EMPLOYER FREE SPEECH AFTER THE CONVERGYS DECISION

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A. Introduction

On July 30, 2002, several amendments to the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"), came into force as a result of the *Labour Relations Code Amendment Act*, 2002, BC Reg 182/02, more commonly known as "Bill 42". One of the changes made to the Code by Bill 42 was a broadening of the right of employers to express "views". The British Columbia Labour Relations Board has seen these amendments as an invitation to significantly alter the labour relations landscape, particularly with respect to the employer's role during union organizing campaigns. In our opinion, the Board's interpretation of the amended *Code* provisions has opened the door to political-style, anti-union campaigning by employers in British Columbia. The language employed in the amended provisions does not support this interpretation

B. The Amendments to the *Code*

Amendments were made to the unfair labour practices provision in Section 6(1) of the Code, as well as the right to communicate in Section 8.

The former wording of the *Code* was 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 the 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 amended sections now read as follows:

> **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.
>
> **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.

The changes can be described as follows:

- Section 6(1) is now expressly linked to Section 8

- "Nothing in the *Code*" has been removed. In its place is "Subject to the regulations"

- Section 8 now covers "views" that can be "relating to an employer, a trade union or the representation of employees by a trade union" instead of statements of fact and reasonable held opinions regarding the employer's business

- The person expressing themselves now cannot use intimidation or coercion

Apparently, the Legislature intended to broaden the subject matter that employers may communicate with employees about. The old Section only allowed discussion of "the employer's business", while the amendments allows discussion on "any matter", including "matters relating to an employer, a trade union or the representation of employees by a trade union".

Furthermore, by linking section 6(1) to section 8, the Legislature appears to have sanctioned the expression of views that might interfere with the formation, selection or administration of a trade union and that have as such been prohibited as unfair labour practices.

C. The Board's Approach to the Amended Provisions

1. The Convergys decision

The Board's first opportunity to define the scope of the new free speech provisions arose in *Convergys Customer Management Canada Inc.* (2003), 90 C.L.R.B.R. (2d) 238, BCLRB Decision No. B62/2003 ("*Convergys*").

(a) The factual background

In *Convergys*, the union alleged that the employer had committed several unfair labour practices during the organizing drive. The employer is a telephone call centre with about 450 employees. One of the ways that the union organizers gave information to employees was by passing out leaflets at the workplace. The employer responded to the campaign by, among other things, issuing bulletins in response to these union leaflets.

The union complained that the employer's bulletins inhibited employees from signing membership cards. The union claimed that the bulletins described it as a money-hungry organization that was only interested in Convergys employees in order to increase "revenues" obtained through dues. As well, the union alleged that the bulletins implied that organizers were dangerous and intimidating and essentially "commanded" employees to refuse to sign membership cards. The union also alleged that several of the bulletins contained misrepresentations about various issues, including the legal effect of signing a membership card and the employer's duty to bargain in good faith.

(b) The Board's interpretation of the amended Section 8

In its decision, the panel did an extensive analysis of the effect of the new amendments to the *Code*. The panel looked closely at the changes to the wording of Sections 6(1) and 8 to determine what the Legislature intended. In the panel's view, the Legislature essentially intended to broaden the scope of permissible employer expression by adding the phrase "Except as provided by Section 8" to Section 6(1).

In our opinion, the modification of the language in Sections 6(1) and 8 does not necessarily mandate broader protection of employer speech. For example, it could be argued that removing “Nothing in the *Code*” from Section 8 and instead stating that “a person has the freedom to express his or her views” actually weakens the provision. “Nothing in the *Code*” mandates that the freedom of expression is a right that takes precedence over any other right in the *Code*; while simply allowing a person the “freedom to discuss views” appears to bring freedom of expression down to the same level of importance as any other right in the Code. Regardless, the Board in Convergys started from the proposition that the legislature intended to widen the scope of Section 8.

Accordingly, the Board then endeavoured to define how much more employers could say without triggering Section 6(1) of the *Code* (the Board did note that Section 8 is in no way related to Section 6(3)(d), thus any threats or promises are prohibited regardless of whether they are “views” or not: Convergys, supra, at para.116).

To define the scope of permissible employer speech, the Board looked for indicators of legislative intent in the wording of the amended provisions. These indicators act as boundaries for the scope of the protection afforded by Section 8.

