II. ARBITRATION OF FREE SPEECH ISSUES IN THE CANADIAN WORKPLACE

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Introduction

Free speech issues arise in many different contexts in the Canadian workplace. Consequently, many legal doctrines have developed regarding the right to freedom of expression and the need to restrict this freedom in certain circumstances. At common law, there are various legal doctrines such as defamation and the duty of fidelity that restrict an individual's speech. Free speech is also restricted by statutory frameworks, such as the Ontario Human Rights Code,[1] which arbitrators have the jurisdiction to apply. The constitutionally entrenched right to free speech in Canada, contained in section 2(b) of the Canadian Charter of Rights and Freedoms,[2] currently plays only a minor role in the arbitration context. An arbitrator is in a position to apply the Charter only in limited circumstances. An arbitrator's jurisdiction is confined to interpreting the collective agreement, interpreting a statute that is relevant to the proceeding, adjudicating grievances, and, in limited circumstances, applying the Charter.

A brief explanation of the constitutionally guaranteed right to freedom of expression will be followed by examples of both pre- and post-Charter decisions that affect employee or employer free speech in the workplace.

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[1]R.S.O. 1990, c. H-19 *as am.*

[2]Part I of the Constitutional Act, 1982, being Schedule B of the Canada Act, 1982 (UK), 1982, c. 11 [hereinafter Charter].

The Charter Guarantee of Freedom of Expression in Canada

It was not until 1982 that Canada gained a constitutional guarantee of freedom of expression when the Charter was enacted as part of the Constitution of Canada. Prior to this time, courts and other decisionmakers recognized a common law right to freedom of expression that was narrower than the existing Charter right. Arguably, however, that common law right is still applicable in many circumstances where the Charter does not apply. In addition to the common law right, a right to freedom of expression was contained in the Canadian Bill of Rights,[3] which applied only to legislation. This Act was not entrenched in the Constitution and, therefore, lacked the supremacy of the Charter.

The relevant provisions of the Charter for the purposes of this paper are:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms: . . .
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; . . .
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
32. (1) This Charter applies
   (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
   (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 2(b) of the Charter guarantees every person the right of freedom of expression. This section confers an absolute right, and any restriction of expression is considered an infringement of the right for which a remedy may be sought from a court of competent jurisdiction. There are restrictions on the applicability

[3]R.S.C. 1970, Appendix III, s. 1(d) [hereinafter Bill of Rights].

of section 2(b). First, the Charter applies only to government action. This has been commonly referred to as the "public/private distinction." Second, any violation of the Charter can be upheld or "saved" by section 1 of the Charter if it is a reasonable limit in a free and democratic society. These concepts are discussed in more detail below.

"Court of Competent Jurisdiction"

Section 24(1) states that only courts of competent jurisdiction may order remedies for Charter violations. This concept is different from the issue of who is bound by the Charter and relates to the power of a decisionmaker to remedy an infringement.

In *Weber v. Ontario Hydro*,[4] the Supreme Court of Canada recently ruled that arbitrators are courts of competent jurisdiction pursuant to section 24(1) of the Charter, meaning that they have the jurisdiction not only to apply the Charter but to fashion remedies for the violation or infringement of it. As with many contentious Charter issues, the panel that decided *Weber* was closely divided (a 4–3 split).

Once a decisionmaker is assured that it has jurisdiction to consider Charter issues, it must be determined whether the action that is being challenged is "government action."

"Government Action"

Section 32 of the Charter stipulates that the rights and freedoms contained in the Charter apply only to government action. What constitutes government action has been the subject of significant judicial pronouncement and much more is required before clear distinctions can be drawn. Examples of government actors include the legislature, municipalities, labour boards, boards of inquiry, and certain colleges.[5] Examples of nongovernment actors include private corporations, private individuals, trade unions, and certain universities.[6] An example for which the public/private distinction

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[4](1995), 125 D.L.R. 4th 583 (S.C.C.) [hereinafter *Weber*].

[5]*See, e.g., Douglas College v. Douglas/Kwantless Faculty Ass'n* (1990), 77 D.L.R.4th 94 (S.C.C.) [hereinafter *Douglas College*], which found that the college in this case was a government actor. This does not necessarily stand for the proposition that all colleges are government actors.

[6]*See, e.g., McKinney v. Board of Governors of the Univ. of Guelph* (1990), 76 D.L.R.4th 545 (S.C.C.), in which LaForest J. qualified the determination that universities are government actors at pp. 634–44 as follows:

> My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the Charter, but rather that the appellant universities

is unclear is school boards. In the labour relations context, it has been held that the Charter does not apply to private disputes between a union and an employer, such as trespass and tort actions arising from picketing activities.[7]

There are circumstances in which an arbitrator may be faced with a Charter argument. In *Weber*,[8] for example, the Court held that an allegation that a search conducted by private investigators hired by a public utility company to investigate an employee violated the Charter was found to be properly brought before an arbitrator. In *Slaight Communications (Q107 FM) v. Davidson*,[9] the Supreme Court of Canada held that an order, which affected private parties, by an adjudicator, who was appointed pursuant to the Canada Labour Code,[10] can be subjected to Charter scrutiny.

When a Charter argument is raised, a decisionmaker must first determine whether there is government action. If there is government action, the Charter applies and the decisionmaker must determine whether a right guaranteed by the Charter has been violated. Once a violation is established, section 1 of the Charter must be considered to determine whether the action constituting an infringement is justifiable in a free and democratic society. Finally, remedies are fashioned pursuant to section 24 of the Charter.

Section 1: Reasonable Limits

In Canadian constitutional jurisprudence, section 1 of the Charter is referred to as the "saving provision" because it can be used to "save" any government action that is found to be a contravention of the rights and freedoms enshrined in the Charter, if such violation is justifiable in a free and democratic society.

In *R. v. Oakes*,[11] the Supreme Court of Canada developed a three-part test (the "*Oakes* test") to analyze section 1. This test first requires a determination of whether the infringement is rationally connected to the objective that the government actor is seeking to achieve (the "rational connection" test). Next, the "minimal impairment" test requires that the right be infringed as little as

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are not part of government given the manner in which they are presently organized and governed.

[7] *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1986), 33 D.L.R.4th 174 (S.C.C.).

[8] *Supra* note 4.

[9] [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].

[10] R.S.C. 1985, c. L-2 *as am.* [hereinafter Canada Labour Code].

[11] [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

possible. Finally, in the "proportionality test," the objective must be important enough to justify the infringement. If all three parts of the *Oakes* test are met, then the action is allowed. If any part of the test fails, then a remedy must be fashioned pursuant to section 24 of the Charter. Often the remedy involves striking down the offending provision, disallowing evidence, or "reading down" a provision to narrow its application.

