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Captive Audience Meetings and Forced Listening
Lessons for Canada from the American Experience
Rencontres en auditoire contraint et écoute obligatoire
Leçons tirées de l'expérience américaine
Mitin con audiencia en cautiverio y escucha obligada
Lecciones de la experiencia americana para el Canadá

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Résumé de l'article

Avec l'adoption récente et largement répandue du vote de représentation obligatoire et d'une protection explicite du droit de parole de l'employeur, avec le recours intensif aux rencontres en auditoire contraint comme tactique anti-syndicale, l'encadrement juridique de la communication en privé au Canada vaut la peine d'être réévalué. L'expérience américaine en matière d'auditoire contraint sert d'enseignement approprié au moment de la formulation d'une approche canadienne.

De nombreux facteurs ont façonné l'expérience américaine. D'abord, l'approche américaine a subi l'influence du « marché des idées » eu égard à la liberté d'expression. Essentiellement, la métaphore du marché prétend que la vérité va surgir de la confrontation des idées. Cependant, dans un contexte de relations du travail, cette métaphore peut bien s'avérer inutile. Son application est minée par de nombreux facteurs, incluant les échecs du marché, le pouvoir inégal de l'employeur et du poids de son message, l'inaptitude des employés à établir une distinction entre la forme et la substance en matière de communication.

Un autre facteur important réside dans la façon dont est encadré le conflit entre le discours et l'effort de syndicalisation. La question s'est habituellement posée en termes de conflit entre le droit d'expression des employeurs en vertu du Premier Amendement et le droit statutaire des travailleurs d'adhérer librement à un syndicat ou non. Inévitablement, un droit constitutionnel l'emporte sur le droit statutaire. Si la question est formulée de la même manière au Canada, le résultat sera identique, en dépit de la Charte qui exige une approche plus nuancée que l'affirmation catégorique qu'on retrouve dans la constitution américaine.

L'approche actuelle aux États-Unis a vu le jour en émergeant de la montée et de la chute ultérieure des interdictions de communication en auditoire contraint. Les changements variés reflètent les glissements dans l'importance qu'on accorde aux différentes facettes du discours de l'employeur : son contenu, sa méthode, le réglage du moment de la communication et l'occasion de réagir de la part du syndicat.

À l'origine, les restrictions à l'endroit de la communication en auditoire contraint s'intéressaient au contenu du discours des employeurs, quoique les employées ne se voyaient offrir aucune protection eu égard à ce type de communication. Cette approche fut remplacée en 1940 par la doctrine de la « totalité de la conduite ». Le contenu du discours devint le coeur de l'affaire, quoique la doctrine reconnaisse le versant coercitif des communications de l'employeur. Les employeurs pouvaient faire connaître leur opinion au moment d'une campagne de syndicalisation, à moins que le discours et la conduite, dans l'ensemble, ne deviennent coercitifs. Cependant, une décision datant de 1945, reconnaissait de façon évidente le droit d'expression des employeurs comme partie inhérente à la garantie du Premier Amendement. Contre cet arrière-plan, une interdiction de courte durée eu égard aux communications en auditoire contraint ou obligatoire fut introduite en 1946, mais renversée en 1947. À ce moment-là, la liberté d'expression de l'employeur devint une exception à l'interdiction d'interférence de la part d'un employeur dans une campagne de syndicalisation.

Alors, la liberté de parole de l'employeur était protégée en autant qu'elle ne menaçait pas de représailles économiques et n'indiquait aucun recours à la force. L'insistance à évaluer si un employeur avait ou non eu recours à des pratiques déloyales renvoyait au contenu de la communication, plutôt qu'à la manière ou à la méthode retenue. Une modification ultérieure survint en 1951 quand les syndicats exigèrent de se voir accorder une occasion égale de réagir aux messages des employeurs. Autrement, ces derniers seraient taxés de pratiques déloyales. Cette règle ne s'intéressait pas à la manière de communiquer, ni au contenu, mais elle prévoyait plutôt la possibilité d'une réaction. Cependant, peu de temps après, cette règle a été également supprimée. Elle fut remplacée par la règle de l'arrêt *Peerless*, qui demeure encore en effet aujourd'hui. Cette règle interdit les discours tant chez l'employeur que chez le syndicat au cours de la période de 24 heures qui précède une élection prévue. Cette règle encadre seulement le moment et le lieu de la communication et oublie la façon de s'exprimer. Actuellement, une communication en audience captive peut se faire par un employeur avant cette période de 24 heures qui précède le vote. Cependant, en dehors d'un contexte syndical, la réglementation américaine en matière de communication en audience captive diffère de façon importante. Des limites se présentent dans les cas multiples de communication captive, fondée sur la notion de protection face à l'écoute obligatoire. Cette approche est attribuable à un intérêt eu égard à la vie privée et à la liberté individuelle. Encore que cette protection puisse aussi apparaître comme un corollaire à la garantie du Premier Amendement.

Les deux visions américaines, que ce soit en contexte de travail ou autrement, peuvent servir de leçons en matière de droit du travail canadien. En premier lieu, l'encadrement de cette question joue un rôle important dans l'élaboration d'une réponse. Un droit constitutionnel l'emportera sur le droit statutaire. Il a été conçu de cette manière au Canada. La protection d'un employé dans le cas de rencontres en auditoire contraint reposera sur une base précaire. L'article 1 est retenu sur une base de cas par cas et la protection contre la communication en auditoire contraint ne sera pas immunisée contre les problèmes que soulève le conflit entre les droits constitutionnels et les droits statutaires.

De plus, l'expérience américaine soulève également la question du rôle que jouerait la clause de la liberté d'expression prévue par la Charte canadienne à titre de protection contre l'écoute obligatoire. La doctrine de la communication en auditoire contraint et de l'écoute obligatoire présente en dehors d'un contexte de travail fournit quelques indications sur la manière dont la Constitution canadienne devrait être aménagée pour fournir une meilleure protection contre l'écoute obligatoire. Les décideurs au Canada ont encore à réaliser qu'il existe un véritable lien entre l'écoute obligatoire et la liberté d'expression.

Pendant que l'expérience américaine s'achemine vers l'atteinte d'un résultat spécifique où le droit de l'employeur l'emporte sur les droits des salariés, cette expérience présente néanmoins à la fois une mise en garde et une occasion de traiter la communication en auditoire contraint dans un contexte canadien.

