12-9-1993

# Re Canada Post Corp and CUPW

Innis Christie
*Dalhousie University Schulich School of Law*

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IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

RE: Canadian Union of Postal Workers, Atlantic Region
C.U.P.W. Grievance No. R01-91-00005
C.P.C. Arbitration No.

Raymond Poley C.U.P.W. Grievance No. 078-91-00050
C.P.C. Arbitration No.
C.U.P.W. Grievance No. 078-91-00056
C.P.C. Arbitration No.

Ray Gallant C.U.P.W. Grievance No. 078-91-00051
C.P.C. Arbitration No.

Ed Powers C.U.P.W. Grievance No. 078-91-00054
C.P.C. Arbitration No.

Neil Arbeau C.U.P.W. Grievance No. 078-91-00055
C.P.C. Arbitration No.

(The Grievors)



BEFORE: Innis Christie, Arbitrator

AT: Moncton N. B. and Halifax, N.S.

HEARING DATES: ~~April~~ August 19, September 1 and 2, and October 8, 1992 in Moncton and October 20, 1992 in Halifax.

FOR THE UNION: Gordon Forsyth, Counsel
Wayne Mundle, National Director, Atlantic Region
Carole Woodhall, Union Representative
Ron Pascal, President Moncton Local CUPW

FOR THE EMPLOYER: Brian Johnston, Counsel
Joanne Harrington, Labour Relations Officer
Constance Robinson, Legal Assistant
Bernie Leblanc, Retail Supervisor Moncton

DATE OF AWARD: December 9, 1993

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Union grievances alleging breaches of the Collective Agreement between the parties bearing the expiry date 31-07-89 but kept in force by legislation. Specifically, the Regional Grievance by the Union alleges violations of Articles 2, 3, 5, 9, 10, section 8(1) of the **Canada Labour Code** and the **Canadian Charter of Rights and Freedoms** in the implementation by the Employer of its dress code policy. The individual grievances allege that the Employer breached those same provisions of the Collective Agreement and the **Canada Labour Code** by denying the grievors the right to wear various "Union buttons" while at work. Grievance No. 078-91-00056 with respect to Raymond Poley alleges violation of the same provisions of the Collective Agreement and the **Canada Labour Code** in that Mr. Poley was reprimanded for wearing the Union button "The Struggle Continues" on his uniform and continuing to do so after being told to remove it.

The Union requests an order recognizing that the wearing of such buttons is a lawful Union activity, that the Employer was not entitled to require the grievors to remove them, that Mr. Poley was not properly disciplined and that all letters, reports and documents be removed from his personal file.

At the outset of the hearings in these matters the parties agreed that I am properly seized of them, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

## AWARD

The main issue before me here is whether the new dress code implemented by the Employer April 5, 1992, for uniformed employees, was within the power of the Employer in so far as it provides:

> The wearing of tags, buttons, stickers and other insignia is not permitted unless prior approval of the Corporation is obtained.

The secondary issue is whether the Employer breached the Collective Agreement when Bernie Leblanc, the Employer's Retail Supervisor in Moncton, formally reprimanded Raymond Poley on April 29. Mr. Poley was reprimanded for wearing a metal badge, or button, two inches or so in diameter, bearing the words "The Struggle Continues", on his

Canada Post uniform shirt, contrary to the dress code, while on duty and dealing with the public.

This is a boiled down statement of the issues here; in a matter that has required a good deal of boiling down. It involved five days of hearings and a great deal of documentation, and I must confess, undue delay in the preparation of this award. I apologize to the parties for that, and have tried not to compound the problem with an award that goes into all of the detail that burdened the hearings, where it has turned out to be irrelevant.

The main grievance before me is the Union's Regional Policy Grievance, CUPW Grievance No. R01-91-00005, which alleges that;

> the employer is violating Articles 2, 3, 5, 9, 10, section 8(1) of the Canada Labour Code and the Canadian Charter of Rights and Freedoms when it implemented its dress code policy in the Atlantic Region on April 5, 1992.

The Corrective Action Requested on the grievance form is;

> That the employer recognize that its dress code policy is in violation of the provisions of the collective agreement, Section 8(1) of the Canada Labour Code and the Canadian Charter of Rights and Freedoms. Further, the employer recognize that the wearing of buttons is a lawful union activity and that they are not entitled to require employees to remove these buttons since they are neither derogatory nor offensive. The union reserves the right to request any additional compensation and/or damages as a result of this violation.

In his opening statement counsel for the Union stated that this Regional Policy Grievance is, in fact, only concerned with the blanket prohibition of the wearing of union buttons set out above. Other aspects of the dress code implemented on April 5, 1992, are not in issue before me.

In the course of the hearings counsel for the Union advised me formally that the Union was not pursuing any claim that the Employer had acted in breach of the **Canadian Charter of Rights and Freedoms**, so I shall say no more about that.

The matter proceeded on the basis that the issue before me was whether there had been a breach of Article 5.01 of the Collective Agreement,

> 5.01 No Discrimination
>
> It is agreed that there shall be no discrimination, interference, restriction, coercion, harassment, intimidation or stronger disciplinary action exercised or practised with respect to an employee by reason of ... membership or activities in the Union.

