which impedes the teacher's proper performance of daily duties in the classroom; 4) conduct which interferes with the regular operation of the schools. (see pp. 570-573) These factors are strikingly similar to those enunciated by Brown and Beatty (1988) in the Canadian arbitration context as legitimate employment interests which will restrict the free speech rights of public servants. If the Canadian courts follow the American lead, it is more likely than not that the rationales supporting the respective duties of honesty, cooperation,
loyalty, and obedience will translate into pressing and substantial objectives under the s.1 analysis.

In the employment law context, there is no Canadian case law that directly addresses the issue of academic freedom. Hence, there is no extant body of arbitral jurisprudence telling us what counts as legitimate pedagogical concerns when it comes to placing restrictions on the academic speech of teachers. Consequently, there are no legitimate pedagogical concerns that will automatically convert into pressing and substantial objectives for the purposes of constitutional analysis.

If academic freedom or academic speech has special protection under s.2(b) of the Charter, school boards will have to demonstrate that an order restricting teachers' academic freedom amounts to a "reasonable limit" in a free and democratic society in accordance with the s.1 analysis as set out in the Oakes (1986) decision. In considering what justificatory arguments school boards might advance under the pressing and substantial objective test, we turn to the American jurisprudence for assistance. Although United States jurisprudence does not include a Canadian type s.1 analysis, it does articulate justifiable limits to or qualifications of the constitutional protection of free speech related to academic freedom. In Hazelwood School District v. Kuhlmeier (1988), the American Supreme Court stated:

[E]ducators do not offend the First Amendment by exercising editorial control over the style and content
of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. (p. 273)

The same court noted that restricting expression bearing the school's imprimatur without a legitimate pedagogical reason would infringe the First Amendment:

It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]" . . . as to require judicial intervention to protect students' constitutional rights. (p. 273)

Although articulated in the context of the constitutional rights of students\textsuperscript{171} to free speech within the confines of the curriculum, the "legitimate pedagogical concerns" principle has subsequently been applied to public school teachers.\textsuperscript{172} In Miles v. Denver Public Schools

\textsuperscript{171}In Hazelwood, three students claimed that the school principal had violated their free speech rights by censoring the school newspaper. In a journalism class, students produced a newspaper under the supervision of a teacher. The principal objected to the content of two articles. The first article discussed three students' experiences with pregnancy. The principal believed that others would easily identify the three pregnant students whom the newspaper had interviewed anonymously. He also felt that the article's discussion of sexual activity and birth control was "inappropriate" for some of the school's younger students. As for the second article, the principal opposed an identified student's direct criticisms of her father. He believed that the newspaper should have offered the student's parents an opportunity to respond to the comments or to consent to their publication. The Supreme Court upheld the constitutionality of the principal's actions.

\textsuperscript{172}The legitimate pedagogical concerns test has also been applied recently to test the limits of academic freedom in the university context in the United States. See Silva v. University of New Hampshire (1994).
(1991), the Tenth Circuit Court of Appeals stated:

"We find no reason to distinguish between the classroom discussion of students and teachers in applying Hazelwood here. A school's interests in regulating classroom speech . . . are implicated regardless of whether that speech comes from a teacher or student." (p. 777)

In its analysis, the court in Miles (1991) suggested that the application of the Hazelwood test to teachers involves two related yet separate inquiries. First, "are the interests asserted by the school . . . legitimate pedagogical interests?" (p. 778) Second, "are the actions taken by the school . . . reasonably related to legitimate pedagogical interests?" (p. 778) In comparative terms, these two questions resemble the approach adopted by the Canadian courts under the Oakes standard. The first question is similar to the pressing and substantial arm of Oakes which seeks to ascertain whether or not the objective behind the regulation constitutes a pressing and substantial concern which might justify limiting a constitutional right. The second question is like the first phase of the proportionality prong under Oakes - the rational connection test.\textsuperscript{173} Under this test, the school board must demonstrate that the measures taken to restrict a teacher's academic freedom are rationally connected to the restriction's

\textsuperscript{173} We will examine the issue of proportionality separately in our general discussion of rational connection, minimal impairment, and deleterious effects in the following section entitled "Proportionality."
objective."

The American courts have identified a number of bona fide pedagogical concerns or interests which may justify limiting the academic freedom of teachers. The critical ones may be summarized as follows: the "fair and objective presentation of materials" concern; the "appropriateness of the materials" concern; the "general control of the curriculum" concern; and the "material and substantial disruption" concern.

From a Canadian perspective, it is likely that these educational considerations enunciated by the American judiciary will also play a crucial role under a Charter analysis. In Ross, the Supreme Court of Canada has stated explicitly that the educational context is critical in the s.1 analysis of teachers' constitutional right of free speech. Speaking for the court, La Forest J. noted:

In discussing the interest of the State in the education of its citizens in Jones . . . I stated that "[w]hether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society". And I adopted . . . much of what was said in the American case of Brown v. Board of Education of Topeka . . . (1954), in the following

17"Unlike the other two sub-tests under the Oakes formula, "minimal impairment" and "deleterious effects", the American courts do not explicitly employ comparable wording in their analyses. Nonetheless, issues such as overbreadth and vagueness which are critical in the context of minimal impairment are also highly relevant considerations in the American analysis. In addition, implicit in the American approach is a weighing of the seriousness of the infringement (cost) against the value of furthering legitimate pedagogical objectives (benefit). Once again, this goes to the heart of the deleterious effects test.
passage . . . "Today, education is perhaps the most important function of the state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. (p. 873)

Given the state's compelling interest in educating the young, one can argue that the fair and objective presentation of materials, the appropriateness of materials, the general control of the curriculum, and the material and substantial disruption concerns will constitute pressing and substantial objectives under the first arm of the Oakes formula to justify a limit on public school teachers' academic freedom.

Fair and objective presentation of materials. In Sterzing v. Fort Bend Independent School District (1972), Henry Sterzing taught high school civics in Stafford, Texas. Some parents complained about the controversial manner in which he instructed his classes. Parental opposition reached its apex when Sterzing, while teaching a unit on race relations, truthfully responded to a student's classroom question that he did not oppose interracial marriages. His superiors then ordered him to teach his class "within the text and not discuss controversial issues". When Sterzing did not comply with the order, the school board dismissed him.

17Sterzing also distributed controversial materials to his students including an article denouncing the repression of anti-war dissent in the armed forces, and a fund solicitation letter from students at the University of Texas who had been arrested in connection with their anti-war protest during a speech by President Johnson.
for insubordination. On appeal, the South District Court of Texas held that the school board had violated Sterzing’s free speech rights under the First Amendment. 176 Commenting on the right of the teacher to speak out on controversial issues, the court stated:

The freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom. (p. 661)

Nonetheless, the court acknowledged that school boards have a valid educational interest in ensuring that teachers treat controversial issues in a fair manner:

However, it must also be that teacher’s duty to be exceptionally fair and objective in presenting his personally held opinions, to actively and persuasively present different views, in addition to open discussion. (p. 661)

In the Canadian constitutional context, the need to present materials in a fair and objective manner will undoubtedly amount to a pressing and substantial objective under a s.1 Charter analysis. Yudof (1979) states: "The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime" (p. 865). By virtue of their position of power, authority, and superior intellectual skills, public school teachers have a tremendous potential to sway their students’ thoughts and

176 The court awarded Sterzing monetary damages yet did not order reinstatement because, at the advanced stage in the term, it "would only serve to revive antagonisms..." (p. 663).
actions. In *Ross*, the Supreme Court of Canada stated: "Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions" (p. 27).

Public school students are often intellectually and emotionally immature and unsophisticated. They may swallow uncritically the dishes on the academic menu that the teacher presents to them simply because they lack the life experience and critical faculties of an autonomous and independent minded adult. For many students, what the teacher says may be the only source of intellectual authority they receive on a controversial topic. In a match of wits, more often than not, they are likely to be the losers.

Recognizing the inherent innocence, naivete, and vulnerability of young students, La Forest J. in *Ross* declared: "Young children are especially vulnerable to the messages conveyed by their teachers. They are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher" (p. 873). It is worth noting that the court made these comments in the context of restricting racist expression by school teachers outside the school gates. In the classroom, teachers work with a captive audience composed of a majority of students who must attend school on a compulsory basis. Hence, one could argue that the need for teachers to respect this vulnerability is even greater inside the classroom where the
contact with students is direct, immediate, and often inescapable.

Given teachers' relative advantage in authority, power and intellect, and students' corresponding psychological and cerebral vulnerability, Canadian courts will surely accept the proposition that school boards have a legitimate pedagogical interest in ensuring that teachers present controversial materials in a fair and objective manner. Schools are interested in impartial treatment of controversial topics in order that students themselves can reach their own decisions when authorities and the evidence conflict.177 The call to fairness and objectivity constitutes a pressing and substantial objective under a s.1 Charter analysis which will justify the imposition of restrictions on teachers' academic freedom. Three primary educational considerations drive the need for impartiality: to avoid indoctrination, to promote critical thinking, and to advance equality.

First, teachers must avoid indoctrination in teaching by striving for objectivity and balance in the presentation of controversial materials or methods. In the literature, Bryne (1989) reminds us that academic speech attempts to transcend

177 In Quebec, the Education Act (1988) specifically stipulates in s.22(4) that a teacher must act in an "impartial manner in his dealings with his students." Quebec is unique in this regard.
the personal biases178 of the teachers:

The unique point is that academic speech can be more free than the speaker; that the speaker may be driven to conclusions by her respect for methodology and evidence that contradict her own preconceptions and cherished assumptions. The scholar cannot argue merely for her political party, religion, class, race, or gender; she must acknowledge the hard resistance of the subject matter, the inadequacies of friends' arguments, and the force of those of her enemies. That is what scholars mean by disinterested argument - not indifference to the outcome, but insistence that commitment not weaken the rigor and honesty by which the argument is pursued. (p. 259)

Second, teachers must exemplify impartiality and objectivity when employing controversial materials if they wish to instill the virtues of critical thinking in their students. Teachers who demonstrate a disproportionately strong bias in favour of certain views may preclude students from thinking about different or contrary perspectives which they might have otherwise considered if the teaching had been more balanced. Even older and more mature students who hold opinions that differ from those of their teachers may feel reluctant to speak out in an atmosphere where teachers exert inordinate control and discourage students from expressing dissident beliefs.

In Keegstra v. Board of Education of Lacombe No. 14 (1983), we saw in the employment context that teachers have the potential to undercut critical thinking. The evidence indicated that "students believed the appellant [Keegstra]
and did not question the accuracy or truth of the information and facts presented to them" (p. 381). Given the credulity of students and their lack of critical rigour, the Keegstra case also aptly illustrates that the capacity for teachers to indoctrinate young and unsophisticated students is real and powerful.

From the perspective of critical thinking, teachers who indoctrinate fail to engage in the very qualities and characteristics that they are called on to model. Indoctrinating teachers demonstrate an unfitness to teach by undermining the very tenets of openness and inquiry upon which academic freedom ultimately rests. The refusal to present students with alternative viewpoints and the silencing of minority voices which run counter to teachers’ discourse are both inimical to the values of a liberal education which argue in favour of helping learners to think critically and independently. Hence, requiring teachers to present materials in a fair and objective manner serves a dual purpose: it ensures that teachers respect the canons of sound teaching by attempting to transcend their own personal biases, and it provides space for students to express contrary and divergent views in an environment where respect for the person is prominent. Since these are legitimate pedagogical concerns, the need for fairness and objectivity in the presentation of controversial materials will probably qualify as a pressing and substantial objective under the
Charter’s s.1 analysis which will justify constitutional restrictions on teachers’ academic freedom.

