

CAPTIVE AUDIENCE MEETINGS: Lessons from the American Experience

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Abstract

As the Canadian labour relations landscape comes to more to resemble that in the United States, with widespread adoption of mandatory representation elections and the employer campaigns this will entail, and widening scope for employer communications, the question of restricting captive audiences meetings during union organizing is newly relevant in Canada. A useful first step for creating a Canadian approach to this question is to seek lessons from the lengthy American experience with this issue. This article examines the notion of employee choice, the “marketplace of ideas” view of free speech dominating the American debate, the central dilemma of a contest between constitutional and statutory rights, and assesses different approaches to captive audiences that has developed, contrasting the treatment of captive audiences inside and outside the American workplace. Finally, this article offers suggestions about how we can benefit from the lessons learned from the American experience, as we seek our own solution to the captive audience question.

1 Introduction

In the United States, the National Labor Relations Board’s influential 1946 *Clark Bros.* decision proclaimed two problems with the captive audience meeting held by the employer to express its anti-union views: the meeting, and what was said at the meeting. This decision established the short-lived Captive Audience Doctrine, prohibiting compulsory meeting of employees as an independent unfair labour practice where employees’ attendance was compelled during working hours on company property for the purpose of hearing employer speeches concerning union organizing. This was a separate and distinct ULP apart from considerations of conduct and content of the meeting.

In its essence, this doctrine was initially adopted wholesale by Canadian labour boards and, without clear examination or articulation of the rationale or underpinnings for the rule, and with little regard given to our distinct constitutional and labour relations landscape.

Two recent changes to the landscape of Canadian labour relations make the problem of captive audience communications and their regulation newly pertinent. First, with the recent adoption of mandatory representation elections for certification in many provinces, employer anti-union campaigns and captive audience meetings have become more relevant.

Second, some jurisdictions have recently introduced or strengthened explicit statements of the right to free expression into labour legislation and expanded the scope of permissible employer communications.¹ This legislative encouragement may lead to greater use of anti-union communications by employers, including captive meetings.

Another reason for revisiting this question is that existing assessments of the constitutional validity of restrictions on employer communications – particularly captive audience speech – are not sufficient. They do not include a sufficiently probing examination of the constitutional values underlying the permissible scope of employer speech and captive communications in particular, nor do they adequately examine the boundary of permissible employer communications.

Therefore, it is time for a careful re-examination of this question in Canada, and a useful first step is to consider the American experience with this issue, as representation

¹ See for e.g. s.8 British Columbia *Labour Relations Code*.

elections and employer anti-union campaigns are a long-standing feature of unionization in that country.

The problem of limiting employer speeches to captive audiences of workers during the pre-election period is characterized in the American discourse as a clash between employees' right to free choice under the *National Labour Relations Act* ("NLRA") and employer's constitutional right to free speech. As this article explains, this description of the question has, to a great degree, defined the outcome of this question. So, this article begins by introduce some propositions about free employee choice and then outlines the theoretical view of free speech dominating American debate over regulating captive audience meeting: the "marketplace of ideas". With this background, the next part introduces this central dilemma: the contest between constitutional and statutory rights.

In this light, the American experience and law relating to limiting employer speech to captive audiences is examined. This treatment of captive audiences is then contrasted with the constitutional right of freedom from forced listening that exists outside of the workplace in the U.S.

This article concludes by considering what lessons this holds for Canada, and offering some suggestions about how we can benefit from the lessons learned from the American experience, as we seek our own solution to the captive audience question.

2 Employee Free Choice

Both the American *NLRA* and Canadian labour legislation promise employees the right to make a choice about union representation free of interference.² This employee “right to free choice” about unionization, as we will see, is the crux of the problem in dealing with employer communications to captive audiences during organizing.

We can conceptualize employees’ right to free choice as having several necessary components, which will be used as propositions that will guide the analysis of approaches to employer speech to captive audiences in this article. First, free choice requires that the employee have access to sufficient information and perspectives about the decision to be made. At the least, this demands that the employee is not discouraged or prevented from obtaining this information.

Second, free choice requires that the information provided is reasonably correct, and at least not so misleading or deceptive that it overcomes the listeners’ capacity to rationally assess the message, jeopardizing free choice.