(i) The deletion of “reasonableness”

The first indicator that the Board discussed was the removal of all language referring to the scope and reasonableness of expression in Section 8:

> The previous language protected "the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business" (emphasis added). This provision imposed an objective test regarding employer communications. Before the amendments, employers who made untrue statements about their business, including provisions of the Code, ran the risk of offending Section 6(1). The amended Section 8 represents a departure from the previous regime. First, the Legislature expanded the scope of permissible expression to include views on "any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union". Second, the amended Section 8 does not require that expression be scrutinized against a standard of reasonableness. (*Convergys, supra*, at para. 104)

(ii) The deletion of “undue influence”

The second indicator was the removal of the words “undue influence” in Section 8. The Board reviewed its past jurisprudence on the meaning of “undue influence” both before and after the words were originally set out in Section 8, and found that it had consistently defined undue influence as indirect, subtle intimidation. The Board accordingly found that the removal of “undue influence” from Section 8 mandates that the Board “focus the application of coercion and intimidation to the use of more direct forms of pressure” (*Convergys, supra*, at para. 110).

(iii) The addition of the word “views”

The third indicator was the addition of the word “views” to Section 8. The definition of “views” is obviously a very important issue, since only the expression of “views” is protected under Section 8. The Union argued that to be protected by Section 8, a “view” must be genuinely held by the person expressing it. Thus, lies or the expression of the views of another person would not be covered by Section 8. Accordingly, the Union argued that the misrepresentations made by Convergys are not protected under the *Code*.

The Board agreed with the Union somewhat, but still gave “views” a more liberal interpretation:

> We agree with the Union's submission that the ordinary meaning of the words "express his or her views" in Section 8 refers to views that are genuinely held. If a person makes a statement known to be false in order to deceive an audience, that is not the expression of a view in the ordinary sense of the word; it is a deliberate lie. This type of expression is not captured by the word view for the purposes of Section 8 and may be considered interference for the purposes of Section 6(1). We accept the Union's submission that an objective test might be applied to determine a person's intention in this regard. However, the application of this test does not necessarily require that view be correct or reasonable. For example, a person may express a view with the honest but mistaken belief it is true. (*Convergys, supra*, at para. 114)

Thus, while an outright lie would not be protected by Section 8, an incorrect statement would be, regardless of how unreasonable the error in the statement is.

(c) The Board's application of its new Section 8 test

The interpretation of Sections 6(1) and 8 Convergys is in and of itself a significant alteration of the existing law in British Columbia. However, the Board's application of these new principles to the instant facts appears to grant employers even broader latitude when speaking to employees than the words in the amended provisions contemplate. With one exception, *none* of the statements made by Convergys were found to be unfair labour practices. Specifically, the Board found the following views to be protected by Section 8:

> • Statements that imply that the Union is disrespectful and should not be trusted, even when that view is mistaken and unreasonable (para. 122)
>
> • Statements that the Employer does not have to bargain if the Union is certified (para. 123)
>
> • A statement that signing a Union card has the same legal effect of signing a contract (para. 124)

Overall, while the behaviour exhibited by Convergys during the organizing drive was not as severe or extreme as it might have been, the Boad clearly signaled that it prepared to draw an entirely new "bright line" in the sand with respect to employer intervention during organizing drives. As we discuss below, *Convergys* has been cited subsequently by the Board to draw this line in places that are more and more hostile to organizing efforts by unions.

2. The *Excell* decision

The Board appeared to retreat slightly from *Convergys* in the case of *Excell Agent Services Canada Co*., BCLRB Decision No. 171/2003 ("*Excell*"). In *Excell*, the Board appears to limit the application of Section 8, at least with respect to statements which amount to a "call to action".

(a) The factual background

Excell involved another call centre in the midst of an organizing drive. In response to the union's statements to employees, the employer drafted several bulletins. One bulletin (called the "Ticketmaster" bulletin) warned employees of the serious implications of signing a union membership card, and informed employees who planned to attend future union meetings that there was additional material available in the workplace break room.

The additional material consisted of two documents. The first was entitled “Guarantee” and contained several statements that the employer thought the union ought to be able to guarantee to employees upon certification. Essentially, the employer urged employees to challenge the union to guarantee such things as wages equal to those that they were presently making, plus benefits equal to those available to officers of the union, by presenting the document to organizers at future meetings. At the bottom of the bulletin was a signing line for an authorized officer of the union. The other document was one called “Ask the Union” that contained questions that employees could ask union organizers at future meetings. For example, one of the questions was “What will happen if EXCELL says “NO” to all your contract demands?” Another was “Can you guarantee that, in our first contract, we will not lose anything that we now have?”