Third, the Supreme Court of Canada, in Ross, has recently endorsed, in strong and unambiguous language, the need for tolerance and fairness in the educational context as a means of promoting equality. La Forest J. declares:

The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. (p. 857)

In Ross, Ross’ racist attitudes caused fear in Jewish families (or minority groups) that he and the school (or school board) would not treat Jewish children fairly. Thus, controversial expression which involves attacks on arbitrary personal characteristics such as religion, language, or ethnic background may well create a hostile learning environment which denies equal respect and equal educational opportunity to all students. Teachers who indoctrinate may well silence minority students or dissenting viewpoints sympathetic to those students. Hence, the need to foster an open and respectful environment where minority students are valued is certainly a legitimate pedagogical concern.

Even Alan Borovoy (1991), general counsel for the Canadian Civil Liberties Association, recognized that anti-semitic behaviour in the private realm may render teachers unfit, as professionals, to teach because it calls into question their ability to act in a fair and open-minded
manner. In an article in the *Globe & Mail*, he declared:

> [S]uppose a teacher's comments outside the class revealed a prejudice so deep and hostile that the target of the prejudice acquired a reasonable apprehension that the teacher would mistreat their youngsters? There is no reason why parents should be required to surrender their underaged offspring to the care of those who express such prejudices against them. (p. A 17)\(^{179}\)

For Borovoy, the value at stake transcends the right to free speech:

> Because of my commitment to freedom of speech, I oppose prosecuting Malcolm Ross under the anti-hate law. Indeed, I oppose the anti-hate law itself. But the issue is not the right to speak and remain free. The issue is the entitlement to a position of delicate public trust. (p. A 17)

Hence, to maintain the integrity and public confidence in the educational system, teachers must strive to act impartially and respectfully in their treatment of others. This applies even to teachers' private lives.

The importance the court attaches to the special nature of the teaching position is further reflected in its decision to strike down clause 2(d) of the Human Rights Commission's order. This clause would have prevented Ross from expressing racist views even in a non-teaching position. As La Forest J. stated:

> It may be that the continued presence of the respondent

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\(^{179}\)Borovoy compares the racist teacher to biased judges: Suppose, for example, certain judges announced publicly that they believed in the guilt of the accused people in their courts. Even if such remarks were made outside the court, those judges would have created, in the public's mind, a reasonable apprehension that they would discharge their judicial duties in a biased fashion. (p. A 17)
in the School Board produces a residual poisoned effect, even after he is removed from a teaching position, and it may be that this is what clause 2(d) seeks to address. Given the respondents' high profile and long teaching career, I acknowledge that the problem in the School District could remain for some time. However, the evidence does not support the conclusion that the residual poisoned effect would last indefinitely once Ross has been placed in a non-teaching role. For that reason, clause 2(d) which imposes a permanent ban does not minimally impair the respondents' constitutional freedoms. Clause 2(d) is not justified under s. 1. (p. 884).

Given the court's finding about the harmful nature of hate propaganda, one might wonder what difference it would make if Ross were to be relegated to a non-teaching status. Yet, the court draws a line between the influence exerted by different categories of employees who work for a public board of education. Non-teaching employees may be overtly and publicly racist in their off-duty conduct while teaching employees may not. Recognizing the highly sensitive nature of teachers' position, greater expressive restrictions are placed on teachers because of the greater potential to compromise the school board's ability to furnish a discrimination-free environment. By limiting Ross' free speech rights in order to ensure an equal and discrimination-free educational environment, La Forest J. stated: "Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth" (p. 878).

Since the Supreme Court of Canada has explicitly
embraced the value of equality as a constitutional justification for limiting racist teacher expression outside the classroom, there can be little doubt that promoting equality inside the classroom will constitute a pressing and substantial objective which will justify placing restrictions on teachers’ academic freedom under s.1 of the Charter.

From a pedagogical perspective, requiring teachers to present materials in the classroom in a fair and dispassionate manner is critical. In particular, the need for objectivity is essential to avoid indoctrination, to advance critical thinking, and to further the value of equality. Under the Charter’s s.1 analysis, the school board’s legitimate educational concern in seeking balance and impartiality in the presentation of controversial materials will certainly constitute a pressing and substantial objective under the first prong of the Oakes formula which would justify placing restrictions on teachers’ academic freedom.

In Ross, it is worth stressing that the controversial expression which led to Ross’ removal from the classroom occurred outside the school gates. This result, and the underlying reasoning, derives in large part from the attention the court accords to the special nature of the teaching position. In the context of s.1 analysis, for instance, the court concluded that it was possible to reasonably anticipate that there was a causal relationship
between Ross' speech and the poisoned educational environment. This conclusion was drawn on the basis of the "significant influence teachers exert on their students and the stature associated with the role of a teacher" (p. 881).

When the Supreme Court mentions "influence", it never employs the term "role model" in its judgment. Nevertheless, the duty to act as an exemplar goes to the heart of the reasoning expounded by the Board of Inquiry:

In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall within the scope of the employment relationship. (1994, p.10)

Similar language is adopted by Ryan J. in the dissent at the Court of Appeal:

Ross, as a school teacher is a role model to pupils in an elementary school, inside and outside the classroom. He teaches developing minds. He is a role model to children and yet, outside the classroom, he advocates prejudice. He urges discrimination. He publicly proclaims outside the classroom that which would not be tolerated if said in the classroom. (1994, pp. 27-28)

The idea of furnishing a teacher model of appropriate deportment rests on the underlying assumption that teacher behaviour has some influence on student behaviour. Applied to Ross, one might say that he influenced children to imitate his racist conduct. In other words, he served as a racist role model and hence an unacceptable one in a public school context.

In Ross, the court suggests that some activities a
teacher pursues, even in the absence of direct contact with students, still carry moral weight and may influence students:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. (p. 858)

La Forest J. went on to note:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community’s perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community’s confidence in the public school system as a whole. (p. 857)

In this regard, La Forest J. quoted with approval Allison Reyes (1995, p. 42) who considers the importance of teachers in the education process and the impact that they bear upon the system.

Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher). (p. 857)

Concerning the locus of teachers’ conduct, La Forest J. further observed:

By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see Re Cromer and British Columbia Teachers'
Federation (1986) . . .; teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. (p. 857)\textsuperscript{180}

Nonetheless, the Ross decision does not resolve all the related issues. For instance, it is far from obvious how one strikes a balance between teachers’ legitimate expectations to privacy and their very public role as teachers. A searching degree of scrutiny may unfairly place teachers under the societal microscope. For Manley-Casimir and Piddocke (1992): “Public school teachers, especially in a small town or a rural community, are rather like goldfish in a goldfish bowl: their behaviour is always open to public inspection and censure” (p. 116).\textsuperscript{181}

\textsuperscript{180}Once again, La Forest J. quoted with approval Reyes (1995, p. 37) in this regard:
The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact directly on their ability to teach, they may conflict with the values which the education system perpetuates. (p. 858)

\textsuperscript{181}Manley-Casimir and Piddocke made this comment in response to the Abbotsford School District 34 Board of School Trustees v. Shewan and Shewan (1986) case. Here, the Board of Education suspended a married teaching couple for misconduct. The four-week suspension arose from the publication of the wife’s semi-nude photograph in a magazine. The husband took the picture and both agreed to submit it for publishing. The B.C. Supreme Court (1986) upheld the suspension because the misconduct did not meet community standards:
If a good number of teachers in or about Abbotsford are publishing their nude photographs in a magazine such as the one in question, then the conduct of the respondents may be within community standards. If no other teachers are doing this, then it may be misconduct. (p. 59).
Other teachers in Abbotsford did not publish their semi-nude
Even La Forest J. offered the following warning:

I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. (p. 858)

Here, the court recognizes that although teachers are public servants, they still have private lives. To expect our teachers to be on the job seven days a week, 52 weeks a year is simply unrealistic and unfair. Gochnauer (1992) articulated the Court of Appeal's reluctance to interfere in the private life of Ross in these terms:

The worry of course, is that once we open the door to what amounts to on-duty regulation of off-duty activities, our hard-won freedom to live our personal lives as we choose will be eroded, and narrow-minded, illiberal sentiments will gain public muscle. If Malcolm Ross can be turfed out of the classroom for what he writes during his off hours, are gays and lesbians, unwed mothers, adherents of unusual religions, and so on, in danger of being forced to conform or lose their jobs? (p. 318)

For Gochnauer, censoring Ross' off-duty expression does not compromise our liberal values. He suggests that it is possible to draw a line between speech which is simply controversial and speech which is destructive of fundamental pictures in magazines. The Court of Appeal (1987) confirmed this but focused on the "adverse effect" the couple's behaviour had on the educational system:

Teachers must maintain the confidence and respect of their superiors, their peers and, in particular, the students, and those who send their children to our public schools. Teachers must not only be competent, but they are expected to lead by example. Any loss of confidence or respect will impair the system and have an adverse effect upon those who participate in or rely upon it. (p. 98)
societal values. In this regard, Gochnauer declares:

In general, the liberal vision of society, in which state power is neutral between various conceptions of the good life, is very appealing. But the benefits of liberalism need not be sacrificed to deal effectively with the anti-Semite teacher. Practicing anti-Semitism is not at all like being a football player, a conservative or wearing polyester. It involves in its essence disrespect and the promotion of hatred for others. Being a conservative or a football player or a wearer of polyester does not. As a result, the practice of anti-Semitism is easily distinguished, for example, from homosexuality, which at its core is about love and connection, not hatred and disrespect. Homosexuality does not threaten our basic values, the educational process or students, even though some people may feel uncomfortable about gay or lesbian teachers in the classroom. The presence of known homosexuals in the classroom may, indeed, validate the 'state' of being homosexual or the 'practice' of homosexuality. But that is quite different from validating anti-Semitism. The former is perfectly consistent with society's core values of empathy and respect; the latter is patently repugnant to those values. (pp. 322-323).

Yet, the teacher advocating gay rights may not be so easily distinguishable from the racist teacher. Many people might think that advocating the rights of gays and lesbians is morally destructive of fundamental Judeo-Christian values which accord the highest importance to the heterosexual family as the sacred human institution, par excellence, upon which our social foundations rest. Similar challenges can be raised about other forms of unconventional teacher conduct. The outspoken teacher who belongs to the communist party may undermine confidence in a school board which embraces the values of capitalism. The vociferous hippie teacher who criticizes modern technology and renounces all worldly possessions may undermine confidence in a school system which
preaches the virtues of computers and material progress in contemporary industrial societies.

Attempting to reconcile these seemingly irreconcilable differences is indeed a daunting task. One solution has already been offered by the Supreme Court of Canada in Fraser v. Public Service Staff Relations Board (1985). In assessing the relevance of public servants' off-duty expressive conduct, the guiding principle must focus on the conduct and whether it impairs public servants' "actual or apparent" ability to do their job. On one hand, we recognize that teachers' conduct outside class can affect their job. If a teacher announced publicly a proclivity for intergenerational sex, parents would not be expected to tolerate such utterances. This announcement would shatter parental confidence in the teacher's ability to perform his or her duties even if he or she were an excellent teacher.

On the other hand, in the more difficult cases, the line can not be so easily drawn. After all, teachers are not saints and they commit fallible acts. We can not expect them to be perfect or free from all human foibles. In addition, teachers have a legitimate expectation of a certain degree of privacy. They cannot be on public display at all times. Nonetheless, teachers occupy a position of delicate public trust. This role is inextricably linked to the moral basis of teaching. Fenstermacher (1990) reminds us: "What makes teaching a moral endeavor is that it is, quite centrally,
human action undertaken in regard to other human beings. Thus, matters of what is fair, right, just, and virtuous are always present" (p. 133).