Third, free choice is a process of applying rational faculties to the information and arguments presented. However, this can be defeated or impaired where the communication has irrational appeal, such as through coercion. Decision-making can be irrationally influenced by emotion, such as fear, or other forms of pressure. Such pressure can include threats of negative consequences, promises of benefits, or time pressure

² See, e.g. Section 4(1) of the B.C. *Labour Relations Code*: “Every employee is free to be a member of a trade union and to participate in its lawful activities.”; s. 7 of the *NLRA*: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....”

where the individual is pressured to make a quick decision without sufficient time for rational thought, inquiry and reflection.

In sum, this article proposes that a free choice is a decision based on reasonably complete, reasonably accurate information, reached following a process of rational weighing of arguments and facts.

3 Theories of Free Speech

Four categories of values are recognized as underlying the freedom of expression: a means of seeking truth, ensuring self-fulfillment, a means for ensuring participation in political and social decision-making, and a way to balance stability and change in society (Emerson, 1963: 878).³

3.1 Marketplace of Ideas

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

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

³ Thomas Emerson first identified four categories of values underlying free expression (1963: 878). In Canada, Sharpe (1987) combined the third and fourth categories, and this three category approach was adopted by the Supreme Court of Canada. These are the three values now routinely cited in Canadian law. For discussion of these values in Canadian law (see for e.g. *Keegstra*, 1990: 727-728; *Irwin Toy*, 1989: para 53).

As we will see, this theory has come to dominate American decisions on captive meetings.

This approach holds that competing self-interested behaviour in the realm of ideas will ultimately work to society's benefit, just as is the case of the economic market (Strauss, 1991: 349). This model trusts that truth will emerge from competition among ideas, even when truth is met with falsehood, and resists all silencing or censoring of expression (Ingber, 1984: 6).

The free-market theory explains why the government or society should not suppress ideas that they believe to be false, because in so doing they will in fact suppress some true beliefs as well. Society must recognize human fallibility by allowing the expression of contrary views (Shauer, 1982).

It is this first underlying value and the marketplace metaphor that we see driving (implicitly or expressly) (see e.g. *Thomas v. Collins*, 1945: 537; Story, 1995: 387).

3.2 Criticisms of Marketplace Metaphor

The marketplace metaphor is heavily criticised – both in general and in its application to the workplace context. First, critics query the assumption that there is an “objective truth” to be found. Story contends this is an unwarranted assumption, particularly in the workplace and with regard to representation questions. The answer to such questions is very much subjective and influenced by individuals' experiences and background (Story, 1995: 398-90). Empirical evidence linking probability of supporting unionization and an individual's background and family characteristics (see e.g. Fiorito, 1986), evidence that employees' union voting tends to be determined by their initial preferences rather than

any campaigning (Getman, 1976), and evidence of the “experience good” nature of union representation add force to this argument (see Bryson et al., 2005).

Another questionable assumption is that a perfect market in expression exists. Critics point out the possibility of a perfect market is a fiction that economists acknowledged long ago, and the marketplace of ideas is susceptible to the same shortcomings of all free markets, which can frustrate the goal of achieving the truth, and could potentially allow the hegemonic group to define what is true. (See for e.g. Ingber, 1984: 5) So then, it is argued, like other markets, a marketplace of ideas requires regulation to correct market failures caused by real world conditions (Ingber, 1984: 5).

A related criticism is of the assumption that truth rather than simply power, will prevail; rather, unrestrained expression may actually entrench established interests and privilege rather than changing society (Ingber, 1984: 15, 76).

Particularly in the workplace context, market failure arises from the unequal competition established by the property and managerial rights granted to the employer, and the unbalanced right to speak that these rights produce. The result is that there is not necessarily any exchange or dialogue in the workplace, nor are the listeners necessarily willing consumers of the single product on offer in this market: the employer’s views (Story, 1995: 383-385). Story contends that, rather than a “marketplace” the workplace is more accurately characterized as “an all-but-monopolized forum subject to strictly defined and limited incursions by non-owners” (Story, 1995: 388), as there is no exchange and, due to property and managerial rights, expression is not free and entry by certain speakers – union organizers, for instance - is barred (Story, 1995: 383-385).

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

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

4 Contest of Constitutional and Statutory Rights

The question of restricting employer speech during organizing has generally been posed in America as a contest between employers' First Amendment right to free speech (in addition to their common law and statutory property and managerial rights) and workers' statutory right to freely choose to unionize, though this approach has been strongly criticized (see e.g. Andrias, 2003: 2416).⁴

⁴ The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

We see this contest, and the inevitable result of pitting a constitutional versus a merely statutory right, in history of the treatment of the captive audience question in American labor law, below. In short the result, of course, is that workers' statutory rights bow to employer's speech rights.