Arbitrators have often been faced with free speech issues in the workplace. More recently, some of those issues have touched upon the Charter right. For the most part, however, arbitrators have made decisions that impact upon speech without addressing the topic of free speech and have applied principles that have evolved over the years in arbitral jurisprudence. The following section examines how free speech issues arise in the workplace and how arbitrators have addressed them.

Free Speech Issues in the Workplace

Free speech issues may arise in the workplace in a variety of scenarios:

- employee or union communications about the employer
- employee communications about other employees
- employee communications to third parties
- employee or union communications in the workplace concerning nonunion issues
- employer communications about the union or employees

In these situations, the trier of fact seeks to balance competing factors such as an individual's right to freedom of expression, the employer's right to manage, the employer's obligation not to harm the reputation of an employee, the employee's right to freedom of expression, the union's right to organize employees without interference by the employer, the employee's duty of fidelity to the employer, and the right of employees to be free from harassment.

In an arbitration case that addressed the issue of whether discipline was justified for a union steward who spoke out against her employer's intention to lay off workers, the arbitrator expressed the concept of freedom of expression in the labour relations context as follows:

> It is my view that since the rule is an attempt to limit the very precious right of freedom of expression for the preservation of which many within living memory have died, and many have and continue to

> endure much, vigilance must be exercised to see that it is not improperly confined either by rules or the imposition of discipline.[12]

The following sections explore a sample of arbitration awards that either expressly balance free speech rights with competing interests or have the effect of restricting speech.

Employee Communications about the Employer

In the context of employee communications about the employer, an employee's right to say what he or she feels is weighed against an employer's right to discipline employees who are insubordinate. Further interests must be considered when an employee makes prejudicial comments about the employer to others.

Insubordination. Employees are limited in what they can say to their superiors. Employers have a right to discipline employees who are insubordinate or verbally abusive toward management. Obscene language in some, but not all, circumstances justifies discipline. An employer is justified in disciplining employees who use such language only if it is directed to a member of management in a contemptuous fashion,[13] or if it is accompanied by some other conduct of a serious nature such as an assault. Language that conveys insolence or contempt toward management "will amount to insubordination where such behaviour involves a resistance to or defiance of the employer's authority."[14]

In *Dominion Forge Co. Ltd.*,[15] an employee was discharged because he used abusive language with his supervisor, threatened him, and threw a roll of paper at him. Mitigating factors, including 13 years' seniority, a clean disciplinary record, and the fact that this conduct constituted a temporary flare-up, meant that discharge was excessive. In *Re National Grocers Co. Ltd. and United Food & Commercial Workers, Local 1000A*,[16] the discharge of an employee who directed insubordinate and abusive language at his supervisor was upheld. Similar past conduct of the employee was taken into consideration by the Board of Arbitration. In *Re Public Utilities Commission Sandwich East and International Electrical Workers, Local 911*,[17] the Board

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[12] *Re Robertshaw Controls Canada Inc. & United Elec., Radio & Mach. Workers of Am., Local 512* (1982), 5 L.A.C.3d 142 at 147 (Egan).

[13] *Re MacMillan Bathurst Inc. (Rexdale Plant) & Canadian Paperworkers Union, Local 1497* (1992), 29 L.A.C.4th 415 (Schiff).

[14] *Alberta Liquor Control Bd.* (Jan. 16, 1989), unreported (Clark), *cited* in *Re Government of Yukon & Beacon* (1990), 16 L.A.C.4th 253 (Norman).

[15] (1978), 20 L.A.C.2d 307 (Bird).

[16] (1991), 23 L.A.C.4th 213 (Verity).

[17] (1962), 13 L.A.C. 18*n* (Lane).

upheld the discharge of an employee who verbally abused his supervisor and committed a severe assault against him. In *Re Toga Mfg. Ltd. and U.A.W., Local 195*,[18] an employee, upset because of a shift change that was impossible for her given her babysitting arrangements, called her foreman a "pig," and various other names in Italian, and spat at him. The arbitrator held that this conduct was not severe enough to warrant discharge. In *Re Union Drawn Steel Co. Ltd. and U.S.W., Local 2308*,[19] the discharge of an employee with little seniority, without a good record, who used insubordinate, abusive language without provocation, was upheld. In *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79 (Dritsas)*,[20] the arbitrator upheld a four and one-half day suspension imposed on the grievor who had directed racist and abusive remarks toward her manager.

The arbitral jurisprudence supports the proposition that an employee is given more latitude in his or her use of profanity with management if acting as a union official.[21] The justification for this protection is that union officials must be free to aggressively pursue issues with management without fear of discipline.

In some cases, an employee's conduct after an insubordinate incident may be considered a mitigating factor. For example, in *Re Government of Yukon and Beacon*,[22] the grievor had written a letter of apology for using insubordinate and abusive language with the acting president of the company. In that case, the grievor's two-day suspension was reduced to a one-day suspension.

Insubordination may also take the form of group dissension. In *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees, Local 675*,[23] a group of employees circulated a document that was highly critical of a manager and described him as "unfair," "irresponsible," and "discriminatory." The one-day suspension given to each employee responsible for the document was upheld. The arbitrator explained the reason that the conduct was considered insubordinate:

> It is evident that, standing alone, the preparation and distribution amongst fellow employees of a document containing assertions such as

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[18](1974), 6 L.A.C.2d 381 (Curtis).
[19](1963), 14 L.A.C. 2 (Little).
[20](1993), 38 L.A.C.4th 297 (Dunn).
[21]*See, e.g., Firestone Steel Prods. of Canada Ltd. & U.A.W., Local 27* (1975), 8 L.A.C.2d 164 (Brandt); and *Re Ford Motor Co. of Canada Ltd. & U.A.W., Local 107* (1976), 12 L.A.C.2d 334 (Palmer).
[22]*Supra* note 14.
[23](1982), 6 L.A.C.3d 415 (Franklin).

> those contained in the document circulated by the grievors would generally be construed as an affront to the authority of management and as such an act of insubordination exposing the employees involved to a disciplinary response. The document is a direct attack upon a person in authority, designed to undermine the effectiveness of that person in the discharge of his duties.[24]

Generally, arbitrators will examine all surrounding circumstances in deciding whether the discharge of an employee who uses abusive language or is otherwise insubordinate to his or her supervisor should be upheld. In making a decision, the arbitrator will consider the employee's past disciplinary record, length of service, and the circumstances surrounding the discharge. If it appears that the abusive language used was an isolated incident involving an otherwise good employee and if there was no serious misconduct accompanying it, then an arbitrator is unlikely to uphold discharge. More often, lesser penalties are supported in cases of abusive language. The decisions support the proposition that some form of discipline is warranted for an employee's insubordinate behaviour. Although arbitrators seldom analyze cases involving abusive language directed at an employer by referring to the Charter, the section 1 test of a reasonable limit appears to be similar to the balancing of interests supported by arbitral jurisprudence.