In *Ross*, Ross' conduct violated two normative requirements: the duty to act as a role model and the duty to treat all students in a fair and respectful manner. Yet, meeting the concerns of those who are reluctant to remove controversial teachers like Malcolm Ross from the classroom is difficult. Such unease stems from an insidious fear that this kind of action is nothing less than the "thin edge of the wedge". In response to this argument, Gochnauer (1992) offers the following possibility:

> When the loss of his job is the price of his freedom to speak, are not all of our freedoms in danger? The short answer is no. Anti-Semitism and similar culturally deep systems of belief and practice are, in general, readily distinguishable from other controversial or even undesirable practices or conditions. Being based on inequality, domination and violence, they are repugnant to our most basic values or ideals. Few tolerable lifestyles, beliefs or activities satisfy this description. Being an unwed mother, publishing wacko books about alien abductions, and most other things we do or we are, do not foster culturally entrenched patterns or practices of violently enforced inequality. The offence, and even danger, of lifestyles and activities we would want to protect from social sanction are shallow in comparison to the dangers of anti-Semitism, sexism, heterosexism and racism. Removing the anti-Semitic teacher from her or his post does not open the door to the tyranny of 'political correctness' from the left or the right. (p. 326)

**Appropriateness of the materials.** While in class, teachers must also select materials and methods which are suitable for their students. In this regard, a number of American constitutional cases concerning public school
teachers and the use of obscene language have come before the courts. In Hazelwood School District v. Kuhlmeier (1988), the American Supreme Court stated that educators have a pedagogical interest in assuring "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity" (p. 271). In the Canadian context, it is likely that choosing appropriate and suitable materials will constitute a pressing and substantial objective under the s.1 analysis.

In Bethel School District No. 403 v. Fraser (1986), the United States Supreme Court ruled that a school may restrict student expression that is vulgar.182 The court stated that one of the objectives of public education is the "inculcation of fundamental values necessary to the maintenance of a democratic political system." Among those values to be taught include "the habits and manners of civility". Elaborating on what this entails, the court noted:

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be

182In Bethel, the school board suspended Fraser, a high school student, for three days and denied him the possibility of being a graduation speaker after he delivered an in-school speech at an official high school assembly of 600 students. The speech contained a sexually explicit metaphor. While endorsing a candidate for student government, he referred to him as "firm in his pants" and "a man who takes his point and pounds it in". Under the school district's grievance procedures, a hearing officer determined that the student's speech was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly."
unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. (p. 557)\footnote{In this regard, the court noted: In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." (p. 557)}

On this basis, the court held that school boards may determine the appropriate manner of expressing oneself in the school context:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of values is truly the "work of the schools." ... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board. (p. 558)

Since lewd and vulgar speech "undermines the school's basic educational mission", school authorities may censor it without contravening the First Amendment. If students can be
censured for employing vulgarities in the school setting because promoting appropriate civil speech constitutes a legitimate pedagogical concern, then an even stronger argument for restraint would arguably apply to teachers. As inculcators of "the habits and manners of civility", teachers have a mandated duty to lead by example. For the court in *Bethel*:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. (p. 558)

Hence, requiring teachers to demonstrate "the boundaries of socially appropriate behaviour" counts as a legitimate pedagogical concern. Under the *Charter*, one could argue that "inculcating the habits and manners of civility" also amounts to a pressing and substantial educational objective and hence offers a legitimate restriction on teachers' constitutional right of free speech.

It is unclear whether the judicial approach to obscenity in the criminal law context will be relevant to the placement of restrictions on obscene expression in the classroom. In the United States, the courts have held that obscenity does not fall under the rubric of speech. Thus, it does not qualify for constitutional protection under the First Amendment. The United States Supreme Court articulated a
three-fold test for obscenity in *Miller v. California* (1973):

The basis guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (p. 24)

The American approach is thus solidly rooted in a morality-based model. Hence, if the U.S. courts decide that curricular materials or methods are obscene, teachers will have no recourse under the constitution. The application of American principles on this issue in Canada is complicated by the contrasting approach to obscenity which our judiciary has adopted.

In our country, the Supreme Court of Canada has rejected a morality type model grounded in community standards of public decency. Speaking for the majority in *R. v. Butler* (1992), Sopinka J. noted:

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus . . . refers to this as "legal moralism" of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter. (pp. 492-493)

Instead, the Supreme Court has embraced a harm-based model. Characterizing the objective of s.163 (the obscenity provision) of the *Criminal Code*, Sopinka J. said: "In my view
...the overriding objective of s.163 is not moral disapproval but the avoidance of harm to society" (p. 493). He also added: "The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure" (p. 485).

In Butler, the accused operated a shop that sold and rented what some described as "hard core pornography" videotapes, magazines, and sexual paraphernalia. The court offered the following categorization of pornography:

Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. (p. 484)

According to s.163(8) of the Criminal Code, "any publication a dominant characteristic of which is the undue exploitation of sex... shall be deemed to be obscene." In examining the relationship between the three-fold classification of pornography and the criminal law definition of obscene, Sopinka J. noted:

[The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex.

18"Here, Sopinka J. refers to the community standards test as "concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to." (p. 478)
unless it employs children in its production. (p. 485)

It is worth noting that in both Canada and the United States, a person criminally charged with running afoul of the obscenity law may respond to the charge by offering the "artistic" defence. In the United States, the accused must prove that the work, taken as a whole, contains "serious literary, artistic, political, or scientific value." In Canada, the court will not find sex-based materials which serve a "wider artistic, literary, or other similar purpose" (p. 486) to be obscene.185

If Canadian public school teachers brought sexually explicit materials from the first two categories outlined in Butler (sex coupled with violence and sex which is degrading or dehumanizing) into class, they would probably face criminal charges under s.163(8) of the Criminal Code. In Butler, the Supreme Court of Canada has already ruled that these restrictions on free speech are constitutionally justifiable because of the harm to women and children that flows from materials which promote the undue exploitation of sex.

But the Criminal Code might not prevent teachers from

185In this regard, the court in Butler (1992) noted: [T]he "internal necessities" test, or what has been referred to as the "artistic defence," has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent "dirt for dirt’s sake" but has a legitimate role when measured by the internal necessities of the work itself. (pp. 482-483)
bringing in materials that showed explicit consensual adult sex that was neither violent nor degrading and dehumanizing. It is conceivable that teachers might simply want to show students pictures of adult women from Playboy in a social studies class while covering a unit on the portrayal of women in contemporary culture. On the basis of Butler, the court has already stated that the public interest in maintaining a "decent society" does not amount to a pressing and substantial objective which justifies overriding the freedom to distribute obscene materials. If the court adopts a similar standard for public school teachers and their students, under a s.1 analysis, the school may be unable to restrict the use of the Playboy magazine simply because it is indecent, disgusting, or threatens the morals or the fabric of society.

Nonetheless, in the criminal law context, school boards may attempt to distinguish Butler because children are involved. First, in the context of pornography, the court indicated that different standards apply when children are implicated. In other words, even if children are willing participants in pornographic activities that are neither violent nor degrading and dehumanizing (categories one and two), the resulting pornography is still illegal. This reflects the inherent vulnerability normally associated with the status of childhood. Hence, restrictions on child pornography are constitutionally appropriate.
Second, the separate and concurring judgment of Gonthier J. (L’Heureux-Dubé concurring) may offer support for greater restrictions on sexually explicit materials which fall into the third category when children are involved. Gonthier J. focused on the manner of representation in arguing that materials in the third category may still be harmful to society and thus subject to restriction under s.1:

[I]t seems natural to me that the likelihood of harm, and the tolerance of the community, may vary according to the medium of representation, even if the content stays the same. Let me take, as an example, an explicit portrayal of "plain" sexual intercourse, where two individuals are making love. This falls within the third category of Sopinka J. If found in words in a book, it is unlikely to be of much concern (if found in a children’s book, though, this may be different). If found depicted in a magazine or in a movie, the likelihood of harm increases but remains low. If found on a poster, it is already more troublesome. If found on a billboard sign, then I would venture that it may well be an undue exploitation of sex, because the community does not tolerate it, on the basis of its harmfulness. (p. 518)

Commenting further on the nature of the harm, he stated:

The harmfulness, in the billboard example, would come from the immediacy of the representation, inasmuch as the sign stands all by itself (as opposed to a passage in a book, a film or a magazine). Its message is at once crude and inescapable. It distorts human sexuality by taking it out of any context whatsoever and projecting it to the public. This example goes to the extreme, of course, but it is meant to show that the element of representation may create a likelihood of harm that may lead to the application of s.163 of the Code, even if the content of the representation as such is not objectionable. (p. 519)

The school might argue that showing students pictures of naked women is harmful because of the manner of representation. The objectification and decontextualized way
in which women are presented in Playboy may well "contribute to the deformation of sexuality through the loss of its humanity."

More important, one can argue that the courts' approach to obscenity in the classroom and educational context may not be the same as its approach to obscenity under the Criminal Code. Establishing harm, as defined in the adult context, may simply be unnecessary to justify a restriction on sexually explicit material in schools. Given the captive audience and the educational setting, embracing appropriate deportment and decorum, as we saw previously in our analysis, may in itself be a sufficiently pressing and substantial objective.

In the classroom context, adjudicators may simply be willing to adopt an American approach that relies on the argument of moral disapprobation. Hence, Canadian courts might well be much more sympathetic to the objective of "preventing dirt for dirt's sake" in the public school classroom. If this is right, then the Butler test - or, rather, the criminal code provision - would not really be relevant because it would be much too low a standard. On this basis, school boards could arguably exclude Playboy from the classroom because it offends community standards of decency, propriety, and good taste. Since teachers are role models, they must engage in a type of teaching which exemplifies "the habits and manners of civility." Therefore, preventing the teacher from using Playboy might serve a legitimate
pedagogical concern - teaching students "the boundaries of socially appropriate behaviour." Under s.1 of the Charter, this type of restriction on academic freedom would seem to amount to a pressing and substantial educational objective.

In a related vein, the appropriateness of the materials and methods used is also governed by the issue of relevance. This requires teachers to examine the educational purpose for which controversial materials and methods are introduced into the classroom. In Hazelwood (1988), the United States Supreme Court acknowledged that educators have a legitimate pedagogical interest in ensuring that students "learn whatever lessons the activity is designed to teach . . . " (p. 271). In Mailloux v. Kiley (1971), the Massachusetts District Court had to rule on the question of relevance. While discussing a novel with a class of grade 11 basic English, the issue of societal taboos arose. In this regard, Mailloux wrote the word "fuck" on the blackboard and asked the class to define the word. Concerning the issue of relevance, the court declared:

The topic of taboo words had a limited relevance to the Stuart novel which plaintiff's class was discussing, but it had a high degree of relevance to the proper teaching of eleventh grade basic English even to students not expecting to go to college and therefore placed in a "low track." The word "fuck" is relevant to a discussion of taboo words. Its impact effectively illustrates how taboo words function. (p. 1389)

The matter of relevance also arose in Brubaker v. Board of Education (1974). In this case, the Illinois Court of Appeals upheld the dismissal of three teachers who
distributed, to grade eight students, a movie brochure about the 1969 rock festival *Woodstock*. The brochure contained a number of obscenities. Clara Brubaker, a primary grade French teacher, "made no allegation that the brochure or its contents were in any way relevant to what she was teaching" (p. 977). 186

As for the other two teachers, John Brubaker and Ronald Sievert, they placed the brochures on their desks to be available to their eighth grade students. John Brubaker, an Industrial Arts teacher, offered the following justification for the brochure's relevance: "I think that this whole thing contributed to the interest of my class in musical instruments" (p. 978). Sievert maintained that the brochure "had relevancy to his teaching assignment - Language Arts - because under his guidance his class was studying the history of rock music" (pp. 977-978). 187 More important, neither Brubaker nor Sievert "explained to their students any claimed relevancy of the Woodstock brochure" (p. 978). Given the

186"Clara Brubaker placed some of the brochures in the teachers' lounges and displayed one of the brochure's posters in her classroom.