(b) The *Excell* panel’s interpretation of the amended Section 8

The panel began the analysis by noting that, regardless of the latitude granted by the amendments to the Code, employers did not have carte blanche to express themselves during organizing drives:

> While an employer can now go beyond those former limits and even offer an opinion that may express an unfavourable attitude toward unionization, the amendments do not confer a complete licence to engage in debate without any restriction. Employer comments are not shielded from all unfair labour practice complaints. By the express wording of Section 8, they are robbed of any protection if they involve coercion or intimidation.
>
> Nor does the freedom conferred in Section 8 eliminate all of the continuing prohibitions in Section 6. Section 6(1) is made subject to Section 8, but Section 6(3) is not so limited. The Section 8 immunity does not diminish the prohibition against threats or promises in Section 6(3)(d). Conduct which falls outside of the definition of a view in Section 8 may also be subject to scrutiny under Section 6(1). By the introductory words, "except as otherwise provided in Section 8", Section 6(1) is made subject to Section 8 to the extent that the employer's conduct involves a communication of a view. If the conduct amounts to an expression of a "view", it is carved out of the general prohibition against interference. However, if the conduct does not amount to a "view", Section 8 has no application. (*Excell, supra,* at paras. 35-37)

While this statement of the law would not have seemed too out of the ordinary in the past, in light of *Convergys*, these words can be seen as somewhat of a step back from the Board’s *laissez faire* views on employer intervention in organizing campaigns.

With this premise in mind, the Board focused the rest of its decision on attempting to further define what constitutes a “view” in Section 8.

(c) The definition of “view”

The panel used two sources to craft its definition: the dictionary definition of “view” and the case law interpreting the free speech provision in the Alberta *Labour Relations Code*, S.A. 1988, s. 146(2) (which also contains the word “view”).

In looking at several dictionary definitions, the Board defined “views” as ideas, thoughts, beliefs, judgments and opinions, but not the acts done in furtherance of those views. Thus the Board separated the content from the form of the expression.

As for the definition of “view” in Alberta, the Board canvassed the Alberta Board’s jurisprudence and adopted the idea of distinguishing the expression of a view from the use of communication to induce action in others.

The Alberta cases dealt with employers giving what amounted to veiled commands to employees. As an example, in *Banff Centre for Continuing Education*, [1997] A.L.R.B.D. No. 84 ("*Banff Centre*"), the employer sent out a letter urging employees to attend a meeting where the union executive was explaining its position on a proposed union successorship. The letter contained several questions that employees could ask the union, and concluded with the phrase "Do not let others make the choice for you". The Alberta Board held that statement to be a call to the employees to oppose the position of the executive.

Following this logic, the panel in *Excell* declined to interpret "view" in Section 8 of the Code to include such "calls to action" by the employer. Any call to action would not be protected by Section 8, and would be caught by Section 6(1) if it amounted to interference.

(d) The application of the "call to action" doctrine on the facts

In the Board's view, both the "Ticketmaster" bulletin and the "Ask the Union" bulletin were found to contain something other that views, since both contained "calls to action". The Ticketmaster bulletin had several imperative aspects, including "Ask the union to put it in writing". While the "Ask the Union" bulletin had no imperative statements, the Board read it in conjunction with the "Ticketmaster" bulletin and found it was a "call to action".

Interestingly, the Board also held that the Ticketmaster and Ask the Union bulletins were not "views" for another reason. According to another of the Alberta cases cited by the Board (*United Nurses of Alberta*, [1995] Alta. LRBR 373), the framing of questions to be asked of others is not an expression of views. Thus, the sample questions in both bulletins were not the views of the employer in Excell.

In a similar vein, the "Guarantee" bulletin was also found not to be a "view", since the Board felt that drafting a document to be used by others was not an expression of a view. The "Guarantee" was designed to be used by employees to extract promises from the union, thus the employer was not expressing any sort of view.

Thus, the Board appeared to be placing of the scope of Section 8: It appeared that direct orders by employers would not be considered "views", and would be subject to scrutiny under Section 6(1).

3. The *RMH* decision

However, the boundaries set by *Excell* did not last long. *RMH Teleservices International Inc*., BCLRB Decision No. B345/2003 ("*RMH*") finishes what Convergys started. It takes the comments on free speech made by the Board in *Convergys* and essentially allows employers to actively campaign against organizing drives.

