

SCOPE OF EMPLOYER FREE SPEECH

The focus of this document is the recent reconsideration decision of the B.C. Labour Relations Board (the “Board”) in *RMH Teleservices International Inc.*, BCLRB No. B188/2005 (leave for reconsideration of BCLRB No. B345/2003).

2002 Amendments to the *Labour Relations Code*

On July 30, 2002, a number of amendments to the *Labour Relations Code*¹ (the “Code”) came into force as a result of the *Labour Relations Code Amendment Act, 2002*² (more commonly known as Bill 42).

Amendments to subsection 6(1) and section 8 of the Code broadened the scope of an employer’s freedom to express its views, particularly in the context of union certification drives.

Before the amendments, the Code was worded as follows:

- 6(1) *Unfair labour practices* – An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.
- 8. *Right to communicate* – Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer’s business.

The Code now contains the following language:

- 6(1) *Unfair labour practices* – Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

¹ *Labour Relations Code*, R.S.B.C. 1996, c. 244.

² *Labour Relations Code Amendment Act, 2002*, B.C. Reg. 182/02.

8. *Right to communicate* – Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

To summarize the above, subsection 6(1) is now linked to – *and subject to* – section 8. While Section 8 previously covered statements of fact or opinions reasonably held in respect of the employer’s business, the section now covers “views on any matter, including matters relating to ... a trade union or the representation of employees by a trade union”. An employer exercising freedom of expression under section 8 need only refrain from engaging in intimidation or coercion.

The foregoing amendments seem to broaden the scope of permissible employer expression. They appear to – in the absence of intimidation or coercion:

- give employers the ability to discuss any matter with employees (including the question of whether or not to unionize); and
- protect all employer expression.

The amendments further appear to give employers the ability to express views that are not reasonable or correct (provided they are not intentionally deceptive).

Original Decision in *RMH Teleservices International Inc.*

Before canvassing the original decision in *RMH Teleservices International Inc.*³, we provide an overview of the facts.

The employer, RMH Teleservices International Inc., operates a telephone call centre located in Surrey. In the course of a union certification drive by the B.C. Government and Service Employees’ Union, the employer mounted a campaign against unionization. That campaign included the following tactics:

- holding a number of meetings to discuss the union’s certification drive, during which meetings the employer referred repeatedly to the amount of money it was losing;
- setting up a number of slide projectors in the call centre, dimming the lights and projecting anti-union messages⁴, an overview of the employer’s RRSP matching program (next to a picture of a “money tree”), and images of the employer’s financial statements;

³ The date of the original decision in *RMH Teleservices International Inc.* is October 15, 2003.

⁴ The anti-union messages that were projected included statements to the following effect: “by joining [the] union, employees will become just ‘one [of] the crowd’ to the union”; “the union cannot guarantee any promise ... [RMH Teleservices] can refuse their requests”; “the union does not understand the dynamic, client-centered business of [RMH Teleservices]”; and “a union does not ensure job security ... only the employees and their productivity do”.

- bringing in managers from the employer's other locations to wander the call centre and answer any employee questions; and
- having managers distribute gifts to employees, which gifts bore anti-union messages and ranged from frisbees and notepads to chocolate bars and buckets of popcorn.

The original panel characterized the employer's conduct as permissible expression under section 8 of the Code, and concluded that none of the employer's actions amounted to a contravention of the Code. In reaching its conclusion the original panel made the following findings of fact and rulings:

- The meetings were not "captive audience" meetings. The employer "made it clear at the outset of the meetings that attendance was voluntary, that surveillance cameras were disengaged and that attendance was not recorded" [at para. 96]. Moreover, employees were free to leave if they so chose, and were paid regardless of attendance at the meetings.
- The projected images were not offensive to the provisions of the Code. They were not intimidating or coercive, and were compared to large posters in the workplace. The employees were free to look away from or ignore the projected images. The "employees were able to go about their affairs without constantly reading the messages (there was no audible component to the projection)" [at para. 103].
- The presence of extra managers was not contrary to the Code. There was some evidence that the extra managers were performing tasks not related to the campaign against unionization.
- The distribution of gifts did not qualify as "the expression of a genuinely held opinion" or "the expression of a view" [at para. 99], and accordingly did not fall within the protection of section 8 of the Code. Moreover, the distribution of gifts was not improper, unlawful or contrary to the Code because the "[gifts] distributed to [the] employees carr[ied] marginal value" [at para. 99].

The original panel found that the employer acted contrary to the Code in prohibiting employees from wearing union buttons in the workplace. The original panel accordingly "declare[d] that the Employer contravened Section 6(1) by issuing blanket prohibition against the display of union insignia" [at para. 129]. The original panel otherwise dismissed the union's complaint in its entirety.

Reconsideration Decision in *RMH Teleservices International Inc.*

The union applied under section 141 of the Code for leave and reconsideration of the original decision. The union took the position that the original decision was “inconsistent with Code principles” because the employer was permitted to “engage in a political style anti-union campaign, contrary to the ... long-standing rejection of such conduct”, and “effectively force employees to view and listen to its anti-union messages” [at para. 1].