With respect to the allegation that the Employer had acted in breach of Section 8(1) of the **Canada Labour Code**, R.S.C., 1985, c.L-2, counsel for the Union submitted, as has been held by arbitrators in the past, that, at a minimum, Article 5.01 of the Collective Agreement precludes Employer actions that would be held by the Canada Labour Relations Board to constitute unfair labour practices. In defining and prohibiting unfair labour practices Section 94(1) of the **Canada Labour Code** provides;

> 94.(3) No employer or person acting on behalf of an employer shall ...
>
> (a) refuse to employ or to continue to employ or suspend, transfer or lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate threaten or otherwise discipline any person, because the person...
>
> (vi) ... exercised any right under this Part; ...

Section 8(1) states some of those rights "under this Part" as follows;

> 8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

Breach of the **Canada Labour Code**, in and of itself, is not, of course, before me. My jurisdiction is under the Collective Agreement between the parties.

The Union's Regional Policy Grievance alleges breach not only of Article 5 but also of Articles 2, 3, 9 and 10. However, in addition to Article 5.01, the only specific provision among these that appears to bear on this matter is Article 3.02, which provides;

> 3.02 Consultation and Discussion
>
> In view of this recognition [of the Union as sole and exclusive bargaining agent] and in accordance with structures provided for in this Collective Agreement, the parties agree to discuss and consult each other on matters pertaining to their working relationship.

On March 26, 1992, prior to the filing of the grievances before me here, the Union in Ottawa filed a national policy grievance in the following terms;

> On or about 14 February 1992, the Employer informed the Union that effective the week of 5 April 1992, it planned to introduce an "Employee Dress code" applicable to all Canada Post Corporation employees, without there having been any discussions and constructive meaningful consultations with the Union. In addition, the Employee Dress Code imposed unilaterally by the employer violates the provisions of the collective agreement and the

> relevant laws and charters. The Union's objections include but are not limited to paragraphs 4, 5, 9 and 10 of the first page of the said Dress code as well as paragraph 5 of the second page.

This National Policy Grievance goes well beyond the issue of the wearing of Union buttons, although it includes that. At the time of the hearing and at the time of the writing of this award I had, and have, no knowledge of what has become of the National Policy Grievance. There was discussion on the first day of the hearing in this matter of the overlap between the two, but the only outcome was the Union's statement that if my decision was rendered before Christmas of 1992 it would be brought to the attention of whichever national list arbitrator was seized of the matter. Obviously, that has gone by the boards.

The significance of the National Policy Grievance for me here is its focus on the alleged lack of appropriate consultations. While I heard some evidence and argument about that, I do not deal with it in this award because I have decided it would be more appropriately dealt with in the context of a decision on whether the Dress Code as a whole was properly introduced. The evidence I heard made it clear that the differences between the parties with respect to consultation on the Dress Code relate to the Code as a whole and not to the blanket prohibition of buttons in particular. If the entire Dress Code falls, or has fallen, this rule will probably fall with it. On the other hand, it is not for me, on the basis of the limited evidence and argument before me of what went on nationally, to strike down, or uphold, the buttons rule on a basis that affects the validity of the Dress Code as a whole.

Without in any way purporting to decide the question, I have therefore proceeded on the basis that the Dress Code as a whole was properly implemented by the Employer, subject to the issue of whether, quite apart from any requirement to consult with the Union, the Employer was entitled to unilaterally establish the rule that:

> The wearing of tags, buttons, stickers and other insignia is not permitted unless prior approval of the Corporation is obtained.

In the course of the hearing it became clear that none of the individual grievors other than Raymond Poley had, in fact, been disciplined. Each of them, and Mr. Poley on the first occasion, received a notice of interview and, at the interview, was simply told to remove the button he was wearing. All but Mr. Poley complied, choosing to "obey now, grieve later". The issue that they wished to grieve is precisely that presented in the Regional Policy Grievance. There is nothing now, and never was anything on their files which constituted discipline.

Mr. Poley, however, did not comply and was interviewed a second time. This resulted in a letter, dated 92/04/29, being placed on his personal file which is clearly disciplinary. Dated April 29, 1992, and signed by Bernard J. Leblanc, Retail Supervisor, it recorded a formal interview on April 28 at the Employer's George St. location in Moncton, stating in part;

> On April 15/92 you were present for an informal interview for non compliance of Canada Post employee dress code for wearing a badge on your uniform.
>
> You were advised that the button "Struggle Continues" wasn't approved as part of dress code and was not to be worn.
>
> You have continued to wear your button (Struggle Continues).
>
> It was reiterated that the dress code is in effect. As you continue to disregard the dress code this letter will be placed on your personal file for non compliance of Canada Post Dress Code.
>
> Further acts of misconduct will be subject to discipline up to and including discharge.
>
> I have enclosed an additional copy of the Employee Dress code for you information.

The facts as set out in this version of the letter were not disputed.

The issues before me are, therefore, the relatively straight forward ones I have already stated; (i) whether the new dress code implemented by the Employer April 5, 1992, was within the power of the Employer in so far as it prohibits the wearing of buttons and other insignia by uniformed employees in contact with the public without the prior approval of the Employer, and (ii) whether the Employer breached the Collective Agreement when Bernie Leblanc, the Employer's Retail Supervisor in Moncton, formally reprimanded Raymond Poley on April 29, 1992, for wearing a "The Struggle Continues", button on his Canada Post uniform shirt, contrary to the Dress Code, while on duty and dealing with the public, and for refusing to stop wearing it when told to do so.

