THE MEDIUM AND THE "ANTI-UNION" MESSAGE: "FORCED LISTENING" AND CAPTIVE AUDIENCE MEETINGS IN CANADIAN LABOR LAW

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[I]t is only too typical that the content of any medium blinds us to the character of the medium.

Marshall McLuhan[1]

In Toronto, a few city blocks from the Ontario Labour Relations Board (OLRB), sits a small center dedicated to the work and ideas of Canada's Marshall McLuhan.[2] McLuhan is most well-known for his work examining communications, and his much quoted aphorism, "the medium is the message."[3] He argued that both the form and the content of communications are "media," and the "message" is the "change of . . . pattern the [medium] introduces into human affairs."[4] The method of communication transmits its own message, which is distinct from that conveyed in the content of communications. The key to understanding the power of communication lies in recognizing the ways in which the forms of communication influence events and perceptions.

This is not a paper on communications theory. But McCluhan's framework provides a useful launching pad from which to commence a review of employer "captive audience meetings" (CAMs) in Canadian labor law. A CAM is an assembly of workers at the behest of their employer, usually occurring during working hours, and with

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1. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 24 (2d ed. 1964).

2. It is called the McCluhan Program in Culture and Technology, and its website is http://www.mcluhan.utoronto.ca/index.htm.

3. MCCLUHAN, *supra* note 1.

4. *Id*.

the express purpose of requiring employees to listen to the employer's opinions. They involve the unusual practice of "forced listening," whereby employees are held "captive," in the practical sense that leaving may have negative implications for their employment security. The subject matter of employer speeches in these meetings vary, but one of the most controversial use of CAMs is to proselytize anti-union, anti-collective bargaining messages to employees during union organizing campaigns. It is this particular use of the CAM that is the subject of this paper.

The CAM is a display of employer power, demonstrating at once the employer's position of dominance at work and the employees' vulnerability. It is difficult to think of other examples workers would experience in their lives in which they could be forced to sit and listen to opinions with which they may strongly disagree. Due to the very uniqueness of the experience, the CAM transmits an extremely potent signal to employees that is quite distinct from the content of the speech. It is a message about where power in the employment relationship rests, about the limits of a union's power (because unions are not likewise permitted to address workers at the workplace), and about the state's opinion of this imbalance of power and communicative access in the workplace.

My argument is that CAMs need to be conceived of as a distinct expression of employer power and regulated as such. The examination of Canadian labor law in this paper indicates that the dominant approach to CAMs in Canada does not do this. Instead, CAMs and forced listening at the hands of the employer are treated as "message neutral" events that may color the meaning of the content of the message the employer delivers. This approach leads labor boards to presume that CAMs and forced listening at work is lawful *per se*. The focus of inquiry becomes exclusively whether the *content* of the employer's message is unlawful. This approach ignores the important question of whether CAMs and forced listening "interfere with the formation and selection" of unions by employees, which is prohibited in Canada. A better approach is to treat CAMs as a distinct form of employer expression, and then to decide whether this type of expression advances sound labor policies.

The paper is structured as follows. In Section I, I briefly situate CAMs within the broader context of the contemporary "Canadian model" of freedom of association. Section II provides a brief description of the regulation of the *content* of employer expression during union organizing campaigns in Canadian labor law. In Section III, I examine more directly the treatment of "forced listening" and

CAMs in Canadian law. This includes both an analysis of the potential impact of the *Charter of Rights and Freedoms,* and an examination of the ways in which Canadian labor boards have applied labor legislation to CAMs and forced listening. Finally, in Section IV, I argue that the dominant approach in Canadian labor law should be replaced with a new model that treats employer CAMs and forced listening as independent forms of employer expression. This approach would encourage an evaluation of whether these particular forms of expression deserve legislative protection in light of labor policies objectives and contemporary Canadian values as reflected in recent Supreme Court *Charter* decisions.

I. INTRODUCTION TO CAMS IN THE CANADIAN CONTEXT

I begin this part with the usual disclaimer about Canadian labor law. Since 1925, principle jurisdiction over labor relations has resided with the provinces.[5] This means that there are actually eleven different labor relations models, including ten provincial models and the Federal model.[6] While there are differences in the jurisdictional models, overall there is sufficient similarity that it has been possible to identify a distinctive "Canadian approach" to collective bargaining regulation over the years.[7]

Historically, the most commonly noted distinction of the Canadian model was the use of the "card-check" system of union recognition: labor boards would certify unions that submitted evidence in the form of membership cards satisfying some specified level of majority support (often 55% or greater of a bargaining unit defined by the labor board to be "appropriate" for collective bargaining). Ballots were held if the union submitted evidence on behalf of less than the required level for "automatic" certification, but more than a lower threshold level (for example, 45%). But ballots were nevertheless relatively rare under card-check models since

5. Toronto Electric Commissioners v. Snider, 2 D.L.R. 5 (P.C.) (1925).

6. The federal jurisdiction covers approximately 10% of the Canadian workforce employed as federal public sector workers, in designated industries (like banking, telecommunications) and inter-provincial and international business activities (transportation, airlines).

7. *See*, *e.g.*, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the* NLRA, 96 HARV. L. REV. 1769, 1805 (1983); JUDY FUDGE & ERIC TUCKER, LABOUR BEFORE THE LAW: THE REGULATION OF WORKERS' COLLECTIVE ACTION IN CANADA, 1900–1948 (2001); John Logan, *How Anti-Union Laws Saved Canadian Labour: Certification and Striker Replacements in Post-War Industrial Relations*, 57 RELATIONS INDUSTRIELLES 129 (2002).

unions tried to avoid them by ensuring a safe majority of cards were collected prior to filing the application for certification.

The principle reason why the card-check model can improve access to collective bargaining is that it neutralizes the opportunity for employers to campaign against collective bargaining through both lawful and unlawful means.[8] In many cases, employers do not learn of an organizing campaign until after the union has already collected sufficient membership cards to be certified without a vote or the union's campaign is in its late stages. At that point, campaigning against the union would often be futile. This fact no doubt explains in large measure why the incidence of CAMs in Canada has historically been lower than that in the United States.

For example, in a 1998 study, Thomason and Pozzebon found that the incidence of CAMs in campaigns leading to a certification application in Ontario (49%) and Quebec (36%) fell far short of that recorded in the United States in 1990 studies by Lawler[9] (67%) and Freeman and Kleiner[10] (91%).[11] However, relative infrequency is not to be confused with ineffectiveness. Thomason and Pozzebon found that CAMs in the Canadian context "appear to be the most effective tactic to reduce union support and certification probability."[12] For supporters of collective bargaining, this is disturbing news because recent developments in Canadian labor law have made it considerably easier for employers to wage campaigns against unionization of the sort common in the United States.

The so-called "Canadian model" has been under attack from right-of-center governments during the past two decades. The most significant manifestation of this attack in terms of labor policy is the shift from the card-check system of certification to a system more closely resembling the American model of mandatory ballots.[13]

8. Weiler, *id*. 1806.

9. JOHN LAWLER, UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES (1990).

10. Richard Freeman & Morris Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351 (1990).

11. *See* Terry Thomason & Silvana Pozzebon, *Managerial Opposition to Union Certification in Quebec and Ontario*, 53 RELATIONS INDUSTRIELLES 750, 757 (1998). Karen Bentham found the incidence of CAM in Canada to be 56% based on data from the early 1990s. Karen Bentham, *Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions*, 57 RELATIONS INDUSTRIELLES 159, 173 (2002). Kate Brofenbrenner found that CAMs were held in 92% of U.S. union organizing campaigns. Kate Brofenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing,* U.S. TRADE DEFICIT REVIEW COMMISSION 81 (2000), *available at* http://digitalcommons.ilr.cornell.edu/reports/3.

12. *Id*. at 757.

13. *See*, *e.g.*, David Doorey, *Neutrality Agreements: Bargaining Representations Rights in the Shadow of the State*, 11 C.L.E.L.J. (2006); Sara Slinn, *An Analysis of the Effects on Parties'*

Today, Ontario (since 1995), British Columbia (2001), Newfoundland and Labrador (1994), Alberta (1988), and Nova Scotia (1977) require mandatory certification ballots (unless the employer agrees to voluntarily recognize the union).[14] This means that a large majority of the Canadian workforce is now governed by ballot-based models of certification, and their employers, like their American counterparts, now have a guaranteed opportunity to campaign against unionization prior to the ballot.

There are, however, important differences between certification ballot systems in the United States and the relatively new Canadian model of mandatory ballots. The most important practical difference is that Canadian governments have opted for faster votes than is the case under the National Labor Relations Act (NLRA). For example, in Ontario, the Labour Relations Board (OLRB) conducts certification votes five "business days" from the date the union files its "application for certification" and all legal matters are resolved afterward.[15] From the unions' perspective, this "quick vote" model is obviously preferable to the drawn out model under the NLRA. Nevertheless, the shift from card-check to ballot has had a noticeable negative effect on union organizing success in Canada. For example, Riddell found that private sector union success rates in certification applications fell by about 19% when the British Columbia (BC) government switched from a card-check model to a quick vote model, and that almost all of that decrease could be attributed to the change in the certification model.[16]

Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model, 43 OSGOODE HALL L.J. 407 (2005); Logan, *supra* note 7.

14. *See* Slinn, *id*. at 412–13. Manitoba introduced mandatory ballots in 1997, but when the left-of-center New Democratic Party was elected it re-introduced a card-check model. The federal jurisdiction, Quebec, Saskatchewan, Manitoba, and New Brunswick, and Prince Edward Island still use a card-check certification model. The Ontario government reintroduced card-check for the construction sector only in 2001. Labour Relations Statute Law Amendment Act, 2005, S.O., c. 15, § 8.

15. Section 8(5) of the Ontario Labour Relations Act, 1995 S.O. 1995, Ch.1, Sch. A [hereinafter OLRA] provides the Board with discretion to delay the vote, but the Board rarely does so.

16. Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia*, 1978-1998, 57 INDUS. & LAB. REL. REV. 493, 507 (2004). *See also* Sara Slinn, *An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification*, 11 C.L.E.L.J. 259 (2004) (union success rate in certification applications declined by approximately 20% when ballots replaced card-check in Ontario); Sue Johnson, *Voting or Card-Check: How Union Recognition Procedure Affects Organizing Success,* 112 ECON. J. 344 (2002) (union success rates fell by about 13% when Canadian jurisdictions replaced card-check with mandatory quick votes); Elizabeth Mitchell & Ron Lebi, *The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification*, 10 C.L.E.L.J. 473 (2003) (union success rates fell from approximately 71% in the years prior to the introduction of mandatory ballots in 1995 in Ontario to approximately 48% by 2002–03).