Captive Audience Meetings and Forced Listening

Lessons for Canada from the American Experience

Sara Slinn

Widespread adoption of mandatory representation votes and express protection of employer speech invite employer anti-union campaigns during union organizing, including employer-held captive audience meetings. Therefore, the problem of whether and how to restrict employers' captive audience communications during union organizing is of renewed relevance in Canada. Captive meetings are a long-standing feature of American labour relations. This article considers how treatment of captive meetings evolved in the U.S., including the notion of employee choice; the "marketplace of ideas" view of expression dominating the American debate; and the central role of the contest between constitutional and statutory rights. It also considers the concept of "forced listening" and the associated Captive Audience doctrine in U.S. constitutional law and considers its possible application to captive audience meetings and the Charter definition of free expression. Finally, it offers suggestions about how Canadian labour law can benefit from lessons learned from the American experience.

A captive audience meeting is a compulsory gathering of employees in a workplace during which an employer delivers anti-union messages or information. Two recent changes to the landscape of Canadian labour relations make the problem of captive audience communications during union organizing and their regulation newly pertinent.

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First, several provinces have adopted mandatory representation elections in recent years.[1] Canadian adoption of a "quick" vote procedure, incorporating relatively short statutory time limits for holding elections (generally five to 10 days, varying by jurisdiction) was based on the belief that this period would be too brief for employers to engage in effective anti-union campaigns or unfair labour practices ("ULPs") (Weiler, 1983: 1812). Such "quick" votes contrasted with the situation in the U.S., where 50 days is the approximate median period between petition and election, with about 20 per cent of votes occurring more than 60 days after the petition is filed (U.S. Department of Labor and Commerce, 1994: 68).

However, it is evident that even "quick" votes allow employers to engage in effective union avoidance efforts before the election. For instance, Riddell found that union avoidance tactics during the 1984 to 1992 period of mandatory vote in B.C. were highly effective—rivalling that of such tactics in the U.S. (Riddell, 2001), and estimated that these tactics were twice as effective under the mandatory vote regime than under card-based certification (Riddell, 2004). Therefore even a few days between application and election is sufficient for effective employer anti-union conduct to occur.[2]

The second important change in Canadian labour legislation is that some provinces have recently introduced or strengthened explicit statements of employers' free speech rights in labour legislation. In one province at least, B.C., it is clear these changes have greatly expanded the scope of permissible employer communications.[3] This legislative encouragement may lead to greater use of anti-union communications by employers, including captive meetings.

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1. Originally, all Canadian jurisdictions used card-check certification procedures. Mandatory vote procedures have since been adopted in Nova Scotia (1977), Alberta (1988), British Columbia (1984 to 1992, 2002 to present), Saskatchewan (2008), Manitoba (1997 to 2000), Ontario (1995, though allowed unions to opt for card-based certification in the construction industry beginning in 2005), and Newfoundland and Labrador (1994).

2. Additional criticisms of the mandatory vote procedure include objections that employers have no legitimate role in such elections; employers do not contribute to informed worker decisions as employers cannot and do not defend the right or interests of employees; such elections are not legitimately analogous to political elections; and, that they encourage employer interference in employee free choice (Becker, 1993; Weiler, 1983: 1813-1815). The broader critical debate over choice of mandatory vote or card-based certification is well-canvassed in Becker (1993) and Weiler (1980, 1983).

3. This 2002 amendment has been interpreted as a deliberate and significant expansion of lawful employer expression such that B.C. now has the broadest employer speech rights in the country (see *RMH*, 2005: paras. 36, 42; *Convergys*, 2003: para. 103). Statutes in several other jurisdictions also contain such provisions (Canada, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, and P.E.I.).

These changes, together with evidence that captive audience communications are widespread in Canada and among the most effective union-avoidance tactics (Bentham, 2002; Riddell, 2001; Thomason and Pozzebon, 1998), suggest it is time to re-examine the legal treatment of employer speech—and captive communications in particular—during organizing in Canada.

A useful first step is to consider the American experience with captive communications, as representation elections and employer anti-union campaigns are a long-standing feature of unionization in the United States. As the Supreme Court of Canada has observed, development of Canadian law can benefit from careful use of lessons learned from the American experience:

> Notwithstanding our differences, it may be helpful here to look at the American experience, not with a view to applying their decisions blindly but rather to learn from the process through which they were derived (*Commonwealth*, 1991: para. 82).

Given the close history and parallels between the *NLRA* and Canadian labour legislation the value of a comparative approach may be particularly true for Canadian labour law. Both the American *NLRA* and Canadian labour legislation promise employees the right to make a choice about union representation free of interference.[4] This employee "right to free choice" is the most important employee right relevant to the conduct of captive audience communications by employers during organizing.

In American discourse, captive audience communications are characterized as a clash between employees' right to free choice under the *NLRA* and employers' constitutional right to free speech. Framing the question in this way has, as we will see, to a significant degree determined the outcome of the battle in favour of employers' ability to require their employees to listen to their communications and influence the outcome of elections.

This article begins with a brief description of existing treatment of employer speech and captive audience communications in Canada, then considers the theory of the "marketplace of ideas," a free speech doctrine dominating American debate over regulating captive audience meetings. The article then addresses the issue's central jurisprudential battle: the contest between constitutional and statutory rights. It concludes by considering what lessons the American experience offers for Canadian labour law.

EMPLOYER COMMUNICATIONS IN CANADA

In Canada the federal jurisdiction and British Columbia represent two ends of the spectrum of approaches to employer speech and captive audience

4. See, e.g., ss. 4(1), 6 and 9 of the B.C. *Labour Relations Code*, and s. 7 of the *NLRA*.

communications. The federal jurisdiction stands alone in Canada in its restrictive approach to employer communications, requiring employers to remain "strictly neutral" (*Ganeca Transport*, 1990: 209) and prohibiting captive audience communications during organizing "…because of the nature of the meeting and apart from the specific content of what was said…" (*Bank of Montreal*, 1985: para. 67).[5]

British Columbia represents the other extreme, only limiting employer speech that is coercive or intimidating, and permitting employers to express biased views that are uninformed or unreasonable (*Convergys*, 2003: para. 112). Captive audience communications are not unlawful *per se*, though will be closely scrutinized, and the context and cumulative effect of the speech "…may render otherwise permissible expression coercive or intimidating. In each case, both the content and the method used must be considered." (*RMH*, 2005: paras. 34, 56, 57, 61, 69). A captive audience meeting will considered coercive if the timing or other circumstances of the meeting deny employees a reasonable opportunity to make inquiries and assess the employer's views (*Simpe 'Q'*, 2007: paras. 79, 89, 138).