There is a background to all of this that is relevant, and Mr. Poley is part of it. On November 6, 1985 the Union's national executive organized what it called a "national day of protest", designed to highlight a number of issues of concern to the Union and its membership. Mr. Poley, who was then President of the Moncton Local, passed out to others, and himself wore, a button, similar in size and shape to the one in question here, which bore the words "National Day of Protest - Nov. 6". He was ordered to remove it and on that occasion did so and then grieved breach of what the Union claimed was his right under Article 5.01. The matter was heard by Arbitrator Bruce Outhouse, who ruled in **Canada Post Corporation and Canadian Union of Postal Workers** (1986), 26 L.A.C.(3d) 58 that the Employer's order had been in breach of the Collective Agreement.

Three years later the Union filed a Regional Grievance, CUPW R-1400-H-30, alleging that two postal clerks in Halifax and two in St. John's, had been ordered, in breach of the Collective Agreement, to remove Union buttons bearing the slogans "Your Service Our Jobs", "Oppose Privatization" while working on wicket duty. That grievance resulted in a memorandum of settlement dated July 14, 1988, which, after stating the facts, concluded with the words:

> 3. The Corporation recognizes that they should not have been instructed to remove the above-mentioned button and that wicket clerks have the right to wear this button while on duty during working hours.

However, under date of November 2, 1988 Mr. Andre Sauriol, the Employer's Director Labour Relations, sent an official memorandum to Mr. J.C. Parrot, then National President of the Union, stating the Employer's position on the wearing of buttons as follows:

> It has recently come to our attention that an increasing number of wicket clerks have been wearing union buttons, or buttons with political messages, that demonstrate a public opposition to major Corporate initiatives. Furthermore, these buttons are being worn during working hours and at the work station.
>
> This action appears to be based on the settlement of CUPW grievance R-1400-H-30 reached between CUPW and Canada Post on July 14, 1988 in the Atlantic division. CUPW literature indicates that the union is now preparing to apply this settlement across the country.
>
> It is the Corporation's position that the settlement reached in the above grievance is restricted to the facts in that instance, particularly given that the incident occurred during the last round of negotiations. Accordingly, this will advise you that, from now on, the Union's position on this issue will no longer be accepted and such concerted action will not be tolerated.
>
> The present therefore serves as a notice to the Union, and employees will be asked to refrain from wearing such buttons, or will be asked to leave the workplace.

> Accordingly the following directive will be placed on all information books and/or communicated to all employees:
>
> "Employees of Canada Post Corporation whose positions put them in contact with the public should be aware that, while on duty, they are not to wear or display materials which attack Corporate Programs or which may otherwise prove damaging to the Corporation. Refusal to remove such materials when instructed will result in disciplinary action.

The Memo concludes by stating that the Employer is prepared to expedite any policy grievance against this position, and to discuss the matter.

The Union evidence, which was not refuted to any effective extent, was that even after this the wearing of Union buttons continued unabated, certainly in Moncton, and, I find, elsewhere in Atlantic Canada. A wondrous collection of them, carrying a wide range of Union slogans, was introduced in evidence. It is also clear that for many years, without objection from management, postal clerks on the wickets have worn a pocket protector in their shirt pockets with the Union symbol and the words "No Power Greater" clearly visible. Thus, Mr. Sauriol's memo to Mr. Parrot notwithstanding, I find that, up to the introduction of the Dress Code which is in issue here, there was, in Moncton, a practice of condoning the wearing of Union buttons which were neither derogatory nor offensive in themselves.

While there is less direct evidence, on the basis of Ms. Woodall's testimony, and on the basis of the lack of Employer evidence to the contrary, I find that this practice prevailed throughout Atlantic Canada, up to April 5, 1992, although there may have been local variations. After of that date, for the purposes of this proceeding I find that the Employer took a clear stand in Moncton against the wearing of Union buttons without approval, and no such approval was given. There was no satisfactory evidence to suggest that the Employer's stance was any different in other locations.

I find that in Moncton Bernie LeBlanc, the Retail Supervisor, did not concern himself with certain other tasteful insignia, such as Canada flags and insignia boosting Moncton, at the same time that he was enforcing the dress code to prevent the wearing of Union slogan buttons.

Based largely on the evidence of Andre Malo, Vice-President Divisional Operations Eastern, who was in charge of developing the new uniform and the dress code, I find that from late 1988 on the Employer was much concerned with these matters. I find as a fact that the Employer committed itself to a policy of establishing a new visual identity, spurred on by the conclusion that it had to compete in the market place partly, at least, by presenting a more business-like image. There is no room to doubt the importance the Employer attached to this initiative.

From the Employer's point of view, with which Mr. Malo agreed in his testimony, Union buttons are not consistent with the effective, efficient business image which was being sought, but that was not an aspect of the dress code to which Mr. Malo appears to have directed any real attention in the period from the fall of 1988 on. He was concerned with getting the job done and, beyond ascertaining that the Employer was prepared to provide uniforms that went beyond the entitlements of employees under the Collective Agreement, appears not to have involved himself at all with where the Union might stand on any aspects of the dress code, and certainly not with this one. Apparently, that was for Labour Relations.

I have already explained that I will not here explore the extent to which the Employer fulfilled any obligation it had to consult the Union with respect to the dress code.