To some extent, this result may reflect the structure of the American Constitution which, lacking an analogue to our section 1 limiting provision, differs markedly from constitutional protection of expression in Canada.⁵ In short, application of the First Amendment involves one question: is the speech in question included or excluded from First Amendment protection? In Canada, there are three questions: Is the activity expressive, and thus presumptively protected by s.2(b) of the Charter? Does it lose this protection because of the method or location of the activity? If it is protected, is the limitation reasonably justifiable in a free and democratic society?

This differing constitutional architecture makes it more difficult to restrict employer speech in the U.S. than in Canada. We should be alive to this difference, as it is an important difference to keep in mind when formulating a Canadian approach to employer speech. Nevertheless, we should be aware of the danger of framing the question of captive audience limits as one that pits a constitutional right against statutory rights,

⁵ Section 2(b) of the *Charter* provides:

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.

Section 1 of the Constitution reads:

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.

because the American experience warns us that to pose the question in that manner may also determine the answer.

5 Rise and Fall of the Captive Audience Doctrine in the United States

Against this background, we now turn to the American history and experience. The question of limits on employer speech during union organizing under the American *NLRA*, and captive audience meetings in particular, has been a contentious issue resulting in a number of different approaches at various times. These approaches can be differentiated by the importance placed on different aspects of the effect of the speech on employees' free choice: content of the communication, method, timing and the opportunity for union response.

These approaches developed against the following statutory framework. Section 7 of the *NLRA* gives employees the right to: self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing....” and section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by s. 7 of the *NLRA*. That provision is interpreted as prohibiting employers from expressing anti-union views where expression is accompanied by a threat of reprisal or force (see e.g. *Brown & Root*, 1996: 634).

5.1 Employer neutrality and totality of circumstances

Initially, the National Labor Relations Board (“NLRB”) required employers remain strictly neutral in their communications with employees, but afforded no special protection to safeguard employees from captive audience meetings held during

organizing (see e.g. *NLRB v. Federbush*, 1941). The manner of the employer's communication was simply one factor taken into account in determining whether an employer had committed an unfair labour practice. The rationale for the neutrality standard was that employers' communications to employees "have a force independent of persuasion" arising from employers' greater economic power and employees' economic dependence on their employer (*NLRB v. Federbush*, 1941: 975). Therefore, restrictions on employer communications focused on the content of the speech, though with explicit recognition that employer speech has an inherent influence on workers.

5.2 Totality of conduct doctrine

This strict neutrality requirement was replaced by the "totality of conduct" doctrine in a 1941 decision of the U.S. Supreme Court decision in *NLRB v. Virginia Electric & Power Co.* This provided that an employer was entitled to express its opinion about organizing to employees, except where the communications were part of a course of conduct that restrained or coerced employees' free choice, which would be an unfair labour practice ("ULP"). The Court recognized that "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring about employer's strong displeasure." (*NLRB v. Virginia Electric*, 1941: 477). Therefore, the doctrine provides that speech and conduct, *if examined together*, may be considered coercive and an ULP. Again, the focus remained on the content of the communication, with a refined recognition of the coercive tendency of employer speech. This rule places too much focus on content to exclusion of method and manner of communication. As a result, it ignores the complex nature of communication and its effects on an audience. By treating speech simply as context and focusing on its content,

this rule gives insufficient weight to the fact that expression has both form and content, that form can affect the message received by the listener, and that form and content can be difficult to separate. Consequently, this rule is the high-water mark of employer freedom of speech, and its effect to give far greater consideration to the interests of the speaker than to those of the listener.

This was followed in 1945 by a decision explicitly stating recognizing that that “employers’ attempts to persuade to action with respect to joining or not joining unions are within the First Amendment’s guaranty” (*Thomas v. Collins, 1945: 537*). It is at this point that employer speech rights began its real ascendance in American labor law.

5.3 Clark Bros.’ Captive Audience Doctrine

Against this backdrop, the NLRB introduced the short-lived “Captive Audience” doctrine in its 1946 *Clark Bros.* decision, finding that a captive audience meeting, in and of itself and separate from any other conduct of the employer and apart from the content of the speech, constitutes interference, restraint, and coercion within the meaning of the Act and therefore violates its prohibitions on unfair labour practices (ss. 7 and 8(a)(1)). (*Clark, 1946: 804-5*). This was a separate and distinct ULP apart from considerations of conduct and content, relying strictly on the method of communication.