At the outset, the five-member reconsideration panel noted that two fundamental rights were engaged in *RMH Teleservices International Inc.* – namely, “the right of employees to choose whether they wish to be represented by a union” and “the right of expression which includes, but is not limited to, an employer’s right of expression” [at para. 27].

The reconsideration panel proceeded to note that the:

- “legislative intent in the current provisions of the Code broadens the content of expression that can now be communicated while narrowing the legislative restrictions” [at para. 36];
- “[Supreme] Court [of Canada] has emphasized the importance of expression rights as fundamental in our free and democratic society” [at para. 39]; and
- “[Supreme] Court [of Canada] has also recognized the right to hear or receive views as a part of expression rights” [at para. 39].

Notwithstanding the foregoing, the reconsideration panel stated that the “[Supreme] Court [of Canada] has explained that while expression rights are critically important, they are not unlimited” [at para. 40]. According to the reconsideration panel, “listeners have the right to not listen if that is their wish” [at para. 40].

The reconsideration panel expressed the following views:

“While employers thus [now] have broadened expression rights during a union organizing drive, *this is also obviously the occasion when concerns regarding employer coercion and intimidation⁵ will be at their highest.*

....

While the legislative intent of the amendments to Sections 6(1) and 8 includes a broadening of expression rights in the workplace, there is nothing in the amendments to suggest that the legislature intended to undermine the principle of employee free choice with respect to unionization ... The restriction on coercion and intimidation in Section 8 (as well as restrictions and prohibitions on

⁵ The following statement reflects the reconsideration panel’s understanding of “coercion and intimidation”: “Inherent to the concept of coercion and intimidation is the notion of compulsion for the purpose of influencing conduct” [at para. 46].

employer conduct in other Code provisions) is intended to protect that fundamental Code principle.

....

If an employer expresses views on unionization to its employees which are coercive or intimidating, or in a manner which coerces or intimidates, that expression of views would fall outside the scope of Section 8 and would constitute an unfair labour practice.”

[Italics added; at paras. 44, 45 and 49.]

The reconsideration panel took the position that “an employer can provide its views to employees, including addressing the issue of unionization” [at para. 47]. However, the reconsideration panel affirmed that “an employer cannot ... seek to ‘compel’ employee choice in respect of unionization” [at para. 47].

The reconsideration panel then proceeded to underscore that “the requirement to assess evidence and facts contextually and cumulatively is a key part of the Board’s approach to these matters” [at para. 70]. The reconsideration panel cited the Board’s decision in *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003 (“*Convergys*”) as authority for the following propositions:

- “[T]he views expressed [by an employer] ‘may reflect ... bias and be uninformed or unreasonable’ ... *[but] must still be considered in the entire context in determining whether they are coercive or intimidating*” [italics added; at para. 42];
- “[W]hether an expression of views is coercive or intimidating ‘depends on the entire context in which the view is expressed’” [at para. 49]; and
- “[A]long with being viewed contextually, the cumulative effect of communication will be considered” [at para. 49].

The reconsideration panel summarized its position as follows:

“[I]n order to determine whether an expression of views falls within the scope of Section 8 or is excluded by virtue of being coercive or intimidating, *it is not sufficient merely to consider the words expressed. The entire context must be considered.* Where the context is an organizing drive, and the employer is expressing its views about unionization to its employees, the concern about protecting the free choice of the employees from coercion or intimidation is particularly strong. The way in which the employer expresses its views to its employees about unionization in this context can determine whether the expression of views, viewed contextually, is coercive or not.”

[Italics added; at para. 50.]

As noted above, a contextual consideration of “whether an expression of views falls within the scope of Section 8 or is excluded by virtue of being coercive or intimidating” includes recognition of the fact that “during a union organizing drive ... concerns regarding employer coercion and intimidation [are] ... at their highest”. A contextual consideration also includes recognition of the:

- “nature of the power relationship in the workplace” [at para. 51];
- “employer’s position of authority in the workplace” [at para. 52]; and
- “unique ... situation [of the employer] in a position to be able to influence the views of [its] employees” [at para. 52].

Against the backdrop of the foregoing principles, the reconsideration panel went on to reconsider the original decision. The determinations of the reconsideration panel are outlined under the various headings below.

Meetings

With respect to the meetings to discuss the union’s organizing campaign, the reconsideration panel ruled as follows:

“We note that the original panel closely scrutinized the meetings with the employees and concluded that the attendance was voluntary ... We find that this conclusion of mixed law and fact is one that we will not disturb. The determination as to whether coercion or intimidation has been established, particularly in the context of employee meetings, will be made on a case by case basis applying the approach and factors articulated in this decision.”⁶

[At para. 69.]