No doubt part of the reason for this decline in union success rates is the increased role played by management campaigning against unionization in the days prior to the ballot. Canadian employers have proven to be extremely adept at using the relative short period between the certification application and the ballot to get their message across to employees. Management side labor law firms have developed comprehensive "seven day plans" to ensure that their employer clients maximize their influence on employee choice. One or more meetings with employees will inevitably be included on the "to do" list.[17] The emergence of mandatory certification ballots as a gateway to collective bargaining in Canada has elevated the significance of CAMs during organizing campaigns to the Canadian labor relations landscape, and this warrants a fresh look at the laws governing this form of employer expression and the policies this law advances.

II. A PRIMER ON THE REGULATION OF THE *CONTENT* OF EMPLOYER SPEECH

There are two main types of provisions that govern the content of employer expression in Canadian labor law.[18] First, all jurisdictions include a general prohibition on employer "interference" in the formation, selection, and administration of a union ("Interference Prohibitions"). Second, most jurisdictions confer on employers an expressed right of speech ("Free Speech Provision") that creates an exception to the Interference Prohibitions by permitting employers to express their "views" or "opinions" about unionization without running afoul of the Interference Prohibitions.

17. For example, one Toronto-based law firm includes on its recommended seven day plan that the employer consider holding at least two management meetings with employees during working hours designed to convey the employer's opinions about the organizing campaign. Sherrard Kuzz, LLP, *Seven Crucial Days For Your Business,* Manual (on file with the author).

18. I am generalizing somewhat because there are sporadic differences among the jurisdictions in the statutory language. For example, the Manitoba legislation expressly prohibits employers from inquiring of employees whether they have exercised rights under the legislation. Manitoba Labour Relations Act, C.C.S.M., c. L10, s. 25(1). *See also*, Saskatchewan Trade Union Act, R.S.S. 1978, c. T-17, s. 11(1)(o). However, even when legislation does not include that expressed prohibition, labor boards have ruled that making such inquiries of employees constitutes unlawful interference in the formation of a union. See, David McPhillips, *Employer Free Speech and the Right of Trade Union Organization*, 20 OSGOODE HALL L.J. 138, 144–45 (1982), and cases cited therein, and Cardinal/Klassen, 34 Can. L.R.B.R. (2d) 1 (1997), ¶ 203.

A. Interference Prohibitions

Every jurisdiction prohibits employers from "interfering" with the selection or formation of a union.[19] Labor boards apply an objective test, asking whether a reasonable employee "of average intelligence and fortitude" would be negatively influenced in their decision whether to support collective bargaining by the employer's comments or conduct.[20] This objective assessment is based on the reasonable employee "at the workplace" and in the particular circumstances in which the employer's conduct occurs, including the "context, timing, and audience."[21] It is not sufficient to ask what a reasonable "outsider" would think of the employer's conduct.

Read broadly, this language, and the objective test as stated, could prevent all forms of employer speech that seek to encourage employees to reject unionization and collective bargaining and effectively require employer neutrality during organizing campaigns. This interpretation has in fact prevailed at various times and in various places in Canada.[22] However, today only the federal jurisdiction interprets the Interference Prohibition provision as a requirement for employer neutrality during organizing campaigns.

In a landmark 1985 decision, the Federal Board affirmed its position that employers that engage in dialogue with their employees in an attempt to influence their decision about whether to support a union are, with limited exceptions, interfering with the selection or formation of a union. The Board concluded:

> [An] employer cannot be expected to stop communicating with his employees simply because some are engaging in union organizing activity. Normal business communication is unaffected by the provisions of the Code. . . . Nor do they constitute an attempt to

19. An example is in the OLRA, *supra* note 15, section 70:

> No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Quebec's Labour Code, R.S.Q. c. C-27, uses the language "hinder" rather than "interfere." Section 12 reads:

> No employer, or person acting for an employer or an association of employers, shall in any manner seek to dominate, hinder or finance the formation or the activities of any association of employees, or to participate therein.

20. *See*, *e.g.*, Excell Agent Services, 96 C.L.R.B.R. (2d) 161 (2003) (BCLRB), ¶ 69-69.

21. *Id.* ¶¶ 70, 72.

22. For example, between 1973 and 1987, the B.C. labor board interpreted the "no interference" provision as a requirement of employer neutrality. See Consumer Pallet Ltd., [1974] Can. L.R.B.R. 289, and discussion in *Cardinal/Klassen, supra* note 18, ¶¶ 124–35.

> control the expression of opinion on unions and collective bargaining by an employer anywhere outside the narrow and specific content implicit in their language. It is valid to hypothesize that these provisions would not act as a bar to an employer responding fairly to unsolicited employee questions about unions or answering publicly and appropriately any propaganda that might be directed against him by union organizers. But there is nothing in the Code which suggests that an employer should be or may be a party to the employees' actually decision-making process about forming or not forming a union and everything to suggest that he should maintain a neutral and hands-off stance while the employees determine their destiny themselves free of employer pressure.[23]

Saskatchewan has similarly applied a very broad and purposive interpretation of the no-interference provision, finding that employers can only make statements of "fact" and respond to misrepresentations directed against it by the union organizers.[24]

The Interference Prohibition captures more than simply the content of employer speech. Employers can interfere with the formation and selection of unions not only with spoken and written words, but through actions as well. Obviously, for example, dismissing employees because they support the union would usually amount to unlawful interference.[25] More importantly for our purposes, the methods by which employers communicate with employees may interfere with the employees' free choice about unionization, regardless of the content of the message. For example, the B.C. Labour Board ruled recently that the act of distributing water bottles to employees containing labels with anti-union messages constituted unlawful interference, even though the content of the messages were not otherwise unlawful.[26]

This has obvious implications for the regulation of CAMs. There is a strong argument that employers that exploit their power over workers to compel them to attend meetings to listen to the employer's anti-union arguments are "interfering" with the free selection of unionization by the employees. This is the approach of the Federal

23. Bank of Montreal, C.L.R.B.R. (N.S.) 129 (1985), ¶ 46. *See also* American Airlines, 3 C.L.R.B.R. 90, 105 (1981) ("employer's communications are to be permitted inasmuch as they are related to the efficient operation of the business. If they are not, then they must be viewed as a participation or interfere).nce in the representation of employees by a trade union."

24. *See*, *e.g.*, Super Value, 3 C.L.R.B.R. 412 (1981); Prairie Bus Services (1983) Ltd., SASK. L.R.B.R.D No. 29 (1999); Brown Industries, SASK. L.R. 71 (1995).

25. There are usually also provisions that regulate this sort of conduct more directly. For example, see the OLRA, *supra* note 15, section 72.

26. RMH Teleservices International Inc., 114 C.L.R.B.R. (2d) (BCLRB) (2005) [hereinafter RMH].

Board, which prohibits CAMs altogether during union organizing campaigns.[27] However, in every other Canadian jurisdiction, employer CAMs are permitted. In fact, when it comes to the regulation of CAMs outside the federal jurisdiction, the Interference Prohibitions are largely ignored. This is a peculiar result that is not easily explained, and one that I will examine more closely later in this paper.

B. Employer Free Speech Provisions

Every jurisdiction except Saskatchewan, Newfoundland and Labrador, and Quebec now includes an expressed right of employer speech in some form. The Free Speech provisions are usually drafted so as to create an exception to the Interference Prohibition provisions. They protect the right of employers to express "views" or "opinions" about the employees' decision whether to support unionization. Provided these views or opinions are not intimidating or coercive (and do not amount to "undue influence" or "promises" in some jurisdictions), their expression will not be treated as unlawful interference.[28]

Section 148(2) of Alberta's Code provides a typical example:

> An employer does not contravene subsection (1) [the Interference Prohibition section] by reason only that the employer: (c) expresses the employer's views so long as the employer does not use coercion, intimidation, threats, promises, or undue influence.[29]

This type of "free speech" provision has generally been interpreted to confer on employers the right to inform their employees of their views about unionization, including the right to encourage employees to reject unionization and collective bargaining.[30]

The scope of employer expression protected by these Free Speech provisions is limited in two important ways. First, there are content restrictions. Comments that amount to "intimidation" or "coercion" are unprotected in every Canadian jurisdiction. Most jurisdictions also do not protect statements that amount to "threats" or "promises" designed to influence employee choice.[31] Canadian

27. Bank of Montreal, *supra* note 22.

28. *See*, *e.g.*, OLRA, *supra* note 14, § 70; Canada Labor Code, R.S.C. 1985, c. L-2, § 94(2); Alberta Labour Relations Code, R.S.A. 2000, c. L-1, § 148(2); Manitoba Labour Relations Act, *supra* note 18, § 6(3); N.B. Industrial Relations Act, R.S.N.B. 1973, c. I-4, § 3(5); N.S. Trade Union Act, R.S.N.S. 1989, c. 475, § 58(2); P.E.I. Labour Act, R.S.P.E.I. 1988, c. L-1, § 9(8)

29. *Id.* § 148(2).

30. *See*, *e.g.*, Dylex Ltd., OLRB REP. 357 (1977); *Cardinal/Klassen, supra* note 18.

31. *See*, *e.g.*, OLRA, *supra* note 15, § 70; Alberta's Labour Relations Code, *supra* note 28, § 148(2).

labor boards have traditionally been quite vigilant in assessing whether the content of employer speech violates these provisions, recognizing that employees are extremely sensitive to employer comments made during the union organizing process and that, because of their economic vulnerability, employees are acutely aware that their employers possess the power to make their threats or promises a reality.[32]

For example, in *Wal-Mart Canada,* the OLRB ruled that the employer intimidated employees when, at a store meeting, it remained silent as an anti-union employee made comments suggesting that the employer would close the store if employees voted for the union.[33] Wal-Mart's failure to distance itself from the employee's comments would have suggested to a reasonable employee that it condoned the comments. The OLRB also found Wal-Mart intimidated employees when managers repeatedly engaged employees in discussions about unionization prior to the ballot, as well as when it solicited employee questions about the organizing process, but then refused to answer the question of whether the store would close if the union won.[34]

Most jurisdictions also ban comments that constitute "undue influence."[35] Undue influence is intended to catch more subtle forms of employer conduct that seek to exploit the employees' particular sensitivity to employer behavior during union organizing campaigns. It has been described as follows:

> [U]ndue influence includes the unconscientious use by an employer of its power or authority over employees in order to persuade them to forgo their rights in relation to the union. An employer exerts undue influence on its employees . . . when it takes unfair advantage of its position and authority in an attempt to sway the will of employees.[36]

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32. A typical statement of this premise is found in the B.C. Labour Board decision in *Forano Ltd*, C.L.R.B.R. 13, 18 (1974):

> we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that choice. Comments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by management.