Employee Criticism of Employer. Free speech issues frequently arise when employees are publicly critical of the employer. Criticism of employer policies may amount to a breach of an employee's duty of fidelity owed to the employer. Government employees, due to their position, traditionally have been more restricted than nongovernment employees with respect to their ability to criticize. An employee's statements that are defamatory may also be restricted by actions in libel and slander.

Related to Employer Policies. In *Re Simon Fraser University and Association of University and College Employees, Local 2*,[25] unionized professors of the university were publicly critical of the university's open-door policy in the reading room of the library. After the university reprimanded the professors, the union asserted that the discipline violated section 2(b) of the Charter. The arbitrator found that the Charter did apply to universities given that, in this case, the university exercised statutory authority and was subordi-

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[24] *Id.* at 421.

[25] (1985), 18 L.A.C.3d 361 (Bird) [hereinafter *Simon Fraser Univ.*].

nate to the British Columbia legislature.[26] The arbitrator held that the authority exercised by the university constituted a violation of section 2(b), but found that the limitation was a reasonable limit on the right of free speech. In upholding the discipline, the arbitrator found that the employees had breached the duty of fidelity they owed to their employer and explained the limitations imposed on the free speech of employees as follows:

> In the present case the duty of loyalty is a duty under the collective bargaining laws of British Columbia. *I hold that those limitations prescribed by law have been demonstrably justified by the university in our free and democratic society.* I am reinforced in my opinions by the analysis of Jackett C.J. in *Stewart v. Public Service Staff Relations Board,* [1978], 1 F.C. 133, 16 N.R. 306 *sub nom. Re Stewart, i.e., that reasonable limitations on the right of free speech, and inferentially s. 2(b) of the Charter, are assumed when a person voluntarily enters employment.* Experience shows that, except in the most unusual circumstances, such as in the case of academics, public criticism of the employer almost inevitably leads to a deterioration of working relationships with bad consequences for the employer, the employee, or both. Only when some higher purpose is served such as to expose crime or serious negligence, to serve the cause of higher learning, to fairly debate important matters of general public concern related to the employer or those in authority over him, as examples, can the employer be publicly criticized about the employer's conduct without breaching the duty of loyalty. Even then the criticism must be fair in that a deliberate omission and negligent misstatement of significant facts will be treated as a breach of the duty of loyalty and so will a failure to exhaust all reasonable opportunities to resolve the issue internally before making matters public. The employer's legitimate goals must be accorded respect by employees who are required to work towards accomplishing those goals. That respect was not accorded here. Not only did the grievors breach their duty of loyalty, they also breached art. 8 which by necessary implication requires employees to respect management decisions to pursue lawful means to achieve lawful ends.[27]

In *Re Wainright School Division No. 32 and Canadian Union of Public Employees, Local 1606,*[28] a secretary at a school board was given a letter of reprimand after she wrote a letter to her employer as a concerned parent criticizing certain policies. The fact that the letter was written from the perspective of a concerned parent, rather than as an employee criticizing her employer, served to minimize the seriousness of the conduct. In addition, the board of

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[26]It should be noted that, subsequent to the *Simon Fraser Univ.* award, *id.*, the Supreme Court of Canada, in *McKinney v. Board of Governors of the Univ. of Guelph* (1990), 76 D.L.R.4th 545, held that the Charter did not apply to the universities in that case.

[27]*Simon Fraser Univ., supra* note 25, at 368 (emphasis added).

[28](1984), 15 L.A.C.3d 344 (Laux).

arbitration referred to the defense of fair comment, which is afforded to those who are critical of elected officials with respect to their duties in public office. However, counter to this defense is the proposition that employees may well lose some rights or freedoms by virtue of their employment relationship. The board of arbitration summarized the arbitral jurisprudence with respect to these issues as follows:

> [E]mployees may be disciplined for "off-duty" conduct . . . where such conduct is sufficiently injurious to the business interest of the employer, or is incompatible with the due and faithful discharge of his duties, or is likely to be prejudicial to the reputation of the employer.[29]

The board of arbitration held that the language used by the employee was intemperate and inappropriate but that the disciplinary letter was an unwarranted overreaction.

Generally, it is an accepted principle by arbitrators that an employee's freedom of expression is restricted when voluntarily assuming the role of employee. The jurisprudence relating to government employees, covered in the next section, is indicative of this principle but reveals that there is a limit on the extent of the restriction.

Government Employees. Traditionally, public servants have had more restrictions imposed on their speech than have private sector employees. The Canadian Constitution embraces a convention of political neutrality that is central to the principle of responsible government. Consistent with this convention, legislation such as section 33 of the Public Service Employment Act[30] was enacted that further restricted the activities of government employees in comparison with other employees. Since the advent of the Charter, however, challenges brought in the courts to legislation restricting the liberties of government employees have resulted in court decisions that narrowed the scope of the statutes' application.

In *Re Fraser and Public Service Staff Relations Board*,[31] the Supreme Court of Canada recognized the importance of the perception of government employees as impartial and effective in fulfilling their duties. The employee in this case was suspended for three days after he wrote a letter to the local newspaper that was critical of the government's metric conversion program and the enactment of the Charter. The employee continuously attacked the government's

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[29] *Id.* at 350.
[30] R.S.C. 1985, c. P-33 [hereinafter Public Service Employment Act].
[31] (1985), 23 D.L.R.4th 122 (S.C.C.).

policies publicly in a vicious manner until he was dismissed from his employment. The Charter did not apply because the incidents occurred prior to the enactment of the Charter. Further, the Bill of Rights had no application because legislation was not being challenged. The Court, however, recognized the common law right to freedom of expression and the fact that it is not an absolute right. The Court stated that a public servant's job has two dimensions: (1) the employee's tasks and performance, and (2) the perception held by the public. The latter refers to the actual and apparent impartiality of the public service that has a general requirement of loyalty to the Government of Canada, as opposed to the political party in power. Having regard to the substance, context, and form of the criticisms, the Court found that the grievor's ability to perform the second dimension of his job as a public servant was impaired. The grievor simply went too far. The arbitrator dismissed the grievance on the grounds that the right to freedom of expression is not an absolute one, and the activities of the grievor impaired his ability to perform his functions as a public servant.