The Issues: The issues, once again, are: (1) whether the new dress code implemented by the Employer April 5, 1992, for uniformed employees, was within the power of the Employer in so far as it provides:

> The wearing of tags, buttons, stickers and other insignia is not permitted unless prior approval of the Corporation is obtained.

and (2) whether the Employer breached the Collective Agreement when Bernie Leblanc, the Employer's Retail Supervisor in Moncton, formally reprimanded Raymond Poley for wearing a button bearing the words "The Struggle Continues", on his Canada Post uniform shirt, contrary to the dress code, while on duty and dealing with the public, and for refusing to stop wearing it when told to do so.

Decision: (1) The **starting position** for me, in any case involving employee appearance on the job, is that it is for the employer to make the initial business judgement of what effect the appearance of its employees will have on its business operations. Subject to the constraints to which I will turn shortly, the employer has the right to direct employees to achieve that appearance, whether as a matter of behaviour, grooming or dress.

Of course, the employer's right is subject to human rights legislation, interpreted in light of the Charter, and perhaps to the Charter directly, but for the reasons I have explained those do not concern me here. There might well be other legislation to be concerned about as well, but here the legislated right in issue is the Canada Labour Code, in so far as the Employer's dress code could be said to infringe Sections 94(3)(a)(vi) and 8(1). Does the dress code illegally infringe the rights of Union members to "participate in" the "lawful activities" of the Union.

Even if it does not, this Employer may be constrained by the Collective Agreement, most obviously by Article 5.01, which precludes Employer action against an employee by reason of his or her "activity in the Union". Obviously, the parties must be taken to have intended that such activity must be lawful, and therefore this Collective Agreement constraint on the Dress Code is not be very different from that in the Canada Labour Code. Because it is clear that the arbitrator has primary jurisdiction to apply the collective agreement, not the Code, most arbitrators, including Arbitrator Outhouse in the award referred to above, have focused on the collective agreement, rather than the Labour Code. Where it appears from labour relations board precedent that there would be a breach of the Code arbitrators usually content themselves with saying that if there is a breach of the Code there would certainly be a breach of the collective agreement, and making the appropriate order on that basis.

Even without Article 5.01 or a provision like it, every employer is constrained in its power to make unilateral workplace rules outside the collective agreement, by the requirement that if such rules are to be enforced through discipline they must be "reasonable". This is the most important of the requirements set out in **Lumber and Sawmill workers Union, Local 2537 and K.V.P. Co.** (1965), 16 L.A.C. 73, quoted in Brown and Beatty, **Canadian Labour Arbitration (3rd ed., looseleaf)** para.4,1500 and cited in countless arbitration decisions.

In determining whether a workplace rule with respect to appearance is reasonable arbitrators have required employers to demonstrate that there is a good business reason for the rule, following the award of Arbitrator Owen Shime in **I.A.F.F. Local 626 and Borough of Scarborough** (1972), 24 L.A.C. 78, in which he said at p.84;

> ...an employee should only be subjected to the imposition of such standards not on speculation, but on the basis of legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance of are adversely affecting the employer's business.

In **Pacific Western Airlines Ltd. and Canadian Airlines Employees Association** (1981), 29 L.A.C. (2d) 1 I accepted this general principle, but made the point that, in determining what is reasonable, the cogency required of the business reasons advanced by the employer must depend on the degree to which the rule in question invades the employee's sphere of personal freedom. I distinguished the "hair" cases from the clothing cases on that basis.

In the absence of anything to the contrary in a collective agreement, it should be assumed that the parties intended that the employer could make reasonable rules for the workplace but not rules that would affect the employee's freedom of choice in his or her private life, unless the work related justification is very clear. Thus, because hair length and style cannot be changed as easily as clothes there is a heavier burden on the employer to show

good business reasons for a "hair" requirement than for a clothing requirement. The burden is heavier in terms both of showing the inherent rationality of the requirement and of demonstrating through evidence that it actually matters.

Similarly, it seems to me that an employer who is paying for clothing will have an easier time showing that its requirements are reasonable than will one whose requirements impose a financial burden not expressly contemplated in the collective agreement.

What this means is that, where there is nothing explicit about the matter in the collective agreement, in the absence of past practice or precedent on the basis of which the parties can be assumed to have negotiated, an employer can require the wearing of a reasonable uniform for which it pays and which in its judgement will enhance its business. This assumes, of course, that any specific requirements of the collective agreement, such as the requirement for consultation in Article 3.02 of this Collective Agreement, have been respected.

Thus, on the facts before me, my **starting point** is that the Employer was entitled to require the wearing of a uniform, for which it was to pay, by its wicket clerks. There is nothing inherently unreasonable about the Employer having decided that a uniformed image would be effective for its business, and unless the uniform is damaging to some right or legitimate interest of the employees the Employer did not, in my opinion, have to do more than assert that it had made that considered judgement. Since the uniform was for the explicit and obvious purpose of creating a certain image it is a natural and reasonable part of that entitlement that the Employer could maintain the effect it sought by dictating that no buttons or badges were to be worn on the uniform, or that only approved buttons were to be worn.

The issue here, of course, is whether this right of the Employer is outweighed by Article 5.01, particularly when that right is weighed against Article 5.01 as interpreted by Arbitrator Outhouse and in light of past practice. Article 5.01 precludes Employer discipline for "activity in the Union". As a matter of first impression wearing the sort of button in issue here might not be thought to be what the parties meant when they specified "activity in the Union"

as a prohibited basis for discriminatory treatment, but this is not a matter of first impression. There is far too much in the way of precedent and past practice, which the parties must be assumed to have had in mind when they negotiated the Collective Agreement, to allow me to easily reach any such conclusion.