Projected Images

The projected images were found by the reconsideration panel to be intimidating or coercive. The reconsideration panel noted that the original panel had found that the:

- projected images were “prominent features of the workplace” and “by all accounts ... impossible to miss” [at para. 24 in the original decision]; and
- “employees would inevitably see them in the course of their workday” [at para. 103 in the original decision].

⁶ At this juncture, we note that one of the members of the reconsideration panel, Kathy Sanderson, while agreeing with “the majority’s disposition of th[e] case” and “the majority’s analysis concerning the gifts, the slide show, and the cumulative effect of the conduct” [at paras. 73 and 74], “prefer[red] the original panel’s approach in assessing whether the meetings were ‘captive audience’ meetings and whether there was intimidation or coercion” [italics added; at para. 73].

The reconsideration panel did “not agree with the original panel that employees should have to avert their eyes from employer communications in the course of their ordinary working circumstances”, and opined that “bulletin boards or other such locations may [thus] be different” [at para. 66]. The reconsideration panel stated the following:

“The slide shows were so prominent, persistent, and impossible to miss that employees, while at work, would inevitably have been forced to view them or forced to consciously turn away from them ... Accordingly, as a means of communication, the slide shows fall outside the allowable communication of views protected in Section 8 of the Code. They constitute improper pressure on the employees and are thus are [*sic*] contrary to the restrictions on coercion and intimidation in ... the Code.”

[At para. 66.]

Distribution of Gifts

With regard to the distribution of gifts, the reconsideration panel noted the following finding in the original decision:

“Managers distributed [gifts] to employees while they sat at their workstations or placed them at workstations when employees were absent. Employees were asked if they wanted the items and were free to refuse.”

[At para. 18 in the original decision.]

The reconsideration panel ruled as follows:

“The gifts were used by the Employer to convey messages. As found by the original panel the act of handing items to employees and the items themselves are not protected by Section 8 ... [W]e find that, while the gifts were of marginal value, viewed contextually in light of the overall communications by the Employer, they were improperly intrusive and persistent. We thus find the gifts are a breach of Section 6(1) of the Code in the circumstances of this case.”

[At para. 68.]

In passing, we note that the reconsideration panel also made the following general observation: “Generally speaking, communicating employer views about unionization on, or accompanied by, a gift may violate ... the Code” [at para. 48].

How Broad is the Scope of Permissible Employer Expression at Present?

We are thus left with the question of how broad is the scope of permissible employer expression after the reconsideration decision in *RMH Teleservices International Inc.*

A starting point in answering the foregoing question is the following. The reconsideration panel in *RMH Teleservices International Inc.* referred – with approval – to the Board’s decision in *Convergys*. In that case, the employer “engaged in an *extended exchange of written memoranda* with the union *which could be characterized as an anti-union ‘campaign’*, yet the Board did not find this method of expressing views to be coercive or intimidating” [italics added; at para. 55]. It would thus appear that kind of employer expression is permissible under the Code.

In answering the foregoing question, we also find the following passages in the reconsideration decision instructive:

“[T]he legislative intent in the amendments was to broaden employer expression rights and to further informed choice. Accordingly, *if the campaign takes place in written form and the views expressed are not in themselves coercive or intimidating, the Board has in effect found that the fact that they could be characterized as an anti-union campaign by the employer would not be sufficient to render them coercive or intimidating.*

....

[W]e find the legislative intent of the amendments to be that, notwithstanding the fact [that] ... a union [is prevented] from communicating with employees at the workplace during work time, *employers are entitled to communicate their views on unionization to their employees in the workplace during working hours, as long as they do so in a manner that is not coercive or intimidating.*

....

Section 8 does not guarantee an audience. The right of expression under Section 8 does not entail a right to compel others to listen ... A reasonable employee who has no choice but to listen to an employer’s views regarding unionization may feel coerced or intimidated by the very fact that they have no choice but to hear their employer’s views [sic]. Whereas they can turn away from a union organizer or a co-worker and decline to listen to them on the topic of unionization, an employee is far less able to turn away from their employer [sic]. By virtue of their authority in the workplace, employers can compel their employees to listen to them. *Compelled or forced listening raises serious concerns regarding employee free choice on the issue of unionization.*”

[Italics added; at paras. 54, 56 and 58.]

Notwithstanding the above, we appreciate that it is not easy to determine whether employer expression “falls within the scope of Section 8 or is excluded by virtue of being coercive or intimidating” – in other words, it is not easy to determine whether employer expression is permissible or impermissible.

Please do not hesitate to contact any lawyer at our firm if you have questions regarding the scope of an employer’s freedom to express its views (particularly in the context of

union certification drives), or if you wish to have information on any other labour or employment law issue.

* Every effort has been made to ensure accuracy in respect of this document. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this document. *

This document was compiled by James D. Kondopulos, who is an associate lawyer at Roper Greyell LLP, and can be reached by telephone at (604) 806-3865 or by e-mail at jkondopulos@ropergreyell.com.