The Supreme Court of Canada considered whether restrictions on the political activity of public servants were in breach of the Charter in *Osborne v. Canada (Treasury Board)*.[32] In *Osborne*, the Court was faced with a challenge to section 33 of the Public Service Employment Act.[33] The section prohibited public servants from engaging in work for a candidate or political party and provided that such conduct could result in discipline up to and including dismissal. The Supreme Court of Canada found that the section restricted expressive activity and was, therefore, a violation of section 2(b) of the Charter. The Court held that it could not be saved under section 1 because it failed the proportionality and minimal impairment tests. The legislation was overinclusive as to both the range of activity and the range of public servants who were covered. The Court, therefore, read down the section so that it applied only to deputy heads.

In *Ontario Public Service Employees Union v. Attorney-General for Ontario*,[34] a decision rendered after *Osborne*, the court of appeal held that similar restrictions on employees contained in the pro-

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[32](1991), 82 D.L.R.4th 321 (S.C.C.) [hereinafter *Osborne*].
[33]*Supra* note 30.
[34](1993), 105 D.L.R.4th 157 (Ont. C.A.).

vincial legislation were unconstitutional. *Osborne* was applied, and it was found that the freedoms of only deputy ministers could be restricted pursuant to the legislation.

In *Re Insurance Corp. of British Columbia and Office of Technical Employees' Union, Local 378 (B.C.)*,[35] which is discussed in more detail below, the employee was an adjuster employed by the government of British Columbia. The arbitrator found that the critical comments made in public by the grievor made him unable to function in his job properly. Significant to this finding was that the grievor was the spokesperson for the government insurance organization for that geographic location. Accordingly, a non-disciplinary transfer was held to be justified given his publicly critical comments.

The jurisprudence suggests that government employees are more likely to have their freedom of speech restricted than other employees because of their roles as public servants, but that the employer must have a reason tied to job performance for imposing such a restriction. In addition, higher-level employees are more likely to have their speech restricted than lower-level employees.

An employee's expression about his or her employer within and outside the workplace may give rise to discipline that amounts to a restriction on the employee's right to free speech. Such restriction may be justified only where the expression has an adverse effect on the employee's job performance. The following section contains a review of cases addressing issues that arise out of employee comments about other employees.

Employee Communications about Other Employees

A classic example of communications between employees that may invite discipline and, therefore, that may have to be adjudicated, are comments that give rise to allegations of harassment between employees. If an employee harasses another employee because of that employee's gender, race, ethnic origin, sexual orientation, and so forth, not only does the employer have the right to discipline the employee, but the employer has an obligation to take action pursuant to obligations under human rights legislation,[36] which requires that employees be free from harassment in

[35](1981), 3 L.A.C.3d 355 (Ladner) [hereinafter *ICBC*].

[36]*See, e.g., Re Eastcan Bottling Ltd. & Soft Drink Workers Joint Local Executive Bd., Local 387W* (1990), 13 L.A.C.4th 180 (Bendel) [hereinafter *Re Eastcan*].

the workplace.[37] Arguably, this is a violation of the harasser's right to freedom of expression. Many collective agreements have adopted provisions similar to those provided in human rights legislation. In addition to collective agreements and the statute itself, many employers have instituted harassment policies for the investigation and management of sexual or other harassment in the workplace. The power to restrict speech in such a manner can be a powerful one since many people have different perspectives about what constitutes "harassment."

Arbitral jurisprudence has identified several forms of sexual harassment. Sexual coercion occurs when a person who is in a position to grant a subordinate person an advantage promises to do so in exchange for sexual favours. Another type of sexual harassment is a poisoned work environment, which occurs when any individual uses language, gestures, touching, leering, or other forms of communication so as to make others feel uncomfortable.[38] The manner in which employers may respond to harassment of one employee by another depends not only on the nature of the conduct, but on the practice and policies in place in the organization[39] and the atmosphere of the workplace.[40] In the *North York*[41] award, for example, the grievor, a 14-year employee with a good disciplinary record, was discharged for harassing summer students employed in the city's parks. The grievor's behaviour was found to be "objectionable and deserving of a stern disciplinary response."[42] The grievor, who had told racist and sexist "jokes" and had made lewd and obscene comments, was reinstated without compensation. The arbitrator indicated that, had the grievor been warned that his conduct was unacceptable and could lead to his discharge, as contemplated by the employer's workplace harassment policy, the discharge may have been upheld.

In *Canada Post*,[43] the arbitrator indicated that among the reasons for mitigating the penalty was the fact that the lewd comments

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[37] *See, e.g.*, s. 5(2) of the Ontario Human Rights Code, which states:

> Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

[38] *Re City of North York & Canadian Union of Public Employees, Local 9* (1990), 16 L.A.C.4th 287 (Burkett) [hereinafter *North York*].

[39] *Id.* at 297.

[40] *Re Canada Post Corp. & C.U.P.W., (Gibson)* (1987), 7 L.A.C.3d 27 (Swan) [hereinafter *Canada Post*].

[41] *Supra* note 38.

[42] *Supra* note 38, at 297.

[43] *Supra* note 40.

made by the grievor took place in a context that, to a certain extent, was contributed to by the female employee. Where a grievor's conduct reveals a pattern of conduct over time that is considered "harassment," then an employer is justified in terminating the grievor's employment provided that he or she has been given the appropriate warnings and opportunities to improve.[44]

Similar to sexual harassment, an employer has the right and the obligation to discipline employees who express racist views or direct racist comments toward other employees. In *Re Eastcan*,[45] the arbitrator upheld the discharge of an experienced employee who subjected a new young black employee to racial slurs. This conduct amounted to a culminating incident that justified the grievor's discharge.

Even if an employee is not engaging in harassment with an underlying element of discrimination, an employer may be justified in restricting such communications by imposing discipline on the harasser. The arbitrator in *Canada Post* explained the nature of harassment as follows:

> There is really no difference between harassment of this kind and harassment on the basis of any other of the prohibited grounds of discrimination; when one employee sets out to make another employee's life miserable because of some characteristic of that employee which also constitutes a prohibited ground of discrimination, that can reasonably be perceived as undermining that person's right to equality in the work place. Indeed, harassment may justify discipline even where the basis for the harassment is not a prohibited ground; if employees have a right to be protected from physical assaults by their fellow employees, they have an equivalent right to be protected from a course of verbal injury, whether that verbal injury has a basis which is a prohibited ground of discrimination, or has some other basis, or even has no basis at all. The paradigm of such cases is *Re Dhillon and Treasury Board (Post Office Department)* (1980), 80 C.L.L.C. ¶18,007 (Norman), where a course of insults to one employee by another based on racial intolerance was found to be a breach of the collective agreement.[46]

In *Re ITT Cannon Canada and C.A.W., Local 1090*,[47] the grievor was dismissed because he embarked upon a conduct of behaviour primarily toward women employees that made them feel very uncomfortable but was not sexual in nature. The arbitrator explained that even though the conduct is not a violation of human