MARKETPLACE OF IDEAS

The Concept

Four categories of values are recognized as underlying the freedom of expression: a means of seeking truth, ensuring self-fulfilment, a means for ensuring participation in political and social decision-making, and a way to balance stability and change in society (Emerson, 1963: 878).[6]

Among the most prominent conceptions of the first value, truth-seeking, is the "marketplace of ideas" metaphor, introduced by Justice Holmes in his influential dissenting opinion in *Abrams v. United States,* where he stated:

> [T]he ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market…. (1919: 630).

5. Though express employer speech protection was introduced into the legislation in 1998, the federal labour board has held that Parliament did not intend to change the existing case law with the addition of this provision (*Air Canada*, 2001: para. 35).

6. Thomas Emerson first identified four categories of values underlying free expression (1963: 878). In Canada, Sharpe (1987) combined the third and fourth categories, and this three-category approach was adopted by the Supreme Court of Canada. These are the three values now routinely cited in Canadian law. For discussion of these values in Canadian law, see *Keegstra* (1990: 727-728) and *Irwin Toy* (1989: para. 53).

According to this theory, competing self-interested behaviour in the realm of ideas will ultimately work to society's benefit, just as in the case of the economic market (Strauss, 1991: 349). Truth will emerge from competition among ideas, even when truth is met with falsehood, and resists all silencing or censoring of expression (Ingber, 1984: 6). Thus, the government or society should not suppress ideas that they believe to be false, because in so doing they will in fact suppress some true beliefs as well. Society must recognize human fallibility by allowing the expression of contrary views (Shauer, 1982).

This concept has come to dominate American decisions on captive meetings. It is this first underlying value and the marketplace metaphor that we see driving (implicitly or expressly) legislative and NLRB approaches to employer speech during organizing (see, e.g., *Thomas v. Collins,* 1945: 537; Story, 1995: 387).

Criticisms of the Marketplace Metaphor

The marketplace metaphor has been heavily criticized, both in conception and in its application to the workplace context. Critics query the assumption that there is an "objective truth" to be found. Story contends this is an unwarranted assumption, particularly in the workplace and with regard to representation questions. The answer to such questions is very much subjective and influenced by individuals' experiences and background (Story, 1995: 398-90), and evidence of the "experience good" nature of union representation adds force to this argument (see Bryson et al., 2005).

Another questionable assumption underlying this theory is that there exists a perfect market in expression. Critics point out the possibility of a perfect market is a fiction that economists acknowledged long ago, and the marketplace of ideas is susceptible to the same shortcomings of all free markets, which can frustrate the goal of achieving the truth, and could potentially allow the hegemonic group to define what is true (see, e.g., Ingber, 1984: 5). Critics challenge the assumption that truth rather than simply power will prevail in the marketplace, arguing that unrestrained expression may actually entrench established interests and privilege rather than changing society (Ingber, 1984: 15, 76). Thus, like other markets, a marketplace of ideas requires regulation to correct market failures caused by real world conditions (Ingber, 1984: 5).

In the workplace context market failure arises from the unequal competition established by the property and managerial rights granted to the employer, and the unbalanced right to speak flowing from these rights. The result is that there is not necessarily any exchange or dialogue in the

workplace, nor are listeners necessarily willing consumers of the single product on offer in this market: the employer's views (Story, 1995: 383-385). Story contends that, rather than a "marketplace," the workplace is more accurately characterized as "an all-but-monopolized forum subject to strictly defined and limited incursions by non-owners" (Story, 1995: 388). In this forum there is no exchange and, due to property and managerial rights, expression is not free and entry by certain speakers—union organizers, for instance—is barred (Story, 1995: 383-385).

Story allows that there may be an argument that there are other marketplaces for ideas outside the workplace where union representation questions may be aired, and this may offset employers' dominance of the workplace market, producing ideas which will "seep into the representation election marketplace" (Story, 1995: 389). However, Story is sceptical of this, asserting that these "outside" marketplaces are hostile to the notion of worker collective action and instead will "reinforce and naturalize the barriers to workplace unionization" (Story, 1995: 389).

Finally, critics also contend that the marketplace metaphor rests on too much faith in individuals' ability to make sophisticated, rational assessment of messages, requiring listeners to be able to distinguish the form from the substance of communications (see Ingber, 1984: 7-8). The danger, Ingber notes is that the marketplace may "…favour the most attractively packaged ideas rather than those with the 'best' substance" (Ingber, 1984: 16).

CONTEST OF CONSTITUTIONAL AND STATUTORY RIGHTS

In America, the question of restricting employer speech during organizing has generally been posed as a contest between employers' First Amendment right to free speech (in addition to their common law and statutory property and managerial rights) and workers' statutory right to freely choose to unionize, though this approach has been strongly criticized (see Andrias, 2003: 2416). The inevitable result of pitting a mere statutory right against constitutional right is that workers' statutory rights bow to employer's speech rights.[7]

To an extent this may reflect the structure of the American Constitution which, lacking an analogue to our section 1 balancing provision, leads to markedly different judicial interpretation of constitutional protection of expression than in Canada.[8] In short, application of the First Amendment

7. The next part of this article traces this victory of employer speech rights over protection of employees' free choice.

8. See Greenawalt (1992) for a comprehensive comparison of constitutional treatment of expression in the two countries.

is a largely categorical assessment, involving one question: is the speech in question included or excluded from First Amendment protection? In Canada, there are three questions: Is the activity expressive, and thus presumptively protected by section 2(b) of the *Charter*? Does it lose this protection because of the method or location of the activity? If it is protected, is the limitation reasonably justifiable in a free and democratic society under section 1 of the *Charter*? Section 1 permits more of a balancing of interests approach to determining limits to constitutional rights.

