6. If a potentially dangerous situation arises, professional psychiatrists, psychologists, or counselors should be relied on for crisis intervention. Although training in how to diffuse a potentially violent situation is useful for union activists, where a potential for violence clearly exists, union representatives should not attempt to resolve the problem themselves.
7. Recognize the existing legal or contractual rights of employees, such as a collective bargaining agreement, employment discrimination laws, and any other due process rights that employees may have, when responding to workplace violence.

Worker-on-worker violence issues are never easy for a union representative to deal with—either within the union or between labor and management. The reasons have to do with the conflicting responsibilities of the union representative, as well as management approaches that do not encourage open and productive labor-management relations. To develop a labor-management relationship that fosters resolution of worker-on-worker violence issues with a minimum of labor-management conflict, it is necessary for management to understand the union's responsibilities and concerns, as well as to recognize that the union also has a sincere wish to resolve these problems for everyone's benefit. Labor and management must work together to find a nonconfrontational process that resolves workplace violence problems without ignoring the individual or collective rights of workers or the union, and without undermining the contractual, due process, and legal protections.

IV. WORKPLACE VIOLENCE—THE PROPER ROLE FOR ARBITRATION

KENNETH P. SWAN*

Canadians have a disconcerting attitude toward stories of violence—especially those involving the use of firearms—in the United States. We say "Canada is different—we have gun control, a more peaceful society, and a cultural disinclination to blow each other away." At least in respect to workplace violence, our smugness may be misplaced. Canada may indeed be different, but not because we

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do not have the same problems. If there is a difference, it may lie in the extent to which our version of labour arbitration can adapt more readily to be part of the solution.

As to workplace violence from nonemployees, Canadian statistics appear to be entirely consistent with U.S. figures. The greatest threat to employees is from outside the workforce, from customers, patients, clients, or criminals. Although the rates of incidence of such offenses is lower in Canada than in the United States, the pattern of violence is substantially similar.[1]

Similarly, in terms of co-worker violence, even a cursory search reveals a number of Canadian examples of workplace violence that parallel the massacre at the postal facility in Royal Oak, Michigan. In October 1971, a discharged former employee of DuPont Canada returned to his former office in Montreal and shot three executives to death before surrendering to police. In February 1992, a worker suspended for performance problems entered the Ontario Glove Manufacturing plant in Waterloo, Ontario, and shot one of the owners, a supervisor, and another employee; he was subsequently arrested on murder charges.[2] On August 24, 1992, Dr. Valery Fabrikant returned with a handgun to the Department of Mechanical Engineering at Concordia University in Montreal, where he had spent 13 increasingly unhappy and angry years, killed four innocent bystanders, and gravely injured a fifth.

To complete that particularly bloody year, on September 18, 1992, an explosion in the strike-bound Giant Yellowknife Mine in the Northwest Territories killed nine miners who had crossed the picket line to work. Recently, a striker was convicted of their murders.[3] By an unhappy coincidence of names, the mine is owned by Royal Oak Mines, Inc.

And this is only the record of workplace murder. When we consider the full record of mass murders in Canada, from the devastating killings of female engineering students at the Polytechnique in Montreal that still brings the whole country to a mood of sober reflection on its December anniversary, to the recent annihilation of an entire extended family in British Columbia during preparations for a wedding only weeks ago, we realize that we have little to learn about mass murder from our closest

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[1] *See generally* Burroughs & Jones, *Looking Out for Trouble*, OH & S Canada, Mar.–Apr. 1995, 34–36; Liss & Craig, *Homicide in the Workplace in Ontario*, Ontario Ministry of Labour/Ministry of the Solicitor-General, Dec. 1988 (typescript report).

[2] Appleby, *Employee Revenge Is Rarely a Motive*, The Globe & Mail, Feb. 5, 1992, at A6.

[3] Feschuk, *Warren Found Guilty in 9 Miners' Deaths*, The Globe & Mail, Jan. 21, 1995, at A1.

neighbours. The body count may be lower in Canada, but that is a difference in degree, not in kind.

The Concordia killings are by far the most thoroughly studied, at least on the public record, of all of these events. The University appointed two inquiries into the events leading up to the murders, one to look into issues of academic and scientific integrity arising from allegations made by Fabrikant,[4] and one to review the employment and governance issues involved.[5] For our purposes, the latter report is the more relevant, although both chronicle a history that, with the glibness of hindsight, seems to have been inevitably heading toward violence.