187"In particular, Sievert said:
We were to begin a new unit that day, but since we had just finished the other unit on the evolution of music I took out a brochure and I opened it up and instead of showing it I said, 'I have a brochure here which might be of interest to you because it seems to pertain specifically to what we just studied.' And I said, 'It has a very colorful poster in it as well, which I think you may well be interested in,' and so I held up the poster part and got ooh's and ahh's from the class. (p. 978)
absence of a legitimate pedagogical purpose for introducing the brochure, the court ruled that the material was irrelevant as it "served no educational value" (p. 982).  

Under the Charter, the courts are likely to conclude that restrictions on irrelevant material constitute a pressing and substantial objective for the purposes of the s.1 analysis which justify limiting academic freedom.

Apart from interdicting obscene and irrelevant curricular expression, the educational principle of appropriateness has even been used in the American context to restrict informal dialogue between teachers and students. In Miles v. Denver Public Schools (1991), the board of education successfully reprimanded a high school civics teacher for comments he made during a ninth grade government class. Miles stated that the quality of the school had declined since 1967. When a student asked for specific examples, Miles replied that in the past the school did not have so many pop cans lying around and school discipline was better. He also added: "I don’t think in 1967 you would have seen two students making out on the tennis court" (p. 774). A colleague, who had heard of the incident from two students alleging to have witnessed it, told Miles about it. Miles did not seek official confirmation of the rumour before repeating it to the class.

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188At the hearing, appellants Brubaker and Sievert said they had not read the poem "Getting Together" before they first made it available to their students. (p. 982)
Miles challenged the reprimand on the grounds that it violated his constitutionally protected free speech rights under the first amendment. The school board defended maintaining that placing restrictions on Miles' speech furthered three specific legitimate pedagogical interests:

First, the school states an interest in preventing Miles from using his position of authority to confirm an unsubstantiated rumor. . . . Second, the school asserts an interest in ensuring that teacher employees exhibit professionalism and sound judgment. . . . Third, the school states an interest in providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers. (p. 778)

In rejecting Miles' claim, the Tenth Circuit Court of Appeals stated that "[t]he interests asserted by the school in this case clearly are legitimate pedagogical interests" (p. 778).

This case demonstrates the extent to which American courts are willing to apply the educational value of appropriateness to restrict the curricular speech of teachers. Canadian courts may be willing to follow suit. To do so, they must first be convinced that spreading rumours, acting unprofessionally, and making statements that embarrass students among their peers are pressing and substantial objectives which justify curbing teachers' academic freedom.

General control over the curriculum. Apart from requiring teachers to be fair and objective in the presentation of their materials, and to choose materials and methods that are appropriate, school boards have an educational interest in general control over the curriculum.
In *Kirkland v. Northside Independent School District* (1989), a probationary high school history teacher (Kirkland) in Texas used a nonapproved reading list in his class. The school board did not renew his contract. Kirkland took the board to court arguing that the employer had violated his constitutional rights to free speech. In rejecting Kirkland's argument, the Fifth Circuit Court upheld the state's interest in maintaining curricular control:

> We conclude that the first amendment does not vest public school teachers with authority to disregard established administrative mechanisms for approval of reading lists. Public schools have a legitimate pedagogical interest in shaping their own secondary school curricula and in demanding that their teachers adhere to official reading lists unless separate materials are approved. The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers. (p. 795)\(^\text{199}\)

In Canada, courts are likely to conclude that maintaining curricular control, as a justification for limiting teachers' academic freedom, amounts to a pressing and substantial objective under a s.1 analysis.

From an educational perspective, school boards have a legitimate interest in controlling the curriculum. They want to make certain that teachers will use methods and materials that are current, accurate, relevant, and of sound or proven

\(^{199}\)In *Hazelwood* (1988), the United States Supreme Court stated: "Educators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach . . . " (p. 271). As already indicated, this decision has been applied to teachers.
educational value. This is necessary to ensure that teachers advance bona fides educational goals. For instance, requiring students to memorize a novel or to spend the entire term on one novel when the curriculum called for a variety of literary genres would not serve a legitimate pedagogical interest. Likewise, teachers who use a novel to re-inforce their anti-ethnic predilections and to propagate this among their students would not be advancing valid educational goals. In sum, allowing teachers to teach whatever they wanted using whatever methods they deemed appropriate to pursue whatever pedagogical goals they determined relevant would undermine the curricular control the school boards must exercise in promoting the interests of a state run educational system.

If teachers usurped curricular control, they could jettison the established curricula at their pleasure. By so doing, the quality of education the student received would simply depend on the quality of the teacher in any given school. The state can ill afford the risks associated with this kind of approach. Since the state is not prepared to abdicate its role in formulating and implementing appropriate curricula for public schools, a certain degree of control is necessary. This helps to ensure that all students are exposed to the agreed upon curriculum, that teachers cover the designated curriculum, and that students receive a balanced, fair, and varied curricular experience. In Kirkland (1989),
the court noted: "Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula" (p. 800). Thus, the state's ability to keep ultimate control over the curriculum arguably amounts to a legitimate pedagogical concern. Under a s.1 analysis, the need to regulate the curriculum will probably constitute a pressing and substantial objective which will warrant placing restrictions on teachers' academic freedom.

**Substantial & material disruption.** We have seen that the state has legitimate pedagogical interests which will justify placing some degree of limitation on teachers' constitutionally protected academic speech. First, teachers must ensure that they present controversial materials and methods in a fair and objective manner. Second, teachers must employ materials and methods that are appropriate. Third, teachers must use materials and methods within the confines of the state's broader mandate as general controller of the curriculum. In the American context, the courts have identified another pedagogical concern which places restrictions on teachers' academic freedom. This concern relates to the need for order and discipline in the school setting.

In *Tinker v. Des Moines Independent Community School District* (1969), several students in Des Moines, Iowa, challenged a school board's authority to suspend them for
wearing black armbands in protest of American activities in Vietnam. In rejecting the ban on the wearing of the symbolic clothing, the United States Supreme Court concluded that the school had discriminated on the basis of political viewpoint "upon an urgent wish to avoid the controversy which might result from the expression" (p. 510). While rejecting the school's argument that its fear of a disturbance justified the students' suspensions, the Supreme Court enunciated an important legal proposition. School authorities may restrict student speech if the speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (p. 509).  

Although Tinker did not involve teachers, some lower courts have invoked the "Tinker" test when considering  

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190 The school had allowed students to wear other political symbols and solely punished those students who wore symbols critical to the Vietnam War. Other students came to school wearing buttons from national political campaigns, and some even wore the Iron Cross, a traditional symbol of the Nazi Party. The Court characterized the board's action as constitutionally impermissible viewpoint discrimination.  

191 Although this test has come to be known in subsequent cases as the Tinker "material and substantial disruption" test, it was first formulated in Burnside v. Byars (1966). The Tinker court approved of the test by incorporating it into the Supreme Court's jurisprudence. Speaking for the majority, Justice Fortas reasoned that mere fear of disturbance was not enough to overcome the right to free expression which contemplates the expression of all viewpoints: "[O]ur Constitution says we must take this risk; and our history says it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans." (pp. 508-509)
arguments about teachers academic freedom. In *Kingsville Indep. School Dist. v. Cooper* (1980), for example, the 5th Circuit Court held that the school could not punish Ms. Cooper, a high school history teacher, for her role-playing techniques and discussions of "Blacks in American history" unless it could show that the speech caused substantial disruption that outweighed her usefulness as an instructor. Last, the American courts have indicated a willingness to curb academic freedom to preserve order and discipline in the class. Hence, speech which "substantially and materially disrupts" the order and good discipline of the school will justify restrictions on teachers' academic freedom.

In Canada, there seems little doubt that avoiding substantial and material disruption will amount to a pressing and substantial objective under the s.1 analysis. Boards of education have a legitimate interest in maintaining the orderly and efficient operation of the educational enterprise. Under provincial schooling legislation, all Canadian public school teachers must "maintain good order and proper discipline." To be a successful public school teacher, one must be adept at classroom management. We all know that optimal learning cannot occur in an environment where chaos reigns, structure is jettisoned, and students do not feel

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192In fact, Ms. Cooper had received directives from the school principal that "nothing controversial should be discussed in the classroom" (p. 1111).
physically, emotionally, and psychologically safe. Hence, the need for appropriate discipline will most likely amount to a pressing and substantial objective which will justify limiting a teacher’s academic freedom under the Charter.

Nonetheless, the application of the "material and substantial disruption" test, by itself, to restrict academic freedom is somewhat problematic. From a foundational perspective, Clarick (1990) suggests that the test is conceptually inadequate because it fails to recognize "the necessity of incorporating an understanding of the education process into the balance, an understanding which would include a prohibition on pure viewpoint discrimination" (p. 732). At a definitional level, it is unclear what "material and substantial" really means. Are the words synonymous, complementary, or do they represent two different notions? The courts cite the phrase like a mantra yet the term often seems vacuous. At one end of the spectrum, one can easily imagine a classroom where chaos and disorder reign. In these circumstances, where the teacher cannot fulfil his or her statutory duty to maintain order and discipline, avoiding pandemonium counts as a legitimate pedagogical concern which would warrant placing limits on teachers’ academic freedom under a s.1 analysis.

As we move along the continuum, however, it is unclear at what point the disruption ceases to be material and substantial. In addition, it is uncertain whether the
disruption must be real or whether the test covers potential disruption. In other words, does an order to refrain from using certain materials or methods based on possible material and substantial disruption constitute a pressing and substantial objective which would justify curbing teachers' academic freedom? On one hand, schools can not wait until a crisis arises before taking action. On the other hand, fear of something which may or may not arise might be abused to unduly curtail teachers' academic freedom.

In sum, the legitimate pedagogical concerns identified in the American constitutional context as grounds for restricting academic freedom are: the presentation of controversial materials in a fair and objective manner; the selection of appropriate materials and methods; the state's role as regulator of the curriculum; and the need for order and discipline in the schools. In Ross, the Supreme Court of Canada has recognized in its contextual approach to s.1 that the state has a compelling interest in educating its youth. On this basis, it is very likely that the identified legitimate pedagogical concerns in the American context will constitute pressing and substantial objectives for the purposes of Charter analysis under s.1 which will justify restrictions on teachers' academic freedom.