See similarly Pigott Motors (1961) Ltd., 63 Can. L.L.C. 1125 (OLRB) (1963), 1130; *Excell, supra* note 20, ¶ 71.

33. Wal-Mart Canada, O.L.R.B. Rep. Feb. 141, 155 (1997).

34. *Id.*

35. *See*, *e.g.*, Alberta Labour Code, *supra* note 28, § 146(1)(ii)(c); OLRA, *supra* note 15, § 70; PEI Labour Act, *supra* note 28, 9 (8)(a); Nova Scotia Trade Union Act, *supra* note 28, (2); Canada Labour Code, *supra* note 28, § 94(2).

36. K-Mart Canada Ltd., OLRB REP. 60, 70 (1981). *See also* Globe & Mail, OLRB REP. 189 (1982). In Converges Customer Management Canada, 90 C.L.R.B.R. (2d) 238, ¶ 110 (2003), the B.C. Board ruled that the B.C. government's recent deletion of "undue influence" from the list of prohibited employer activities signaled that the Board should "focus the application of coercion and intimidation to the use of more direct forms of pressure." *See also* Focus Building

Employers who solicit employee grievances, improve conditions of work, or engage in a large volume of one-on-one discussions with employees during organizing campaigns have been found to be exerting "undue" influence because demonstrations of power like this undermine the legislative attempt to "place employees on a more equal footing with the employer."[37]

The second principle way in which the Free Speech provisions are limited is that they protect only employer expression that amounts to a "view" or "opinion." The B.C. Board noted recently that "a 'view' does not include acts taken in furtherance of those views."[38] In other words, a "view" is the expression of an opinion, thought, or belief, and it is does not include *methods* of communication. Thus, the act of handing out water bottles containing labels with text encouraging employees to reject unionization is not protected employer speech because it is neither a "view" nor an "opinion."[39] The point is that the Free Speech provisions in Canadian labor legislation protect only the *content* of employer speech, not the *methods* of communication. Therefore, if a CAM "interferes" with the formation or selection of a union, then it is unlawful, regardless of the content of the speech made at the meeting.

III. THE REGULATION OF CAMS AND FORCED LISTENING IN CANADIAN LABOR LAW

An examination of the treatment of CAMs in Canadian labor law requires us to look at both the Canadian Charter of Rights of Freedoms[40] and the interpretation of labor legislation to CAMs by labor boards. I will review both in this Section, with the Charter reviewed first.

Services Ltd., B.C. Ind. Rel. Council No. C90/1987 (at 17) for a statement of the B.C. Board's interpretation of "undue influence" prior to its repeal:

> In my opinion, undue influence is a species of intimidation. It may be distinguished from the more direct form of equally coercive pressure by a certain subtlety of application. Its effectiveness is perhaps enhanced by this characteristic. The Legislators have clearly stated that the use of such a weapon by an employer has no place in the industrial relations arena.

37. *K*-Mart Canada Ltd, *id.;* Wal-Mart Canada, *supra* note 33.

38. Excell, *supra* note 20, ¶ 41.

39. RMH, *supra* note 25, ¶ 68. *See also* UNA v. Alberta Healthcare Ass'n., Alta. L.R.B.R. 373 (1995) (the act of taking a poll or survey of employees is not the expression of a "view," which includes only the "direct expression of an opinion.").

40. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sch. B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

A. CAMs, Forced Listening, and the Charter of Rights and Freedoms

Both freedom of expression (Section 2(b) of the Charter) and freedom of association (Section 2(d)) are constitutionally protected in Canada.[41] As a result, in regulating employer behavior during organizing campaigns, the state is inevitably drawn into a balancing act pitting expression rights against association rights.[42] The Charter applies directly only to government action, including the state's law-making function and its actions as an employer. Canadian governments have elected to defer the decision as to whether CAMs are lawful to labor boards by declining to include any reference to them in the labor legislation. As a result, the responsibility for deciding upon the legality of these meetings has fallen to the various labor boards, interpreting the two types of provisions discussed in Section II of this paper.

A decision by a labor board that CAMs are prohibited by legislation could be challenged by an employer as an infringement of its freedom of expression. This is the most obvious way in which the Charter would be engaged in relation to employer CAMs. Alternatively, an employee (or union) that wants to engage the Charter as a *defensive* mechanism, to prevent their employers from holding CAMs, faces a more complex legal scenario. They need to identify both (1) the existence of state action and (2) a *Charter* right that is infringed when employees are required to attend CAMs. Both possibilities are explored in this section.

1. Are Employer CAMs During Union Organizing Campaigns Constitutionally Protected?

a. Bank of Montreal: The Early Charter Years

Canadian courts have not yet dealt directly with the question of whether freedom of expression protects a right of employers to compel employees to listen to anti-union messages in a CAM. One reason for this is that all but one of Canada's labor boards have ruled that CAMs are lawful, so that the issue of whether the state can prohibit this activity has not often arisen. The Federal Board is the lone exception. As previously noted, it treats CAMs as a violation of

41. Charter, *id,* section 2: "Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion, and expression, including freedom of the press another media of communication . . . (d) freedom of association."

42. *Cardinal/Klassen, supra* note 18, ¶ 137.

the "No Interference"[43] provision of the Federal Canada Labour Code.[44] That interpretation was challenged at the labor board level as a violation of employers' freedom of expression in *Bank of Montreal*, a case decided in the very early years of Canada's Charter, before the Supreme Court of Canada had developed its current framework for assessing Charter claims.

The Federal Board ruled that banning CAMs during union organizing campaigns does infringe employers' expression rights, but that the restriction was demonstrably justified and a reasonable limit within the meaning of section 1 of the Charter.[45] In explaining why the ban on CAMs was justified under the Charter, the Board objected to the "forced listening" aspect of CAMs both because it gives employers an "unfair advantage" over unions and their employee supporters and because employees have a "right" not to listen to their employers' views on unionization, just as they have a right not to listen to the union's views:

> In the present context what we are faced with is employees who, in a practical sense, are given no real opportunity to decide whether they want to hear the employer's message about unions. The economic power of the employer puts it in a position to compel an audience. The purpose of making a captive audience meeting an unfair labor practice is to remove that leverage. It is appropriate to remove that leverage from the employer not only to preserve the free choice of the employees, but also because to do nothing gives the employer an unfair advantage. Those with a competing message, i.e. the unions, are in no position to secure a [CAM]. By itself, the captive audience doctrine does no more than equalize the position of employers and unions.
>
> The above analysis applies no matter what the specific content of what might be said at a captive audience meeting. . . The issue is not whether the message itself is constitutionally protected. . . *The point is that the employee has a right to choose whether or not to listen to anything the employer has to say about unionization just as the employee has the right to decide whether or not to listen to anything a union has to say about unionization*.[46]

The Board's decision in *Bank of Montreal* has not been reviewed by the courts, and the federal ban on CAMs continues today.

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43. Section 184(1)(a) of the Canada Labour Code read: "No employer and no person acting on behalf of an employer shall: (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union."

44. *Bank of Montreal, supra* note 23.

45. *Id.* ¶ 75. See *Cardinal/Klassen, supra* 18, ¶¶ 215–91 for an additional treatment of section 2(b) and § 1 in the context of labor law restrictions on employer speech.

46. *Bank of Montreal, supra* note 23, ¶¶ 73–74.

b. Section 2(b) or Section 1 of the Charter: Where Do CAM's Fit?

In the years following *Bank of Montreal*, the Supreme Court developed a more systematic framework for dealing with Charter cases.[47] In short, the Court deals first with whether state action has infringed or restricted Charter rights or freedoms. If it has, then the court considers whether that infringement is "saved" by Section 1 of the Charter. The Section 1 analysis requires the Court to engage in a balancing of rights and state objectives applying a "proportionality test" to decide if the infringement is "demonstrably justified in a free and democratic society."[48]

The cases to date that have considered restrictions on employer speech during organizing campaigns have treated the restrictions as an infringement on the employer's Section 2(b) rights. However, the restrictions have then been "saved" by Section 1. This approach is consistent with the typical analysis of courts in freedom of expression cases more generally: courts have interpreted the scope of expression protected by section 2(b) broadly to include any activity that "conveys or attempts to convey meaning," unless violence is involved.[49]

So, for example, in *Cardinal/Klassen*, the B.C. Board ruled that statutory restrictions on the *content* of employer speech infringe the employer's section 2(b) freedom of expression, but that the restrictions were justifiable under Section 1 of the Charter.[50]

47. The Charter came into effect on April 17, 1982. In the seminal decision, R. v. Oakes, 1 S.C.R. 103 (1986), the Supreme Court established the framework for analyzing whether violations of Charter rights or freedoms are "saved" by Section 1 of the Charter, which reads 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.

48. In *Oakes*, *id.,* the Court the explained that Section 1 requires the application of a proportionality test in several steps that can be summarized briefly as follows: (1) Do the objectives of the legislation related to a pressing and substantial concern; (2) If so, then are the means chosen to obtain the objective reasonably and demonstrably justified, a question that requires an analysis of three sub-questions: (a) Are the means rationally connected to the objectives?; (b) Do the means impair freedom as little as possible?; and (c) Are the deleterious effects of the infringement proportional to the objectives of restriction? The leading decision on freedom of expression under the Charter is Irwin Toy Limited v. Quebec (A-G), 1 S.C.R. 927 (1989). See *Cardinal/Klassen, supra* 18, ¶¶ 215–91 for an additional treatment of section 2(b) and § 1 in the context of labor law restrictions on employer speech. For a discussion of the treatment of expression rights under the Charter, see, e.g. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA ch. 43 (5th ed. 2007); Richard Moon, *Out of Place: Comment on Committee for the Commonwealth of Canada v. Canada*, 38 MCGILL L.J. 204 (1993).

