NOTES

RESTRAINT OF INDIVIDUAL LIBERTY IN CONTRACTS OF EMPLOYMENT

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A contract of employment is essentially one in which the employee undertakes to provide his labour for the benefit of the employer in consideration for the payment of salary or wages. It gives rise to a "lien de droit" which constrains the employee to the prestation and in effect "l'obligation emporte une restriction aux droits de l'individu".[1] In an attempt to protect their own interests, employers often add to the contract conditions which further restrict the individual liberty of the employee but which have no direct bearing on the performance of his work. Since our democratic society values and respects individual human rights, it is important to examine to what degree it legally tolerates these restrictions on individual liberty in contracts of employment.

If contractual limitations of individual liberty have any validity it is because "aux yeux des rédacteurs du Code civil, une telle atteinte [aux droits d'individu] n'est tolérable que si le débiteur y a volontairement consenti".[2] The autonomy of the will is the underlying principle of the law of contracts in the Civil Code which permits the contracting parties to freely regulate their juridical relationships in accordance with their mutual interests. The resulting contract, or meeting of the wills, becomes the law unto the parties.[3] Is the worker then free to validly contract out of his personal fundamental rights in an absolute manner?

Under the Civil Code of the Province of Quebec, an individual who is of the age of majority cannot obtain judicial release from the contractual obligations which he freely undertook on the grounds of lesion, nor will the courts intervene on the grounds of equity alone. "Seul le respect de la morale et d'un ordre public strictement limité

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1 H., L., & J. Mazeaud, *Leçons de droit civil*, 2e éd., 1962, t. 2, p. 25; no 28.

2 *Ibid.*

3 *Chaput* v. *Bonhomme*, (1925) 38 B.R. 27, and Art. 1022 C.C.

restreindra la liberté de contracter."[4] Thus, article 13 C.C. states that, "No one can by private agreement, validly contravene the laws of public order and good morals".

Although a precise definition is impossible, most authors would agree with Trudel that, "L'ordre public comprend toute chose qui intéresse plus directement la société que les individus".[5] Many rules of public order are expressed in statutes and in the Civil Code, but,

> Le législateur, ne pouvant prévoir d'avance toutes les circonstances où devront être protégés les intérêts fondamentaux de la nation, accorde aux juges l'autorité de s'appuyer, pour suppléer aux lacunes de la loi, arrêter l'égoïsme trop souvent injuste des individus, sur l'ordre public...[6]

In the absence of a specific prohibition it is left to the courts to determine as a question of law, what is the content of the concept of public order.[7]

In the field of contracts of employment the only express rule of public order is article 1677 C.C.,[8] which prohibits the hiring of a worker for life. One must therefore look to the jurisprudence to determine whether a particular clause in a contract of employment is contrary to public order. There are many decided cases which invoke the judicial notion[9] of public order to invalidate restrictive clauses which come into effect at the termination of employment, but few, if any, cases on clauses which have the effect of limiting the employee's freedom during the term of the contract. In a recent case before the Superior court *Whitfield* v. *Canadian Marconi Co.*,[10] Mr. Justice Nadeau was faced with the question of the validity of this type of clause.

The parties had entered into a one year contract under which the plaintiff was engaged as an electrician to assist with the maintenance of a power plant on a military DEW line base in Northern Quebec. One of the clauses in the contract stipulated that employees on the base were prohibited from fraternizing with the native Indian

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[4] Mazeaud, *Supra*, footnote 1.

[5] G. Trudel, *Traité du droit civil du Québec*, Montréal, 1942, t. 1, p. 87.

[6] A. Perrault, *Ordre public et bonne moeurs*, (1949) 9 R. du B. 1, at p. 16.

[7] *Ibid.*, p. 4; *Hébert* v. *Sauvé*, (1932) 38 R.L. n.s. 410 (S.C.), at p. 418.

[8] The Civil Code contains only five articles relating to contracts of employment, since under the old French law they were regulated by craftsmen's associations. See, G. Charlap, *The Contract of Employment*, in Journées de droit civil français, (1934), Livres souvenir, 1936, p. 417.

[9] See, L. Baudouin, *Le Droit civil de la Province de Québec*, Montréal, 1953, p. 1272, where public order is described as «... une notion judiciaire, dégagée par les magistrats et non l'oeuvre proprement dite du seul pouvoir législatif».

[10] An unreported judgment of the Superior Court, (Montreal, 561, 864), Nov. 19, 1965.

or Eskimo populations living in settlements near the base, and that any violation would constitute grounds for dismissal. The Plaintiff happened to befriend a young Eskimo Woman and after refusing to end the relationship he was dismissed before the termination of the contract. He therefore instituted an action for breach of contract on the grounds that the fraternization clause was illegal and null, making his dismissal illegal as well.