Articulating the Pressing and Substantial Objectives

Apart from considerations as to what constitutes a pressing and substantial objective for the purposes of
restricting dishonest, uncooperative, disloyal, and disobedient teacher expression under the Charter, the thrust of the s.1 analysis will also be shaped by the specificity of the objective invoked to restrict the free speech rights of teachers. If the objective is articulated in broad and general terms, the first phase of the Oakes test will not receive a great deal of analytic attention from the courts. Thus, if the broadly stated objective is found to be pressing and substantial in nature, the real analysis will occur at the second phase of the Oakes test - proportionality. However, where the objective for restricting teacher criticism is expressed in careful and specific terms, the heart of the court's analysis will take place under the first prong of the Oakes formula. Should the court decide that the precise objective is a pressing and substantial one, it will still have to examine the exigencies of the proportionality test; but this latter step will assume diminished importance in the overall analysis.¹³

By way of example, consider a school rule which requires teachers to refrain from engaging in uncooperative forms of

¹³Macklem et al. (1994) suggest that the designation of the pressing and substantial objective affects the proportionality test in these terms: The more narrow and concrete the formulation of the objective, the easier it is for the proponent of the impugned measure to meet the proportionality tests. Indeed, the "objective" can be simply cast as having as its purpose the imposition of the impugned legislated "means" - rendering the end-means evaluation circular. (pp. 181-182)
expression. Let us assume that the objective of the restriction is cast in broad and sweeping terms - to promote harmony and goodwill among colleagues and students. Since this is certainly a legitimate employment interest, the school board would have little difficulty meeting the requirements of the pressing and substantial test under the first phase of the Oakes formula. The real analysis, however, would occur under the proportionality test. In contradistinction, if the employment objective were drawn with much greater precision, then the critical part of the analysis would occur under the pressing and substantial prong of the Oakes formula. For instance, if the purpose of the rule were to prevent any forms of unpleasantness among teachers and students, then the court would have to determine whether this objective was pressing and substantial. It is unlikely, for obvious reasons, that this objective would count as pressing and substantial.

Proportionality

Even if the employment objectives are treated as pressing and substantial objectives for the purposes of s.1 analysis, the courts will still have to address the issue of proportionality. To restrict teachers' expression, school boards must demonstrate that the means chosen to further the pressing and substantial objectives are a proportional response. Hence, the means adopted must comply with the exigencies of rational connection, minimal impairment, and
deleterious effects. To reiterate, the test of proportionality set out in Oakes (1986) states:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance." (p. 139)

To determine whether the Charter enhances protection of freedom of expression beyond the protection offered by employment law, it will be necessary to consider the relationship between the proportionality standard in Oakes and how the issue has been treated in the employment law context. As we saw earlier, adjudicators may espouse a strict application of the Oakes proportionality test or a more deferential one. If they adopt a stringent approach, this may enhance teacher protection of free speech currently offered by employment law. Under this tack, school boards will be required to demonstrate a higher standard of justification when interdicting teachers' free speech rights. Yet, if adjudicators embrace an approach based on reasonableness, it is unclear whether the Charter will change the degree of protection accorded to teachers' freedom of expression already guaranteed under employment law.

It is important to remember that the test for proportionality is fact specific and depends on the
particular wording of the order restricting teachers’ free speech rights as well as the context in which the expression occurs. Thus, in the abstract, it is difficult to predict how this part of the s.1 analysis might play out. Consequently, our remarks will, of necessity, be confined to general observations concerning similarities and differences in the application of the test of proportionality in both the employment and constitutional contexts.

In Ross (1996), the Supreme Court of Canada embraced a more deferential view of proportionality. This case is especially significant because it applies specifically to public school teachers and their free speech rights under the Charter. Speaking for a unanimous court, La Forest J. set out the test of rational connection followed in the previous Supreme Court of Canada Charter decisions involving free speech:

As to standard of proof required under s.1, McLachlin J., in RJR-MacDonald . . . stated that proof to the standard of science was not required, and accepted the civil standard of proof on a balance of probabilities. In order to establish a rational connection between the impugned measure and its objective, scientific evidence need not be established. Similarly, in R. v. Butler . . . Sopinka J. accepted that if it was "reasonable to presume" that there was a causal relationship between the harm and the expression in question, then this was sufficient where a direct link could not be established. (p. 881).

From an evidentiary perspective, La Forest J. also indicated what type of evidence, in a Charter context, will be considered relevant in assessing whether teachers’ expressive conduct has impaired their ability to perform
their job:

In *Fraser* . . . Dickson C.J. observed two forms of impairment: impairment to perform the specific job and impairment in a wider sense. With respect to impairment of the first kind, the general rule, he stated, should be that direct evidence of impairment is required. He qualified this rule, however, as not absolute and stated that when the nature of the occupation is important and sensitive, and when the substance, form and context of the employee's comments are extreme, an inference of impairment may be sufficient. . . . [W]ith respect to impairment in the wider sense, Dickson C.J. stated . . . "It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of [the impugned conduct]." (p. 859)

Hence, in terms of what counts as sufficient evidence, the Supreme Court of Canada has endorsed the standard of reasonableness from its earlier non-Charter decision in *Fraser v. Public Service Staff Relations Board* (1985).

La Forest J. also adopted a deferential view of minimal impairment. He again followed the reasoning of his sister judge in *RJR-MacDonald* (1995):

In *RJR-MacDonald* . . . McLachlin J. reasoned that an impairment must be minimal to the extent that it impairs the right no more than necessary. She stated: "The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement." (pp. 882-883)

La Forest J. gave only cursory consideration to the deleterious effects test. In fact, he did not indicate what type of analytic approach the court adopted. Given his
approach to rational connection and minimal impairment, however, one can safely argue that the court also implicitly espoused a reading deferential to the state actor. It is also worth noting that Ross dealt with speech outside the school gates. If the courts adopt a less strict view of proportionality in these circumstances, they are likely to adopt a similar standard of proportionality when the speech takes place on school premises.

To determine the Charter's potential impact on employment law protection of teachers' free speech rights, it is important to consider how proportionality plays out in the non-Charter context. Under employment law, notions of rational connection, minimal impairment, and deleterious effects are not expressly articulated as discrete, formal, and separate sub-tests as they appear in Oakes. Nonetheless, there is a certain notion of proportionality which emerges in the arbitral jurisprudence. While restricting free speech, adjudicators wish to ensure that the means chosen to further legitimate employment interests are indeed proportionate. For example, this sense of proportionality is reflected in Re Continuous Colour Coat Ltd. (1975) where the arbitrator refers to the appropriate course of action an employer must follow before discharging an employee with an "attitude".

The employer must show that the proven behaviour of the discharged employee does indeed manifest the purported attitude. The employer then must show that the attitude is essentially one which disables, or is likely to disable, the employee from the proper performance of his job. Finally, the employer must show that discharge is
the appropriate response to that attitude. (p. 331)

Here, proving that the attitude "disables or is likely to disable" would fall within the ambit of rational connection. Requiring the employer to demonstrate that the discharge is the "appropriate response" raises the issue of minimal impairment. Alternative, less intrusive measures (e.g. reprimand or suspension) might be available to alter the uncooperative attitude.

In Re Wainwright School Division No. 32 And C.U.P.E. (1984), a school secretary made written comments critical of her school board while off-duty. The arbitrator commented on the appropriate evidentiary standard governing these situations:

[I]t is not necessary that there be direct evidence that the conduct of the employee in fact impaired the employment relationship, but, rather, that there be evidence of a behaviour which the adjudicator could reasonably conclude would impair the relationship. (p. 350)

This attempt to draw a correlation between the impugned behaviour and its effect on the employer makes one think of the evidentiary requirements of a reasonableness-based approach to the rational connection test.

In Re Board of Education And O.P.S.T.F. (1984), the school board suspended a teacher for 19 & 1/2 days for refusing a direct order from the principal to readmit a troublesome student to class. The teacher verbally expressed his refusal of admittance to the vice-principal in front of his class. In upholding the suspension, the arbitrator noted:
"[T]here certainly existed cause for discipline, and if anything the board's response was tolerant and restrained" (p. 30) (my emphasis). This clearly reflects a concern that the means chosen to enforce the legitimate employment objective of maintaining appropriate control and discipline are indeed proportionate. In Re Kings County District School Board And N.S.T.U. (1995), the arbitrator chose a lengthy suspension over dismissal in disciplining a teacher who had made a number of personal, sexually suggestive, and flirtatious comments to female students:

Dismissal should only result where a lesser penalty would not be suitable. This is well-stated by arbitrator M. G. Picher in Re Canadian National Railway and C.B.R.T. & G.W. (1988) . . . in dealing with a sexual harassment case: "In all cases where discharge is at issue consideration must be given to the alternative of a lesser penalty. If there are indications within the evidence that rehabilitation can be achieved without resort to discharge, and that the reinstatement of the offending employee will not be unduly disruptive to the work place, that alternative may well commend itself." (p. 320)

And in Fraser v. Public Service Staff Relations Board (1985), the Supreme Court of Canada expressed concern about all encompassing orders which curtail the free speech rights of public servants: "A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people" (p. 174). Under a Charter analysis, the reasoning in both of these employment law cases reflects concerns which would be readily translatable into a question of "minimal impairment".
The issue of deleterious effects does not seem to surface directly in the employment context. Yet, one might argue that by implication it arises in certain circumstances. For instance, in Re Kings County District School Board And N.S.T.U. (1995), the arbitrator agreed that placing restrictions on sexually suggestive language in the public schools is entirely appropriate. By implication, one can argue that this kind of expression is easily restricted because it is only tenuously connected to the rationales underlying free speech - truth, political participation, and self-fulfilment. Hence, the nature of the expression appears to be a relevant issue even under employment law.

The concept of proportionality is present in employment law cases. Adjudicators use a standard of reasonableness to ensure that the means chosen to restrict free speech do not over reach and capture otherwise valid expression. Under the Charter, the Supreme Court in Ross has unequivocally adopted a deferential interpretation of the proportionality test also based on reasonableness. In comparative terms, one might conclude that these two approaches will likely yield similar results. Consequently, under the test of proportionality, Charter protection of teachers' constitutional right of free speech generally appears to maintain the status quo as embodied in employment law.

Nonetheless, the Charter's test of proportionality has the potential to enhance the free speech rights of teachers.
Even though the Supreme Court in *Ross* adopted a reasonableness-based approach, one might distinguish the decision because of its "extreme" facts. Hate speech obviously deserves less protection under proportionality because it threatens the equality rights and interests of others, and most notably students. The court’s approach in *Ross* may not, however, be conclusive because the test of proportionality may play out differently in other circumstances where different values may surface.

Furthermore, under the *Charter*, a higher standard may well apply even though we are dealing with the employment context. It is important to remember that the explicit test of proportionality, unlike the implicit test of proportionality under employment law, requires school boards to prove that an order restricting teacher expression satisfies the specific tests of rational connection, minimal impairment, and deleterious effects as these tests are measured against the constitutionally protected right of free speech.

Apart from these general considerations, the test of proportionality may offer additional protection to the free speech rights of teachers in two specific areas. First, the *Charter* may make a difference when teachers speak out in a responsible manner on matters of public concern. Second, the *Charter* may extend protection when teachers exercise their academic freedom in professionally appropriate ways. In *Ross*,
the Supreme Court of Canada stated that a higher standard of justification applies under s.1 when the expression invokes core values of free speech. When teachers comment in a public way, they engage the political process rationale underlying s.2(b). When they choose materials and methods for their teaching, they implicate all three values undergirding s.2(b) - search for truth, political process, and self-realization.

Under employment law, restrictions in these special areas need only be reasonable to meet the test of proportionality. Under the Charter, a higher standard may well apply even though we are dealing with the employment context. Hence, under rational connection, adjudicators may require a "tight fit" between means and ends which characterizes the stringent application of the proportionality test. Under minimal impairment, they may require school boards to choose the "least intrusive means" to restrict teacher speech in these special areas.