There is a long and well known line of decisions in the Canada Labour Board and the Ontario Labour Relations Board holding that it can be an unfair labour practice for an employer to prohibit the wearing of union insignia during a union organizing campaign. Most of them are canvassed in **I.C.T.U., A.M.T. and Ottawa-Carleton Regional Transit Commission** (1984), 7 CLRBR(NS) 137, and, of course, in Arbitrator Outhouse's 1986 award between these parties, also coming out of Moncton, which has already be cited above. Certainly, the Employer cannot be heard to assert that in agreeing to Article 5.01 it did not know that wearing Union buttons could not constitute a Union activity.

Both counsel cited arbitration awards, labour board decisions and court cases, even American cases, dealing with employee freedom of speech, including the freedom to wear buttons, where it conflicts with an employee's duty to not to act against the interests of his or her employer, or with the duty to follow directions. The broader issues of freedom of speech are closely related to the one before me, but I will not explore many of the authorities cited because none of them stands for more than the proposition that the competing rights and duties must be weighed in particular contexts.

The relevant considerations include the nature of the employment, whether the employee was in the workplace, whether he or she was engaged in the activity in question during working hours, whether he or she was exercising a union right, a public political right or some other specifically recognized right, and the damaging effect on the employer of the words said or otherwise broadcast. As Arbitrator Outhouse said (at p. 65);

> ... an employee's freedom of expression is at its lowest ebb where, as here, the employee is actually engaged in the performance of his or her duties.

With a few exceptions, the authorities cited to me were before Arbitrator Outhouse when he dealt with the right to wear the "National Day of Protest" button in 1986. Many of the same arguments were made; the only real difference being that the Employer has since given notice the notice of November 2, 1988, put a great deal of time effort and expense into creating a new image and promulgated the dress code, which makes the wicket clerks a uniformed group in a way they were not before, although there was then a limited uniform. In finding that the Employer had violated the Collective Agreement by denying wicket clerks the right to wear that button Arbitrator Outhouse concluded, at pp.67-8, 26 L.A.C. (3d) 58:

> ...an employer must be able to show some overriding interest in order to justify restricting an employee's freedom of expression, particularly where the employee seeks to exercise that freedom in pursuit of a lawful union activity. Such overriding interests will frequently ... take the form of maintaining an orderly work-place as well as good customer relations. Thus employees are not entitled, while at work, to express themselves either in verbal or written form in a manner which is calculated to disrupt production or bring the employer into disrepute with its customers. On the other hand, absent any interference with production or harm to customer relations, an employee's freedom of expression and the right to participate in lawful union activities cannot validly be circumscribed by the employer.
>
> ... I find it highly unlikely that the button worn by the grievor would have caused any disruption in the work-place or inflicted any damage upon the employer's relationship with its customers. The button simply announced November 6th as being a national day of protest. It did not mention the employer by name and was neither derogatory nor offensive.

> ... there is no evidence whatsoever of any inquiries having been made by customers, let alone complaints.

In light of this award, not only must the Employer be taken as having agreed, when it re-negotiatted the collective Agreement, not to interfere with the wearing of buttons where it constituted "union activity", Article 9.43 of the collective Agreement provides;

> 9.43 Future Cases
>
> The final decision rendered by an arbitrator binds the Corporation, the Union and the employees in all cases involving identical and/or substantially identical circumstances.

Thus, there is little point in belabouring awards decided under other collective agreements subsequent to the Outhouse award. In one case, **Ontario (Ministry of Solicitor General) and O.P.S.E.U. (Polfer)** (1986), 23 L.A.C.289 (Delisle, Vice-Chair), it was held that a rule against wearing a union pin on a uniform was unreasonable and in another, **Hub Meat Packers Ltd. and United Food and Commercial Workers, Local 1288P** (1990), 12 L.A.C. 4th 81 (Tuck, Chair), it was held that a union sticker could not be worn on a hard hat, for sanitary reasons.

More significant in general terms are two judgements of the Federal Court of Appeal, although, like the subsequent arbitration awards just quoted, their relevance is limited because they obviously cannot be treated as having in any way informed the mutual expectations of the parties when they negotiated Article 5.01. Nevertheless, I have found them to provide a useful framework.

The first, **Quan v. Canada (Treasury Board); Bodkin v. Canada (Attorney General** (1990) 107 N.R. 147, involved judicial review of two decisions of the Public Service Staff Relations Board. Both involved grievances by members of the PSAC who had been ordered by their supervisors in Canada Employment and Immigration to remove buttons, not unlike the ones in issue here, carrying the words "I'm

on strike alert", from their uniforms. Their collective agreement contained a provision almost identical to Article 5.01. Although the grievors were uniformed public servants there is no mention in the report of the case of any dress code.

In **Quan** the Board had dismissed a grievance on the ground that wearing the button did not constitute "activity in the union" while in **Bodkin** another member of the Board had explicitly disagreed and allowed a grievance on identical facts. Speaking for a unanimous Court, Iacobucci, C.J. (as he then was) set **Quan** aside and dismissed the application for review of **Bodkin**, saying that the conclusion reached in **Quan** "was error". His Lordship also characterized as "error" the conclusion of the Board member in **Quan** that the wearing of the button had the potential to damage customer relations and jeopardize the employer's public image.