Mr. Justice Nadeau dismissed the action on the following grounds. In the first place, the plaintiff had freely consented to all the terms and conditions of the contract. This was, therefore, the law between the parties. Secondly, the condition in question was not against public order or good morals. This second ground was based on a decision of the Cour d'appel de Paris in *Epoux Barbier* v. *Cie Air France.*[11]

The question in that case was the validity of a condition which prohibited air hostesses from marrying while under contract with the airline. The court held that it was a celibacy clause and was therefore contrary to public order because

> ...le droit au mariage est un droit individuel d'ordre public qui ne peut se limiter ni s'aliéner... et qu'a moins de raisons impérieuses évidentes, une clause de non-convol doit être déclarée nulle comme attentatoire à un droit fondamental de la personnalité...[11]

Mr. Justice Nadeau used the same line of reasoning to reach the opposite conclusion on the facts. He decided that the condition prohibiting fraternization was not a celibacy clause and furthermore, even if did amount to such a clause, there were "des raisons impérieuses évidentes" to justify it (protection of the natives due to their different social and moral habits and their low resistance to contageous diseases carried by white men, and the strict discipline required on a military base).

The final decision as to the validity of the fraternization clause may have been correct, but the method of reaching that conclusion is, it is submitted with respect, questionable. The test for questions of public order of "des raisons impérieuses évidentes" was formulated by a French court and may not necessarily be valid in Quebec. When faced with a question of public order, the court is supposedly making a decision in the interest of society, that is, the society in which it operates. It follows, therefore, that reference to foreign decisions as authority is not warranted[12] except, perhaps, where the interests of the two societies on a particular issue are almost

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[11] D. 1963, 428.

[12] Perrault, *Supra*, footnote 6, p. 1.

identical.[13] Certainly, when an established line of jurisprudence already exists and when it would lead to a different solution of the question decided by the foreign court, the latter's decision cannot be used as authority. Although the notion of public order is not static and is constantly changing, the judgment of Mr. Justice Nadeau, it is respectfully submitted, was not rendered in recognition of such change but merely introduced a foreign test of public order and ignored the criteria already established by Quebec jurisprudence.

Inalienable individual freedoms form an important part of the notion of public order and therefore even a partial restraint on individual liberty would be null as a general rule. The freedom to work is as fundamental a right as the freedom to marry and yet the courts have recognized the validity of contractual restraints of the right to work under certain conditions despite their policy "... to protect the individual's freedom of action and his right to earn a livelihood".[14]

The restriction on the freedom to work usually takes the form of a prohibition on the employee from competing directly or indirectly with his employer after the termination of the contract. To determine the validity of these prohibitive clauses the courts have formulated what may be called the "doctrine of reasonableness". The restriction must be reasonable as regards the interests of the parties and those of the public, otherwise it will be contrary to public order.[15]

The *locus classicus* for the development of the "doctrine of reasonableness" is the decision of Mr. Justice Salvas in *Dominion Blank Book Co.* v. *Harvey*.[16] The basic premise is that although "la liberté pour l'individu de travailler ou d'exercer son art ou sa profession est de droit naturel et d'ordre public",[17] the employer is nevertheless entitled to protection of his special interests, for ex-

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[13] C.A. Sheppard, *The Enforcement of Restrictive Covenants in Quebec Law*, (1963) 23 R. du B. 311, at p. 314,

> Obviously, foreign doctrine or precedents can only have a limited relevance in this area of our law. They can be used for illustration or for enunciation of general principles accepted by our courts. They are certainly not binding and their persuasiveness is restricted. Hence, the importance of Quebec jurisprudence.

[14] Sheppard, *Supra*, footnote 13, p. 316.

[15] *Nordenfeldt* v. *Maxim Nordenfeldt Gun Co.*, (1894) A.C. 535, at p. 565 as cited in *Grossman* v. *Schwartz et Kafka*, (1943) B.R. 145, at p. 150.

[16] (1941) 79 C.S. 274.

[17] *Ibid.*, p. 275.

ample, his clientele or trade secrets.[18] The freedom to compete is a rule of public order and "un droit légitime",[19] but the courts recognize the right of the employer to protect himself from the possible unfair competition of his former employee who has the advantage of knowing confidential information regarding his former employer's business.[20]

To be reasonable, the restriction must be "... de moindre étendue et établie dans une mesure strictement nécessaire"[21] for the adequate protection of the employer's legitimate rights. For example, to protect his clientele, the employer may prohibit his salesman from making any contact with that clientele for a reasonable period of time necessary to permit him "de se trouver un nouveau vendeur, de le mettre en contact avec la clientèle que desservait le défendeur, de façon à retenir et garder cette clientèle selon les lois de la libre concurrence".[22] Hence, the restriction must operate within clearly defined limits as to time and place. The Court of Appeal in *Grossman* v. *Schwartz,* approved these criteria and added that the nature or scope of the prohibited acts must also be described in definite terms.[23]