(a) The factual background

RMH involved yet another telephone call centre, this time located in Surrey. The union was actively organizing employees at RMH when the employer began mounting what can only be described as a full fledged political campaign against unionization. The employer's campaign consisted of a wide range of tactics, including:

- Bringing in managers from their other locations to circulate throughout the call centre, just in case employees had any questions;

- Having these managers give out gifts to employees ranging from Frisbees to sand pails full of popcorn, which were emblazoned with anti-union messages;

- Holding several meetings to discuss the union's organizing campaign, during which RMH referred repeatedly to the amount of money it was losing; and

• Setting up five projectors in the call centre, dimming the lights, and flashing the same anti-union messages that appear on the gifts, as well as flashing a description of RMH's RRSP matching program (next to a picture of a "money tree") and a copy of RMH's financial statements.

The actual messages printed on the gifts and flashed during the slide show contained statements to the effect of:

• A union does not ensure job security, only the employees and their productivity do
• The union does not understand the dynamic, client-centered business of RMH, and it would get in the way of productive business
• By joining a union, employees will become just "one in the crowd" to the union
• The union cannot guarantee any promise, RMH can refuse their requests

As well, several of the messages had questions that employees should ask the union, including:

• We have been told Union will charge approximately $540 per year. That's about $.35 per hour. If I pay you some of the money I have earned so you can bargain for me, will you guarantee that the first contract you bargain for us will get me at least what the dues will cost, plus what I would have gotten from the Company anyway?

• What will happen if RMH says "NO" to all your contract demands?

• Can you guarantee that, in our first contract, we will not lose anything which we now have?

• Will you guarantee that you will get us a contract?

• If unions are so great at getting job security and better wages and benefits for their members, why are the hospital jobs being contracted out to lower wage earners?

• Are any of the employees of the BCGEU represented by a union? If not, why not? If yes, why do they need to be? Are you a bad employer? Also, if they are unionized, by what union and will you give us a copy of their contract.

(b) The Board's analysis of RMH's behaviour

In a rather shocking decision (and with little or no analysis), the Board found *absolutely none of these events amounted to a contravention of the Code*. Regardless of the fact that several of the actual statements made by RMH could be seen as veiled threats or promises, the Board characterized all of RMH's behaviour as valid expression under Section 8.

(i) The meetings

First of all, the meetings were held not be captive audience meetings, since employees were free to go, and attendance was not being taken.

(ii) The slide show

More surprisingly, the slide shows were found not to offend the *Code*. While the Board conceded that the method of expressing a view could be coercive or intimidating regardless of the content of the view, it held that since employees of RMH were free to look away from the screens and ignore the message, the slide show was not coercive or intimidating. This conclusion was drawn in spite of the Board's findings that the images were "impossible to miss" and were "pervasive".The Board compared the slide show to a large poster in the workplace.

(iii) The gifts

The gifts were found to not be the expression of a view and thus not protected by Section 8, but they were found not to be interference because of their "marginal value".

(iv) The extra managers

The presence of the extra managers was not offensive to the *Code* because there was some evidence (from the employer) that these managers were performing other tasks besides circulating the call centre with gifts.

The only breach of the *Code* found by the Board was a prohibition by RMH against employees wearing union buttons in the workplace. As a remedy, the Board issued a declaration and ordered RMH to cease the practice.

D. Further Commentary: What are we left with?

1. What is the Board's policy on the scope of Section 8?

(a) The policy

Overall, the Board's analysis of the wording of the amended *Code* provisions substantially altered the approach to employer free speech. In general, the Board appears to be formulating a new, more *laissez faire* attitude towards employer speech in general. As it stated in *Convergys*:

> Taken as the whole, the Legislature's amendments to Sections 2, 6(1) and 8 reflect important judgments about the ability of employees to make free choices about union representation, despite attempts to influence their decision-making through the expression of views that are not coercive or intimidating. The amendments reflect the confidence that a reasonable employee can make inquiries and assess these views, knowing that most often, their employer will view their participation in a union and collective bargaining as contrary to the employer's self-interest. Hence, the expression of non-coercive or non-intimidating views based on the preference to resist certification are prima facie protected by Section 8 and do not constitute interference for the purposes of Section 6(1). This reasoning equally applies if views are expressed in what might be characterized a campaign to influence employees' decision-making about union representation. In the absence of a deliberate lie, it is not the Board's role to police the accuracy or reasonableness of views expressed in accordance with Section 8. (Convergys, supra, at para. 118)

According to the analysis in the cases above, several principles regarding the scope of Section 8 emerge:

• Employers can now discuss topics besides its "business" with employees. Now, no discussion is prohibited, even if the topic is whether to unionize or not.