This differing constitutional architecture may also make it more difficult to restrict employer speech in the U.S. than in Canada. Nevertheless, even in Canada there is danger in framing the question of captive audience limits as a contest between a constitutional and statutory right. Even under Canadian law, posing the question in this manner may largely determine the answer.

RISE AND FALL OF THE CAPTIVE AUDIENCE DOCTRINE IN THE UNITED STATES

The American *NLRA* was part of President Roosevelt's New Deal reforms and met with tremendous resistance from political opponents and employers. The question of limits on employer speech during organizing, and captive audience communications in particular, was a contentious issue throughout the early decades of the *NLRA's* life. Different approaches dominated at different times, often coinciding with shifts in government power and in composition of the President-appointed NLRB.[9] These approaches clearly differ in the importance placed on different aspects of the effect of the speech on employees' free choice: content, method, and timing of the communication, and the opportunity for union response.

These approaches developed against the following statutory framework. Section 7 of the *NLRA* gives employees the right to self-organization, to form, join, or assist labour organizations, and to bargain collectively through representatives of their own choosing, and section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by section 7. Violation of section 8(a)(1) would be an ULP.

9. NLRB members are appointed by the President on the advice and consent of the Senate. Created under a Democrat President, the NLRB was initially empanelled with three Democrat members. Not until October 1941 was a Republican member, Gerard D. Reilly, appointed to the NLRB. See Cooke et al. (1995) for empirical evidence of the influence of political party of appointment on NLRB member decision-making.

Employer Neutrality and Totality of Circumstances (1935)

The original panel of the NLRB, consisting of three Democrat-appointed members, required employers to remain strictly neutral in their communications with employees during organizing, but afforded no special protection to safeguard employees from captive audience communications (*NLRB v. Federbush*, 1941). The manner or method of the employer's communication was simply one factor taken into account in determining whether an employer had committed an ULP. The rationale for the neutrality standard was that employers' communications to employees "have a force independent of persuasion" arising from employers' greater economic power and employees' economic dependence on their employer (*NLRB v. Federbush*, 1941: 975). Therefore, restrictions on employer communications focused on the content of the speech, though with explicit recognition that employer speech has an inherent influence on workers.

Totality of Conduct Doctrine (1940)

This strict neutrality requirement was replaced by the "totality of conduct" doctrine in a 1940 decision of two of the three Democrat-appointed NLRB members serving at the time (*Virginia Electric*, 1940). The totality of conduct doctrine provided that an employer was entitled to express its opinion about organizing to employees, except where the communications were part of a course of conduct that restrained or coerced employees' free choice. Where speech and conduct, examined together, were coercive, it would be an ULP. With this rule, the NLRB's focus remained on the content of speech, but with refined recognition of the coercive tendency of employer communications.

The U.S. Supreme Court rejected the employer's argument that this decision violated its First Amendment rights, stating that:

> … pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 78 (*NLRB v. Virginia Electric*, 1941: 476-477).

This was followed in 1945 by a U.S. Supreme Court decision explicitly recognizing that "…employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty" (*Thomas v. Collins*, 1945: 537). It is at this point that employer speech rights began its real ascendance in American labour law, buoyed by the First Amendment.

Clark Bros. *Captive Audience Doctrine (1946)*

Against this backdrop, the NLRB introduced the short-lived "captive audience" doctrine in its 1946 *Clark Bros.* decision, from which the sole Republican member dissented. It held that a captive audience meeting, in and of itself and separate from any other conduct of the employer and apart from the content of the speech, constitutes interference, restraint, and coercion within the meaning of the *NLRA* and therefore constitutes an ULP (*Clark Bros.*, 1946: 804-805). Such an ULP is separate and apart from considerations of conduct and content, relying strictly on the method of communication: to a captive audience. The NLRB expressly held that forced or captive communications are unlawful, even if that speech falls under the protection of the First Amendment, because forcing employees to receive employer communications removes employee free choice (*Clark Bros.*, 1946: 804-805). The NLRB emphasized that the employer had other avenues to express its views, and likened a captive audience meeting to physical restraint of the audience (*Clark Bros.*, 1946: 805).

Legislative Reversal (1947)

Nineteen forty-six also saw the end of World War II for the U.S. This brought tremendous unemployment and price inflation, and many lengthy strikes in several industries as unions that had their agreements frozen or subject to National War Labour Board wage controls or were subject to reciprocal management-labour no-work-stoppage pledges protecting wartime production, sought to catch up (NLRB: 18, 19). These widespread and devastating disputes contributed to a growing popular view that labour had become too politically and economically powerful. This helped the Republicans gain majorities in both houses of Congress in the November 1946 elections, which had been dominated by Democrats since 1930 (Ludwig, 2007: 2; NLRB: 19).

This shift in political power and popular anti-union sentiment provided the setting for the 1947 amendments to the *NLRA* (the *Labor-Management Relations Act* or "*LMRA*"). The *LMRA* was compromise legislation based on one bill introduced by Representative Hartley and passed in the House of Representatives, and one introduced by Senator Taft and passed in the Senate, in May 1947. Congress overrode President Truman's veto of the *LMRA* (NLRB: 22).

The purpose of the *LMRA* was to moderate union power so as to restore the balance between labour and management that the *NLRA* had disrupted (Hartley, 1948: xii-xiv). One significant element of the *LMRA* was to introduce the section 8(c) employer free speech provision into the *NLRA*

as an exception to the section 8(a)(1) prohibition on employer inter-ference.[10] *LMRA* supporters contended it was necessary to explicitly recognize employer speech rights because employers' First Amendment rights were being violated by the *Clark Bros.* captive audience doctrine (Andrias, 2003: 2427; U.S. Congress, 1948: 292, 297, 407, 429).[11] Therefore, one objective of section 8(c) was to override the *Clark Bros.* captive audience doctrine and prevent the NLRB from finding captive audience communications to be ULPs *per se* (Note, 1978-9: 761). A second purpose was to prevent the NLRB from misusing the totality of conduct doctrine by prohibiting it from finding employer speech to be coercive because of a separate employer ULP or from relying on evidence of non-coercive employer statements to establish that other employer conduct was an ULP (Note, 1978-9: 761).