The NLRB expressly held that the *NLRA* grants employees the right to decide whether or not to receive communications, and that forced communications interfere with employees’ free choice and are unlawful, even if that speech falls under the protection of the First Amendment, because forcing employees to receive employer communications removes employee free choice (*Clark, 1946: 804-805*). The NLRB emphasized that the

employer had other avenues to express its views, and likened the captive meeting to physical restraint of the audience (*Clark*, 1946: 805).

5.4 Legislative Reversal

In 1947 Congress eliminated the Captive Audience doctrine by amending the *NLRA* to include section 8(c), an exception to the prohibition on employer interference:

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

This amendment was motivated by view that explicit recognition of employer speech rights in the *NLRA* was necessary to implement employers' First Amendment rights to express views to their employees, which were being violated by the captive audience doctrine (*Allentown*, 1998: 386; *Brown & Root*, 1996:634; Andrias, 2003: 2427; U.S. Congress, 1948: 292, 297, 407, 429). Therefore, one objective of the amendment was to override the *Clark Bros.* captive audience doctrine and prevent the NLRB from holding captive audience meetings to be ULPs (Note, 1978-9: 761).

This amendment returned the emphasis of employer speech restrictions speech to the content of the communication, and away from the manner in which the employer conveyed its views (*Babcock & Wilcox*, 1951). Consequently, employer speech was protected and could not be an ULP where it did "not by its own terms threaten force or economic reprisal." (Jackson & Heller, 1982:50; U.S Congress, 1948: 56). Furthermore,

any speech falling within 8(c) cannot be used as evidence of employer ULPs (Jackson & Heller, 1982: 49).

5.5 The Equal Opportunity Rule

A version of captive audience protection was briefly revived in 1952, and the NLRB met the challenge of s.8(c), with the “Equal Opportunity” rule established in the *Bonwit Teller* case (1951). Rather than focusing on the manner or content of the communication, the NLRB emphasized on whether or not the union had an opportunity to respond to the employer’s message such that employees’ right to be informed was fulfilled, and thus whether employee’s right to free choice was fulfilled.

Under this rule, whether the employer committed an ULP with speech on employer property and during working time depended on whether it allowed the union an equal opportunity to respond to the employer’s comments. Because this rule did not limit employer speech, it did not run afoul of s.8(c) (*Bonwit Teller*, 1951: 615). The NLRB identified, as a separate justification for its decision, the fundamental consideration that employees’ Section 7 rights include a right to “hear both sides” (*Bonwit Teller*, 1951: 612) By denying the union an opportunity to address employees “under the same advantageous circumstances as the [employer] had made available to itself”, it had “created conditions incompatible with a free, uncoerced choice in the election.” (*Bonwit Teller*, 1951: 613).

5.6 The Peerless Rule

The Equal Opportunity rule was short lived, overturned and replaced in a pair of decisions (*Livingston Shirt* and *Peerless Plywood*) issued on the same day in 1953, with

the NLRB majority characterizing the rule as the "discredited *Clark Bros.* doctrine in scant disguise." (*Livingston*, 1953: 407).

The *Livingston* majority explained that the *Bonwit Teller* doctrine was not only unworkable in practice, creating a competition between employer and union for the "treasured backfence advantage of having the last word." (*Livingston*, 1953: 407), but also essentially negated employers' speech rights by linking a right of reply to that right (*Livingston*, 1953: 406).

In its place, the NLRB created the *Peerless* rule that remains in effect today, prohibiting both employers and unions from holding "election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." (1953: 429). So, to this minimal extent, it limits captive audience meetings.

The majority explained that its rationale for the rule was based on its election experience that last-minute speeches "...to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." and that they tend to "...to destroy freedom of choice and establish an atmosphere in which a free election cannot be held." (*Peerless*, 1953: 429-30). Therefore an opportunity for employees to rationally assess arguments and employee free choice were ostensibly the NLRB's guiding concerns.

The majority emphasized that the real mischief and harm of last-minute speeches to mass assemblies on company time lay in their timing and use of company time, and applied equally to employer and union-delivered speeches and, therefore, a 24 ban would be sufficient protection for employees (*Peerless*, 1953: 429). The majority concluded that, beyond giving employees this 24 hour "breathing spell", no further restraints on

employer speech are needed: “With this rule in election cases, we see no reason in law or equity for seeking to impose further restraints.” (*Livingston*, 1953: 408). At the same time, the NLRB emphasized that this Rule didn’t unnecessarily restrict employer speech rights, since other forms of communication, or speeches held at any time (even with 24 hours of the election), and whether at the workplace or elsewhere, so long as employee attendance was voluntary and it was not during working time. (*Peerless*, 1953: 430). With this decision, special protection from captive audience meetings was all but extinguished.