• The employer's views do not have to be correct or reasonable, provided that it is not lying to employees. The employer can also express the views of another.

• All employer communication will be protected unless it is *directly* coercive or intimidating.

The overall effect of *Convergys* and the decision it spawned, *RMH*, is almost staggering. Employers now have, for all practical purposes, a free hand during organizing drives, short of outright threats to job security and terminating employees. Not only can employers say almost anything to employees, as we will discuss below, they can say it in almost any fashion they wish.

(b) Problems with the policy

Besides the overall unfairness of the Board's new free speech doctrine, there are several problems with the Board's logic in *Convergys* and *RMH*.

(i) What ever happened to "undue influence"?

First, the Convergys panel concludes that the removal of "undue influence" from Section 8 mandates that the Board only concern itself with "more direct form of pressure". The logic behind this decision appears to be that undue influence has been interpreted in Board caselaw as a more subtle form of intimidation. Accordingly, by removing "undue influence" from the wording of Section 8, the Board surmised that the Legislature must have intended for "subtle" forms of intimidation and coercion to be protected by the amended provision (see *Convergys, supra* at paras. 106-110).

With respect, this conclusion is not consistent with past findings of the Board that undue influence is a subtle species of intimidation and is thus *included in the concept of intimidation*; see *Cardinal/Klassen* at para. 199, 132-134 and *Focus Building Services*, IRC No. C90/87. Therefore, contrary to the conclusion drawn by the panel, views which result in undue influence being brought to bear on employees are views which intimidate employees and are not views that are protected by section 8.

With respect, the other problem with the conclusion that undue influence may be brought to bear upon employees is the common sense notion that undue influence is just that – *undue*. It is difficult to support the conclusion that the Legislature intended to sanction *undue* influence in the absence of the clearest of statutory language. That language is lacking, and the panel's conclusion that the absence of an express reference to "undue influence" alongside coercion and intimidation in section 8 does not amount to the kind of clarity necessary to draw this startling conclusion.

(ii) What ever happened to the danger inherent in "captive audience meetings"?

Second, the panel is wholly insensitive to the problem of views expressed in a "captive audience" context. Even if the amendments to Section 8 allow employers to express views on a broader range of issues than previously, and even if employers could say anything they want, any time they want, they cannot force employees to listen. The freedom to express views does not include the right to compel employees to listen to the message.

The panel in *RMH* says (correctly) that a "…key element of a captive audience meeting is that employees attend because of a reasonably held fear of adverse job consequences if they should they choose not to attend" and purports to express concern about compelling persons to listen to a message (see paras. 94, 95). However, the panel then (inexplicably, in light of these comments) finds no fault with the employer for projecting images on the wall day in and day out when employees are "captive" at work. The panel says that

the images were “impossible to miss” and were “pervasive” but then finds that “Employees were not compelled to look at or “listen” to the Employers views in the course of their work. Employees could avert their attention and effectively ignore the projections” (*RMH, supra*, at para. 103). Employees are also free to count sheep, cover their ears and hum “God Save The Queen” to themselves during a captive audience meeting, but that does not change the inherently coercive nature of such meetings.

(iii) Can the “expression of a view” be interference even if the “view” itself is not?

Even though *Convergys*, *Excell*, and *RMH* all discuss the issue of whether the form in which the employer expressed itself can contravene Section 6(1) regardless of the *content* of the expression, the Board does not appear to give a clear answer.

The amended Section 8 speaks only of “views”. If we understand a “campaign” as acts done in furtherance of a “view”, then there is nothing in the amended section 8 might warrant a conclusion that the changes made by the Legislature permit sweeping action by employers as well as the right to hold and express views on a broader range of issues.

If anti-union political style campaigns remain an unacceptable vehicle or medium for the expression of views, then it must follow that:

> 1. waging a campaign to convey views amounts to “the use of intimidation or coercion” to express a view(s) within the meaning of section 8 and is therefore prohibited; OR
>
> 2. employer actions in the course of a campaign of that sort are not “views” at all, and at least amount to “interference” within the meaning of section 6(1) and are possibly contrary to section 9.

It is submitted that if we accept that anti-union political style campaigns remain repugnant to our labour relations law and policy (as we must, since the amended provisions do not sanction campaigns), then one or the other of these approaches must be adopted. If not, there is nothing prohibiting such campaigning.