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[44] *Re Toronto Hydro Elec. Sys. & C.U.P.E., Local 1* (1988), 2 L.A.C.4th 169 (Davis).
[45] *Supra* note 36.
[46] *Canada Post, supra* note 40, at 44.
[47] (1990), 15 L.A.C.4th 369 (Brown).

rights legislation, only because it does not fall into the expressly stated prohibitions, it still amounts to culpable conduct for which discipline can be imposed. In deciding that the employer was justified in dismissing this employee, the arbitrator noted that the employer has a responsibility to protect its employees from abuse.[48]

Another situation involving employee-to-employee communications where employers may limit free expression is when one employee uses profanity toward another. In *Re Boeing of Canada and I.A.M., Local 1542*,[49] the grievor, a shop steward, was dismissed because he called an employee, with whom he was trying to discuss a problem in the workplace, a "cocksucker." The arbitrator found that this profanity was not acceptable "shop talk." The distinction was explained as follows:

> Words derive much of their meaning from the manner in which they are spoken and the broader context in which they are used. While jokingly using profane language in the course of friendly banter is acceptable conduct in a work place such as this, expressing one's anger by calling a fellow employee a profane and highly insulting name is cause for discipline.[50]

In *Boeing*, the grievor argued that because he was a union official he should be given more latitude with respect to his use of profanity in these circumstances. The arbitrator rejected this argument, stating that this immunity enjoyed by union officials in relation to management does not extend to dealings between the union steward and a member of the bargaining unit. Given the grievor's prior disciplinary record, the arbitrator upheld the discharge.

The general principle to be derived from the jurisprudence is that in promulgating rules and disciplining employees who are abusive or who harass one another, the degree of discipline, as with most other conduct, depends on the employee's disciplinary record and the manner in which the abuse or harassment was managed. If an employee is told that certain conduct is unacceptable, is given a chance to improve, and yet the employee continues to be abusive or to harass, then more severe discipline is warranted.

Employee Communications to Third Parties

The development of the right to freedom of expression entrenched in the Charter developed in part as a result of cases

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[48] *Id.* at 383.
[49] (1991), 23 L.A.C.4th 27 (Brown) [hereinafter *Boeing*].
[50] *Id.* at 32.

involving teachers who communicated inappropriate or unacceptable versions of history to students or to others outside of the school. Free speech issues also arise when an employee discloses confidential information gained through employment to the detriment of his or her employer. Employee statements in articles or comments about employers published in union newsletters enjoy a limited protection, which are explored later in the paper.

The Teacher Cases. Two key Supreme Court of Canada cases regarding freedom of expression involve teachers. In these cases, the individuals held anti-Semitic views and communicated these views to students and to the public. In *R. v. Keegstra*,[51] the issue before the Court was whether the provision of the Criminal Code[52] under which Keegstra was charged was a violation of section 2(b) of the Charter.

Mr. Keegstra was a teacher in Alberta who began teaching in the 1970s and was dismissed from his position in 1982. In 1984, Mr. Keegstra was charged pursuant to section 319(2) of the Criminal Code for distributing hate propaganda. Mr. Keegstra held anti-Semitic beliefs that he published and taught to children. A prime example of his "teachings" was that the holocaust was a hoax. The provision under which Mr. Keegstra was charged was a very new one, enacted to address precisely this type of crime.

Chief Justice Dickson wrote the majority in a case that divided the Court 4 to 3. The Chief Justice decided that the Criminal Code section under which Mr. Keegstra was charged infringed section 2(b) of the Charter but was saved by section 1.

The Chief Justice stated that section 2(b) of the Charter is very broad and provides what amounts to an absolute right. The only restriction on this right referred to by the Chief Justice was violent expression.[53] Chief Justice Dickson specified that the "violent expression" restriction relates to the form of expression rather than its content. A violent act, therefore, is not protected by section 2(b). Violent words, however, are protected.

Approximately two years after the *Keegstra* decision was rendered, the Supreme Court of Canada addressed similar issues in *R. v. Zundel*.[54] Mr. Zundel, like Mr. Keegstra, held anti-Semitic views, which he chose to publish. Unlike Mr. Keegstra, Mr. Zundel

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[51][1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

[52]R.S.C. 1985, c. C-46 *as am.* s. 319(2) (willful promotion of hatred).

[53]In stating this proposition, the Court relied on an earlier freedom of expression case, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

[54][1992] 2 S.C.R. 731 [hereinafter *Zundel*].

was charged under the "spreading false news" provision of the Criminal Code.[55] This provision dates back to 1275 in England. It was incorporated into Canadian law as part of the 1892 Criminal Code of Canada. The British provision was used to convict those who spoke out against the monarchy. The provision was abolished in Britain in 1887, prior to its enactment in Canada.

In *Zundel* a differently constituted Court held, by a 4–3 margin, that section 181 infringed section 2(b) of the Charter and could not be saved by section 1 because it failed the minimum impairment portion of the *Oakes* test. The section was too vague and broad to be saved by section 1.

In *Ross v. New Brunswick School District No. 15*,[56] the most recent Supreme Court of Canada case regarding freedom of expression, a school board was ordered by a provincial human rights board of inquiry to suspend for 18 months a teacher who held anti-Semitic views, during which time they could appoint him to a nonteaching job. Mr. Ross had published his views and taught them to students in his classes. If no nonteaching positions were available, the school board was to terminate Mr. Ross' employment after 18 months. In addition, the board of inquiry ordered the school board to terminate Mr. Ross' employment if he published, sold, or distributed his anti-Semitic literature again.

The hearing before the board of inquiry was initiated by human rights complaints filed by parents of students taught by Mr. Ross. The board found that the school board had an obligation to discipline teachers who profess discriminatory views and pass those views onto the children they have been retained to teach.

The Court, in reviewing the order of the New Brunswick Human Rights Board of Inquiry, found that it constituted a violation of section 2(b) of the Charter but was partially saved by section 1. The portions that were not saved and that were severed from the order were the clauses limiting what Mr. Ross could publish and distribute.

Although this decision is not based on an arbitrator's award, it does provide guidance to arbitrators in Canada who may be faced with grievances filed by individuals like Mr. Ross whose expression has been limited because the educational institute disapproved of what was being said. Obviously, a case like *Ross* is clear cut. Mr. Ross'

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[55]s. 181.

[56](Apr. 3, 1996), Doc. No. 24002 [unreported].

views were discriminatory and harmful to members of the Jewish community. Young children were being taught to disrespect and question the validity of the Jewish religion and the holocaust. Without a doubt, this type of expression in these circumstances must be restricted. However, such limitations are censorship. It is for this reason that decisionmakers must rely on section 1 to "save" government action in only the most extreme of cases. Arbitrators' awards may be subject to such Charter scrutiny and must, therefore, be made in compliance with the Charter.