Chief Justice Iacobucci contrasted this with the views of the Board member in **Bodkin**, which he quoted as follows:

> ..the wearing of a "union button" during working hours constitutes the legitimate expression of one's views on union matters and, although not an absolute right, ought to be curtailed only in cases where the employer can demonstrate a detrimental effect on its capacity to manage or on its reputation.

"This approach", said the Chief Justice, at p.150, "is clearly correct", and went on to quote the following, which he said "I also agree with";

> ... the employer should not have to tolerate during working hours statements that are derogatory or damaging to its reputation or detrimental to its operations. It follows that there is a subjective element in determining whether a union button exceeds the permissible limits. I have considered the message contained on the button "I'm on strike alert" and it is my conclusion that the words do not in any way impinge on the employer's

> authority, nor can they be qualified as damaging to the employer's reputation. Also, I fail to see how they can be detrimental t the employer's operations. In my view the words "I'm on strike alert" are neutral in that they are neither insulting nor flattering nor critical of the employer. They constitute a statement of fact... As for the likelihood that the employer's operations might have been or might be affected, I would have required some evidence of some kind...

The second judgement of the Federal Court of Appeal, in **Almeida v. Treasury Board** (1990), 90 CCH Canadian CLLC, para. 14,054, also involved uniformed Federal public servants, in this case customs and excise officers. In context of a threatened downsizing, they wore buttons carrying the message "keep our customs inspectors - keep out drugs and porno", and were told by their supervisors to remove them. The Customs and Excise Branch had in place a Code of Conduct which read in part;

> Article 54...
>
> (f) Uniformed Employees
>
> (1) Uniformed employees of Customs and Excise have a particular responsibility for maintaining a good appearance, since their uniforms foster immediate recognition...
>
> (2) Accordingly, where a uniform is supplied, it shall be worn in its entirety, complete in all details and devoid of ornaments which are not part of the uniform...

The customs and excise officers' grievance was denied, by the same Grievance Board member who had denied the grievance in **Quan**, but before that decision was quashed by the Federal Court of Appeal.

Predictably, in **Almeida** the Union sought judicial review of the denial of the grievance, relying on the Federal Court of Appeal

decision in **Quan v. Canada (Treasury Board); Bodkin v. Canada (Attorney General,** discussed above. However, the majority of the Court saw the two cases as being quite different and allowed the denial of the grievance in **Almeida** to stand. Speaking for the majority, Heald J.A. distinguished the two cases on the basis that "in **Quan**, ... there was no requirement that they wear uniforms while on duty" [at p. 12,379] and quoted the passage from the Board decision in **Quan** set out above, which Iacobucci C.J. had also quoted with approval. His Lordship went on to say that in **Almeida** the employees were "Peace Officers" so "it is important that they '... exude the appearance of authority and control' and that that appearance is not '... diminished or subject to debate or question byu the general public'". "It is not apparent", he said "that the same rationale would apply to the employees in **Quan**..."

Since the employees with which I am dealing here were required to wear uniforms, and since the issue of buttons was similarly addressed in a dress code, **Almeida** provides some useful insights although the Employer here was concerned with a business-like image, not "the appearance of authority and control".

"Secondly", Heald J.A. said, "in **Quan** the grievors did not act insubordinately. In the case at bar the, the applicants refused several requests to remove the offending button... ."

In the matter before me there was no insubordination, except in the case of Raymond Poley's second grievance. I return to that below, but I must say here, with respect, that I do not see how the presence or not of insubordination in a particular instance can affect the answer to the question of whether or not union buttons in general, or a particular union button, may be forbidden.

"Thirdly", His Lordship continued,

> the buttons in issue in **Quan** contained "neutral words"... [i]n contradistinction there is nothing "neutral" about the message conveyed by the buttons in this case... In my view, based on the evidence on this record, I think the Adjudicator was justified in concluding that the wearing of buttons on duty

> presented a potential for involving the employer in public confrontation or debate... the adjudicator did balance the legitimate rights and aspirations and the employees with those of the employer.

Before me, counsel for the employer stressed this "potential for...public confrontation or debate" in the wearing of Union buttons. His focus was not so much on potential disruption as on the loss of time. The evidence did not satisfy my that this had occurred, or was likely to occur, in the Canada Post wicket context, certainly not in Moncton.

Returning to **Almeida**, MacGuigan, J.A., the only member of the Court who had also sat on **Quan v. Canada (Treasury Board); Bodkin v. Canada (Attorney General**, dissented. His Lordship found no test in that case that the message be "neutral", saying rather that "it may be quite pointed, provided that it is not detrimental to the employer." He expressly approved the award of Arbitrator Outhouse between these parties discussed above and stated that the cases make no distinction on the basis of whether the employee wearing a button is in uniform [at p. 12,385].

On this point, as I have already indicated I respectfully disagree with MacGuigan J.A. and tend toward the majority view. It seems to me that the mere fact that an employer, for whatever reason, has decided to provide its employees with uniforms makes it clear that the employer genuinely thinks, to the point of making a costly business decision, that appearance, and specifically uniformity of appearance, is important to its endeavour.

MacGuigan J.A. also held that the adjudicator should have "required evidence of at least a real or serious possibility of harm to the employer" rather than speculating about possibilities and "potential".