These effects of section 8(c) were affirmed in a 1948 NLRB decision which held that both the language of the section and its legislative history made it clear that the *Clark Bros.* captive audience doctrine was no longer applicable (*Babcock & Wilcox*, 1948: 578). *Babcock & Wilcox* was decided by a panel containing three of the five NLRB members: two Democrats and one Republican, with none dissenting.[12] Consequently, employer speech was protected and could not be an ULP where it did not "…by its own terms threaten force or economic reprisal" (Jackson and Heller, 1982: 50; U.S. Congress, 1948: 56). Furthermore, any speech falling within section 8(c) could not be used as evidence of an employer ULP (Jackson and Heller, 1982: 49). Therefore, section 8(c) returned the emphasis of employer speech restrictions to the content of the communication, and away from the manner or method the employer used to convey its views (*Babcock & Wilcox*, 1948).

The Equal Opportunity Rule (1951)

A form of captive audience protection was briefly revived in 1951 when the NLRB met the challenge of section 8(c) by establishing the "equal opportunity" rule in the *Bonwit Teller* case, with the sole Republican on the five-member panel dissenting in part from the majority's decision. Under

10. S. 8(c) reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act... if such expression contains no threat of reprisal or force or promise of benefit."

11. The U.S. Supreme Court has held that s. 8(c) does not create any new employer right, but "merely implements the First Amendment" (*NLRB* v. *Gissel*, 1969: 617).

12. Note that the *LMRA* also expanded the NLRB to five members, with one Democrat and one Republican appointed in August 1947 to fill the two new positions. However, all five members need not decide each case: *NLRA* s. 3(b) authorizes the NLRB to delegate decision-making to a three-person panel.

this rule, an employer would commit an ULP if it communicated with employees in the workplace during working time, but did not allow the union an equal opportunity to respond. Because this rule did not actually limit employer speech, the NLRB concluded that it did not run afoul of section 8(c) (*Bonwit Teller*, 1951: 615). The NLRB identified, as a separate justification for its decision, the fundamental consideration that employees' section 7 rights include a right to "hear both sides" (*Bonwit Teller*, 1951: 612). By denying the union an opportunity to address employees "under the same advantageous circumstances as the [employer] had made available to itself," the employer had "created conditions incompatible with a free, uncoerced choice in the election" (*Bonwit Teller*, 1951: 613).

Rather than focusing on the manner or content of the communication, this rule centres on whether or not the union has an opportunity to respond to the employer's message. The NLRB's concern was whether employees' right to be informed was satisfied and, therefore, their right to free choice was fulfilled. The effect of this decision was to transform the question of whether employee free choice was protected into a question of whether employees had received information from both sides. This version of "informed choice" was "free choice," in the Board's view.

The Peerless *Rule (1953)*

The equal opportunity rule was soon overturned and replaced in a pair of decisions, *Livingston Shirt* and *Peerless Plywood*, issued on the same day in 1953, with the NLRB majority characterizing the rule as the "… discredited *Clark Bros.* doctrine in scant disguise" (*Livingston Shirt*, 1953: 407). By this time, under Republican President Eisenhower, Congress and the NLRB both had Republican majorities. Three of five NLRB members were Republican, and the full panel ruled on both decisions, in each case with one of the two Democrat members dissenting in full or in part.

The *Livingston Shirt* majority explained that the equal opportunity doctrine was unworkable in practice, encouraging employers and unions to jockey for position to claim the advantage of being the last to address workers, adding a new element to the competition for workers' votes (*Livingston,* 1953: 407). Employers' greater access to the workplace again favours them in this competition. This doctrine also essentially negated employers' speech rights by linking a right of reply to the speech right (1953: 406).

In its place, the majority in *Peerless* created the *Peerless* rule that remains in effect today, prohibiting both employers and unions from holding speeches on company time to massed assemblies of employees within 24 hours of a scheduled election (1953: 429). So, to this minimal extent, it

limits captive audience communications. The *Peerless* majority explained that its rationale for the rule was based on its election experience that last-minute speeches "…to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect" and that they tend "…to destroy freedom of choice and establish an atmosphere in which a free election cannot be held" (1953: 429-430). Therefore an opportunity for employees to rationally assess arguments and employee free choice were ostensibly the majority's guiding concerns.

The majority emphasized that the real mischief and harm of last-minute speeches to mass assemblies on company time lay in their timing and use of company time, and applied equally to employer and union-delivered speeches. Therefore, a 24-hour ban would be sufficient protection for employees (*Peerless*, 1953: 429). The *Livingston* majority concluded that, beyond giving employees this 24 hour "breathing spell," no further restraints on employer speech are needed: "With this rule in election cases, we see no reason in law or equity for seeking to impose further restraints" (1953: 408). At the same time, the NLRB emphasized that this Rule didn't unnecessarily restrict employer speech rights, since other forms of communication, or speeches held at any time (even with 24 hours of the election), and whether at the workplace or elsewhere, so long as employee attendance was voluntary and it was not during working time (*Peerless*, 1953: 430). With this decision, special protection from captive audience communications was all but extinguished.

The *Peerless* rule removed emphasis on the manner of expressing the opinion and the opportunity to respond, instead focusing solely on the timing and location of the communication. Otherwise, the "totality of conduct" approach governs for determining whether employer speech is coercive and thus unlawful.

The Modern Approach: The **Peerless** *Rule*

The *Peerless* rule remains the key restriction on employer communications, displacing any specific rule concerning captive audiences. At present, the test for whether employer communications during organizing constitute an ULP is whether the speech tends to be coercive (not whether it is, in fact, coercive) in the totality of the circumstances from employees' perspective (*NLRB v. Pneu Electric*, 2002). It is still the case that, if a communication is found to fall within the protection of section 8(c), then it cannot be found to be an ULP (*Brown & Root*, 1996: 633). Employers remain able to compel captive audiences during working time other than during the last 24 hours before the vote, prevent workers and unions from responding, and can discipline workers for failing to attend or leaving

such meetings (*NLRB v. USWA*, 1958). As one commentator describes it, captive audience communications are "now considered to be integral to the employer's right to freedom of speech…." (Andrias, 2003: 2439).

The durability of the *Peerless* rule may be due less to its adequacy than to the evident political obstacles to employee-friendly change to American labour law, as demonstrated by the repeated failure of the *Employee Free Choice Act* to pass in Congress (2007), and the often Republican-dominated NLRB.