Otherwise, precluding teacher criticism which is reasonable and tempered on matters of public concern would arguably deny an entire range of legitimate political expression of benefit to the larger educational community. In the classroom, standing in fear of retaliatory action for exercising academic freedom in a responsible manner would reduce teaching to the trivial and uninteresting transmission of facts and knowledge. In Ward v. Hickey (1993), the First Circuit Court of Appeals declared: "Few subjects lack
controversy. If teachers must fear retaliation for every utterance, they will fear teaching" (p. 453).

Unlike the test of proportionality under employment law, a Charter analysis requires adjudicators to consider the consequences of restricting an individual teacher's free speech rights. Hence, the test of deleterious effects assumes significant importance in the constitutional framework. Interdicting the contributions of informed and professional teachers to important public debate goes to the heart of the political process rationale. In these circumstances, adjudicators could well conclude that the cost of interdiction may simply be too high.

School boards may also have difficulty satisfying the test of deleterious effects when they attempt to restrict teachers' responsible use of academic freedom. Courageous teachers are not afraid to question conventional thinking and will often inspire their students to pursue truth and transcend the traditional boundaries of knowledge. Academic freedom helps protect teachers and students from viewpoint discrimination. In Tinker v. Des Moines (1968), the United States Supreme Court noted: "In our system, state operated schools may not be enclaves of totalitarianism" (p. 511). The same court also observed:

School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. (p. 511)
If we do not want our teachers to become unthinking parrots of authoritarianism in their curricular design and implementation, this reasoning from *Tinker* must apply equally to them. Given the state's interest as an educator in a democratic tradition, teachers must be allowed to embrace critical thinking and help prepare our students for citizenry. In addition, teachers who encourage students to express their opinions and share their views and visions in a responsible manner may help those learners move toward achieving to their full potential. Self-fulfilment becomes a possibility in a stable and emotionally secure learning environment where students are affirmed for articulating their beliefs and providing reasons behind those beliefs. In essence, restricting the proper use of academic speech may fail the test of deleterious effects because the nature of the expression goes to the heart of the values which support s.2(b) of the *Charter* - the search for truth, the political process, and self-realization/autonomy rationales.

It is important to recall that the Supreme Court of Canada in *Fraser* (1985), an employment law decision concerning public speech by public employees, highlighted the importance of the "political process" rationale and recognized that restricting "all public discussion of all public issues by all public servants" simply goes too far. One might argue that this implicit test of proportionality is just as strong as the explicit test under the *Charter*. Hence,
teachers may well be protected to the same extent under employment law when they speak out responsibly on public issues.

Nevertheless, in Fraser, Dickson C. J. took great pains to point out that the court’s analysis of free speech might well be different in a constitutional context:

This appeal is not about certain things. It does not arise under either the Canadian Charter of Rights and Freedoms (which had not been proclaimed when the events in this case arose) or the Canadian Bill of Rights (because no federal law is being challenged). Accordingly, the "freedom of expression" and "freedom of speech" provisions of these watershed documents are not in issue. (p. 168)

On the basis of the Chief Justice’s comments and the absence of any Supreme Court of Canada employment law involving teacher speech in the classroom, one may argue that the constitutional test of proportionality may indeed make a difference when teachers speak out carefully on issues of public concern or attempt to exercise their academic freedom in a judicious manner.

Constitutional Law & Teacher Free Speech: Conclusion

On the basis of Ross (1996), the Supreme Court of Canada has unmistakably embraced the interpretive canon of reasonableness as the approach it will adopt when reviewing the free speech rights of Canadian public school teachers under the pressing and substantial objective and proportionality tests of s.1 of the Charter. Hence, generally speaking, school boards will not have to meet the high
standard of justification normally associated with the principled approach to s.1 analysis when they place restrictions on the free speech rights of teachers.

Our highest court has also highlighted the relevance of the employment context to the constitutional analysis of teachers' free speech claims. When the government acts as employer, as well as state actor, it will be accorded a certain administrative leeway to accomplish its specific tasks. Hence, arguments for effectively and efficiently carrying out the day to day operations of government employment become quite compelling. Since governments, through elected school boards, run our public schools and in the process regulate the speech of its teacher employees, it would be unreasonable to hold the government, as employer, to a strict standard of constitutional scrutiny under the s.1 analysis. A preferred constitutional standard of review for school boards is the reasonableness-based approach currently reflected in Ross and recent jurisprudence. This will reinforce a valid distinction between the government, as state actor alone, which regulates the free speech of its citizens and the government, as both state actor and employer, which must regulate the free speech of its employees.

Finally, adjudicators are likely to consider the nature of the expression when they examine teachers' free speech arguments under s.2(b). In Ross, the Supreme Court has stated
that the farther the expression "strays from the core values" undergirding free speech, the easier it will be to justify restrictions on that expression. Those core values are: pursuit of truth, political participation, and self-fulfilment/autonomy. From an employment perspective, one can posit as a general rule that dishonest, uncooperative, disloyal, or disobedient speech are less likely to advance the underlying rationales associated with the constitutional value of free speech.

Hence, it will arguably be easier for school boards to justify restrictions on teachers' constitutional right of free speech under the s.1 analysis. One can argue that legitimate employment and educational concerns, already recognized in employment law, will automatically translate into pressing and substantial objectives for the purposes of the s.1 analysis. Thus, the real analysis will take place under the proportionality test. Unlike employment law, restrictions on free speech under the Charter must comply with the explicit and specific tests of rational connection, minimal impairment, and deleterious effects as these tests are measured against the constitutionally protected right. However, as we have already seen, there is a notion of implicit proportionality which is at play in the employment law context. This standard of proportionality is based on one of reasonableness. If the explicit test of proportionality under the Oakes formula is stronger than the test of
proportionality under employment law, the Charter may well enhance protection for teachers’ free speech rights. If there is no appreciable difference between the two tests, the Charter is unlikely to alter the employment law analysis.

Generally speaking, enhanced protection of teacher speech under the Charter is unlikely because of the employment context and the more deferential approach to proportionality the Supreme Court has adopted in Ross (1996). Nonetheless, the Charter may enhance free speech protection for teachers given their special status as professionals and their special role as educators in a democratic culture. Hence, the Charter has the potential to make a difference in two specific areas. First, the Charter may offer additional protection when teachers criticize their employers in a reasonable and controlled manner and thereby speak out on matters of public concern. Second, the Charter may extend protection when legitimate claims to academic freedom are made.

In both areas, core Charter values are invoked. In the first area, the contribution to public debate goes to the heart of the political process rationale. In the second area, the responsible exercise of academic freedom primarily engages the search for truth rationale but also implicates, to a lesser degree, the political process and self-fulfilment/autonomy rationales. To the extent that the Supreme Court of Canada’s non-Charter decision in Fraser does
not or will not recognize these special characteristics of being a public school teacher, as opposed to being a public servant per se, the Charter has the potential to enhance teachers' constitutional right to freedom of expression.
CHAPTER 6
SYNTHESIS, CONCLUSION & RECOMMENDATIONS FOR FUTURE RESEARCH

Summary

In this study, the researcher has attempted to respond to two fundamental questions. First, as a matter of employment law principles alone, what constitutes legitimate restrictions by the employer on the free speech rights of Canadian public school teachers? Second, as a matter of constitutional law, does the Charter enhance protection of free speech for teachers beyond the protective ambit of the common law principles of employment law?

Under employment law principles, and absent Charter considerations, teachers, like all employees, have a duty to act honestly, cooperatively, loyalty, and obediently. Hence, school boards may restrict deceitful expression which undermines trust, may curb uncooperative expression to advance effectiveness and efficiency and to protect people from abuse, may limit disloyal expression which unjustifiably harms school boards’ legitimate business interests, and may interdict disobedient expression which challenges employers’ authority.

Yet, in other situations, employment law recognizes and
protects teachers' free speech notwithstanding their employment obligations. Employers may not restrict the speech of teachers simply because it is unconventional or idiosyncratic, prevent teachers from bantering with students in acceptable ways, preclude teachers from speaking out when employers engage in illegal or negligent conduct, or curb teacher expression in the collective bargaining context which is direct and frank.

It is still unclear under employment law, however, whether teachers can speak out responsibly on matters of public concern or whether they can wisely exercise some measure of academic freedom in the selection of teaching materials and methods. In the first area, we believe that teachers, as professionals, should be able to speak out because they have a relevant and informed insiders' perspective to offer the larger community which the education system serves. Second, we believe that teachers, as educators, should be able to exercise some degree of academic freedom. If we want our teachers to train our youth to think critically and to prepare them for citizenry, they must have the freedom to question received dogma and explore new ways of thinking. Academic freedom makes these goals attainable.

Under constitutional law, for the most part, the Charter is unlikely to change the employment law analysis and protection of teachers' free speech rights. On the basis of Ross (1996), the Supreme Court of Canada's leading decision
on teachers’ freedom of expression under the Charter, adjudicators are likely to adopt a reasonableness-based approach to s.1 analysis. Furthermore, when the government acts as both employer and state agent, as opposed to state agent alone, adjudicators will be more sympathetic to employer arguments based on pragmatic and utilitarian considerations, such as efficiency and effectiveness, as reasonable grounds for restricting teachers’ speech. In essence, governments as employers and teachers as employees have specific educational tasks to complete and goals to achieve. Free speech should not interfere with the proper functioning of the school system.

In addition, adjudicators will consider the nature of teacher expression to see if it furthers the core values underlying s.2(b) expression: pursuit of truth, political participation, and self-fulfilment/autonomy. As a general rule, one can argue that dishonest, uncooperative, disloyal, and disobedient expression are unlikely to invoke core Charter values. Hence, legitimate employment restrictions will probably constitute pressing and substantial objectives under the s.1 analysis which will justify restrictions on teachers’ constitutionally protected free speech rights. Under the proportionality test, employers must demonstrate that restrictions on teachers’ expression satisfy the requirements of rational connection, minimal impairment, and deleterious effects. Since adjudicators are likely to adopt
a test of proportionality based on reasonableness, and consequently follow the same standard under employment law, the analysis of teacher speech under constitutional law will probably not change.

Nonetheless, the Charter may enhance protection of teachers' free speech rights to the extent that employment law principles, per se, do not or will not protect responsible teachers who comment on matters of public concern or exercise some measure of academic freedom. In the first area, political speech is implicated. In the second area, the search for truth (and to a lesser degree political participation and self-fulfilment/autonomy rationales) rationale is engaged. In both cases, core Charter values are at play. Hence, employers may be required to demonstrate a higher standard of justification before adjudicators will agree to curtail the free speech rights of teachers in these particular circumstances.

Political Theories Reflected in
Teacher Speech Jurisprudence

In terms of competing political theories, it is important to consider how the employment law and constitutional law jurisprudence reflects the rival versions of political philosophy which underlie the approach one takes to free speech. In Chapter Two, we saw that those theories most frequently cited in the literature include: liberalism,
feminism, Critical Legal Studies, and communitarianism.

Under employment law principles only, adjudicators' legal analyses of claims involving the free speech rights of teachers generally do not reflect the concerns of the dominant political philosophy of liberalism. The employment context and the vulnerability of children seem to account for this result. A liberal defence of free speech is most forcefully articulated and defended when the government, as state actor and state actor alone, is attempting to restrict the free speech rights of its citizens. In these circumstances, liberals like Dworkin argue that free speech is necessary to protect the moral autonomy of individuals.