Fabrikant was hired by Concordia in 1979, literally off the street.[6] As a Russian emigré travelling on Italian papers, he dropped off his curriculum vitae and talked his way into an interview, during which he was hired on the first of a long series of "soft-money" research appointments, first on staff and later on faculty. During his period in the *lumpenprofessoriat*, in a series of positions with inferior status and no job security, he was constantly engaged in wrangles with colleagues, especially the clerical staff, and behaved on a number of occasions in ways that constituted just cause for discharge, or worse. There was even an accusation of rape, made to the University ombudsman by a woman student. The rape charge languished, held back by the fragile psychological state of the student, for a decade. The rest of the misconduct also went unpunished. Fabrikant blustered, threatened, and manipulated, and went on to better appointments and higher salary.

In 1985, he achieved a status that, although not in the academic bargaining unit, had similar conditions of employment for a three-year term funded on soft money from a government source. This position was renewed in 1988 for two more years, but even as the renewal was being processed there was an angry, irrational dispute with the purchasing department, culminating in threats of litigation.

By 1989, his simmering discontent with his continuing tenuous status at the University led to an escalation in his complaints of mistreatment, exploitation, and academic dishonesty, some of which were found by the Academic and Scientific Integrity inquiry

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[4]Arthurs, Blais & Thompson, *Integrity in Scholarship: A Report to Concordia University*, Apr. 1994 (typescript).

[5]Cowan, *Lessons From the Fabrikant File: A Report to the Board of Governors of Concordia University*, May 1994 (typescript).

[6]The history that follows is adapted from Arthurs et al., *supra* note 4, and Cowan, *supra* note 5.

to have a certain degree of validity, or at least plausibility. For the first time, there was also a record of threats of violence, although couched in ambiguous terms: "I know how people get what they want, they shoot a lot of people." The University sought the advice of an outside psychiatrist on how to deal with him; the advice was to "be firm and record everything."

Nevertheless, Fabrikant's academic career flourished. He received a further extension of his soft-money appointment to May 1992, and he began to inquire how his status might be converted to a regular faculty position. When an answer was less than forthcoming, he became obdurate and conducted the correspondence with less and less civility. He began to involve outsiders in his dispute and acted in ways that led University officials to complain that he was harassing them and their staffs.

At the same time as his Department was recommending a regular tenure-stream appointment on the basis of research and teaching, the University was developing a case for discipline based on behaviour. The University blinked, and Fabrikant was offered a probationary appointment leading to tenure consideration in the third year. He accepted and became a member of the faculty bargaining unit with rights of grievance and arbitration.

After a few months of relative peace, a full scale war of words broke out in the autumn of 1991 that escalated until it ended in gunfire a year later. Increasingly wild accusations were made, and there were fears, apparently not provable, that Fabrikant was carrying a weapon. An e-mail campaign brought his allegations to an ever wider audience, and the University began to invoke its disciplinary process. In the meantime, the University had taken a decision in relation to an application for sabbatical that was probably in error, and the faculty association had referred the matter to arbitration. Another grievance in relation to promotion was allowed in the grievance procedure, and the University embarked on a promotion consideration.

Astonishingly, toward the end of June 1992, Fabrikant applied for a handgun transport permit, an application that implied that he already had a legally acquired handgun. The application required an endorsement from his employer, and he actually asked for such approval at the Department level. The request was ultimately denied, but no action was taken to remove him from the campus or to seek direct police involvement.

By mid-August, Fabrikant was engaged in litigation on several fronts, had alienated most of his colleagues and even his faculty

association, and had all but abandoned scholarly activity to promote his campaign of vituperation. On August 21, the University's outside legal counsel wrote a letter to him that threatened legal action unless he stopped his e-mail campaign, and that also effectively promised action to terminate his employment. It is not clear whether Fabrikant ever received this letter, but it is clear that the University had taken no steps to protect itself and its members when it sent what amounted to a dismissal notice to a demonstrably unstable, armed man. As a consequence, on August 24 it was utterly defenseless, whatever may have precipitated the horror of that day.