FREEDOM FROM FORCED LISTENING OUTSIDE THE WORKPLACE

The experience of captive audiences in American organizing campaigns has been quite different than that of captive audiences elsewhere in that country. Entirely outside the labour context, time, place and manner limits on free speech and a separate "Captive Audience doctrine" have developed in U.S. constitutional law as a justification for government restrictions on speech to captive audiences (see *Hill v. Colorado*, 2000; *Frisby v. Schultz*, 1988). Such justified restrictions are commonly applied in cases such as door to door soliciting, billboards, telephone soliciting, mail, public address systems, and residential picketing. This is an interesting counterpoint to the treatment of captive listeners during union organizing, demonstrating that employers are among the most constitutionally privileged speakers in America.

This Captive Audience doctrine is commonly identified as arising from the right to privacy (a "penumbral" rather than explicit, constitutional right), providing an exception to the First Amendment. Privacy interests of the listener are weighed against the speaker's First Amendment rights in the "intrusion test," which requires proof that "substantial privacy rights are being invaded in an essentially intolerable manner" for the captive audience protection to apply and restriction of the communication to be justified (see, e.g., *Cohen v. California*, 1971). Courts have tended to put greater onus on audiences to avoid unwanted speech in a public forum compared to private homes (*Cohen v. California*, 1971).

Commentators identify several values underlying this doctrine: individual autonomy, the right to repose, and the right to be free of offensive communications.[13] The second justification, a right not to be disturbed or intruded upon by uninvited communications, particularly when one is in the private sphere (Strauss, 1991-1992: 111-114; Haiman, 1972: 175), is firmly

13. See Strauss (1991-1992); Taylor (1983); Haiman (1972) for differing interpretations of these underlying values.

rooted in the privacy right origins of the doctrine and, consequently, has little application to workplace captivity. Regarding the final justification, Canadian law has firmly rejected restricting speech simply because of its offensive nature (see, e.g., *Keegstra,* 1990; *Butler*, 1992). It is the value of individual autonomy explanation that has greatest resonance with the question of captive audiences and speech rights in the workplace, and is the factor this article focuses on.

Individual Autonomy and Forced Listening

Several commentators identify an interest in autonomy (though differently articulated) as underlying the Captive Audience doctrine (Taylor, 1983: 216; Strauss, 1991-1992: 108-111; Haiman, 1972: 174). Taylor defines individual autonomy as freedom of thought and personal autonomy (1983: 216). On the other hand, Strauss contends that individual autonomy centres on free decision-making, requiring that individuals' decisions relating to intimacy or personal identity be free from intrusion to preserve the decision-making authority of the individual (1991: 106, 108-9). She concludes that "Forced listening by definition removes decision-making authority from the individual" (Strauss, 1991-1992: 109). More simply, Haiman characterizes individual autonomy not as autonomy in decision-making, but simply autonomy of hearing such that there is a right to decide whether to receive speech (Haiman, 1972: 174).

Taylor and Strauss' descriptions of this interest most clearly match the interest in autonomy underlying our right to free expression (1983, 1991-1992). Each of these articulations of the justification closely matches explanations of values underlying free expression under the Canadian *Charter*. Taylor explains the rationale behind the necessary link between autonomy and protection for captive audiences:

> If freedom of thought and personal autonomy of the listener require that the government refrain from suppressing an idea or communication, the same principles forbid the government from forcing an unwilling listener to receive a communication (Taylor, 1983: 216).

Free Speech as a Source of the Captive Audience Doctrine

Though the Captive Audience doctrine has been identified as rooted in the American conception of privacy (Strauss, 1991-1992) other commentators contend that, rather than an emanation of the right to privacy and a form of restriction on the First Amendment, the American Captive Audience doctrine is better regarded as a corollary to the First Amendment (Taylor, 1983), or that it is actually a form of time, place and manner restriction on the First Amendment (Nauman, 2002). Certainly a number

of cases have limited speech to captive audiences on the basis that it is a justifiable time, place and manner restriction of First Amendment protected speech rather than on the basis of the Captive Audience doctrine and its intrusion test (see, e.g., *Frisby v. Schultz*, 1988).

Taylor suggests, rather than applying the "intrusion test," pitting privacy rights against free speech rights, the captive audience doctrine be viewed as arising from the free speech right, as a corollary right, rather than from another source. Then, the limits and scope of captive audience protection would be determined by a balancing of competing interests. Taylor suggests that the captive audience doctrine, or the right not to be spoken to, is a corollary of the constitutional protection of free speech, rather than an exception to it (Taylor, 1983: 214, 216).

LESSONS FOR CANADA

The American experience with employers' captive audience communications during union organizing provides some lessons about how Canadian labour law may develop its own approach to this question. It offers some cautions about framing questions of competing rights, and about accepting simple solutions to the problem of captive communications. It also shows possible ways forward to develop a more holistic definition of free expression and its limits, through careful selection of underlying values, a balanced understanding of the expression right and through the incorporation of concepts of captivity and forced listening.

Framing the Question

One key lesson of the American experience is the importance of how the question of restrictions on employer communications is framed. One of the greatest impediments to employer speech protections for workers in America is that the courts and NLRB have framed the problem as a contest between employers' constitutional right to free speech and workers' merely statutory right to free choice. This is a contest that workers rights cannot—and have not—won, under the American system. We see this, for example, in how the *Clark Bros.* captive audience doctrine was so readily overcome with the *LMRA* and concerns over employers' First Amendment speech rights.

As noted above, Canadian constitutional law provides more scope for limiting expression, and thus protecting statutory rights, primarily because of the opportunity section 1 allows for balancing rights and interests (*Commonwealth*, 1991: para. 80). And, so far, early challenges to statutory restrictions on employer communications, including the federal strict neutrality standard and prohibition on captive audience communications

have been saved under section 1 (*Bank of Montreal*, 1985; *Cardinal*, 1996).

However, reliance on the section 1 saving provision is a precarious foundation for employee protection, and is subject to case-by-case decision making. It is important to recognize that concern over impinging on employer constitutional speech rights has, like the *LMRA* amendments, underpinned statutory extensions to employer speech rights and limitations on ULP prohibitions in at least one Canadian jurisdiction (British Columbia, 2002a: 5; 2002b: 3508, 3377, 3546). Therefore, Canadian law is not immune from the problems arising from a contest of constitutional and statutory rights.