The *Excell* panel appears to accept, to a degree, the second approach, which distinguishes between the “view” and the acts done in furtherance of the view. The first approach, on the other hand, eschews the attempt to separate the message from the medium, and would hold that all views expressed in the course of a campaign, and the acts done in furtherance of them, are indivisible and such views are therefore inherently coercive, even if they might be less than coercive if expressed in a different context. The first approach holds that a campaign cannot be deconstructed in the way implied in *Excell*, and that the whole process is prohibited as coercive and intimidating.

In the *Excell* case, the panel considered statements in employer bulletins which incited employees to direct certain questions or statements to union organizers. The panel in *Excell* identified the distinction between a view and acts done in furtherance of the view, because the panel was called upon to distinguish between a view and a “call to action”:

> The common element of all those definitions [of “view”] is that views are ideas, thoughts, beliefs judgment and opinions. The notion of a “view” does not include acts taken in furtherance of those views.
> …..
>
> Actions taken to influence on outcome by inciting others to act are not the same as views expressed. We find the language in Section 8 referring to “his or her views” extends the immunity to expression of ones own views and not to facilitating or

> formulating the speech of others. If view are by definition one's own beliefs, we do not think that formulating questions for others is covered by any Section 8 immunity. By the express language in Section 8, the freedom is limited to the person who expresses the view.
> (paras. 41, 49)

True, the panel went on to conclude that although the statements were not covered by section 8 because they were not "views", they did not amount to interference in the circumstances and did not therefore run afoul of section 6(1). Acts which are not "views" and are therefore not covered by section 8 may nonetheless be permissible if they do not amount to interference within the meaning of section 6(1).

At the same time, the panel cautions against the "strategy of rhetorical questions" (para. 84) and affirms the view expressed in *Cardinal/Klassen* that written bulletins are the preferred medium for the expression of a view; para. 79

It is submitted that recognition of the distinction between views and acts done in furtherance of them, including inciting others to action, is not consistent with political style, anti-union campaigning by employers in this Province. Since the amended section 8 speaks only of "views" (and not acts done in furtherance of them) this approach is more consistent with the language of the statute. Also, reiteration of the *Cardinal/Klassen* preference for written bulletins is wholly at odd with a U.S. style political campaign that might involve anything from balloons to puppet shows. For those inclined to dismiss these examples as frivolous or improbable, see *RMH*.

In a sense, although the *Excell* approach largely maintains the prohibition on political style anti-union campaigns, it implicitly accepts that the expression of certain views in the course of such a campaign may be permissible because only acts, and not views, offend the Code. So, in essence, the campaign is deconstructed, and its pieces are examined in light of sections 8 and 6(1).

Also, *Excell* appears to accept that the acts committed in the course of a campaign might not offend section 6(1). This is not entirely consistent with our long standing prohibition on campaigning. It is submitted that employer "campaigns" and the conduct they entail cannot withstand scrutiny outside of the protective cloak afforded by section 8. Thus, if employer campaigning is to become a feature of labour relations in this province, this activity must be shielded by section 8 or wither and die as intrinsically amounting to "interference" under section 6(1). Contrary to the conclusion drawn in *Convergys*, however, the language of section 8 does not serve to sanction employer campaigning in B.C.

Thus, *Excell* is largely, but not entirely, faithful to our longstanding prohibition on campaigning. A preferable approach might be to accept that the campaign cannot be deconstructed, that a campaign is indivisible, and that a campaign is a coercive and intimidating way to express any views. This approach offers something of a "bright line" and maintains the prohibition on political style anti-union campaigning in a more emphatic way.

In any case, the *Convergys* decision adopts neither approach. Instead, as noted above, the panel quite blithely accepts campaigning as permitted under section 8. We repeat, the statement made in *Convergys* that all but expressly sanctions campaigning by employers finds no support in the Code. The amendments to section 8 did not change long standing, existing law that employers may not campaign against unions. If the legislature intended to expressly permit this sort of conduct, then it could easily have included a reference to "campaigning" in the Code.

RMH further muddies the waters. The Board, in discussing the distribution of gifts in the workplace, clearly accepts the idea that the form of the message is different from its content. The Board further holds that the act of giving out a gift is not "expression of a view" and will not be prohibited if the act is found to be interference with the formation of a union (*RMH, supra* at para. 99). This appears to be the identical approach to the one taken in *Excell*. However, while discussing the slide show, the Board reconfirms the form/content distinction, but then proceeds to analyse whether the projection of images is coercive or intimidating (*RMH, supra* at para. 101). If, as the Board stated in regards to the gift giving, the method of expression is not a "view" under Section 8, *why would the Board analysis its coercive or intimidating effect?* Coercion and intimidation is the language of Section 8. The Board should have proceeded directly to an analysis of whether the slide show was interference under Section 6(1), as it had done with the gift giving.