49. *Irwin Toy, id.,* 968. See discussion in Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights,* 40 OSGOODE HALL L.J. 337, 344 (2002)

50. *Cardinal/Klassen, supra* note 18 *See also* Wal-Mart Canada Corp. v. Sask. (Labour Relations Board), 251 Sask. Rep. 114 (Sask. Q.B.) reversed, (2004), 247 D.L.R. (4th) 30 (Sask. C.A.), in which the Court of Appeal noted in *obiter* at paragraph 53 that "there is strong

Although the Board did not consider CAMs specifically, it did conduct a thorough Charter analysis of the balance between the state's objective in protecting the right of workers to organize and the expression rights of employers. It found that restrictions on employer speech during the relatively condensed period of an organizing campaign represent a limited infringement of employer expression that is justified in balancing the competing right of "vulnerable" employees to exercise their Charter freedom of association.[51]

It is possible for otherwise protected expression to lose its protected status, thereby falling outside of the very expansive scope of section 2(b). In a recent decision, the Supreme Court ruled that otherwise protected expression ceases to be protected if the "method" of expression undermines the core values that the section was intended to protect, namely, democratic discourse, truth finding, and self-fulfillment.[52] Thus, violent expression is not protected by section 2(b) because "the *method* by which the message is conveyed is not consonant with *Charter* protection."[53] The Court explained:

> Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(*b*) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(*b*) because violent means and methods undermine the values that s. 2(*b*) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it.[54]

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argument that [statutory restrictions on employer speech are] saved by s. 1 as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society, by virtue of sound policy reasons, long accepted in the labor law of this country, for its continued existence."

51. *Id.* ¶ 283.

52. Montréal (City) v. 2952-1366 Québec Inc., 3 S.C.R. 141 (considering whether expression projected onto public streets by a loud-speaker inside a private club is protected speech). *See also*, Canadian Federation of Students (British Columbia Component) v. British Columbia (Greater Vancouver Transportation Authority), 266 D.L.R. (4th) (B.C.C.A.) (2006). Leave to Appeal Granted, S.C.C.A. No. 52 (2007) (whether advertising on the outside of public buses is protected speech); and CanadianForest Products Ltd. (Re), [2006] B.C.L.R.B.D. No. 312 at ¶ 277 (picketing with placards is not a method of expression that loses its section 2(b) constitutional protection):

> In *City of Montreal*, the method was a speaker broadcasting outside the building. In *CFS*, it was advertising on the outside of buses. In the case before me, it is people holding placards. There is nothing about that method of expression that would disqualify it from protection under Section 2(b).

53. *Id.* ¶ 60.

54. *Id.* ¶ 72. *See also* HOGG, *supra* note 48, 43.11.

Therefore, the Supreme Court requires a distinction be made between the content and method of expression. The message may be protected while the method is not if it is inconsistent with Charter values.

This approach casts some doubt on whether employer expression through the method of the CAM is protected expression under section 2(b). The principle difficulty with employer CAMs during union organizing campaigns is that employees are compelled by virtue of the power imbalance inherent in the individual employment contract model to listen to opinions with which they may not agree and that may personally offend them.[55] As will be discussed in the next part, Canadian courts have recognized a "constitutional aversion" to expression in the form of forced listening in contexts outside of the workplace because this form of expression is in fact not "free" but coercive.[56] Within the section 2(b) analysis, therefore, the question becomes whether the employer CAM, as a method of communication, is inconsistent with the core values underlying the Charter protection of freedom of association. If a court accepts that CAMs are exploitive of vulnerable employees and represent forced listening, then it must follow that CAMs undermine rather than advance democratic values, the pursuit of truth, and personal self-fulfillment.[57]

It remains to be seen whether this argument will be advanced by employees or unions in the future, and if so how courts will respond to it. Certainly, while the argument has some attraction, the tendency remains strong in Canada to sweep virtually all forms of expression within section 2(b), and then to deal with the justification for state limitations on that expression within a Section 1 analysis.[58] Space

55. This is not the only difficulty with employer CAMs. Another is that the union has no comparable opportunity to address workers at the workplace, so that the law permitting CAMs bestows a significant imbalance of communicative access on employers relative to unions.

56. *See* Attorney General of Ontario v. Dieleman et al.; Torcan Women's Reproductive Health Clinic et al., Intervenors, 20 O.R. (3d) 229 (Ont. Ct. Gen. Div.) (1994); Committee of Commonwealth of Canada v. Canada, 1 S.C.R. 139 (1991).

57. The Federal Labour Board in *Bank of Montreal*, *supra* note 22, ¶ 70, foreshadowed this argument when it wrote:

> It is self-evident that the use of physical force to compel someone to listen would not raise even a *prima facie Charter* argument. Less drastic forms of compulsion, which happen to make use of speech, should be no more worthy of constitutional protection.

58. For example, courts and labor boards have accepted that picket lines convey a powerful "signaling effect" that is independent from the actual content of arguments presented on placards and leaflets. The signaling effect can cause workers (and sometimes customers, suppliers, etc.) to engage in "irrational" behaviour, such as respecting the picket line and thereby breaching contracts. The Supreme Court has noted that the signaling effect renders some picket lines "coercive," even if the content of speech made on the picket line is not. Nevertheless, courts and labor boards have treated the picket line as a form of expression that is protected by section 2(b), notwithstanding its potentially coercive nature. Restrictions on "signal effect" picketing have been found to be justified under section 1 of the Charter. *See*, *e.g.*, discussions in

considerations prevent here a complete analysis of all of the various arguments and issues that could be raised in a section 1 analysis of a prohibition on CAMs. It is worth noting though that the Supreme Court has traditionally afforded wider latitude to regulation that restricts the "time, place, and manner" of expression rather than the content of expression,[59] and it has tended to defer to legislative discretion in expression cases that involve a balancing of the interests of competing groups.[60] It has also indicated that expression rights are contextual, so that expression that threatens "vulnerable" groups may be deserving of less constitutional protection.[61]

In addition, the Supreme Court has recently bolstered and expanded the scope of protection offered by Section 2(d) freedom of association. In a surprising decision that overturned nearly two decades of precedent, the Court ruled in *Health Services* that freedom of association includes not only the right to form and join unions, but also to engage in collective bargaining in good faith with employers.[62] The Court wrote that collective bargaining "enhances the dignity, liberty, and autonomy of workers" as well as advances the goals of "equality" and "democracy."[63] These are lofty achievements, and the Court has noted that the protection of freedom of association requires a supportive regulatory framework that recognizes the vulnerability of employees in the employment relationship and the resulting potential for employers to interfere with employees' ability to exercise their rights.[64] In this judicial climate, there is good reason to believe that a

United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. K-Mart Canada Ltd., 2 S.C.R. 1083 (1999), ¶¶ 40–43; Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 1 S.C.R. 156 (2002), ¶¶ 93-100; Re Canadian Forest Products Ltd., B.C.L.R.B.D. No. 312 (2006), ¶¶ 270–79.

59. HOGG, *supra* note 48, 43.19

60. *Irwin Toy, supra* note 48, at 990; MOON, *supra* note 49, at 347.

61. Thomson Newspapers v. Canada (A.G.), 1 S.C.R. 877, 942-43 (1998).

62. *See also* Health Services and Support Facilities Subsector Bargaining Assn. v. B.C., 283 D.L.R. (4th) 40 (S.C.C.) (2007).

63. *Id.* ¶¶. 82–85.

64. *See* Dunmore v. Ontario (Attorney-General), 207 D.L.R. (4th) 193 (S.C.C.) (2001), where the Court ruled that the Ontario government violated the Section 2(b) association rights of certain classes of employees (including agricultural workers) by excluding these employees from the Ontario Labour Relations Act. The Court ruled that the exclusion "substantially interfered" with the freedom of association of these workers because, without the protection of the statute's unfair labor practice provisions, employer interference, or the fear of it, effectively prevented these vulnerable employees from exercising their association rights. For commentary on *Dunmore*, see Peter Barnacle, *Dunmore Meets Wilson and Palmer: Interpretation of Freedom of Association in Canada and Europe*, 11 CAN. LAB. & EMP. L.J. 205 (2004) and papers in Volume 10 CAN. LAB. & EMP. L.J. (2003), *Special Issue on Labour Law and the Charter.* See also the recently released decision *Health Services*, ¶ 82, where the Court noted that states should support collective bargaining because it "enhances the human dignity, liberty, and autonomy of workers by giving them the opportunity to influence the establishment of

legislative prohibition on employer CAMs during union organizing campaigns would be upheld under a Section 1 analysis.

2. Do Employees Have a Constitutional Right Not to be Subjected to "Forced Listening" to their Employer's Anti-Union Opinions?

Of course, the fact that governments likely *could* ban CAMs does not mean they are lining up to do so. Nor does the fact that the Charter likely does not protect a right of employers to convene CAMs to proselytize anti-union opinions mean that employers are prohibited from holding them. Thus, for the unions and the employees who are forced to attend these employer meetings, the Charter has provided little protection. Those who wish to access the Charter as a means of challenging the practice of employer CAMs in Canada face two legal hurdles. First, they need to identify a Charter right that is infringed by being forced to listen to employer opinions in a CAM. Second, they need to link that infringement to an act of government, since the Charter governs only state action.

For the purposes of addressing the first hurdle, assume for the moment that we are dealing with the state as employer. This avoids the public-private distinction. We can then ask the question: From a constitutional perspective, can the state (as employer) compel its employees to attend a CAM to listen to anti-union expression by employer representatives? The answer must be in the affirmative, unless the employees can show that they have a Charter right protecting them from this form of compulsion.

One candidate is the *employees'* freedom of expression. Canadian courts have noted that freedom of expression in Canada does not include a right to an audience or to force others to listen, and have suggested that freedom of expression includes a right not to be compelled to listen. For example, in a case in which the state sought an injunction restricting anti-abortion picketing, Justice George Adams, coincidently one of Canada's leading labor law scholars, explained:

> It has also been held that freedom of expression assumes an ability in the listener not to listen but to turn away if that is her wish. The *Charter* does not guarantee an audience and, thus, a constitutional right to listen must embrace a correlative right not to listen.[65]

workplace rules and thereby gain some control over a major aspect of their lives, namely their work."

65. *Dieleman et al., supra* note 56, para. 122.

Justice Adams explained that the rationale for the "constitutional aversion to captive audiences" is that:

> forced listening "destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms": see Black Jr., *He Cannot Choose But Hear: The Plight Of The Captive Auditor* (1953), 53 Columbia L. Rev. 960 at p. 967. Free speech, accordingly, does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question.[66]

Justice Adams ruled that expression in the form of picketing at the homes of doctors constituted the common law tort of nuisance, and a court-ordered ban on this form of expression, while limiting the picketers' expression rights, was nevertheless demonstrably justified under section 1 of the Charter and therefore not a violation of the Charter. Citing with approval the U.S. Supreme Court decision in *Frisby v. Schultz*,[67] he ruled that people are, in a practical sense, captive in their homes and entitled to protection from expression targeting them there.