Employer Rules Regarding Communications in the Workplace. Employers have a right to manage the workplace. In order to manage, employers must make rules. In the preceding paragraphs, rules, such as workplace harassment policies that limit expression, were discussed. In addition to harassment policies, employers promulgate rules that may restrict employee free speech in certain circumstances by prohibiting employees from wearing buttons, pins, or stickers that communicate their views, or posting notices that express certain views on the union bulletin board in the workplace.

Issues such as these come before arbitrators when an employee files a grievance regarding an employer rule or when discipline has been imposed as a result of a breach of a rule. In addressing such issues, arbitrators must balance the competing interests. The employer's interest lies in its right to manage and to impose rules so as to protect the interests of the employer. The employees' interest lies in their right to freedom of expression and their right to show support for their union.

Buttons, Pins, and Stickers. Generally, arbitrators have held that an employer cannot impose rules prohibiting employees from wearing union buttons, pins, or stickers because supporting the union in this fashion is considered a lawful union activity unless there is some overriding interest to restrict it.[57] If the item being worn is not offensive, provocative, embarrassing, or potentially disruptive, an arbitrator will likely find that the employee's rights outweigh the employer's.[58] Two examples of slogans that were found to be properly restricted by the employer were T-shirts with the slogan

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[57]*See, e.g., Re White Spot Ltd. & C.A.I.M.A.W., Local 112* (1991), 21 L.A.C.4th 421 (McPhillips); *Re Canada Post Corp. & Canadian Union of Postal Workers* (1986),26 L.A.C.3d 58 (Outhouse) [hereinafter *Re Canada Post*]; and *Re the Crown in Right of Ontario (Ministry of Solicitor-General) & Ontario Public Service Employees Union* (1986), 23 L.A.C.3d 289 (Delisle).

[58]*Re Canada Post, id.*

"Management Sucks"[59] and buttons stating "Crown Corporation Now T.W.U."[60]

In *Re Hub Meat Packers Ltd. and United Food & Commercial Workers, Local 1288P*,[61] the arbitrator upheld the employer's rule forbidding the placement of stickers on hard hats because such stickers posed a health hazard in a meat packing area where hygiene must be meticulously maintained. The arbitrator held that there were "overriding, compelling and justified business reasons not to allow the Union sticker on the hard hats or other stickers that would pose the same health risks or other legitimate health risks that outweigh an employee's rights."[62]

In *Re The Bay (Windsor) and REDS, Local 1000*,[63] an employer was found to be justified in prohibiting employees from wearing union buttons that said "Say No to Sunday Shopping" because the collective agreement prohibited employees from participating in union activity during working hours. In another case, an arbitrator upheld an employer's rule prohibiting uniformed customs inspectors from wearing buttons that said "keep our customs inspectors" and "KEEP OUT DRUGS & PORNO."[64]

There is support for the proposition, therefore, that employers may limit the expression of employees unless such expression is a "lawful union activity" that is not prohibited by the collective agreement and that is not offensive, provocative, embarrassing, or potentially disruptive.

Bulletin Boards. Similar to the issue of wearing buttons, pins, or stickers is the controversy that arises over the use of the union bulletin board. In many workplaces, the employer reviews all notices being posted on the bulletin board, often in accordance with a provision of the collective agreement. Depending on the language in the relevant provision, denial to post by the employer may result in a grievance. As with buttons, pins, and stickers, an employer is not justified in prohibiting the posting of notices that relate to union business.

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[59] *Re Schneider & Treasury Bd. (Post Office Dep't)* (1979), unreported (P.S.S.R.B. file Nos. 166-2-5219 & 5264) (Farlardeau-Ramsay); *Re Burden & Treasury Bd. (Post Office Dep't)* (1979), unreported (P.S.S.R.B. file Nos. 166-2-5220 & 5264) (Farlardeau-Ramsay); and *Re Berry & Treasury Bd. (Post Office Dep't)* (1979), unreported (P.S.S.R.B. file No. 166-2-5223) (Farlardeau-Ramsay), all of which were cited in *Re Canada Post, supra* note 57.

[60] *Re British Columbia Telephone Co. & Telecommunications Workers Union* (1982) 8 L.A.C.3d 271 (Williams).

[61] (1990), 12 L.A.C.4th 81 (Tuck).

[62] *Id.* at 96.

[63] (1990), 16 L.A.C.4th 298 (Shime).

[64] *Re Treasury Bd. (Revenue Canada—Customs & Excise) & Almeida & Capizzo* (1989), 3 L.A.C.4th 30 (Young).

In one case, the arbitrator held that the employer was justified in removing a notice containing the results of a survey that criticized specifically named managers because it was grossly disrespectful.[65] The arbitrator who decided this case stated, "Considerable weight is given to the importance of freedom of expression which is to be restrained only where it is illegal, abusive, defamatory or fraudulent."[66]

In *Re Interforest Ltd. and International Woodworkers, Local 1-500*,[67] the grievor, who was the president of the local union, posted a notice about sick leave that, among other things, questioned the competence of supervisors employed by the employer. The fact that the grievor was a union official who posted the notice pursuant to his duties as a union official was found to justify giving him more leeway with respect to his speech. The arbitrator held that, although the language used by the grievor was "intemperate," it was within the bounds of reasonable comment. The arbitrator stated that the grievor's conduct did not assist in promoting a labour relations atmosphere in which a productive bargaining relationship can flourish. The conduct was not, however, sufficient to warrant discipline.

A review of the cases reveals that, although arbitrators extol the virtues of employee freedom of expression, there are many circumstances in which an employee's right to free expression by wearing buttons, pins, or stickers or by posting notices on the bulletin board can be restricted by employers.

Disclosure of Confidential Information. At common law, employees are prohibited from disclosing confidential information, gained while employed, to another party so as to prejudice their employer. Often, even after an employee leaves, he or she is restricted by the terms of an employment contract from disclosing such information and from using it for a certain period of time. Competing interests of employee free speech and free enterprise clash with an employer's right to expect loyalty from its employees or former employees when, for example, an employee or former employee discloses trade secrets to a competitor,[68] or when an employee leaves a position with the employer, taking a customer

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[65] *Re Metropolitan Auth. & Amalgamated Transit Union, Local 508* (1992), 27 L.A.C.4th 36 (Cromwell).

[66] *Id.* at 41.

[67] (1990), 12 L.A.C.4th 257 (Kilgour).