Overall, the Board is sending mixed messages as to whether the form that one uses to express oneself is protected by Section 8 or not. As well, if the Board is going to allow employer campaigns, it must do an analysis explaining how such campaigns are either not interference or are not coecive and intimidating. Until then, though, employers wishing to engage in a campaign can find support for that course of action in both the *Convergys* and *RMH* decision. The ability of employers to campaign is also enhanced by certain other findings made by the *Convergys* panel.

2. Does *Convergys* represent the whole of the Board's policy on Section 8, or is there anything left of the "call to action" doctrine in *Excell*?

Essentially, two approaches emerged at the Board following the amendments to sections 8 and 6(1). One approach is represented by *Convergys*, and the other by *Excell*. In light of the Board's subsequent caselaw, it now appears that the analysis of Sections 6(1) and 8 in *Excell* may no be longer good law in British Columbia

Recall that *Excell* addressed the fairly narrow point of whether or not a "call to action" is a "view" within the meaning of Section 8. The *ratio* of the *Excell* decision is thus quite specific, but it contains certain statements and observations that put it at odds with *Convergys* in significant ways.

Convergys dealt with a broader range of employer communications and statements in relation to section 8 than *Excell*, although the statements were almost exclusively contained in bulletins.

The cases that have followed both *Convergys* and *Excell* clearly show that the Board's policy is now expressed in the former case, and not the latter. In fact, the Board now appears to take Convergys as the unquestioned gospel as to the effect that the new amendments have on Sections 6(1) and 8 of the Code.

The Union filed an application for reconsideration in *Convergys* (see: BCLRB Decision No. B111/203), but the original panels decision was upheld by a reconsideration panel consisting of the Chair and the Associate Chair.

The few cases that were decided by the Board in the period after Convergys was released, but before Excell was released, simply took the analysis in Convergys as the state of the law in British Columbia: See *Ridgeway Mechanical*, BCLRB Decision No. B129/2003 at paras. 44-46; and *Wal-Mart Canada*, BCLRB Decision No. B156/2003 at paras. 191-193. The Board in both decisions simply cites *Convergys* and adds no new analysis.

As well, the Board appears to have formally blessed *Convergys* in *British Columbia Lottery Corporation*, BCLRB Decision No. B289/2003 ("*BC Lottery*").That case was decided by a panel once again containing both the Chair and the Associate Chair. It cites *Convergys* extensively (see *BC Lottery*, supra, paras. 37-43), and makes no reference to the analysis of Section 8 in Excell. The *BC Lottery* case is a clear message that the Board's policy is now set out in *Convergys*.

The final nail in *Excell*'s coffin was driven in by the Board in *RMH*. In discussing a slide entitled "Ask the Union" used during *RMH*'s campaign, the Board made the following remark:

> I reject the Union's submission that the Employer's message entitled "ASK THE UNION" is not the expression of a view for the purposes of Section 8 because it is a "call to action". Even if I accept the analysis underpinning the distinction between the expression of a view and a "call to action" articulated in Excell Agent Services Canada, … the Employer prefaced its message with the words "in our view" thus permitting employees to attribute the message to the Employer. This answers the Union's submission in this regard. The use of the phrase "ask the union" and subsequent questions, are rhetorical devices used to convey the Employer's views about the Union as an organization and the value of collective bargaining. Those views are not coercive or intimidating for the purposes of Sections 6, 8 and 9.

> Therefore, this message does not constitute interference for the purposes of Section 6(1). (*RMH, supra*, at para. 101)

Thus, the Board notes that it has not endorsed the distinction between speech and a "call to action". But even if the Board did endorse this segment of *Excell*, employers can now simply add "in our opinion" to any imperative orders and their statements will be "views" protected by Section 8. This suggests that the "call to action" doctrine may be, for all practical purposes, dead in British Columbia.