In *Committee for the Commonwealth of Canada*, the Supreme Court of Canada considered a legislative ban on canvassing in public airports.[68] Justice L'Heureux-Dubé cited with approval the American decision, *Lehman v. Shaker Heights (City)*,[69] and she contrasted physical public spaces such as parks and streets with enclosed environments like buses and airplanes. Whereas in the former, people have the ability to avoid the speech by walking away or diverting their eyes, in the latter, people are "captive" listeners. In ruling that expression in public airports should be protected under section 2(b) of the Charter, Justice L'Heureux-Dubé wrote:

> People who find certain political expression unpleasant or disquieting in a park or on a street can easily move elsewhere. On planes the costs of premature exit are too high. However, bus stations and airports have much more in common with streets and parks than they do with the buses or airplanes which they service. These locations are "contemporary crossroads" or "modern

66. *Id.* ¶ 169.

67. 487 U.S. 474 (1988) (ban on picketing in front of residential homes permissible because residents are captive).

68. Committee of Commonwealth of Canada, *supra* note 56.

69. 418 U.S. 298, 306 (1974): "In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."

> thoroughfares", and thus should be accessible to those seeking to communicate with the passing crowds. [70]

Neither *Dieleman* nor *Committee for the Commonwealth of Canada* concludes affirmatively that a "negative" right to expression—a right not to be compelled to listen—is protected by the Charter. However, the inference is there, and certainly the cases are authority for the proposition that expression through the medium of forced listening is worthy of little constitutional support.

There can be little debate that employees are "captive" in mandatory meetings called by their employers during working hours in the same sense that passengers are captive in the plane and bus examples and people are captive in their homes. People can always choose not to fly, take buses, or lounge at home, but the law recognizes that people will sometimes need to do these things and that they should not have to stop doing them to avoid another's expression. It is a practical compulsion we are dealing with, rather than physical compulsion in the form of bars and chains. In the case of employees, the compulsion comes in the form of economic dependence and vulnerability. People need to work, and to borrow the words of Justice L'Heureux-Dubé, the costs to an employee of defying their employer's instruction to attend a meeting and listen "are too high" for most employees to risk.[71] The analogy between the captive bus and plane passenger and the employee is particularly compelling.

Nevertheless, in the United States, the NLRB and the courts have refused to recognize a right of employees to be free from

70. Committee of Commonwealth of Canada, *supra* note 55, at 205. *See also* Canadian Federation of Students v. Greater Vancouver Transportation Authority, 275 D.L.R. (4th) 221 (B.C.C.A.) (2006) (distinguishing advertising on the outside of buses from communications inside buses on the basis that the public who see the advertisements on the outsides of buses are "not a captive audience").

71. I could not locate any Canadian case in which an employee was disciplined or discharged for leaving or not attending an employer meeting at which unionization was discussed. My own sense is that Canadian labor boards would be more suspicious of an employer who engaged in this type of behavior than has been the NLRB, which has upheld the right of employers to dismiss workers who have left a CAM or who have dared to ask the employers' questions at the meeting. *See*, *e.g.*, NLRB v. Prescott Indust. Prod. Co., 500 F.2d 6 (8th Cir. 1974); Litton Sys. Inc., 173 N.L.R.B. 1024 (1968). I think it likely that Canadian labor boards would infer an anti-union motive if an employee was suddenly singled out for non-attendance at an employer meeting during an organizing campaign. (But see Baptist Housing, B.C.L.R.B. Dec. 406/99 (1999), where the B.C. Board suggested that employers could discipline employees for refusing to attend usual departmental business meetings). Nevertheless, most employees would not risk testing this law by challenging their employer's order to attend the meeting.

coerced anti-union speech by their employer during union organizing campaigns.[72] As Alan Story has observed:

> Outside the employment setting, a long list of Supreme Court and courts of appeal cases has recognized that speeches delivered to captive audiences are generally undeserving of First Amendment protection. In such cases, determining whether an audience is "truly captive" is often the threshold inquiry; an audience often has an option other than listening. But once a finding of "captivity" is made, the danger of giving constitutional protection to such speeches has been clearly recognized by the Court. . . . The conclusion: speech to a captive or coerced audience is not free speech, it is coercive—and hence unprotected—speech. Within the confines of labor law doctrine, however, the foregoing is ignored.[73]

Andrias makes the same point, arguing that the law allowing employer CAMs "is inconsistent with First Amendment doctrine in other contexts."[74]

There is no Canadian decision, at the labor board or court level, dealing directly with the question of whether there is a Charter right not to be subjected to forced listening to employer opinions about unions while at work. It is true, of course, that employers routinely require employees to attend meetings to discuss any number of work-related matters, and that employees are expected, as part of their implied or expressed terms of employment, to attend those meetings.[75] However, there is an important difference between a common

72. In Thomas v. Collins, 323 U.S. 516 (1945), the U.S. Supreme Court declared that the First Amendment expression rights protected the right of employers to campaign against unions. Four years earlier, in NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941), the Supreme Court ruled that the NLRB's policy requiring employer neutrality violated the First Amendment. In 1958, the U.S. Supreme Court ruled that employers have the right to require employee attendance during working hours to listen to employer anti-union speeches. NLRB v. USWA, 357 U.S. 357 (1958). For treatment of captive speech in the American employment context, see, e.g., Paul Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2007); Alan Story, *Employer Speech, Union, Representation Elections, and the First Amendment*, 16 BERK. J. EMP. & LAB. L. 356, 414–22 (1995); Kate Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415 (2003); Elizabeth Masson, *Captive Audience Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage,* 56 HASTINGS L.J. 169, 188 (2004–05); Mary Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991). On captive audience speech more generally, see Charles Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960(1953).

73. Storey, *id.*, at 415–16.

74. Andrias, *supra* note 72, at 2439 n.117. *See also*, Masson, *supra* note 72, at 187.

75. *See*, *e.g.*, *Baptist Housing Society of B.C., supra* note 71, where the B.C. Labour Board noted the following in regards to meetings called by employers to discuss business matters unrelated to union activity (at ¶ 233): "Employers have the right to continue to communicate directly with employees on a day to day basis with regard to operational and business matters which includes the calling of compulsory departmental meetings for the purpose of discussing departmental business. Indeed, an employee's refusal to attend such a departmental meeting would generally amount to grounds for discipline."

employer meeting to discuss sales figures and a highly unusual meeting, the sole purpose of which is to compel employees to listen to the employer's opinions as to why the employees should not exercise their fundamental right to support collective bargaining, or why they should support one religion over another, to give another example. In the latter examples, the employer is exploiting its power over workers to influence the exercise by the employees of their Charter rights.

An employer speech made in a CAM that addresses religious views raises similar concerns to the use of CAMs to proselytize anti-union opinions. An employer that compels its employees to listen to Christian sermons at work, for example, would likely be in violation of Canadian human rights legislation that prohibits religious discrimination and harassment.[76] If that employer was the state, then there is a strong argument that the forced religious sermons would infringe the employees' freedom of religion under the Charter.[77] Employers have a right to express their opinions about religion, but when they use their power over workers to compel employees to listen to these opinions, they may cross the line and infringe upon their employees' rights to choose their own religion and the right not to be subjected to forced listening.[78]

A similar analysis might apply to employer speech about unionization and collective bargaining. Just as employees have a right to choose their own religion, or to choose no religion at all, they also have a constitutional right to choose to join a union, to choose among

76. *See*, *e.g.*, Dufour v. J. Roger Deschamps, 10 CAN. HUMAN RIGHTS REP. D/6153 (1989), where an Ontario human rights tribunal found that the employer's use of posters, stickers, and dialogue in both personal and group meeting formats to convey religious opinions amounted to illegal religious harassment under the Ontario Human Rights Code, 1981 S.O., c. 53.

77. *See*, *e.g.*, Zylberberg v. Sudbury Board of Education, 65 O.R. (2d) 641 (C.A.) (mandatory Christian prayer in schools violates the freedom of religion of non-Christian students, even though the regulation conferred a right on students to not participate, and the infringement was not saved by section 1).

78. An employer that uses its power in the workplace to proselytize opinions that an employee finds offensive may also be found to have committed a fundamental breach of the employment contract. Courts have ruled that when an employer engages in conduct that makes continued employment "intolerable" for an employee, the employee is entitled to quit and claim damages "constructive dismissal." *See*, *e.g.*, Shah v. Xerox, 49 C.C.E.L. (2d) 166 (Ont. C.A.) (2000). A constructively dismissed employee is entitled to recover damages in lieu of the "reasonable notice" the employer was required to give prior to dismissal. Canadian courts have also recently developed an implied term in employment contracts requiring employers to treat their employees with "decency, civility, respect, and dignity." There is a good strong argument that forced listening of employer opinions offensive to the employees could also breach this term of the contract. See, generally, discussion in See also the discussion of this subject in David J. Doorey, *Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts,* 34 QUEENS L.J. 500 (2005).

unions, or to choose not to join any union.[79] By compelling employees to listen to their arguments against unionization, employers are arguably interfering with both the workers' freedom of association and freedom of expression (if it includes the right not to be compelled to listen to their employers' opinions).

However, Canadian courts have not yet considered this argument. Nor is there reason to expect they are likely to any time soon. The reason is that, as noted earlier, the Charter applies only to government action, and since CAMs are not a requirement of regulation, there is no "law" to challenge directly, unless the employer is the state. Most of the time, CAMs are convened by private sector employers operating within provincial jurisdiction. The Charter does not apply directly to the actions of these employers. Therefore, while there is a decent argument that the Canadian Charter protects employees against forced listening of anti-union opinions by their employers through the format of CAMs, most employees nevertheless are unable to access that protection.

B. CAMS and Forced Listening Under Canadian Labor Legislation

However, this does mean that Charter values are irrelevant to the issue of whether private sector employers ought to be permitted to hold CAMs. As we saw in Section II, labor boards in Canada have the statutory tools to ban CAMs in the form of the typical "Interference Prohibition" provisions that exist in every jurisdiction. CAMs might also amount to employer "intimidation" or "coercion," which is also prohibited in every jurisdiction.[80] Thus, whether CAMs are legal or not depends upon the exercise of labor board discretion in interpreting the labor statutes. This task does not take place in a vacuum. It must be informed by the values that guide the laws of the land. Chief Justice McLachlin wrote recently that labor "[p]olicy itself should reflect Charter rights and values."[81] A corollary of this is that labor boards must assume that governments intend their policies to be consistent with *Charter* values and therefore interpret labor statutes in a manner that reflects its values.[82] In short, *Charter* values serve as an aid to the interpretation of labor policy and labor statutes in Canada.

79. *Dunmore, supra* note 64; *Health Services, supra* note 62; Lavigne v. Ontario Public Service Employees Union, 2 S.C.R. 211 (1991); R. v. Advance Cutting & Coring Ltd., 3 S.C.R. 209 (2001).

80. *See*, *e.g.*, OLRA, *supra* note 15, § 76.

81. *Health Services, supra* note 62, ¶ 26.