Rather than framing the question as such a contest, the American experience suggests that it is important to focus on developing a conception of free expression that is sensitive to the particular characteristics of communication in the workplace context, where the employer-speaker has uncommon power and influence over the listener-employee, and where captive audience communications are common.

Deceptive Solutions

The American experience with the equal opportunity and *Peerless* rules, in particular, should make us cautious of simply addressing the captive audience problem by requiring that the union has an opportunity to respond to employer statements or that employees have "breathing space" before the representation election. B.C. is following a similar path, distinguishing permissible from unlawful captive meetings by whether employees have an opportunity to reflect and make enquiries following the meeting (*Simpe 'Q'*, 2007).

Such formalistic limits are misleading, and do not address the true mischief of employer speech to a captive audience of workers. Such rules give insufficient weight to the fact that expression has both form and content; that form affects the message received by the listener; and that form and content can be difficult to separate. They ignore the inherent pressure and emotive force of employer words, arising from the context and history of the employment relationship. The NLRB in *Clark Bros.* correctly diagnosed the real problem with captive communication: the restraint and compulsion akin to physical restraint that employees are subjected to, and all that flows from that in influencing employee free choice (1946: 805). A union's message, even in the same location and delivered for the same time as the employer's, simply cannot match the employer's influence. The union cannot speak with the same force as the employer and it is unrealistic to expect employees, after being subjected to captive communications, to

make their own enquiries to test the veracity of their employer's statements. This ignores the irrational effect of such communications on listeners.

Underlying Values

A second important lesson from the American experience is the danger of placing too great reliance on the truth-seeking justification for free speech and, in particular, on the marketplace of ideas conception of this right.[14] This metaphor is unrealistic and perhaps particularly ill-suited to the workplace environment, placing too much focus on the interests of the speaker, and too much responsibility on the listener to be able to separate truth from falsehood, and messages from manipulation. Rather, it would be desirable to refocus on the other underlying values: autonomy, and democratic and social participation, both of which hold the rights and interests of listeners in greater regard.

Both the equal opportunity and *Peerless* rules share the "marketplace of ideas" as their implicit driving rationale. This is apparent, first, in their focus on protecting the interests of the speaker over that of the listener. The marketplace conception is particularly evident in the nature of the equal opportunity solution to employer speech at captive meetings: more speech. The notion that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies" is a central theme of this view of First Amendment speech (*Dennis v. U.S.*, 1951: 503). There is a danger in accepting that more speech cures, as it presumes there is equality in the competing messages. This is particularly implausible in the workplace organizing context, where the union lacks the same access to workers that employers enjoy (even when granted the "equal opportunity" of on-site meetings with employees), and the force of union speech cannot match that of the employer for all the well-recognized reasons that make employer speech unique.

Forced Listening and Free Expression

The American experience also highlights the importance of considering whether and how the *Charter* freedom of expression might incorporate protection of captive listeners. The Captive Audience doctrine American constitutional law has developed outside of the workplace, and the scholarly arguments about the potential for incorporating it into the First Amendment, give us some direction about how our own constitutional

14. See Weinrib (2001: 345-346) for a critique of the Supreme Court of Canada's absorption of American free speech doctrine such as the marketplace of ideas.

freedom of expression may be developed to more tightly embrace protection of listeners.[15]

Canadian courts and labour boards have recognized some glimmer of a right not to listen, holding that section 2(b) does not guarantee the speaker an audience and does not guarantee that a person can be forced to listen (*Committee*, 1991: 204-05*; Dieleman*, 1994; *Bank of Montreal*, 1985; *RMH,* 2005: paras. 39, 40; *Simpe 'Q'*, 2007, para. 123). However, Canadian courts and boards have not recognized that section 2(b) contains freedom from forced listening analogous to the American right or that there is a true negative or corollary right to the freedom of expression, though many of these cases cite and draw reasoning from American constitutional freedom from forced listening cases. The B.C. labour board has, however, expressly adopted the concept of freedom from forced listening as a tool for regulating captive audience communications (*RMH,* 2005; *Simpe 'Q'*, 2007). It identifies forced listening as coming "…closer to capturing the essence of what can make an otherwise acceptable employer expression of views during an organizing drive coercive or intimidating" and helps identify the appropriate balance between expression rights and employee free choice (*RMH*, 2005: 58, 59).

The concept of forced listening is central to problem of captive audiences in labour relations, and brings to the fore the tension between protection of speakers and listeners. These are concepts and dilemmas that need greater attention in the definition of the *Charter* freedom of expression.

Forced Listening and Privacy

Unlike the American constitution, the Canadian *Charter* contains no free-standing right to privacy (*Cheskes,* 2007: para. 79). However, some degree of privacy protection is found in the section 8 *Charter* protection against unreasonable search or seizure (*Hunter*, 1984), though section 8 applies to limited circumstances not generally relevant to the union organizing context. The section 7 right to "life, liberty and security of the person" has also been interpreted as protecting certain privacy interests (*O'Connor,* 1995; *Cheskes*, 2007: para. 81). These include from physical restraint, or from state interference in important and fundamental life decisions (see, e.g., *Cheskes*, 2007; *Godbout*, 1997; *Thomson*, 1990), and protection from serious state-imposed harm to an individual's physical or psychological integrity by interfering with personal autonomy (*Rodriguez,* 1993).

15. Alternatively, the rationales for this American doctrine, and the balancing approach of the "intrusion test" could be introduced into the section 1 or exclusion analyses under our *Charter*.

However, neither section 7 nor 8 has given rise to any notion similar to that of the American Captive Audience doctrine, nor have they been applied to workplace communications. Therefore, protection for captive audiences is more likely to be found, in Canada, in the free expression right than in the very limited privacy protections afforded by the *Charter*.

CONCLUSION

In sum, the American experience has produced a sad trajectory of protection for captive audiences. Employer speech rights, grounded in the First Amendment to the U.S. Constitution, have almost wholly trumped employee rights under the *NLRA*, and recognition of employees' right or ability not to receive employer communications has been virtually extinguished (Andrias, 2003; Story, 1995). Nevertheless, examining the American experience with the problem of communications to captive audiences—both in and out of the workplace—provides both cautions and opportunities as Canadian labour law struggles with this question.