It must be pointed out that the restriction on the right to work may be reasonable yet not be valid because it is contrary to another rule of public order. In the case of *T.* v. *B.*,[24] which involved a medical doctor, the court held that even if the restriction were reasonable in every respect, it would still be invalid because it limits the right of the public to choose a doctor in whom they have confidence. In *Campeau* v. *Terrault,*[25] a one year restriction on a newspaper advertising salesmen was held to be invalid since the employer could effectively get rid of all competition by successively hiring and firing the few qualified salesmen in the area. The five year restriction imposed in

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[18] See *Ibid.*, p. 275 and *Mutual Life & Citizens Assuranee Co. Ltd.* v. *Picotte,* (1936) 61 B.R. 390 in relation to clientele. In regard to trade secrets, see, *Grynwald* v. *Playfair Knitting Mills Inc.,* (1959) C.S. 200.

[19] *Chabot* v. *McGregor,* (1921) 27 R.L. 31 (C.S.), at p. 33.

[20] A. Perrault, *Liberté du commerce et travail, art. 13, 989,990, 1667, C.C.,* (1943) 3 R. du B. 279, at p. 280. This is a case comment on *Grossman* v. *Schwartz,* cited *Supra,* footnote 15.

[21] *Dominion Blank Book Co.* v. *Harvey, Supra,* footnote 16, p. 275.

[22] *Ibid., Mount Royal Dairies Ltd.* v. *Russman,* (1934) 72 C.S. 211.

[23] *Grossman* v. *Schwartz, Supra,* footnote 15; *Perrault* v. *La Laiterie des Producteurs de Joliette Ltée,* (1959) C.S. 45.

[24] (1958) C.S. 587; See a case comment by J.G. Cardinal. *Clause restrictive quant à l'exercice futur d'une profession dans un contrat d'engagement,* (1958-59) 61 R. du N. 330.

[25] (1959) C.S. 449.

Dominion Blank Book Co. v. *Harvey*[26] on a forty-seven year old man amounted to a perpetual alienation of the right to work and was invalid as a violation of article 1667 C.C.

Quebec jurisprudence makes a distinction between the alienation of a right and the reasonable, temporary limitation thereof. If the restraint on the individual's liberty is reasonable, that is;

1) operates within clearly defined limits,[27]

2) protects a legitimate interest of one of the parties,[28]

3) does not violate an express rule of public order,[29]

4) does not adversely affect the public interest,[30]

it will not be declared invalid as contrary public order. An employee could then be validly bound to a condition which prohibits marriage for a limited term "... si elle n'a pas pour effet d'imposer un célibat perpétuel".[31]

If one would apply the above criteria to the restrictive clause in the case of *Epoux Barbier* v. *Cie France*[32] the result would be different. The restriction was not perpetual and the employer had a legitimate interest to protect. The efficiency of its operation would be detrimentally affected if it employed married women due to the likelihood of their becoming pregnant. Therefore, this case cannot be invoked as authority in Quebec. Hence, in *Whitfield* v. *Canadian Marconi Co.*,[33] the non-fraternization clause effectively limited the plaintiff's right to marry, but it would not be contrary to public order according to the "doctrine of reasonableness". The contract and the clause were limited to a one year term and the employer was protecting a legitimate interest (the health, and welfare of the native population and the strict discipline required on a military base).

The general rule is that parties to a contract are free to regulate their juridical relationship according to their mutual interests. Messrs. Mazeaud speak of "un ordre public strictement limité",[34] a view which is justified by the fact that the notion of public order is

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[26] *Supra*, footnote 16.
[27] *Grossman* v. *Schwartz*, *Supra*, footnote 15.
[28] *Caron-Jetté Ltée* v. *Drapeau*, (1943) B.R. 494.
[29] *Dominion Blank Book Co.* v. *Harvey*, *Supra*, footnote 16.
[30] *T.* v. *B.*, *Supra*, footnote 24.
[31] L. Faribault, *Traité de droit civil de Québec*, Montréal 1959, t. 8, p. 26, no 30.
[32] *Supra*, footnote 11.
[33] *Supra*, footnote 10.
[34] *Supra*, footnote 1.

an exception to a general rule. This fortifies the argument against the use of the test of "des raisons impérieuses évidentes" since it is much wider than the already established test of "reasonableness".[35] Of course, the notion of public order is not a static one,[36] but some sense of predictability is possible. The established jurisprudence should, therefore, be followed to the extent that it conforms to the present needs of the society.

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[35] The court in *Epoux Barbier* v. *Cie Francc* stated that a celibacy clause would be valid in the case of military service.

[36] Sheppard, *Supra*, footnote 13, p. 313;

> ... public order is essentially a social concept, peculiar to each society, and in that sense, unique and mobile.