82. *See*, *e.g.*, Slaight Communications Inc. v. Davidson, 1 S.C.R. 1038, 1078 (1989) (per Justice Lamer "it is impossible to interpret legislation conferring discretion as conferring a

It is necessary to ask then whether current labor board approaches to the governance of employer CAMs during union organizing campaigns is consistent, not only with a model of sound labor policy, but with *Charter* values as expressed in recent judicial decisions exploring freedom of association and freedom of expression, including the judicial disapproval of expression presented to "captive" audiences. These are the key questions for the remainder of this paper. We need first to examine more closely how Canadian labor boards presently treat employer CAMs during union organizing campaigns.

1. "Captive" or "Voluntary"?

It is useful to note as an introductory matter that there is some debate in the Canadian labor board jurisprudence about whether all meetings called by an employer to discuss unionization are "captive," as opposed to voluntary. When employee meetings are a common occurrence, so that employees would not perceive anything unusual about them, labor boards may be more inclined to find they are voluntary.[83] However, most Canadian labor boards have rejected the argument that employer meetings called to discuss an organizing campaign cease to be "captive" simply because the employer has given employees the option of leaving or not attending at all. The reason why is explained in one of the country's leading labor texts as follows:

> It is of no avail for the employer to claim that employees are free to leave such a meeting, because an employee with average conviction would probably be disinclined to reveal sympathy for a union, which a departure would imply.[84]

power to infringe the *Charter.*"). See also *RMH, supra* note 26, ¶¶ 38–40, and analysis in HOGG, *supra* note 48, at 37.13 ("Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations . . . decisions and all other action (whether legislative, administrative, or judicial) which depends for its validity on statutory authority.") The Supreme Court has similarly ruled that the common law must be developed in a manner consistent with the Charter, even when the litigation involves a private dispute. RWDSU v. Dolphin Delivery Ltd., 2 S.C.R. 573, 603 (1986). See also, *Dieleman et al*, *supra* note 55, at 285.

83. *See Baptist Housing*, *supra* note 70, ¶ 216.

84. GEORGE ADAMS, CANADIAN LABOUR LAW 10–48 (2d ed. 2007). *See also* Bell v. Howell, OLRB Rep. Oct. 695 (1968), ¶ 17:

> In our opinion, [the employer's] "request" that employees attend the meetings amounted to an order. It is doubtful that any employee felt they had a choice in the matter. . . . [O]nly an employee of unusual conviction or fortitude would have had the temerity to leave the meeting the circumstances in which the "permission" to

On the other hand, labor boards in various jurisdictions have occasionally accepted the employer's argument that their meetings were truly voluntary.[85]

Of course, the fact that there is a debate about whether a meeting is "captive" or not implies that the fact of compulsion itself matters. Employers that seek to avoid the brand of "captivity" in relation to their meetings are implicitly acknowledging that there is something distasteful or unsavory, if not improper, about compelling employees to listen to their opinions. However, while employers will often argue that their meetings were not "captive," they usually also assert in the alternative that it is their right to hold their employees "captive" during working hours in any event. Most Canadian labor boards have tended to accept this argument.

2. CAMs and Forced Listening Threaten Employee Free Choice

Presumably, the right of an employer to compel employees to stop working and attend a meeting to listen to it proselytize about unions and collective bargaining flows from the implied common law right of employers to manage the workplace. This is an implied contractual right historically intended by the courts to institutionalize employer power over employees and employee subordination to the will of her employer.[86] It is accompanied by an implied duty on the part of employees to obey the employer's orders. Therefore, the employer's implied right to convene CAMs is at once an expression of employer power and a reminder of employee subordination.

It is generally recognized in Canadian labor law that employees experience heightened sensitivity to signals transmitted by their employers during union organizing campaigns. The B.C. Board set out this position recently as follows:

> do so was given. The average employee naturally would be inclined to attempt to conceal from management his or her support or sympathy for the applicant [union].

See also *Bank of Montreal*, *supra* note 23, ¶ 49 (meeting not voluntary, even though it took place after work hours and employees were told they were not required to stay); *Cardinal/Klassen, supra* note 17, ¶ 155 ("Employees usually do not fail to attend these meetings; nor do they leave such meetings even when 'free' to do so, for fear that either not attending, or to be seen leaving, will betray their support for the union.").

85. *See*, *e.g.*, *RMH*, *supra* note 25; Greb Industries Inc., OLRB REP. FEB. 89 (1979); Catfish Calhoun, OLRB REP. NOV. 1551(1981).

86. *See*, *e.g.*, PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (3d ed. 1983) ("economic purposes cannot be achieved without a hierarchical order within the economic unit. There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'."). *See also* ALAN FOX, HISTORY AND HERITAGE: THE SOCIAL ORIGINS OF THE BRITISH INDUSTRIAL RELATIONS SYSTEM (1985).

> In assessing an employer's conduct, the Board takes into account the nature of the relationship of employees with their employer recognizing the susceptibility of employees to be influenced by employer's conduct. Higher scrutiny is required in the case of a union organizational campaign as employees are likely to be particularly sensitive to management intervention. The Board recognizes employees' vulnerability to employer influence because of the position of economic dominance enjoyed by the employer and the disproportionate power derived from the control an employer has over employment terms. . . . What may appear otherwise benign can take on another colour given the high degree of influence an employer has on employees with its control over their livelihood.[87]

With this in mind, many Canadian labor board decisions have noted the troubling affinity between the heightened vulnerability of employees during the period of a union organizing campaign and the use of CAMs. As Adams has noted, "[B]ecause of the employer's dominant economic position, [CAMs] provide a very effective forum for influencing the employees' exercise of their statutory rights."[88] Indeed, so common are expressions of concern over the potential adverse impact of CAMs on employee free choice uttered by Canadian labor boards that it is one of the most peculiar aspects of labor law in this country that they are permitted at all.

The B.C. Labour Board has written that it "prefers" employers to use written forms of expression rather than CAMs to dissipate the "emotional impact" of a CAM and alleviate concerns that CAMs amount to "undue influence."[89] According to the B.C. Board, "compelled or forced listening raises serious concerns regarding employee free choice in the issue of unionization."[90] Despite acknowledging these concerns, the B.C. Board nevertheless permits employers to convene CAMs.

The Ontario Board also permits employer CAMs, but it similarly has often noted that CAMs are nevertheless troubling. It looks

87. *Excell*, *supra* note 20, V 71. There are many other examples. An often quoted one is *Pigott Motors, supra* note 32, 1131: "In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious and devious, which may operate to impair or destroy the free exercise of his rights under the [Labour Relations Act]"

88. ADAMS, *supra* note 84, at 10–58. *See*, *e.g.*, Marussa Marketing, M.L.B.D. No. 11 (2001), ¶ 33; Griffith Guitars, N.L.L.R.B.D. No. 6 (2004), ¶ 68; Chaleur Sawmills, New Brunswick L.E.B.D. No. 59 (1995) (noting at paragraph 5 that subtle threats and coercion are "nearly inevitable within the context of a (CAM).").

89. *Cardinal/Klassen*, supra note 18, ¶ 208. *See also Excell*, *supra* note 20, ¶ 79 (circulation of written material is the preferable mode (of employer expression). The choice of written text is less intrusive than [CAMs] or private discussions with employees.").

90. *RMH*, *supra* note 25, ¶ 58.

"askance" at employer CAMs because employees "who are required to attend a meeting may readily conclude they are expected to adhere to the employer's views stated there," and because employees "are not free to refuse to listen to the employer in this forum, whereas in our society freedom of speech is generally counterbalanced by freedom not to listen."[91] The OLRB concluded in one case that a CAM delivered to workers who may not have understood the content of the employer's message because of a language barrier would nevertheless have transmitted the employer's anti-union message because of the obvious urgency conveyed by the sudden meeting at which three senior management officials were in attendance.[92]

The clear inference in these decisions is that CAMs transmit a powerful signal to employees that is distinct from the content of the message delivered. The labor boards are acknowledging that this signaling power potentially undermines the ability of employees to freely choose whether to support collective bargaining. Since one of the essential roles of labor law is to protect this right of employee free choice against employer interference, it seems incongruent to permit employers to convene CAMs during organizing campaigns. Yet, as noted, all but one of Canada's labor boards allow CAMs, while they simultaneously acknowledge the threat CAMs pose to employee free choice.

The reasons for permitting CAMs when they "raise serious concerns" about the exercise of employee free choice are never adequately explained by Canadian labor boards. Indeed, often the efforts of labor boards to reconcile their expressed distaste for CAMs with their consent for employers to convene them leads to legal distinctions and analysis that is difficult to follow. For example, the Ontario Board used to treat petitions in which employees purported to have reconsidered their prior support for the union as suspicious when they surfaced on the heels of an employer CAM.[93] The Board usually assumed that petitions originating after a CAM had been improperly influenced by the employer because "the very formality of

91. Vogue Brassiere Inc., OLRB Rep. Oct. 1737, 1757 (1983). See, similarly, Mittin Industries, OLRB REP. 154, 157 (1975) ("It is well known that the force of words depends upon the context in which they are made. If employees perceive that they are required to attend a meeting and listen to an employer speech, they may also perceive that they are required to adhere to the employer's views, either expressed or merely implied.")

92. Manor Cleaners Ltd, OLRB Rep. 1848, 1856 (1982) ("For those employees who could not understand all of the English spoken, a message was delivered by the fact of the meeting itself: it could not have been missed that a very important matter necessitated the all three owners of the plant meeting with the employees on such short notice.").

93. New Ontario Dynamics, OLRB Rep. 851 (1975). Since the legislation moved to a mandatory vote model, these petitions are no longer entertained in Ontario.

holding such meetings demonstrated the employer's concern," with the result that CAMs "convey anti-union sentiments regardless of content."[94]

Therefore, in the "petition" cases, the OLRB ruled that CAMs have a powerful signaling effect that is independent from the content of the message presented, and that this signal will usually taint subsequent expressions of employee wishes in the form of petitions against the union. However, when the voluntariness of a ballot or of union success in a membership card collection campaign is at issue, the OLRB focuses on the *content* of the employer's speech and not the medium through which that speech is presented.[95] Thus, in the case of anti-union employee petitions, the Board presumed that CAMs wrongfully interfered with employee choice (even if no threats or intimidation were uttered at the meeting), whereas in the union organizing campaign more generally the presumption was reversed.

3. The Contextual Color Approach

It is not easy to make sense of this sort of distinction. The most common approach to CAMs in Canadian labor law today is equally dubious. We can refer to it as the "Contextual Color" approach. Under this approach, CAMs are not unlawful *per se*, but comments made at a CAM may take on a different, more ominous character than employer expression made through other forms of communication. Thus, Canadian labor boards often assert that otherwise lawful employer comments can *become unlawful* when presented at a CAM. The CAM can color the content of the speech.