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

5.7 The Modern Approach

The *Peerless Plywood* Rule remains the key restriction on employer communications, and has replaced any specific rule concerning captive audiences. Now, the test for whether employer communications during organizing constitute an ULP is whether the speech tends to be coercive (not whether it is, in fact, coercive) in the totality of the circumstances (*NLRB v. Pneu Electric*, 2002)) from the point of view of the employees is the reasonable tendency of the employer’s speech or conduct “coercive in effect” (*Peabody Coal*, 1984) And it’s still the case that, if a communication is found to fall within the protection of s.8(c), then that it cannot be found to be an ULP. (*Brown & Root*, 1996: 633).

Employers remain able to compel captive audiences during working time (*NLRB v. USWA*, 1958) (other than in the last 24 hours), prevent workers and unions from responding, and can discipline workers for failing to attend or leaving such meetings. As described by one commentator, “Captive audience speeches... are now [post s.8(c)] considered to be integral to the employer’s right to freedom of speech...” (Andrias, 2003; 2439).

5.8 Critique of “Equal Opportunity” and “Peerless” rules

Both the Equal Opportunity and Peerless rules are ostensibly rooted in concern for employees’ statutory right of free choice about unionization. Formulation of the Equal Opportunity rule focused on employees’ right to receive information (and thus employee free choice) (*Bonwit Teller*, 1951); and the Peerless decision focuses on the opportunity for a “breathing space” for employees to protect sober and thoughtful choice (and thus employee free choice) (*Peerless*, 1953: 408). The *Peerless* rule was also, of course, expressly motivated by concern for fulfilling employer speech rights.

Employee free choice has many aspects. Access to information is only one facet, although this is what the Equal Opportunity, and to a slightly lesser degree, *Peerless*, rules focus on. Although providing individuals with more information, to encourage more informed and, presumably, more rational choice may be an important component of free choice, it cannot be the only route to securing free choice. Free choice also requires that the choice be free from pressure: threats, promises, but also the subtler force of employer speech and emotive force of many verbal communications, particularly in the workplace environment. While the *Peerless* rule purports to protect from coercion - the pressure of last minute, mass captive audience meetings - this neglects real issue of coercion which

is broader. What of the captive audience meeting that is held two days before the vote, or every day but the day before the election? The result is that this rule favours employer speech, in the guise of ensuring informed voters, over true protection of employee rights and interests.

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

Both rules also suffer from practical problems. Under each, workers are still subjected to captive audience meetings, and so still suffer the harm of this interference, coercion and restraint. It is not at all clear that either a reply from the union or a 24 hour breathing period will cure those effects.

The solution of allowing the union an equal opportunity to address workers ignores the inherent pressure and emotive force employer words carry to workers in the workplace, by virtue of the context and history of the employment relationship. A union’s message,

even in the same location and delivered for the same time as the employer's, simply cannot match that influence. The union cannot speak with the same force as the employer.

The Equal Opportunity rule also creates an incentive for employers and unions to jockey for position to claim the advantage of being the last to address workers, adding a new element to the competition for workers' votes (*Livingston*, 1953: 407). Employers' greater access to the workplace again favours them in this competition.

Similarly, the 24 hour "breathing space" from workplace captive meetings held on company time, still allows employees to be subjected to captive meetings, and essentially allows for a captive audience meeting free-for-all up until 24 hours before the vote.

Furthermore, it is not clear how the 24 hour period was arrived at, or whether there is any evidence of its effectiveness. Finally, the Peerless rule applies very narrowly – only to compelled mass meetings at the workplace and on company time. As the NLRB well recognizes, there are many other forms of communication available to employers.

Essentially, the Equal Opportunity and *Peerless* rules take the narrowest possible approach to limiting captive audience meetings, favouring employer speech interests above that of worker free choice.

In sum, in the American experience we see a sad trajectory of protection for captive audiences. We see employers' speech rights, grounded in the First Amendment to the U.S. Constitution have almost wholly trumped employee rights under the *NLRA*, and recognition of employees' right or ability not to receive employer communications has been virtually extinguished.