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RÉSUMÉ

Rencontres en auditoire contraint et écoute obligatoire : leçons tirées de l'expérience américaine

Avec l'adoption récente et largement répandue du vote de représentation obligatoire et d'une protection explicite du droit de parole de l'employeur, avec le recours intensif aux rencontres en auditoire contraint comme tactique anti-syndicale, l'encadrement juridique de la communication en privé au Canada vaut la peine d'être réévalué. L'expérience américaine en matière d'auditoire contraint sert d'enseignement approprié au moment de la formulation d'une approche canadienne.

De nombreux facteurs ont façonné l'expérience américaine. D'abord, l'approche américaine a subi l'influence du « marché des idées » eu égard à la liberté d'expression. Essentiellement, la métaphore du marché prétend que la vérité va surgir de la confrontation des idées. Cependant, dans un contexte de relations du travail, cette métaphore peut bien s'avérer inutile. Son application est minée par de nombreux facteurs, incluant les échecs du marché, le pouvoir inégal de l'employeur et du poids de son message, l'inaptitude des employés à établir une distinction entre la forme et la substance en matière de communication.

Un autre facteur important réside dans la façon dont est encadré le conflit entre le discours et l'effort de syndicalisation. La question s'est habituellement posée en termes de conflit entre le droit d'expression des employeurs en vertu du Premier Amendement et le droit statutaire des travailleurs d'adhérer librement à un syndicat ou non. Inévitablement, un droit constitutionnel l'emporte sur le droit statutaire. Si la question est formulée de la même manière au Canada, le résultat sera identique, en dépit de la Charte qui exige une approche plus nuancée que l'affirmation catégorique qu'on retrouve dans la constitution américaine.

L'approche actuelle aux États-Unis a vu le jour en émergeant de la montée et de la chute ultérieure des interdictions de communication en auditoire contraint. Les changements variés reflètent les glissements dans l'importance qu'on accorde aux différentes facettes du discours de l'employeur : son contenu, sa méthode, le réglage du moment de la communication et l'occasion de réagir de la part du syndicat.

À l'origine, les restrictions à l'endroit de la communication en auditoire contraint s'intéressaient au contenu du discours des employeurs, quoique les employées ne se voyaient offrir aucune protection eu égard à ce type de communication. Cette approche fut remplacée en 1940 par la doctrine de la « totalité de la conduite ». Le contenu du discours devint le cœur de l'affaire, quoique la doctrine reconnaisse le versant coercitif des communications

de l'employeur. Les employeurs pouvaient faire connaître leur opinion au moment d'une campagne de syndicalisation, à moins que le discours et la conduite, dans l'ensemble, ne deviennent coercitifs. Cependant, une décision datant de 1945, reconnaissait de façon évidente le droit d'expression des employeurs comme partie inhérente à la garantie du Premier Amendement. Contre cet arrière-plan, une interdiction de courte durée eu égard aux communications en auditoire contraint ou obligatoire fut introduite en 1946, mais renversée en 1947. À ce moment-là, la liberté d'expression de l'employeur devint une exception à l'interdiction d'interférence de la part d'un employeur dans une campagne de syndicalisation.

Alors, la liberté de parole de l'employeur était protégée en autant qu'elle ne menaçait pas de représailles économiques et n'indiquait aucun recours à la force. L'insistance à évaluer si un employeur avait ou non eu recours à des pratiques déloyales renvoyait au contenu de la communication, plutôt qu'à la manière ou à la méthode retenue. Une modification ultérieure survint en 1951 quand les syndicats exigèrent de se voir accorder une occasion égale de réagir aux messages des employeurs. Autrement, ces derniers seraient taxés de pratiques déloyales. Cette règle ne s'intéressait pas à la manière de communiquer, ni au contenu, mais elle prévoyait plutôt la possibilité d'une réaction. Cependant, peu de temps après, cette règle a été également supprimée. Elle fut remplacée par la règle de l'arrêt *Peerless*, qui demeure encore en effet aujourd'hui. Cette règle interdit les discours tant chez l'employeur que chez le syndicat au cours de la période de 24 heures qui précède une élection prévue. Cette règle encadre seulement le moment et le lieu de la communication et oublie la façon de s'exprimer. Actuellement, une communication en audience captive peut se faire par un employeur avant cette période de 24 heures qui précède le vote. Cependant, en dehors d'un contexte syndical, la réglementation américaine en matière de communication en audience captive diffère de façon importante. Des limites se présentent dans les cas multiples de communication captive, fondée sur la notion de protection face à l'écoute obligatoire. Cette approche est attribuable à un intérêt eu égard à la vie privée et à la liberté individuelle. Encore que cette protection puisse aussi apparaître comme un corollaire à la garantie du Premier Amendement.

Les deux visions américaines, que ce soit en contexte de travail ou autrement, peuvent servir de leçons en matière de droit du travail canadien. En premier lieu, l'encadrement de cette question joue un rôle important dans l'élaboration d'une réponse. Un droit constitutionnel l'emportera sur le droit statutaire. Il a été conçu de cette manière au Canada. La protection d'un employé dans le cas de rencontres en auditoire contraint reposera sur une base précaire. L'article 1 est retenu sur une base de cas par cas et la protection contre la communication en auditoire contraint ne sera pas

immunisée contre les problèmes que soulève le conflit entre les droits constitutionnels et les droits statutaires.

De plus, l'expérience américaine soulève également la question du rôle que jouerait la clause de la liberté d'expression prévue par la Charte canadienne à titre de protection contre l'écoute obligatoire. La doctrine de la communication en auditoire contraint et de l'écoute obligatoire présente en dehors d'un contexte de travail fournit quelques indications sur la manière dont la Constitution canadienne devrait être aménagée pour fournir une meilleure protection contre l'écoute obligatoire. Les décideurs au Canada ont encore à réaliser qu'il existe un véritable lien entre l'écoute obligatoire et la liberté d'expression.

Pendant que l'expérience américaine s'achemine vers l'atteinte d'un résultat spécifique où le droit de l'employeur l'emporte sur les droits des salariés, cette expérience présente néanmoins à la fois une mise en garde et une occasion de traiter la communication en auditoire contraint dans un contexte canadien.