A typical example of this approach is the recent Manitoba Labour Board decision in *Marusa Marketing*.[96] It is useful to set out the passage at length:

> Employer meetings with employees raise additional issues related more to the manner of the communication. The [Board] must of course scrutinize the statements made at the meetings in the same way it would examine statements made in writing. . . . Such meetings, however, raise other issues which may render culpable otherwise innocuous statements. For example, otherwise innocent statements made by a company in a written form concerning its poor economic prospects may take on a more ominous aspect if the same statements are delivered by the employer in a compulsory

94. *Id.* at 851.

95. *See*, *e.g.*, ADAMS, *supra* note 84, at 10-58.1 ("It tends to be the content of the meeting which ultimately attracts the censure of labor boards.").

96. *Supra* note 87.

> employee meeting on company premises on company time, sometimes referred to as "captive audience meetings". To be clear, the mere fact of such meetings, whether completely voluntary or compulsory, does not contravene the legislation, but an employer who used this method of communicating to the employees during an organizational campaign is treading on very thin ice. For example, the more compulsion there is to attend and remain at the meeting, the more a panel is likely to infer that any negative statements made or any negative communicative conduct displayed would have had an impact on the employee adverse to the Union.[97]

This claim of mystical legalism whereby lawful, "innocuous" employer comments pass through the lawful medium of "forced listening" in a CAM and come out soiled at the other end involves some adjudicative slight of hand.

In fact, the CAM does not transform "otherwise innocuous statements" about "poor economic prospects" made during an organizing campaign into unlawful employer interference—the timing of the statement does that, regardless of the medium in which it is presented. What makes the "innocuous" statement in the example controversial is that it is made *during an organizing campaign*, and reasonably intelligent employees will not fail to make the link between the statement and the (likely intended) inference that unionization might be the last straw in the struggle to preserve customers. This link exists whether the statement is made in writing, in a CAM, or in a hip-hop song distributed in compact disc format.

The Board's concern about "compulsion" associated with the CAM is of course a legitimate one. But the compulsion and forced listening that is the *raison d'être* of the CAM is more than simply a contextual agent that colors the content of the speech. It is, rather, an independent expression of employer power and employee vulnerability. The power of employers to compel employees to stop working and to sit and listen to their anti-collective bargaining message is, as numerous Canadian labor boards have noted, a highly unusual power in a democratic society in which forced listening is usually considered repugnant.[98] There are few other examples in a democratic society in which adults are compelled to listen to the opinions of another. This is what makes the employer CAM so distinctive and why it is such a useful and powerful medium for

97. *Id.* ¶ 51. *See also* Cardinal/Klassen, *supra* note 17, ¶ 212 ("Statements that would otherwise be permissible may, in the context of a [CAM], be impermissible.").

98. *See* Vogue Brassiere Inc., *supra* note 91, at 1757; RMH, *supra* note 25, ¶ 58; Bank of Montreal, *supra* note 22, ¶ 69–74.

employers in their campaigns to dissuade unionization. It communicates the employer's serious concern about the outcome of the employees' choice even as it reminds employees that they are dependent upon and subservient to the employer's authority and discretion.

The Contextual Color characterization of CAMs creates an unsustainable dichotomy. On one hand, it treats the forced listening and compulsion aspects of CAMs as neutral events lacking any independent signaling effect. Yet it then simultaneously treats CAMs as a powerful contextual force that can magically transform neutral speech into coercive, intimidating, or unduly influential speech. This is intellectually dishonest. What is really happening is that the labor boards are recognizing that CAMs transmit a message of employer power and employee vulnerability that is independent of the content of speech, and that threatens our ability to assess whether employee decisions about unionization have been freely made. The medium is its own message, as the Federal Board has long recognized.

IV. CAMS AND FORCED LISTENING AS EMPLOYER EXPRESSION: THE MEDIUM IS A MESSAGE

If, as I have argued, the CAM is an independent form of employer expression, with its own distinct signaling affect—a signal of employer power and employee vulnerability—then it should be regulated as such. Whereas the Contextual Color approach treats the CAM as a "message-neutral" event that might change the meaning of spoken words, my argument is that CAMs need to be reconceptualized and treated as a distinct form of employer expression. Whether we characterize forced listening by employers during union organizing campaigns as an independent form of expression (my position) or as merely a coloring agent in assessing speech content matters because it effects how CAMs are treated under labor legislation. In the former case, CAMs would need to be assessed under the Interference Prohibition sections, whereas in the latter, they are dealt with under the Free Speech provisions. My argument is that the former approach is preferable because it directs the labor board's gaze more directly on the issue of whether forced listening is a practice deserving of legislative protection.

When the Contextual Coloring approach is applied, labor boards tend to ignore the Interference Prohibition sections and focus instead on the Employer Speech provisions in assessing the legality of the employer's behavior. The question of whether the signaling effect

associated with forced listening and CAMs interferes with the free choice of employees whether to support collective bargaining is suddenly and inexplicably ignored. The labor boards instead apply the Free Speech provisions by asking whether the CAM has colored the *content* of the employer's speech sufficiently to make it intimidating or coercive (or amount to undue influence in some jurisdictions). If the labor board finds that the content of the speech was not intimidating or coercive (*et cetera*), then that ends the matter. There is no consideration of whether the CAM and the forced listening itself would have negatively influenced a reasonable employee's decision whether to support collective bargaining and therefore breached the Interference Prohibition.

A. RMH Teleservices *Decision of the B.C. Labour Board*

A recent reconsideration decision of the B.C. Board in a case called *RMH Teleservices* exemplifies this approach.[99] The employer had projected "anti-union messages on screens and walls in the workplace throughout the workday for about a week" and held "captive audience meetings."[100] The employer had therefore subjected employees to both forced listening, in the form of CAMs, and to "forced viewing" in the form of a continuous onslaught of anti-union images projected in the employees' work area for days on end. It has also distributed water bottles (and other items) containing labels with anti-union messages.

The union filed an unfair labor practice complaint alleging that the employer's activities amounted to interference with the formation of a union (contrary to section 6(1)) of the B.C. Labour Code,[101] or unlawful intimidation or coercion contrary to Section 8, which protects the expression of non-coercive and non-intimidating "views." Notably, the Board ruled that the content of the messages alone was not coercive or intimidating, so that the focus of the case was on the *method* of expression. The most obvious way for the Board to deal with the issues was to decide whether the various ways in which the employer communicated its messages (slide shows, CAMs, and

99. Under the B.C. Code, decisions of Board at first instance can be "reconsidered" by a full panel of the Board if the applicant raises a serious question as to the correctness of the original decision. Labour Relations Code, R.S.B.C. 1996, c. 244, section 141.

100. RMH, *supra* note 25, ¶ 4.

101. Section 6(1) of the B.C. Code, *supra* note 98, reads:

> Except as otherwise provided in section 8 [the employer speech section], an employer or person acting on behalf of an employer must not participate in or interfere with the formation, selection, or administration of a trade union. . .

distribution of water bottles) amounted to "interference with the formation or selection of a union" contrary to section 6(1). This was how the Board approached the water bottles. It ruled that handing out water bottles containing written anti-union messages amounted to unlawful interference, and that the act of distributing bottles was not a "view," so the defense provided by the Free Speech section did not save the employer.[102]

This must also be true of CAMs and slide shows: the *method* by which employers communicate their anti-union opinions is not the "expression of a view," and therefore the Free Speech provision (section 8) should have no application to the issue of whether the employer's methods of communication were lawful. Therefore, the issue for the B.C. Board was simple enough: Do slide shows bearing anti-union messages projected throughout the workday interfere with the free selection and formation of unions by the employees? Do slideshows bearing anti-union messages projected throughout the workday, or CAMs at which the same messages are conveyed orally through the medium of forced listening, interfere with the free selection and formation of unions by employees?

The Board noted that, while the Charter of Rights and Freedoms did not apply directly to their task of interpreting the statute as it applies to a private employer's actions, the Supreme Court's rulings on the scope of freedom of expression "provide a general context" in which the Code's provisions were passed.[103] Thus, the values described in the Charter cases provide direction. In that sense, the Board noted with approval Charter cases in which courts had ruled that "forced listening" is not protected, and that people have a right not to listen if they so chose.[104]

The Board ruled that the Free Speech section (section 8) did not confer on employers a right to subject workers to "forced listening" at work:

> Section 8 does not guarantee an audience. The right of expression under section 8 does not entail a right to compel others to listen to those views. A reasonable employee who has no choice but to listen to an employer's views regarding unionization may feel coerced or intimidated by the very fact that they have no choice but to hear their employer's views. Whereas they can turn away from a union organizer or a co-worker and decline to listen to them on the topic of unionization, an employee is far less able to turn

102. RMH, *supra* note 25, ¶ 68.
103. *Id.* ¶ 38–40.
104. *Id*. ¶ 40.

> away from their employer. By virtue of their authority in the workplace, employers can compel their employees to listen to them. *Compelled or forced listening raises serious concerns regarding employee free choice in the issue of unionization.*[105] [emphasis added]

If forced listening in the form of mandatory slide viewing and mandatory attendance at CAMs "raises serious concerns regarding employee free choice," does it therefore not amount to interference in the selection and formation of a union?

We are not provided with an answer to this question. Rather than treat the slide show as an instance of unlawful "interference" under section 6(1), as it had done with the distribution of water bottles, the Board treated the slide shows under the Free Speech provision. It ignored the Interference Prohibition section. The Board ruled that the content of the slides, which was otherwise lawful, had *become* unlawful because of the way in which the slides were projected:

> We find that the slide show was coercive and intimidating. . . . The slide shows were so prominent, persistent, and impossible to miss that employees, while at work, inevitably have been forced to view them or forced to consciously turn away from them. *This is the type of communication where otherwise permissible views become coercive or intimidating*.[106]

Thus, the Board inexplicitly reverted to the Contextual Color argument rather than address the more obvious question of whether forced viewing constituted unlawful interference.

The Reconsideration Board conveniently sidestepped altogether the issue of whether the CAMs were lawful in *RMH Teleservices* by electing not to disturb the original panel's peculiar decision that the meetings were not in fact captive because employees were told they could choose not to attend.[107] Thus, the issue of whether CAMs are lawful or not does not arise directly in RMH because it turns out there were no CAMs. However, the Board nevertheless indicates that the legality of CAMs should be dealt with by assessing whether the

105. *Id.* ¶ 58.

106. *Id*. ¶ 66.