Mr. Justice MacGuigan's approach is summed up as follows, at p.12,386;

> Where the employee organization does raise issues as to the employers' managerial

> policies no doubt it is not comfortable for the employer to have such questions raised, even implicitly, in full view of the public, but that consideration must take second place to the employees' freedom to express their concern about workplace issues vital to their employee organization. That is to say, once an employee has established that the message on his button represents a valid concern of his employee organization, the onus shifts to the employer to show a serious possibility of prejudicial effect. Failing that, the employees' interest in what I might call "labour relations expression" must prevail. This process can be spoken of, as has sometimes been done in the labour relations cases, as a balancing of interests, but it is a balancing with a slight weighting in favour of labour relations expression. [Underlining added]

Pratte J.A. expressly agreed with Heald J.A. [at p. 12,380] but made a few observations valuable for their succinctness. **Quan v. Canada (Treasury Board); Bodkin v. Canada (Attorney General**, His Lordship observed, establishes two principles:

> (1) the wearing of a union button by a unionized employee is a union activity within the meaning of section 6 of the **Public Service Staff Relations Act.**
>
> (2) the employer may not forbid his employees to wear a union button during working hours unless he can establish that such an activity has a detrimental effect on his capacity to manage or on his operations.

Significantly, however, Pratte J.A. narrowed the application of these principles to the wearing of buttons which by their messages directly support the union's activities as collective bargaining agent. He continued [on p. 12,381];

> ... In **Quan** the message was directly related to the collective bargaining process **as it is regulated by legislation.** In such a case, it is reasonable to say that the employer cannot prevent the employees from wearing the union button during working hours unless he is able to demonstrate that such an activity will have a prejudicial effect on his operations. The situation is different, however, when, as is the case here, the message conveyed by the union button is in no way related to the bargaining process. Then, the second principle established by **Quan** does not apply and all that can be required is that the employer does not act capriciously. For instance, an employer would have the right to object, without having to prove any detrimental effect, to the wearing by his employees during working hours of union buttons manifesting their opposition to some proposed piece of legislation that the employer may happen to support. Otherwise, the employer would, in a sense, be forced to collaborate to the dissemination of ideas of which he disapproves. [emphasis added]

I note that this differentiation between activity directly related to the collective bargaining process and other things a union may chose to do is consistent with the underlined passage from MacGuigan J.A.'s dissent above. It is also, I think, consistent with, although it does not go as far as, Mr. Justice Heald's judgement in requiring "neutrality" in the message on a union button. Certainly, I find it intuitively correct that not every message a union might chose to convey should be considered protected union activity in this context, although I am well aware of how hard it may be to draw the line in some cases.

Is this differentiation consistent with labour board and arbitral jurisprudence? In 1984, in **I.C.T.U., A.M.T. and Ottawa-Carleton Regional Transit Commission**, cited earlier, the Canada Labour Relations Board said, at p. 153:

> ...the wearing of a trade union pin [is] an expression exhibiting belief in the support of the principles of trade unionism. Those principles have been endorsed by Parliament in the code and a public expression of acceptance of them by wearing a trade union insignia is concomitant with the rights and freedoms granted to employees under the Code. The expression of the exercise of those rights is a lawful activity incidental to the exercise of those rights and must be considered a participation in a lawful activity of the trade union of the employee's choice. ...

The Board went on to quote an earlier case to the effect that in matters of dress "employer imposed limitations must be grounded in reasonableness" which, the Board then said, "must surely include the ability to show a detrimental effect on entrepreneurial interests".

This, I think, amounts to saying that the wearing of a button that does no more than tastefully announce membership in a trade union will always be protected activity. In my view, the same could be said of the tasteful display of an established union logo or slogan. CUPW pocket protectors, for instance, appear to me to fall into this category.

In his 1986 award Arbitrator Outhouse found "easily reconcilable" the award of Arbitrator O'Shea in **Dominion Stores Ltd. and Retail, Wholesale & Department Store Union, Local 414** (1985), 19 L.A.C. (3d) 269 in which the learned arbitrator denied a grievance against the employer's order to remove "Boycott Eaton's" buttons. Arbitrator O'Shea quoted a provision of the collective agreement before him not unlike Article 5.01 here and said, at p. 66:

> The right of employees under art. 2.11 to be free from restraint in respect of union activities does not give employees licence to carry on any sort of union activities during working hours which they might chose. Article 2.11 must be read in the context of other

> provisions of the collective agreement...
>
> The company has the right to present an image to the public that is politically neutral and is non-partisan on political and social issues, including issues such as labour disputes between other employers and unions.

In this framework, I shall now state my view of what is required under this Collective Agreement, interpreted in light of the arbitration awards and past practice of which the parties must have been aware:

(1) The wearing of a Union button directly related to the collective bargaining process by a unionized employee is a union activity within the meaning of Article 5 and is protected by that provision of the Collective Agreement as well as by the Canada Labour Code.

(2) The Employer may not forbid its employees to engage in the protected activity of wearing a Union button directly related to the collective bargaining process during working hours **unless** it can establish that wearing the button has a detrimental effect on its capacity to manage, or on its operations.

(3) Buttons that are inherently disruptive, insulting, derogatory or damaging to the Employer's reputation will be assumed to have that detrimental effect.

(4) Otherwise, where the allegation is that the Employer's operations has been, or might be, detrimentally affected by a Union button directly related to the collective bargaining process which is not inherently disruptive, insulting, derogatory or damaging to the reputation of the Employer, evidence of some kind is required. Only where the evidence of detrimental effect outweighs the statutory right of "labour relations expression" will the Employer be allowed to forbid its employees to wear Union buttons in these circumstances. There appears to be a weighting in favour of the statutory right.

