

## Federal Liberals Reverse Conservative Labour Legislation – Does the Certification Model Have an Effect on Union Density?

### Highlights

- The federal government has introduced legislation that will revert federally regulated industries back to a card-check system for determining majority support for union certification and decertification.
- The mandatory secret ballot vote requirement was introduced by the Conservative government and was in place for less than a year. The new Liberal legislation will return the federal certification/decertification process back to the historical status quo, but runs counter to a shift towards secret ballot voting in provincial jurisdictions.
- The federal government is also repealing a controversial piece of Conservative legislation that required labour organizations to publicly disclose details of transactions over \$5,000 and employee compensation in excess of \$100,000.
- The evidence indicates unions file more applications for certification and succeed in a greater percentage of such applications under a card-check certification system than under a mandatory vote system.

The federal government is poised to enact [Bill C-4](#) to reverse two pieces of legislation enacted by the Conservative government last year. Bill C-4 was introduced in the House of Commons on January 28, 2016 by the Minister of Employment, Workforce Development and Labour, the Honourable Mary Ann Mihychuk. The Bill would repeal [Bill C-525](#), the “*Employees’ Voting Rights Act*,” that implemented mandatory secret ballot votes for certification and decertification in the federally regulated sector, including the federal civil service and parliament. It would also repeal a more controversial piece of Conservative legislation, [Bill C-377](#), that amended the *Income Tax Act* and imposed requirements

on labour organizations to publicly disclose details of transactions over \$5,000, employee compensation in excess of \$100,000, and the percentage of time spent by certain individuals on lobbying, political and non-labour relations functions.

The repeal of both pieces of legislation fulfills a promise made by the Liberal Party in the last federal election campaign.

When introducing Bill C-4 for First Reading on January 28, 2016, the Minister described the Conservative legislation as an “unfair and unjust” attack on the labour movement that was not supported nor requested by the business sector. Bill C-4 was introduced with

the support of both the NDP and Bloc Quebecois members of the House.

### **Repeal of Bill C-377**

Bill C-377 was a private member's Bill sponsored by Russ Hiebert, the former Member of Parliament for South Surrey-White Rock-Cloverdale. Bill C-377 was strongly criticized by the labour movement and given lukewarm support elsewhere. It ran into difficulty during the Third Reading debate in Senate, where significant amendments were proposed by Conservative Senator Hugh Segal. Ultimately, the amendments were not adopted and the original Bill received Royal Assent on June 30, 2015.

The Bill was seen in some circles as unfair to labour in that it was only labour organizations that were required to report this type of information. Its supporters argued that it promoted transparency and accountability, so that union members would know how their dues were spent.

The current Minister, in defending the repeal of the Bill, noted that by giving employers access to the information that unions were required to report, without reciprocation, employers would have an advantage in collective bargaining – by knowing, for example, the amount of the union's strike fund. At Second Reading, on February 3, 2016, the Minister noted that to implement the reporting requirements, the Canada Revenue Agency would incur a cost of at least \$2 million per year to develop the necessary IT systems and build the administrative support for the reporting requirements.

The reporting requirements, which would have applied for fiscal periods beginning on or after December 31, 2015, were waived shortly after the Federal election by the Minister of National Revenue, consistent with the Liberals' intention to repeal the legislation.

The repeal of Bill C-377 brings the federal sector in line with the provincial sectors. Most jurisdictions in Canada require labour organizations to provide financial statements to their members on request. No jurisdiction imposes the type of reporting requirements mandated by Bill C-377. Its repeal therefore comes as no surprise to the labour relations community.

### **Repeal of Bill C-525 “*Employees’ Voting Rights Act*”**

The *Employees’ Voting Rights Act* was also enacted by way of a private member's Bill that received Royal Assent on December 16, 2014, and came into force on June 16, 2015. The Bill amended federal labour legislation to require a mandatory secret ballot vote in all certification and decertification applications in the federal sector and the federal public service.

The repeal of Bill C-525 is much more controversial than the repeal of Bill C-377. This action returns the federal sector to a card-check system for establishing majority support for certification and decertification – instead of a mandatory secret ballot vote requirement that was in place for less than a year. So, in terms of the federal sector, it returns the certification/decertification process to the historical status quo. However, from a national perspective, the repeal of Bill C-525 runs against the trend

since the mid-1990s toward mandatory representation votes.

Mandatory votes are required in British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, and Newfoundland and Labrador. BC adopted the mandatory vote in 1984 and then again in 2001, Alberta in 1988, Ontario in 1995, and Saskatchewan in 2008. Newfoundland and Labrador reintroduced mandatory votes on June 5, 2014, reversing amendments made in 2012 that allowed for card-based certification. Card-based systems are in place in Manitoba, Quebec, New Brunswick, Prince Edward Island, and now (with the repeal of Bill C-525) in the federal sector, including the Northwest Territories.

### **Certification System and Union Density**

As reported in the Business Council of BC's February 2016 issue of Human Capital Law and Policy, "An Update on Union Density in BC," there has been a consistent decline in union density in the province from 36.5% in 1997 to 30.3% in 2015. The overall decline across Canada has been similar but less dramatic. The public sector remains highly unionized in Canada, (77%), with the most significant declines occurring in the private sector.

A question that has been often debated but never resolved is whether the certification system (card check vs mandatory vote) plays any role in the decline in union density. Does a mandatory vote make it more difficult for unions to organize and, if so, does the shift

to vote-based systems explain any part of the decline in union density?