Whatever may be learned about management practices from this tragedy, it is not clear that the arbitration process contributed to it, or that arbitration failed in any way. Indeed, Fabrikant never got to arbitration on even the peripheral matter on which his grievance was referred. Until 1990, as his discontent grew, he had no recourse to the grievance procedure. His demands for an inquiry into his allegations of academic impropriety were ignored until shortly before the shootings, but even then he was unaware that any action was contemplated, and the inquiry was subsequently delayed by his trial and conviction. I do not suggest that the availability of an effective grievance and arbitration procedure could have prevented this tragedy, but at least it would have given the lie to increasingly shrill accusations that had no forum in which to be evaluated and, if appropriate, redressed.

There is at least a hint as well in the Royal Oak Mines case that a denial of access to arbitration was linked with violence. In the judgment of the Supreme Court of Canada involving the unfair labour practice charges that were the outcome of what began as a lockout, the following chilling juxtaposition occurs:

> After it had studied reports and videos of the incidents of violence which occurred between June and September 1992, the appellant decided to terminate the employment of approximately 42 employees for their activities on the picket line. The number of dismissed employees eventually rose to 49. Most of the alleged misconduct occurred on June 14, 1992, when there was a brawl at the mine site. Some 151 charges were laid as a result of that day's events. Yet by November 2, 1993, only 8 convictions had been entered, 16 matters remained pending and 127 of the charges had been either stayed, or withdrawn, or the accused persons had been acquitted or had been discharged at the preliminary inquiry.
>
> The appellant took the position that it would not consider a process whereby the dismissed employees could be returned to work, nor was it willing to accept the inclusion of any form of a grievance arbitration clause for these workers in the new collective agreement. As a result,

the issue of the dismissed employees became the greatest obstacle to the collective bargaining.

On September 18, 1992, there was an explosion in the mine and nine workers were killed.[7]

Obviously, it is a fallacy to suggest that because one event follows another there is a causal connection, but there is at least some reason to think that the availability of a trusted dispute resolution system channels grievances and creates a willingness to operate within the law.[8] Even the best dispute resolution structure cannot eradicate violence, but a good structure is surely better than a bad one, or none at all.

Frankly, I think that the effect of arbitration is likely to be neutral in most such extreme circumstances, provided that it is properly carried out. Employers have a right, and an obligation, to ensure that workplaces are free from what we lump into the category of "harassment":[9] assaults on the person, the dignity, the well-being, or the sense of security of workers from any source, internal or external to the enterprise. Employees have a right to fair treatment in relation to discipline.

Arbitrators have an obligation to uphold reasonable disciplinary action to enforce civility in the workplace, and a correlative responsibility to see that codes of conduct are fairly and reasonably administered. They also have an obligation to require employers to take action against such assaults when the failure to do so is properly raised by an arbitrable grievance, whether on health and safety or other grounds. Taking such steps will not deter sociopaths, but such action will force them to exist in a climate where abusive behaviour will never be tolerated, and where it will be clearly evident, from its very rarity, as aberrant.

Psychiatry has little success with such difficult individuals, and it is asking far too much of the arbitration process to expect it to accommodate itself to those who do not play by any of the recognized rules. If arbitration exacerbates a situation, we should by all means ask why, and try to respond with better methods to arbitrate. For the most part, however, arbitration simply cannot help—not because it is inherently flawed, but because it is based on

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[7] *Royal Oak Mines, Inc. v. Canada Labour Board et al.* [1996] S.C.R. 27–28.

[8] In fact, when public opinion and legal process forced a dispute resolution process on the parties, 44 of those discharged were ultimately reinstated.

[9] An excellent example of a joint approach to this issue is found in *Respect at Work: Anti-Harassment Policy Information Manual*, a negotiated joint policy of Toronto Hydro and Canadian Union of Public Employees, Local 1.

the rule of law in the workplace and can rationally deal only with those who will ultimately obey the law.

Moreover, arbitrators have been aptly described as the pathologists of the labour relations system.[10] It is only when the corpse of good labour relations is stiff and cold on the gurney that we are called upon to analyze the cause of death. If there have been failures of good management, or good labour relations, by the time the result reaches arbitration it is often too late for the arbitrator to do anything but pronounce upon what should have been done. Of course, it is possible to make a final and binding award on the subject matter of the grievance, but that is very often an exercise in futility where serious issues have gone unresolved.