107. *Id*. ¶ 69. As noted in Part III(B)(1), Canadian labor boards (including the B.C. Board) have commonly rejected the argument that CAMs are voluntary simply because employees are told they can leave. The Reconsideration Panel did not actually agree with the original panel's finding that the meetings were voluntary. Instead, it found that "it did not have to agree" with this finding, thereby deliberately leaving uncertain whether it thought the decision was correct.

content of the employer's speech in the meeting is coercive or intimidating.[108]

What happened to the Interference Prohibition in the Board's assessment of the legality of CAMs and forced viewing of anti-union slides? Why is the Interference Prohibition applied to one method of communication (distribution of water bottles) but then completely ignored in relation to other methods of communication (forced listening in CAMs and forced viewing in the form of slide shows)? The Board never explains this discrepancy. The Contextual Color argument suddenly appears and the Interference Prohibition provision falls from the analysis altogether.

B. CAMs and Forced Listening as Employer Expression

The Contextual Color argument assumes that the CAM does not transmit its own signal to employees, so that it is not a subject for regulation in its own right. The method of communication is considered merely part of the overall context within which the content of speech is interpreted. If, on the other hand, the CAM is treated as a distinct form of expression that can influence employees quite independent from the content of the employer's written or oral message, then it can no longer be regulated solely as a contextual factor within the Free Speech provisions. This is because the Free Speech provisions regulate only the *content* of speech, not the method of communication. Therefore, if we accept that CAMs are a distinct form of employer expression that can impact on employee free choice regardless of the content of the speech made there, we must look beyond the employer Free Speech sections in assessing whether this form of expression should be permitted. Our attention is redirected to the Interference Prohibition section.

An extreme example might make the point clearer. If an employer, confronted with a union organizing campaign, burns down the union's head office to send a signal to employees, that act may be expression broadly defined, but it is not the expression of a "view" or "opinion," so the employer Free Speech provisions would not apply to that act of arson. However, burning down the union's office could, and likely would, amount to interference with the formation, selection, and administration of the union. The Interference Prohibitions catch a wider range of employer conduct that might

108. *Id*. ¶ 69 ("The determination as to whether coercion or intimidation has been established, particularly in the context of employer meetings, will made on a case by case basis applying the approach and factors articulated in this decision.").

negatively effect employee decisions about unionization. It is under this section that employer demonstrations of power in the form of forced listening should be considered and not the Free Speech provisions that govern speech content.

To summarize, my argument is that the practice of forced listening, whether in the form of a CAM or otherwise, must be treated as a distinct form of employer expression rather than as merely a contextual factor in assessing speech content. The benefit of this approach is that it would require labor boards to engage in an independent assessment of whether this form of expression amounts to interference in the formation and selection of unions by employees. This interpretative exercise would need to be conducted against a backdrop that considers sound labor policy as informed by prevailing Charter values.

C. Forced Listening, CAMs and Labor Policy

What would that sort of assessment look like? Well, we need to begin by searching for policy justifications that support the right of employers to engage in forced listening practices such as CAMs during union organizing campaigns. There are several possible policy justifications for permitting employers to subject their employees to forced listening and CAMs during union organizing campaigns. None are convincing.

1. CAMs are Necessary to Protect Employer Expression Rights

One justification is that CAMs are necessary in order to ensure that employers have a fair opportunity to express their opinions about unionization. However, the fallacy of this argument is easily apparent. Employers have at their disposal a vast array of methods through which they can communicate their opinions on unionization. They can distribute written information or even digital messages (in CD or DVD format) to employees at the workplace or through regular mail since the employer will have the home addresses of the employees, many employers now also have the ability to e-mail their employees or to use electronic bulletin boards,[109] and the employer controls the physical workplace bulletin boards as well.

109. *See*, *e.g.*, JDS Fitel, [1999] OLRB Dec. No. 3471 (use of electronic bulletin board and e-mail communication to employees not an unfair labor practice).

Unions, on the other hand, generally have no right to organize on company property[110] and no right to address workers at the workplace,[111] and employers can prohibit employees from organizing during working time.[112] And unlike in the United States and Britain, Canadian labor law does not facilitate a right of unions to communicate with workers at their homes.[113] Therefore, while there may be labor policy justifications for permitting CAMs, the need to ensure employer freedom of expression is not one of them. Even if employer CAMs were banned, employers would still have far greater communicative access to workers than do unions. Thus, regulatory support for employer speech during a union organizing campaign is not inconsistent with a regulatory prohibition on CAMs. Therefore, for the policy justification for permitting employers to engage in forced listening in the form of CAMs, we must look elsewhere.

2. CAMs are Necessary to Protect Employer Property and/or Contractual Rights

Another possible justification is the need to protect employer property and contractual rights to govern the workplace as they deem fit. This is essentially an argument that the state should not interfere with the common law rights of employers. This argument too fails to convince. Much of what labor and employment regulation does, and is intended to do, is to introduce controls and restrictions on what otherwise would be largely unfettered rights of employers. The assertion that employers should have the right to compel workers to listen to them simply because they have traditionally had this right at common law begs the central question of whether employers ought to have this power under a model of collective labor law that encourages employees to choose freely whether to support collective bargaining.

110. There are limited exceptions when the employer owns and controls the property on which employees work and reside. *See*, *e.g.*, OLRA, *supra* note 14, § 13.

111. Canadian labor boards often order union access to the workplace, including the right to address workers during working hours, as a remedy for employer unfair labor practices committed during an organizing campaign. *See*, *e.g.*, Baron Metal Industries, OLRB. REP. MAY 363 (1999).

112. *See*, *e.g.*, OLRA, *id.*, § 77 ("Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.").

113. In the United States, employers are required to provide the union with the names and home addresses of the employees prior to a ballot. Excelsior Underwear Inc, 156 N.L.R.B. 1236 (1966). In Britain, pursuant to the Trade Union and Labour Relations (Consolidation) Act, Sch. A.1, unions have a legal right to address workers at the workplace, during working time, prior to a ballot. In addition, unions can submit written literature to a state appointed scrutineer, who will then obtain the employees' addresses and mail the union literature. See discussion in Doorey, *supra* note 13.

3. Promoting Process Validation in the Perception of Employers

Perhaps there is labor relations value in granting employers the right to hold these meetings because doing so may tend to "legitimize" the union certification process in the perception of employers and thereby tend to cause employers to more fully accept the outcome of the certification process. In other words, if employers perceive they have been given a "fair" opportunity to state their case against unionization to the employees, they may be more inclined to accept the decision of the employees to support collective bargaining. Weiler made a similar argument when he proposed the introduction of "fast" mandatory certification ballots instead of statutory card-check as an amendment to improve the NLRA.[114] Although he personally felt that the card-check model was a sound model for testing employee wishes, he nevertheless suggested that ballots tend to convince employers of their employees' will more so than a card-based model ever could.

Encouraging employers to accept the outcome of the certification process is certainly a worthy policy objective. However, it is doubtful that permitting CAMs advances this objective in any significant way. Employers that are permitted to express their opinion in written form have not been denied expression, and reasonable employers will understand this. On the other hand, unreasonable employers, employers that are not inclined to ever believe that their employees have opted for collective bargaining, are unlikely to be convinced of their employees' choice to support collective bargaining simply because they were entitled to hold CAMs. In the end, the argument that CAMs encourage employer "buy in" to the certification process is unconvincing.

D. Promoting Sound Labor Policy that Reflects Charter Values

More importantly, even if the right to hold CAMs does in some manner legitimate the process in the perception of employers, that benefit to the labor relations climate must still be measured against the potential harm to employee free choice caused by forced listening and CAMs. Here is where arguments in favor of CAMs begin to crumble. As I have documented in this paper, Canadian labor boards have long recognized that forced listening in the form of CAMs threaten employee free choice during the organizing campaign. A

114. Weiler, *supra* note 7, at 1812. *See also* Paul Weiler, Governing the Workplace: The Future of Labor and Employment Law 255 (1990).

statutory union certification model based on employee ballots is only justifiable as a form of freedom of association if it protects employee free choice from the obvious threat of employer interference. This need to protect the right of employees to choose (or not to choose) collective bargaining lies at the very core of labor relations legislation. Ultimately, the threat to employee free choice inherent in the CAM weighs against allowing employers to continue this practice.

The argument against permitting forced listening and CAMs in the context of union organizing campaigns is also bolstered by recent Canadian court decisions that have expressed aversion to the practice of forced listening and that have reinforced the importance of protecting the right of workers to unionize against interference from employers and the state. As noted in the Charter section of this paper, freedom of expression in this country does not include a right to compel an audience precisely because forced listening is inconsistent with the values of freedom are so essential in a democracy. Thus, as Justice Adams noted in *Dieleman*, there is a "constitutional aversion" to the practice of compelling others to listen to opinions. An assessment of the practice of forced listening by employers during union organizing campaigns conducted in light of prevailing Charter values weighs heavily in favor of an interpretation of the Interference Prohibitions that rejects the practice as a form of employer expression.

V. CONCLUSION

To summarize, prohibiting CAMs, and the forced listening they entail, would bring labor relations policy in line with the values of the Canadian Charter and would advance the core objective of labor relations legislation, which is the protection of the right of employees to choose collective bargaining, if they so desire, free from employer interference. Charting a new and clear way forward is desirable because the ascendancy of the mandatory certification ballot model in Canada is likely to facilitate and encourage greater employer resistance during organizing campaigns.

I have argued that the dominant approach of Canadian labor boards under-appreciates the signaling effect of forced listening. As the B.C. Board noted in *RMH Teleservices*, forced listening during organizing campaigns raises "serious concerns" about whether employees are able to freely choose whether to support unionization. Other labor boards have made similar pronouncements. Yet, with the exception of the Federal Board, Canadian labor boards have

nevertheless done nothing to protect employees from being compelled to attend these meetings. This might be justifiable as a necessary balancing of interests if permitting employers to engage in forced listening practices during organizing campaigns advanced some other competing policy objectives equal to the need to protect the right of employee association. But there are none.

Prohibiting CAMs and the oppressive practice of forced listening during union organizing campaigns would not prevent employers from expressing their opinions about unionization or even shift the balance of communicative access in the union's favor. It would, however, prevent a practice (forced listening) that in virtually all circumstances outside of the workplace is considered repugnant. The means already exist for Canadian labor boards to prohibit forced listening in the form of the standard Interference Prohibitions. The Federal Board has banned CAMs under this section. This approach strikes a more appropriate balance between the rights of employers to express their opinions and the right of workers to be able to make a choice free from employer interference and unnecessary compulsion than does the Contextual Color approach that has dominated the Canadian landscape.