[68] *Di Giacomo Inc. v. Mangan* (1988), 20 C.P.R.3d 251 (Ont. H.C.).

list so as to solicit the former employer's customers.[69] In these types of situations, the courts may limit the expression of such employees by granting injunctions that enjoin the employees from using their knowledge or by dismissing an employee's claim for wrongful termination on the ground that disclosure of confidential information is sufficient to warrant dismissal with cause. If the employee were found to be acting in the best interests of the employer, a court has held that the disclosure of confidential information did not warrant dismissal for cause.[70]

In most of these cases there is no issue as to the applicability of the Charter because such situations arise in the private sector. In the rare case, similar situations may come before an arbitrator if employees covered by a collective agreement are disciplined or discharged for disclosing trade secrets or other confidential information that prejudices their employer.

Criticism of Employer by Union Official. Employees who are union officials such as stewards or local presidents are accorded more protection of their freedom of expression by virtue of their roles. It is a recognized arbitral principle that an employer cannot discipline a union official who has spoken out against the employer in the labour relations context. If a union official makes comments that amount to inciting harassment against management,[71] that amount to untruthful allegations,[72] or that criticize management actions not related to the terms and conditions of employment,[73] such speech may be restricted in the same fashion as a regular employee's speech.

In an oft-quoted case, *Re Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139,*[74] the grievor, who was a union steward, was disciplined because he wrote a disparaging article about the conduct of two members of management at a grievance meeting. The article was highly prejudicial and was published in the union newsletter. The grievor was discharged as a result of the publication. This conduct was considered by the board of arbitration to be off-duty conduct. As such, the board of arbitration stated that it

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[69]*Genesta Manufacturing Ltd. v. Babbey* (1984), 6 C.C.E.L. 291 (Ont. H.C.); *R.W. Hamilton Ltd. v. Aeroquip Corp.* (1988) O.J. No. 906 (H.C.) (QL).

[70]*O'Callahan v. Transair Ltd.* (1975), 58 D.L.R.3d 80 (Man. C.A.).

[71]*Re Corp. of the City of London & London Civic Employees Union, Local 107* (1978), 19 L.A.C.2d 147 (Kruger) [hereinafter *Re City of London*].

[72]*Re Corp. of the City of Brampton & Amalgamated Transit Union* (1989), 7 L.A.C.4th 294 (Brown) [hereinafter *City of Brampton*].

[73]*Re Chedore & Treasury Bd. (Post Office Dep't)* (1980), 29 L.A.C.2d 42 at 60 (McLean) [hereinafter *Re Chedore*]; *Stewart v. Public Serv. Staff Relations Bd.* [1978] 1 F.C. 133 (C.A.).

[74](1980), 26 L.A.C.2d 379 (Picher) (Ont.) [hereinafter *Burns Meats*].

must find that the grievor's off-duty conduct has directly affected some legitimate interest of the employer such as safety, morale, efficiency of production, or volume of sales. The board of arbitration held that, to warrant discipline, the comments must have a malicious element to them, not unlike the principles of libel and slander. The board examined the role of the union steward and the extent to which his or her speech may be fettered by an employer:

> If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above and by the Court in the *Linn* [*v. United Plant Guard Workers of America, Local 114 et al.* (1966), 383 U.S. 53] case disclose the standard to be applied. The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute licence or an immunity from discipline in all cases. A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the *Labour Relations Act*, R.S.O. 1970, C. 232. Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management: *Re City of London, supra.* Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.[75]

The board held that there was no just cause to impose any discipline on the grievor because of the article in the newsletter, and the grievor was reinstated.

Where the comments made by the grievor are outside of his or her duties as a union official and/or incite harassment of a manager, boards of arbitration have found that discipline is warranted. In one case,[76] the board of arbitration ordered that, if the grievor apologized in a specified manner, within 60 days, then no disciplinary suspension should be imposed. If, however, the employee failed to apologize in the manner directed, his disciplinary suspension was to remain, but was to be reduced from 30 days to 3 days. In another case, a 10-day suspension was reduced to a 2-day suspension.[77] In another case, a union official who was found to have made untruthful allegations against the employer that im-

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[75] *Id.* at 386–87.
[76] *Re City of London, supra* note 71, at 154.
[77] *Re Chedore, supra* note 73, at 64.

paired the employment relationship was suspended for one day. The arbitrator upheld this discipline, stating that it was "well within reasonable limits of a disciplinary response for such misconduct."[78]

In ICBC,[79] during a lock-out, a shop steward, who was employed as a bodily injury adjuster, wrote a letter critical of the employer to the local newspaper and various political representatives. The letter referred to the "mismanagement" of the company that allegedly flowed from the "stupidity, . . . lack of ability . . . or malicious[ness]" of the employer. As a result of the letter, the grievor was thrust into the media spotlight, and the employer transferred him to another location. The arbitrator found that the grievor's language was defamatory and went beyond fair comment. Had the grievor only sent the letter to his employer, rather than sending it to a newspaper thereby "publishing" it, there would have been no defamation. The arbitrator held that the nondisciplinary transfer of the employee was justified in the circumstances given that the employee's job included being a spokesperson for the employer in that area.

Boards of arbitration clearly recognize that employees have a right to free speech. The right of union officials to criticize an employer is clearly given more protection and is less apt to be restricted, as long as the criticism is confined to the employer's policies concerning the terms and conditions of employment, is not malicious, and is not plagued with insubstantial, inflammatory charges that impair the employment relationship.

Employee or Union Communications in the Workplace Concerning Nonunion Issues

There are many emotionally charged issues, such as abortion and politics, on which employees and unions may want to express opinions at the workplace through buttons, pins, stickers, or bulletin board notices. If the issues are not related to union issues, and, therefore, afforded some protection, arbitrators are likely to uphold employer rules limiting the expression of such opinions in the workplace.

In *Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414*,[80] the grievor was instructed by his manager to remove a button that said "boycott Eaton's." The grievor did not

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[78] *City of Brampton, supra* note 72, at 327.
[79] (1981), 3 L.A.C.3d 355 (Ladner).
[80] (1985), 19 L.A.C.3d 269 (O'Shea) [hereinafter *Re Dominion Stores*].

work for Eaton's, but his union was involved in a labour dispute with Eaton's. The arbitrator found that the purpose of the grievor's button was to persuade people who saw it to stop doing business with Eaton's. This was found to be an illegitimate union activity. The arbitrator distinguished this case from others that addressed rules prohibiting employees from wearing pins that identify the employees as union members or stewards. The arbitrator balanced the competing interests and stated:

> While employees are free to express their views on such matters as the Eaton's strike, that freedom is not without fetters. The employees are free to express their personal views on such matters on their own time. However, they are not free to do so during working hours, whether the expression of personal views are made verbally or through a button. That is not what the employees are being paid for. It cannot be said that the wearing of the button is innocuous since that would deny the very purpose of the button and would also deny the fact that advertising works.
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> The company has the right to direct employees to wear promotional buttons since such buttons are intended to increase the sale or enhance the public image of the company. On the other hand, the boycott button is not designed to increase sales or enhance the public image of the company. While some customers may support the sentiments expressed in the boycott button, others would not. *A good rule of thumb would be that if an employer cannot properly compel an employee to wear a button, whether it advocate pro-union or anti-union sentiments or whether it advocates the support of a particular party or any particular side of a contentious issue (e.g., pro-abortion or anti-abortion), an employee cannot choose to wear such a button during working hours.* If it were otherwise, an employee could become a walking billboard for the purpose of espousing any cause he supports. What an employee does on his own time with respect to the wearing of such buttons is his own business. The issue in this case is readily distinguishable from the earlier "hair" cases where the cutting of hair would materially affect the employee's appearance during off-duty hours as well as during working hours.[81] (emphasis added)

In *Re FBI Brands Ltd. and United Food & Commercial Workers, Local 1230*,[82] the union filed a grievance because the employer refused to allow the posting of certain materials concerning a labour dispute at the employer's Quebec plant. A document questioned the employer's negotiating tactics in the other plant. The notice was removed after the employer objected to it. The employer responded to the notice by a letter to the employees, and the union

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[81] *Id.* at 277–78 (emphasis added).
[82] (1987), 29 L.A.C.3d 189 (Willes).

sought to retort by a letter that it wanted to post. The grievance was filed by the union after the employer refused to permit the union's letter to be posted on the bulletin board. In denying the grievance, the arbitrator held that the bulletin board should not be used as a forum for debate. In coming to this conclusion the arbitrator referred to the other methods that were available to the union to communicate its views such as distributing the letter to its membership or discussing the issue with other employees.

Although the number of cases dealing with the expression of contentious issues is limited, a general principle referred to by many arbitrators, often as *obiter*, is that the workplace is not to be used as a debating society.[83] Arbitrators recognize that debating contentious issues is disruptive to employers' operations. This is recognized, therefore, as justification for limiting employee free speech, especially since employer rules do not stop employees and unions from freely expressing their views outside the workplace.

It is not just employees whose right to free speech is restricted. The next section reviews some of the legal principles that lead to the restriction of employer free speech.

Employer's Communications about the Union or Employees

The most obvious example of the restrictions imposed by law on an employer's freedom of speech with respect to comments about the union or employees is in the context of organizing drives. The labour legislation and labour board jurisprudence of the provinces and the federal jurisdiction impose limits on what can and cannot be said or done by an employer during an organizing drive. Employers, quite simply, must not unduly interfere with a union organizing drive. If an employer is seen to be exerting its power by intimidating or threatening employees to vote against the union or to not sign membership cards, the relevant labour board will find that the employer has committed an unfair labour practice. The boards have a wide variety of remedies that they can order to rectify the situation.

Employer comments against the union or individual employees could give rise to actions in the civil courts for defamation. As such,

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[83] *Re Treasury Bd. (Employment & Immigration Canada) & Bodkin* (1989), 6 L.A.C.4th 412 (Galipeau).

an employer's speech is restricted somewhat, as is everyone's, by the possibility of a defamation action.

In the arbitration context, the issue of restricted employer expression about employees arises when an employer is ordered to write a letter of reference for an employee or to respond to inquiries about the employee. In *Slaight Communications*,[84] an employee had been terminated on the grounds of inadequate performance. The adjudicator held that the dismissal was unjust and ordered the employer to give the grievor a letter of recommendation certifying that the grievor had been employed by the station, that he had reached a certain level of sales, and that an adjudicator had found that he was unjustly dismissed. In addition, the employer was ordered not to respond to any inquiries made about the employee except by sending the letter of recommendation. The adjudicator's decision was judicially reviewed and heard by the Supreme Court of Canada, which stated that, although the employer's freedom of expression was violated by the orders, they were saved by section 1. The Court found as follows: the objective of assisting an unjustly dismissed employee is a valid one; the adjudicator infringed the employer's right as little as possible; and the infringement was done only to the extent necessary to achieve the desired result.

In *National Bank of Canada v. R.C.I.U.*,[85] the Supreme Court of Canada dealt with a similar issue based on a Canada Labour Relations Board (CLRB) order requiring an employer to send a letter to all of its employees, the language of which was stipulated by the CLRB, stating that the employer had breached the Canada Labour Code. The letter gave the impression that the comments were coming from the employer, not from the CLRB. The Supreme Court of Canada held that the CLRB infringed the employer's right to freedom of expression by requiring it to express a certain viewpoint in the letter to all its employees. Mr. Justice Beetz, speaking for the Court, stated:

> The creation of the fund and the letter are thus open to the interpretation that they result from an initiative by the National Bank of Canada, and reflect the views and sentiments of the Bank and its president. . . . [T]here is nothing to show that such were in fact their views and sentiments. However admirable the objectives and provisions

[84][1989] 1 S.C.R. 1038, at 147.
[85][1984] 1 S.C.R. 269 [hereinafter *National Bank*].

> of the Code may be, no one is obliged to approve of them: anyone may criticise them, like any other statute.... This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada.[86]

In *Slaight Communications*, the *National Bank* case was distinguished on the grounds that, in *National Bank*, the CLRB ordered the employer to utter opinions that were not its own. This requirement was exacerbated by the wide publication of the letter. In *Slaight Communications*, the employer was required to express the opinion of the adjudicator to only a restricted audience.

Arbitrators, therefore, must be cautious in ordering an employer to make a statement, to respect the freedom of expression of the employer. If such an order is made, it should not require the employer to adopt opinions that it would not otherwise profess. It should require only what is necessary to assist in rectifying a wrong that was done to an employee without infringing on the employer's freedom of expression.

Conclusion

In Canada, the right to freedom of expression is guaranteed in section 2(b) of the Charter. Arbitrators have the jurisdiction to apply the Charter or order remedies for violations of it. Orders made by adjudicators and boards of inquiry that are binding on private parties must comply with the Charter and may be subjected to scrutiny. The Charter applies only to government action. The definition of what constitutes government action is far from clear at this early stage of the development of Charter jurisprudence. If government action is found to violate section 2(b) of the Charter, it can be "saved" by section 1 of the Charter, as long as it is justifiable in a free and democratic society. Long before the Charter was enacted, arbitrators and courts applied the principle of freedom of expression to determine certain issues arising in the workplace. This principle will continue to apply to nongovernment actors such as public companies.

Until the advent of the Charter, the principle of freedom of expression did not constitute an absolute entrenched constitutional right. In Canada, the Charter is in its infancy of jurisprudence. Inevitably, as the case law develops, the Charter can be expected to play a growing role in the determination of free speech issues that arise in the workplace.

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[86] *Id.* at 295–96.