When we are discussing issues involving an unstable employee who is in constant conflict with supervisors and fellow workers, we are dealing with a situation that requires an immediate and direct response, not one that can await the outcome of an adjudicative process many months later. For that reason, I support the observations of the other speakers on this panel to the effect that arbitration cannot be expected to provide a reasonable response, and that some kind of proactive internal dispute resolution structure, carefully designed to provide a smooth interface with the disciplinary and grievance and arbitration structure, is the appropriate way to respond to the case of the troubled, and troublesome, employee.

It may be, of course, that arbitration can still be valuable even when it takes the form of an inquest, and there also may be occasions when it is the only mechanism available for dealing with disputes that have a disciplinary flavour. When arbitration is necessary, therefore, it is incumbent on arbitrators to be sensitive and creative in helping the parties to understand the causes of a particular situation, and in dealing with the respective rights of the employer, the grievor, and all of the other employees at the workplace in fashioning a resolution in individual cases.

I suggested at the outset that there are ways in which the Canadian variant of labour arbitration may be better adapted to deal with the problem of workplace violence. I do not wish to suggest that there is more than a difference at the margin, but I think the difference is real. For the most part, the difference springs from the central cultural contrasts between our countries, and the nature of our arbitration systems.

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[10]I owe this powerful metaphor to my colleague and National Academy of Arbitrators member, Owen B. Shime.

First, in Canada, labour arbitration is statutory, not voluntary. Thus, it is possible to change the culture of arbitration in a particular jurisdiction if the legislators can be interested in the project. When massive changes were proposed in labour law in Ontario in 1992, the opportunity came to "change the culture" of arbitration, to make it less adjudicative and litigious, and to avoid some of the sterile legalisms of the past.[11] These changes included a plenary jurisdiction to interpret and apply all labour relations and human rights statutes in the course of an arbitration, to enforce written settlements, and to mediate a dispute without losing jurisdiction to arbitrate should mediation fail.[12] These reforms survived a subsequent reversal of the other labour relations changes, made in 1995,[13] and they are also included in statutes in other provinces. The result is that Canadian arbitrators do not have to be bound to a sterile adjudicative form of arbitration if they think they should introduce more mediative approaches to a problem, and where the solution lies outside the collective agreement proper, they are not prevented from recourse to statutory sources in decision making.

In addition, there is a long-standing statutory disposition in most Canadian jurisdictions to substitute a penalty for that imposed by management, even where there was just cause to invoke some penalty.[14] That has produced a willingness to look for creative remedies where needed, including complex conditional reinstatement. There are several examples of arbitrators using this jurisdiction to put controls on the reintroduction to the workplace of employees who have made threats or have demonstrated signs of psychological instability, including the involvement of mental health professionals in the reinstatement process.[15]

The other cultural difference that may make solutions easier to find in Canada is the existence of universal health care. Although pressures on our system may eventually erode this advantage, it is still possible in Canada to require as a condition of reinstatement that an employee seek medical or psychiatric help without having to worry about who will pay for it, or how an insurer will react.

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[11]Swan, Campbell & Carriére, *Report of the Arbitration Review Committee to the Minister of Labour*, Oct. 23, 1991 (typescript).

[12]S.O. 1992, c. 21, ss. 45(8) and (8.1).

[13]S.O. 1995, c. 1, Sch. A.

[14]*See, e.g.*, Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(17).

[15]*See, e.g., Re Saint John Shipbuilding Ltd. and Marine & Shipbuilding Workers, Local 3* (1992), 26 L.A.C.(4th) 361 (MacLean); *Re Quebec and Ontario Paper Co. and Canadian Paperworkers Union, Local 84* (1993), 37 L.A.C.(4th) 435 (Brent).

Third-party services such as medical opinions or examinations must be paid for, but the basic therapeutic services are always available. The public health implications of the availability of psychiatric care are inestimable, and certainly give an arbitrator, dealing with a case whose solutions are more likely medical than legal, greater flexibility to fashion a remedy that may be effective.

Finally, although I generally support the argument raised for a multidisciplinary dispute resolution system for workplaces at risk for violence, I suspect there may be cases that will elude even such an approach. I have been involved in cases as a mediator or mediator-arbitrator where the parties have specifically made such an appointment to allow a different approach to a problem employee, only to have the employee scupper the process because it would deny the employee's "day in court," when the accusers could be faced down and justice could be sought. "Healing" does not always come from mediative interventions; sometimes it is found in adjudication as well. Having the wisdom to know which approach is best, and the flexibility to be able to invoke it, may be a critical part of the solution to workplace violence.