Yet, when the government enters the employment context, different considerations apply which militate against a strong application of free speech premised on liberal principles. Although the government does not lose its status as state actor, it acquires an additional role as employer. When the government employs teachers, and organizes an educational system in which they work, a number of important utilitarian concerns spring forth. From the government's perspective, for instance, curricula must be developed, implemented, and evaluated. In the area of human resources, school boards must hire teachers, assign them duties, supervise their work and ensure that they are meeting minimal employment standards of competence and general suitability. The government must also create an entire administrative and
bureaucratic infrastructure that will allow it to proceed with the business of education on a daily basis in a cost effective and efficient manner.

From the teachers' perspective, contracts of employment must be signed. In terms of liberal philosophy, one might argue that valid contractual limitations, per se, do not invalidate liberals' defence of a free speech ideal since teachers may be seen to have voluntarily consented to some prior restraint on their expressive rights. Contracts, freely entered into, require teachers to perform specific tasks and goals. For example, they must teach, administer discipline, act as role models, develop and implement educational programs. They may also have to serve on committees, coach students in sporting and scholastic endeavours, and act as liaisons with the parents and community. Hence, the contractual nature of their work clearly distinguishes teachers from citizens in general. In essence, adjudicators accord less weight to the prominence of individual rights because of the purely pragmatic dictates of the workplace. Arguments based purely on efficiency, cooperation, loyalty, and obedience are typically rejected by adjudicators when governments attempt to muzzle the citizenry's free speech rights. In the employment context, however, these same considerations are of paramount importance because school boards and teachers have specific goals and objectives which they must attempt to achieve as they deliver an educational
product together. Hence, teachers’ discourse which subverts these shared plans may be restricted for purely practical reasons.

When democratic governments act solely as state agents, they cannot compel their citizens to pursue collective goals and quell the dissenting voices of those who speak out against such actions. Yet, when those same governments employ public school teachers, they may restrict the speech of those who violate their contractual duties of honesty, cooperation, loyalty, and obedience. Restrictions on these violations are necessary to protect the joint educational venture which the employment law imposes on both teachers and their employers.

Furthermore, the traditional rationales undergirding a liberal view of free speech—pursuit of truth, political participation, and self-fulfilment—are sometimes not well suited to the employment context and public school teachers. For liberals, free speech is important because it makes the pursuit of truth possible. This pursuit is normally associated with the "marketplace of ideas" metaphor. Yet, the open marketplace, where ideas vie for acceptance, may need to be compromised by other employment objectives in a school environment. In staff meetings, for instance, debate may be encouraged but the principal will likely control the agenda. Discussion will also be limited by time, relevance, and the need to reach consensus on practical issues which may have a direct impact on the daily lives of students.
In the classroom, the marketplace metaphor may at times prove inappropriate. Since teachers are adults, they have an intellectual, psychological, and emotional edge over their students. There can be no true competition of ideas since students are often less mature and sophisticated. They are also more vulnerable given their cognitive and social stages of development. Hence, there can be no clash of equals. Teacher speech must be controlled to account for the disparity among the participants in the classroom forum.

The classroom is also unlike a marketplace because the participants are not always willing participants. Compulsory attendance laws require children to be present. Hence, they are not free to come and go as they would be if they were participating in a discussion held in a public forum such as a park or mall. Teachers are dealing with a captive audience and hence greater restrictions must be placed on their free speech rights. Teachers and students do not occupy a level playing field. Hence, adjudicators have demonstrated a willingness to restrict teacher expression which is doctrinaire and abusive to redress the basic inequalities which govern the student-teacher relationship. The special nature of this relationship places teachers in a position of trust, authority, and power. Under these conditions, one can argue that adjudicators reflect concerns for equality which have been enunciated in feminist and Critical Legal Studies critiques of the liberal ideal of free speech when they
evaluate teachers' expressive claims.

According to the political process rationale, free speech is important because public debate is healthy for our democracy and our democratic institutions. Citizens may speak out against their governments in harsh and excoriating terms. They may form coalition groups, assume a high public profile, and use the media in all its varying forms to mount attacks which are relentless and national in scope. In essence, citizens may use all democratic means of expression at their disposal to influence public policy and defeat governments in power.

School teachers, however, cannot castigate their employer (absent illegality or negligence) in vituperative and vitriolic terms in a highly public manner even when they speak out on matters of public concern. They also must not use expression to undermine trust in their employer. In Fraser v. Public Service Staff Relations Board (1985), the Supreme Court of Canada stated: "A public servant simply cannot be allowed under the rubric of free speech to cultivate distrust of the employer amongst members of the constituency whom he is obliged to serve" (p. 177). By virtue of their employment, teachers are expected to demonstrate a certain degree of loyalty which precludes the exercise of free speech akin to that of an ordinary citizen.

Under the third rationale for free speech, self-realization is essential to ensure that individuals realize
their full potentialities as human beings. It is most vigorously defended in the artistic context where the expression of self is central to all creative endeavours. Although teachers can not be expected to abandon their individuality, they must sometimes compromise their free speech rights in the interests of the larger school community which they are called to serve. First, and foremost, teachers must act as team players who interact continuously with students, colleagues, administrators, and parents in a highly social environment. Hence, the assertion of a bold and unabashed self through free speech is inappropriate in the teaching context. Although teachers may find self-fulfilment in their professional lives, they can not compromise the goals and values of an educational system which have largely been imposed on them by the nature of their employment.

Liberalism also gives pride of place to individual autonomy. Governments may not regulate free speech for fear that citizens may be unduly and adversely influenced by the speech’s conduct. Teachers cannot exercise the same autonomy. In fact, their expression is severely restricted just because, as role models, they have the potential to influence those around them and especially students. The democratic state cannot impose its conception of the good life on its citizens. Yet, public school teachers are expected to embrace and demonstrate a shared morality, based on virtuous conduct. Hence, teacher expression must be consistent with truth,
honesty, tolerance, and moderation to name but a few of these virtues. To the extent that teacher expression undermines these shared values of the school community, it will not be tolerated. Because the educational system has defined how teachers should express themselves, one might argue that adjudicators adopt a more communitarian view of free speech when they consider limits on teachers' expression in these circumstances.

In sum, employment law does not, unqualifiedly, embrace a liberal view of free speech. Adjudicators take care to distinguish between the free speech rights of public school teachers, as employees, and citizens' freedom of expression. They acknowledge that utilitarian concerns are important when governments act as employers and hire teachers as employees. The contractual relationship obliges both parties to perform specific tasks and assignments as they collectively pursue common educational goals. In the employment context, individual rights are less important. In addition, feminist and communitarian approaches to free speech assume greater importance in adjudicators' analyses. Teachers work primarily with younger and vulnerable students who are not equals. They are also members of a larger educational community and are expected to embrace the shared values or institutional ethos of that community. Consequently, adjudicators attach less importance to free speech and place a stronger emphasis on the values of community and equality.
Yet, adjudicators may be reluctant to abandon altogether a liberal view of free speech in certain circumstances. In *Fraser v. Public Service Staff Relations Board* (1985), Chief Justice Dickson of the Supreme Court of Canada underlined the importance of free speech:

As Mr. Fraser correctly points out, "freedom of expression" is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble of the *Constitution Act, 1867*. (p. 169)

The Chief Justice then embraced the "political process" argument for allowing public servants to comment on some public issues:

[O]ur democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion. (p. 174)

As we have already seen, under employment law principles alone, it is unclear whether teachers will be protected when they speak out in a reasonable and controlled manner on issues of public concern. Adjudicators should arguably be guided by liberal principles in these circumstances because teachers have the potential to contribute significantly to an informed debate which is of great importance to those in the local community. Teachers may offer a relevant insiders' perspective which others, including parents and students, may find beneficial when they are evaluating the wisdom of the decision-making abilities of their elected local school boards. This can only help make our democracy and democratic
institutions work better.

In the classroom, in spite of the inadequacy of the marketplace metaphor and the relative position of disadvantage and inequality that students occupy, a liberal view of free speech may still prevail in certain circumstances. In Keegstra v. Board of Education of Lacombe No.14 (1983), the Board of Reference acknowledged that high school students must be entitled to hear all sides of a controversial issue so they can make up their own minds. Although the adjudicator did not make reference to teachers' academic freedom, one can argue that this concern for truth goes to the heart of the most important justification for free speech embraced by liberals. In so far as teachers are willing to use their academic freedom responsibly to encourage their students to seek out the truth, a liberal view of free speech should be embraced under employment law in these circumstances.

Under the Charter, there are arguably even stronger reasons, from a liberal perspective, which would justify special protection for teachers' free speech where the context engages the requirements of discussion of matters of public concern or academic freedom. In the first instance, political speech lies at the very "core" of constitutionally protected free speech values. In the second instance, the pursuit of truth goes to the very heart of the constitutionally guaranteed values for free speech.
To date, there is only one Charter decision involving restrictions by employers on public school teachers and their constitutional right of free speech. In Ross v. New Brunswick School District No. 15 (1996), the approaches of political philosophy to free speech embraced by the Court of Appeal (1994) and the Supreme Court of Canada (1996) stand in sharp contrast one to another. At the Court of Appeal, the majority admitted that Ross' position as a teacher made him a role model to his students. But, the court still accorded a higher value to Ross' freedom of expression:

Mr. Ross' position as a teacher, and thus a role model, is central to Professor Bruce's Order. Teachers do indeed enjoy a high status in our society and have a unique opportunity to influence youthful minds. Having said that, however, the sanction, curtailment of Mr. Ross' freedom of expression, must be considered in the context of the evidence. As noted, it has never been suggested that he used the classroom or school property to further his views. In such circumstances, I do not conclude that this remedy, which violates Mr. Ross' constitutional guarantee of freedom of expression, meets the requirement of being "a specific purpose so pressing and substantial" that the guarantee should be overridden. To hold otherwise would, in my view, have the effect of condoning the suppression of views that are not politically popular at any given time. (pp. 19-20)

In the final analysis, the location of the racist speech became the determining factor. Since Ross never used the classroom to expose his racist views, he could not be relieved of his teaching duties for simply expressing unpopular opinions.

The majority judgment squarely embraced the "political process" rationale in the liberal perspective on free speech.
Ross is entitled to express repugnant and controversial opinions, as a Canadian citizen and while off-duty, even if his beliefs are morally offensive to the larger community. Participation in the political process, if of any value at all, must provide space for the dissenter to voice his or her unpopular expressions. Thus, any attempt to silence Ross will unjustifiably undermine the political process rationale. In other words, speech should not be restricted because of the content of the expression.

The Supreme Court of Canada, however, rejects this "content-neutral" approach to free speech. It was the odious nature of Ross' speech, coupled with his position as a teacher, that was determinative. The court followed its earlier reasoning in *R. v. Keegstra* (1990) and *R. v. Butler* (1992) where it had already ruled that hate propaganda and pornography deserve diminished protection since both forms of expression "stray some distance" from the core values of free speech. Since Ross was expressing virulent racist views, the court had little difficulty applying a lower standard of justification under s.1.

La Forest J. also used the *Keegstra* (1990) decision to review the three liberal rationales which undergird free speech and their applicability to hate speech. First, he considered the pursuit of truth justification:

This Court has held that there is very little chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders
the free exchange of ideas feeding our search for political truth. (pp. 877-878)

Justice La Forest then examined the self-fulfilment/autonomy rationale:

In relation to the protection of individual autonomy and self-development, a value said to underlie s. 2(b), expression that incites contempt for Jewish people on the basis of an "international Jewish conspiracy" hinders the ability of Jewish people to develop a sense of self-identity and belonging. (p. 878)

Last, he addressed the political process argument:

The respondent’s expression is expression that undermines democratic values in its condemnation of Jews and the Jewish faith. It impedes meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process. (p. 878)

On this basis, La Forest J. concluded: "The expression sought to be protected in this case is, in my view, at best tenuously connected to freedom of expression values" (p. 878).