Our labour relations system is largely based on the *Wagner Act* that was passed by the US Congress in 1935. A card-check system was implemented under that legislation to determine employee support for union certification. In the mid-1940s the National Labour Relations Board required representation votes to establish majority support, even though the legislation did not require elections. In the US, where employers have the right to vigorously campaign against union representation, union density has fallen overall from 20.1% in 1983 to 11.1% in 2015 – it currently stands at 35.2% in the US public sector and 6.7% in the private sector.<sup>1</sup>

The decline in union density is clear, but is it due in some part to the system used to measure employee support? Or does it have more to do with other changes in the economy and nature of work, such as the shift from industrial to knowledge-based employment, or a change in worker attitudes towards work and unions? Studies have shown that Generation X'ers<sup>2</sup> were/are sceptical about "jobs for life" and loyalty toward institutions, including labour unions, which can account for some of the decline in union density. A recent study concluded that attitudes toward unions may be changing. The percentage of Millennials<sup>3</sup> providing a favourable response to unions has risen by approximately 10% since 2010.<sup>4</sup>

<sup>1</sup> US Bureau of Labor Statistics, January 28, 2016.

<sup>2</sup> Born early 1960s to early 1980s.

<sup>3</sup> Born early 1980s to early 2000s.

<sup>4</sup> Pew Research Center, January 4, 2016.

In 2005 Professor Sarah Slinn considered the question of whether statutory certification systems are neutral in terms of union organizing outcomes and concluded that a mandatory vote system makes it harder for unions to organize than a card-check system.<sup>5</sup> She looked at the distinct decision points employees are presented with under both a mandatory vote system and a card-check system, and the potential cost/benefit of employer and union action or intervention at each of the decision points. She concluded that the data supported the following hypotheses about the effects of a mandatory election procedure:

1. Fewer certification applications will be filed.
2. Unions will tend to favour organizing units with a relatively higher chance of success and will be less likely to seek to unionize units which are relatively difficult to certify, such as part-time, private sector, and small bargaining units. This preference will also be reflected in a change in the characteristics of units that obtain certification.
3. Employers' union avoidance efforts will increase, although this may not be reflected in higher levels of ULP [Unfair Labour Practice] complaints.
4. In part because of increased employer resistance efforts, the probability of certification application success will be reduced.

Professor Slinn's study looked at the period between January 1993 and November 1995

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<sup>5</sup> Slinn, Sara. "[An Analysis of the Effects on Parties' Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic](#)

in Ontario when a card check system was in place, and the period between 1995 and 2004 when the mandatory vote system was in place. Essentially, her conclusion was that unions filed fewer applications under the mandatory vote system based on their perception as to whether the application was likely to succeed, and they generally sought to organize larger units in the public sector where there was less employer resistance, rather than smaller units in the private sector. The success rate for applications for certification fell by 8.4% under the vote system in Ontario and dropped by 10.3% in BC in the period 1984-1992, when the vote system was in place (prior to 2001). Union certification applications spiked in 1993 in BC after the card-check system was introduced, and then declined significantly with the re-introduction of the vote requirement, as did the application success rate.

To neutralize the different outcomes between the two systems, Professor Slinn argued for quick representation votes, expedited ULP Unfair Labour Practice (spell out ULP when it is first used) proceedings, effective ULP remedies and clearer rules around permissible employer conduct during the period of the election. Most mandatory vote regimes have statutory provisions that attempt to address those concerns.

The data generally supports two conclusions. First, union representation of the workforce has declined over time, regardless of certification systems in place.

[Certification Model.](#)" Osgoode Hall Law Journal 43.4 (2005): 407-450.

Second, unions are likely to file more applications for certification and succeed in a greater percentage of such applications under a card-check certification system than under a mandatory vote system.

It is not surprising, therefore, that in defending the repeal of Bill C-525 in Standing Committee Hearings held on March 21, 2016, the Minister was candid in noting that returning to a card check system would make it less difficult for unions to organize. Nor is it surprising that the NDP is supporting the Liberals' initiative.

What is more surprising is that the Minister pointed to the use of mandatory voting as a factor in the decline in union density in the private sector, citing an internal report produced in 2013. This previously undisclosed report estimated that, had all Canadian jurisdictions not used a mandatory voting regime starting in 1997, union density would have increased by about a half a percentage point instead of dropping 4 percentage points in the following 15 years. The Minister accused the Conservative government of burying the report because it did not support the introduction of Bill C-525.

Whether mandatory voting requirements are responsible for much if any of the decline in union density since the mid-1990s is debatable. What is not debatable is the fact that, for whatever reason, mandatory votes result in fewer successful certification applications. The debate that is needed is not about that but rather about which of the two systems best reflects the true wishes of employees on the question of unionization.

Proponents of mandatory voting liken it to a political election – support is counted in the ballot box, not based on membership in the party. They argue that the ballot box avoids or at least minimizes the impact of union or co-worker coercion to sign cards, and best reflects the true wishes of individual employees. Opponents say the reverse: that mandatory votes invite improper employer interference in a power dynamic that is tilted against the union. They argue that public voting, and disclosure of the results based on those who vote, defeats the anonymity of card signing which is where support for the union is demonstrated.

While the debate continues, C-4 will be enacted, resulting in an almost even split between Canadian jurisdictions that require a representation vote and those which do not. Unions will undoubtedly welcome this legislation, but at the same time know that the certification system itself likely will not reverse the tide of sliding union support. Winning the support of workers depends on much more than how that support is counted.

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