6 Freedom from Forced Listening Outside the Workplace

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

This captive audience doctrine arises from the right to privacy (a “penumbral” rather than explicit, constitutional right), providing an exception to the First Amendment. Privacy interests of the listener are weighed against the speaker’s First Amendment rights in the “intrusion test”, which requires that proof that “substantial privacy rights are being invaded in an essentially intolerable manner” for the captive audience protection to apply and restriction of the communication to be justified (see e.g. *Cohen v. California*, 1971). Courts have tended to put greater onus on audiences to avoid unwanted speech in a public forum compared to private homes, setting out the general principle that “outside of the home, the responsibility to avoid unwanted speech falls on the listener, and makes it very difficult to complain of being a captive audience when in public.” (*Cohen v. California*, 1971).

Commentators identify several values underlying this CAD: individual autonomy, the right to repose, and the right to be free of offensive communications.⁶ The second justification, a right not to be disturbed or intruded upon by uninvited communications, particularly when one is in the private sphere (Strauss, 1991: 111-114; Haiman, 1972: 175), is firmly rooted in the privacy right origins of the doctrine and, consequently, has little application to workplace captivity. Regarding the final justification, Canadian law has firmly rejected restricting speech simply because of its offensive nature (see e.g. *Keegstra*, 1990; *Butler*, 2007). It is the value of individual autonomy explanation that has greatest resonance with the question of captive audiences and speech rights in the workplace, and is the factor this article focuses on.

6.1 Individual Autonomy and Forced Listening

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

⁶ See Strauss, 1991; Taylor, 1983; Haiman, 1972 for differing interpretations of these underlying values.

making, but simply autonomy of hearing such that there is a right to decide whether to receive speech (Haiman, 1972: 174).

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

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

6.2 Free Speech as a Source of the Captive Audience Doctrine

Though the Captive Audience doctrine has been identified as rooted in the American conception of privacy (see e.g. Strauss, 1991) other commentators contend that, rather than an emanation of the right to privacy and a form of restriction on the First Amendment, the American CAD is better regarded as a corollary to the First Amendment (Taylor, 1983), or that it is actually a form of time, place and manner restriction on the First Amendment (Nauman, 2002). Certainly a number of cases have limited speech to captive audiences on the basis that it is a justifiable time, place and manner restriction of First Amendment protected speech rather than on the basis of the Captive Audience doctrine and its intrusion test (see e.g. *Frisby v. Schultz*, 1988).

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

7 Conclusion: Lessons for Canada

The American experience with employer speech to captive audiences during union organizing provides us with some lessons about how we may revise our own approach to this question. Nevertheless, when looking at American experiences and approaches to inform our own solutions, it is important to recognize the differences in constitutions and political and social contexts between the two nations (*Committee*, 1991: para. 80; MacKay, 1989: 719).

The key lessons we may take from the American experience are these. First, the greatest impediment to captive audience protections for workers in America is that the courts and NLRB have framed the problem as a contest between employers’ constitutional right to free speech and workers’ merely statutory right to free choice, and this is a contest that statutory rights cannot – and have not – won. It is for this reason that Clark Captive Audience doctrine’s prohibition on captive audience meetings during organizing gave way over concerns that it was an improper violation of employers’ First Amendment right to free speech.

Though Canadian constitutional law provides more scope for limiting protected expression than does American constitutional law (Commonwealth, 1991: para.80), it is important to consider whether there is some foundation in our *Charter* for protection for captive listeners, and to anticipate that prohibiting captive meetings will be met with similar objection as were made to the *Clark* Captive Audience doctrine.

The Captive Audience doctrine that has developed in American constitutional law outside of the workplace, and the scholarly arguments about the potential for inserting it into the First Amendment, gives us some suggestion about how our own constitutional freedom of expression may be developed to more tightly embrace protection of listeners.

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

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

Finally, we should be cautious of basing limits on employer speech and captive meetings on content and timing alone, as the current American approach does, or simply on the opportunity for the union to address workers.

Such limits and remedies are misleading. They do not address the true mischief of employer speech to a captive audience of workers and harm to listeners; rather, they concentrate on the interests of speaker: the employer and union. The *Clark Bros.* decision got it right, with its Captive Audience doctrine, which diagnosed the real problem with such communication is the restraint and compulsion akin to physical restraint that employees are subjected to, and all that may flow from that in influencing employee free choice.

In conclusion, examining the American experience with captive audiences – both in and out of the workplace – can provide us with some direction about the paths we want to take or avoid, as we struggle with this question in our own workplaces.

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