In all fairness to the Board's analysis of the "call to action" doctrine in *RMH*, the *Excell* panel actually vitiated the doctrine in its decision. After its analysis of Section 8, the *Excell* panel made the following remark:

> We note that had these bulletins been more carefully scripted through the use of a different format, no issue may have arisen as to whether they were an expression of "views" protected by Section 8 of the Code. If an employer were to state its own opinion on a subject and to say, "we think the employees should ask this question", or "we believe you should ask the union to give you a guarantee", either of those statements would be an unobjectionable expression of a view unless the content or manner of communication was otherwise coercive or intimidating…
>
> …If there is clear attribution of the message to the speaker, it can be identified as the opinion of the employer and can be assessed accordingly. We see reason for clear attribution. It aids the ability of employees to evaluate campaign literature as motivated by the self-interest of the speaker. As the dictionary definitions given above illustrate, a view reflects a person's bias. Knowledge of who is speaking informs evaluation of the speech. If the identity of the speaker is made manifest, the listener can evaluate any bias inherent. If a view by its nature reflects the bias of the speaker, and if an opinion is expressed as one's own view, the recipient can assess it to see if the speaker has a motive for taking that position. (*Excell, supra*, at paras. 63-4)

This is exactly what *RMH* did with its "Ask the Union" slide. *RMH* simply finishes what *Excell* started: making the "call to action" analysis moot for all practical purposes.

3. Are U.S. style, anti-union campaigns now permitted in British Columbia?

If *RMH* is taken to be the law in British Columbia, employer campaigns may very well be permitted.

The Board has not traditionally permitted employer campaigns against unions. The Board affirmed its policy (and the policy of all other labour boards in Canada) most recently in *Cardinal/Klassen* (1996), 34 CLRBR (2d) 1:

The longstanding policy of this Board and other labour boards in Canada is that an employer is not entitled to engage in an anti-union political-style campaign in an effort to prevent the union from certifying. The greatest point of resistance by employers to trade unions is at the initial point of employees attempting to exercise their statutory choice in favour of collective bargaining. A statutory choice has been made to restrict employer speech at this point in favour of ensuring employees' freedom of association. An employer's vigorous presentation of its anti-union views may be reasonably perceived by most employees as one that is not "safe to thwart". The American experience seems to verify this. (page 96)

Notwithstanding this long standing, nation wide approach, the Convergys panel says (rather too casually, we suggest) that:

> …the expression of non-coercive or non-intimidating views based on the preference to resist certification are prima facie protected by s. 8 and do not constitute interference for the purposes of s. 6(1). *This reasoning equally applies if views are expressed in what might be characterized a campaign to influence employees' decision making about union representation* (para. 118) (emphasis added)

Convergys did not involve an employer campaign, but this bit of dicta suggests that the amendments to section 8 somehow change our long standing law and policy that employer "campaigns" are not permitted in British Columbia.

This *dicta* became policy in *RMH*. In describing the slide show used by RMH in its campaign, the Board found the following:

> The projections can be fairly characterized as part of a campaign (an organized course of action) designed by the Employer to persuade employees not to join the Union. However, this does not necessarily mean that the messages projected or their method of their delivery is coercive or intimidating. *The fact the Employer expressed its views as part of a campaign against the Union is a relevant feature of the context in which those views are assessed. However, in the absence of coercion or intimidation, views expressed as part of a campaign are protected by Section 8 and do not constitute interference for the purposes of Section 6(1).* (*RMH, supra*, at para. 104) (emphasis added)

It is now apparent that the Board had disregarded the longstanding policy in British Columbia, and Canada in general, that organized, anti-union campaigns are contrary to the *Code*.

E. Conclusion

While the amendments to sections 8 and 6(1) have undoubtedly expanded the parameters of permissible employer speech in British Columbia, the amendments do not sanction the expression or communication of views in the context of a political style, anti-union campaign of the type seen in the *RMH* decision. Moreover, nothing in the amendments suggests that employers may force or compel employees to listen to the employer's views. In our opinion, given that such campaigning has been prohibited in this and other Canadian jurisdictions for over 30 years, the clearest of statutory language is required to open the door to campaigning of that sort. Also, captive audience meetings, where employees are in effect forced to listen to the employer's views, are inherently intimidating and cannot be redeemed.

Unfortunately, the Board was, with respect, wholly insensitive to both issues in the *RMH* decision and has apparently found meanings in the amended provisions which the actual words used by the Legislature do not support. This approach is rather hostile to organizing efforts, and is as such inconsistent with the fundamental purpose or "essential ambition" of the Code, which in the end, is to foster and further the right to organize; *Dunmore v. Ontario*(A.-G.)(2001), 207 D.L.R. (4th) 193 (S.C.C.).