If the Supreme Court refuses to embrace the Court of Appeal’s liberal view of free speech premised on the political process rationale, it is because the court chooses to give priority to another value - equality. La Forest J. noted that limiting Ross’ free speech rights was necessary to ensure an equal and discrimination free educational environment: "Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth" (p. 878).

This concern for equality is embraced by feminist
theorists and even many liberals. In fact, of all liberals, Dworkin has argued that equality is a more fundamental value than liberty. Nonetheless, it might be fair to say that some feminist writers (not all) are more prepared than liberals, including Dworkin, to compromise the right to freedom of speech in the interest of promoting their version of equality.

In Ross (1996), one might also argue that the Supreme Court has taken into account, or given added weight to, considerations emphasized by communitarian theorists. The court acknowledged the importance of "community expectations" as an important determinant in shaping appropriate teacher conduct. Here, the court accepted the Human Rights Commission's submission that the:

"[S]tandard 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." (p. 874)

In its s.1 analysis, the court had to balance Ross' right to free speech "against the ability of the School Board to provide a discrimination-free environment and against the interests of Jewish students" (p. 876). The interests of the educational community at large and the specific community of students (especially minority students) are seen to outweigh the importance of Ross' individual rights.

In sum, the employment law and constitutional law cases reflect a cross-section of philosophical positions which
include liberalism, communitarianism, and feminism. In addition, the various schools of political theory reflected in the jurisprudence have the potential to inform our understanding of teachers and their expressive rights as employees.

Although adjudicators do not embrace the Critical Legal Studies (CLS) approach in their decisions, proponents of CLS would likely be quick to castigate the adjudicative evaluations of teacher-employee free speech rights as inherently flawed. First, and foremost, as we saw in Chapter 2, CLS writers argue strenuously against the existence of the notion of rights per se. Authors like Tushnet (1984) maintain that the liberal ideal of free speech is conceptually indefensible. Hence, it is more appropriate to talk about the "experiences of solidarity and individuality" in a political context rather than the reification of an artificial construct like the right of free speech. Closely linked to the anti-rights argument is the idea of indeterminacy. As Kennedy (1982) states: "Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate plausible rights justifications for almost any result" (p. 47).

Hence, under employment law, CLS disciples would be apt to point out that "reasonableness", as a criterion for restricting free speech, is an inherently vacuous concept that could be used and abused to justify just about any
result. In particular, they might criticize the Supreme Court of Canada's test in Fraser (1985) used to determine whether public employees' public statements impair their ability to do their specific job properly:

As to impairment to perform the specific job . . . the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when . . . the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. (pp. 180-181)

CLS proponents could argue that this rule and its accompanying criteria are profoundly vague and elastic. Hence, attempts to apply the rule in a principled manner must fail because the test will lead to inconsistency and unpredictability. Furthermore, at a more general level, since Fraser dealt with federal civil servants, there is no way of knowing how the test will be applied, if at all, to teachers.

Under constitutional law, similar arguments could be directed at the court's treatment of free speech and its approach to s.1 analysis. First, we have no way of knowing in advance if judges will embrace a reasonableness-based or rights-based approach to constitutional analysis. Second, and more specifically, the open-ended wording of the pressing and substantial and proportionality tests under the Oakes formula leaves tremendous judicial discretion for interpretation. Consequently, there is built in an inherent indeterminacy in the construction and application of the judicial tests and the treatment of free speech as a constitutional value.
In the final analysis, CLS advocates believe that law is inherently political. When considering the free speech claims of public school teachers, a conservative judge will rule in favour of efficiency and effectiveness and other values which promote the concerns of the employer school. A liberal judge, however, will be more sympathetic to the need to protect teachers as individuals with rights who are worthy of dignity and protection. Hence, teachers will receive a more favourable hearing when they present arguments in favour of free speech. Unfortunately, teachers can never be sure what judge they will draw and what his or her political stripes will be. Like a crap shoot, they must throw the dice and take their chances.

Even admitting the interpretive problems inherent in judicial analysis, the personal biases of adjudicators, and the difficulty of predicting legal outcomes, this does not necessarily mean that there is no underlying logic or coherence in the judicial search for better and fairer ways of reconciling the interests of teachers as employees who exercise their free speech rights responsibly and the need for employers to run efficient and effective school systems. Dworkin readily recognizes that law is fundamentally argumentative and inherently controversial. In fact, the adjudicators’ rulings under employment law and constitutional law reflect the ongoing conflict and tension between individual rights and community values. The liberal position
favours greater protection for the individual while the communitarian position favours greater protection for the integrity of the school system. The rulings also mirror a struggle between competing constitutional values. Liberals often prefer free speech for the individual while feminists prefer to choose equality for the disempowered and vulnerable students.

Conclusion

In the final analysis, how can we ensure that teachers as public employees are able to exercise their free speech in responsible and professional ways without fear of retaliatory discipline? How do we strike an appropriate balance between protecting teachers who speak out carefully on issues of public concern, or use academic freedom judiciously, and yet respect the rights and interests of students and the practical realities involved in running or administering a school system? This inherent and ongoing tension between individual rights and institutional imperatives can only be ultimately resolved by examining the nature of the ties that bind teachers, as both employees and professionals, to their employers.

Brown & Kilcoyne (1987) suggest that court rulings in both Canada and the United States are rooted in two fundamental judicial visions of the employment relationship. One mindset is rooted in "the practices of our past" and the
other is anchored in our "aspirations for the future":

The first set gives centre stage to loyalty, property and productivity. As legal norms, these notions trace their lineage to the common law contract of employment and to the era of master and servant. Ideas such as participation, dignity and equality comprise the second set of values. The major thrust of collective bargaining legislation is to foster employee participation in controlling the world of work, in the hope that dignity and equality are thereby also enhanced. Human rights statutes lay down standards of conduct calculated to advance dignity and equality directly. This is not to say that our legislators have entirely spurned yesterday's values. Productivity, for example, remains an important concern. (p. 326)

If the traditional paradigm governs, teachers will be trained to follow directives, policies, and procedures without taking the time to assess them critically. With undue emphasis on unquestioning loyalty and obedience, teachers will be encouraged to think - but to think bureaucratically. De-humanizing educational institutions are obsessed with routine procedures, efficiency, and maximalist organizational tendencies. In these institutions, teachers are no different from civil servants or other public sector employees. Individual teachers are valued to the extent that they conform to, and uphold, the bureaucracies' values as their own. They are expected to fit the mould. As passive receivers of hierarchical orders, they execute their duties with technical expertise. Since teachers are not encouraged to engage in independent thinking and to challenge the governing norms through open and healthy discussion, free speech will be tolerated to the degree that teacher comment is favourable to the bureaucratic status quo, that the comment supports it
and is hostile to those who would challenge it.

In the other paradigm, the researcher has argued that the school as dialogic community promotes a different set of values. Individual dignity and autonomy stress the importance of the "I". Sharing and cooperative learning highlight the value of the "we". Yet both tendencies call out for a never ending dialogue between self and other. In this environment, teachers are perceived, first and foremost, as professionals whose reasoned opinions are taken seriously. Teachers are encouraged to evaluate, to assess and ultimately to pass judgment on board policies, procedures and directives for the benefit of the larger educational community. In the classroom, teachers are encouraged to exercise their academic freedom in new and responsible ways. Teacher input into the selection of materials and methods is not only encouraged but accepted.

The problematic nature of the human condition and the progressive character of a democratic education compel us to question unceasingly and relentlessly the world in which we live. In this context, teachers have a role which is evolving, vital, and dynamic. They are called to contribute to the life of the school and its surrounding community largely through critical, creative and constructive thinking. In essence, democratic teachers are progressive agents of change.
Recommendations for Further Research

The researcher recognizes that a dissertation is never totally finished. Although it attempts to answer some specific questions, a good thesis by its nature must raise new queries which require additional research. Hence, the researcher suggests that the following areas merit greater exploration and consideration.

First, the law is continuously evolving. Hence, it is important that legal research be conducted on a regular basis so that teachers and educators will be kept abreast of the latest decisions and commentary concerning teachers' free speech rights both under employment law and constitutional law. Moreover, since the Charter is still in its infancy and there is a dearth of Charter case law, it will be vitally important to keep up-to-date on changes and new directions under s.2(b) as they relate to teachers.

Second, in this thesis, the researcher has limited the study of expressive rights to restrictions on teachers' free speech by the employer. Yet, teachers may also face restrictions from other sources including the criminal law and the profession. Hence, further legal research on teacher expression in these areas is warranted.

Third, in this dissertation, the researcher has only considered the free speech rights of teachers. Since students are the most important actors in the educational process, a systematic legal study of their free speech rights would also
be a direction worthwhile pursuing.
REFERENCES


Attis v. New Brunswick District No. 15 Board of Education (1991), 121 N.B.R. (2d) 361. (Court of Queen's Bench).


Bozynski v. St. Albert Protestant Separate School District No. 6 (1982), 38 A.R. 93. (Bd. of Ref.).


Brubaker v. Board of Education, 502 F.2d 973 (7th Cir. 1974).

Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966).


Canadian Association of University Teachers, Policy statement on academic freedom, Approved by the Council, May 1977.


Cox v. Dardanelle Public School Dist., 790 F. 2d 668 (8th Cir. 1986).


Education Act, R.S.N.S. 1989, c. 136.


Education Act, R.S.S. 1978 c. E-0.1.

Education Act, S.Q. 1988, c. 84.


Ford Motor Co. (1964) 3 L.A. 779 (Shulman), quoted with approval by Weiler in Lake Ontario Steel Co. Ltd. (1968), 19 L.A.C. 103 at p. 108.


Frohwerk v. United States, 249 U.S. 204 (1919).


Human Rights Act, R.S.N.S. 1989, c.214.
Human Rights Act, S.B.C. 1984, c.22.
Human Rights Act, S.Y. 1987, c.3.


Keegstra v. Board of Education of Lacombe No. 14 (1983), 25 Alta. L. R. (2d) 270 (Bd. of Ref.).


Kingsville Indep. School Dist. v. Cooper, 611 F. 2d 1109 (5th Cir. 1980).


Lewis v. Harrison School District No. 1, 805 F.2d 310 (8th Cir. 1986).


MacDonald v. Red Deer (County), 44 Alta. L.R. (2d) 134 (Bd of Reference, Gallant J.).


D.L.R. (4th) 545


Miles v. Denver Public Schools, 944 F. 2d 773 (10th Cir. 1991).


-Re Algonquin College of Applied Arts & Technology and Civil Service Association of Ontario (1972), 1 L.A.C. (2d) 94 (Weatherhill).


-Re Brampton (City) and A.T.U., Loc. 1573 (1989), 7 L.A.C. (4th), 294 (Brown).


-Re Continuous Colour Coat Ltd. (1975), 9 L.A.C. (2d) 326 (Abbott).


Re Simon Fraser University And College Employees (1985), 18 L.A.C. (3d) 361 (Bird).


Re Treasury Board (Employment & Immigration) and Quigley (1987), 31 L.A.C. (3d) 156 (Cantin).


School Act, R.S.B.C. 1979, c. 375.


School Act, R.S.Y 1986, c. 155.

Schools Act, R.S.N. 1990, c. S-12.


Stewart v. Public Service Staff Relations Board [1978] 1 P.C. 133.

Stewart v. Public Service Staff Relations Board (date unknown), No. 166-2-2000 (P.S.S.R.B.) (Jolliffe).


U.S. Const., amend. I.


Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).