(5) Where the message conveyed by the Union button is not directly related to the collective bargaining process all that is required is that the Employer does not act unreasonably, unless some statutory or Collective Agreement right other that those with which I am concerned here is involved. As I said at the outset, in my view it is not unreasonable for an employer who is providing a uniform, quite evidently because of the business importance it attaches to image, to require that the uniform be unadorned, except in accordance with its direction or permission.

**Conclusion with respect to the Policy Grievance:** This, of course, means that the Policy Grievance must be sustained. Obviously a rule which states:

> The wearing of tags, buttons, stickers and other insignia is not permitted unless prior approval of the Corporation is obtained.

is inconsistent with the rights of employees under this Collective Agreement. The Employer's dress code did not respect those rights and it was not within the Employer's power to promulgate that part of it. It was, and is, of no force or effect in so far as it goes beyond those limits.

To be clear, the Employer cannot be heard to say that it will maintain this rule and approve buttons that meet my statement of what is required under this Collective Agreement. Complicated as that statement is, the Employer still cannot promulgate a rule that is more restrictive of employee rights than the principles I have stated above. The complexity is not of my making. It is in the nature of what the parties must be taken to have understood to be the employees' rights when they negotiated the Collective Agreement, and they did not simplify or otherwise change it.

The reason that the Employer cannot promulgate a restrictive rule subject to its approval on the principles I have set out is that doing so would make a mockery of the "work now grieve later" rule. With all due respect to MacGuigan J.A.'s differing opinion in his dissent in **Almeida v. Treasury Board**, at p. 12,386, Brown and Beatty, **Canadian Labour Arbitration** (3rd ed., looseleaf) para. 7:3624, do not, on my reading, say that the "work now grieve later"

rule does not apply in personal appearance cases. They now state that arbitrators have taken the view that the rule is sometimes inappropriate and inapplicable because the refusal will not generally prejudice production and the grievance and arbitration process would be incapable of providing adequate redress. They say it does apply where the employee can easily comply, and grieve, or where there are considerations of prejudice to the employer, including to its public reputation.

In my view, the only time the "work now, grieve later" rule would not apply to the wearing of union buttons is where the union is actively involved in an organizing campaign, in collective bargaining, or in some other context where the protected activity of wearing of a union button has a time sensitive significance which would be lost in the delays inherent in the grievance and arbitration process.

**Conclusion with respect to the Grievance of Raymond Poley:** Grievance No. 078-91-00056 with respect to Raymond Poley alleges violation the Collective Agreement and the **Canada Labour Code** in that Mr. Poley was reprimanded for wearing the Union button "The Struggle Continues" on his uniform. The letter of reprimand which was placed on Mr. Poley's file, and which stated the undisputed facts, is set out above. It is clear from that letter that Mr. Poley was disciplined for breach of the dress code and for continuing to wear the button after having been told that it was not to be worn. Whether or not any discipline was justified depends on (i) the validity of the dress code provision with respect to the wearing of buttons and, (ii) even if it was not valid, whether Mr. Poley was justified in not complying with the "obey now grieve later" adage.

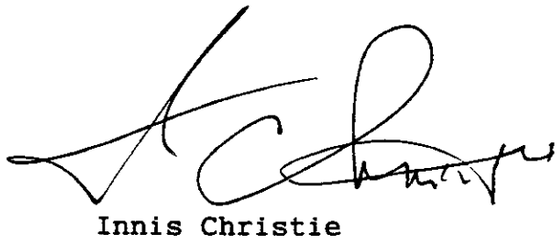
I have already ruled that the dress code under which Mr. Poley was disciplined was broader than any that it was within the power of the Employer to promulgate. It could be argued the dress code was, nevertheless, in effect, but limited in the way I have described. Taking that approach, I would have said that because the parties were not at the time involved in free collective bargaining (which would justify the Union in deciding to use a button to foster special solidarity or public support) "The Struggle Continues" button was not directly related to the collective bargaining

process. Wearing it was not, therefore, a union activity within the meaning of Article 5 of the Collective Agreement and probably was not protected by the Canada Labour Code; and, as I have said, a rule against union buttons on a uniform is not otherwise unreasonable.

However, Mr. LeBlanc did not take into account any considerations even remotely like the five I have said should determine whether a particular Union button can be worn. Why would he have, given the blanket rule he had to work with? The evidence is clear that neither he nor Mr. Poley sought the approval of the Corporation for the particular button Mr. Poley was wearing, so the Employer cannot be said to have, in any way, directed its mind to any such considerations. Therefore, notwithstanding what I have said about the particular button, I have concluded that Mr. Poley was improperly told to remove it.

It follows from what I have already said about the "Work now, grieve later" adage, and from the fact that at the time of this incident the parties were not involved in free collective bargaining, that Mr. Poley should have complied with Mr. Leblanc's order and grieved the issue, as was done in the Regional Policy Grievance. To the extent, therefore, that the disciplinary letter grieved against simply recorded Mr. Poley's failure to comply with a supervisor's order it was appropriately placed on his file.

Were it not the case that all letters, reports and documents relating to this matter will already have been removed from Mr. Poley's personal file in accordance with Article 10.02(c), due to the passage of time, I would order that his file show that he did no more than refuse to obey an improperly given order. In the circumstances, I allow his grievance in part but make no order.



Innis Christie
Arbitrator