

## FAIRNESS AND OPPORTUNITY FOR CHOICE: THE EMPLOYEE FREE CHOICE ACT & THE CANADIAN MODEL

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### ABSTRACT

The authors are engaged in a multi-dimensional project that analyzes Canadian private sector experience under provincial and federal labour statutes. The broad objective of the research is to draw nuanced lessons from the Canadian experience that will inform the debate over labour law reform in the U.S. This commentary reflects the authors' preliminary research results as they relate to the specific proposals included in the Employee Free Choice Act.

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The proposed amendments to the *National Labor Relations Act* (NLRA) contained in the *Employee Free Choice Act* (EFCA) have spawned an intense, politicized, and frequently misleading debate about the merits and possible consequences of these changes. The volume and tone of discussion generated by EFCA gives the impression that its proposals – and the question before Congress – are more complicated than they really are. Distilled to its essence, EFCA is concerned with how to establish whether employees want collective representation, and where employees have chosen to be represented, how to ensure that they have an opportunity to engage in collective bargaining. The fundamental question is how to construct a statutory scheme which allows employees a genuine opportunity to choose and exercise collective representation in the workplace.

Decades of experience in the United States have given rise to volumes of research and evidence showing that, under the NLRA as presently constructed, there is widespread, serious, and effective illegal conduct by employers that deprives workers of their opportunity to make a free choice about workplace representation (Schmitt & Zipperer, 2007; Human Rights Watch, 2000; Friedman,

et al., 1994; U.S. Commission on the Future of Worker-Management Relations, 1994).

This article starts from the premise that the appropriate benchmark of a fair statutory collective bargaining system is whether it provides employees the opportunity to come to a free decision about whether or not to be represented by a union. Because legal provisions similar to key elements of EFCA have been in place for years in Canada, it makes sense to look to the Canadian experience in order to shed light on whether EFCA has the potential to meet this standard of free choice. This is not to say that Canadian approaches are ideal since there is clear evidence of inadequacies, but rather that some aspects of the Canadian framework do support a balanced collective bargaining system.

In the U.S. one statute, the NLRA, governs labour relations for about 95% of the private sector. In Canada, by contrast, federal labour law applies to less than 10% of the private sector, with provincial laws covering the balance. This creates a rather complex system with eleven different jurisdictions each with its own legal framework. In spite of this complexity, the Canadian experience is directly relevant to the EFCA debate because of widespread reliance both on card check certification and on first contract arbitration, the two most controversial elements of the proposed amendment to the NLRA. Originally all Canadian jurisdictions employed card check certification. Over the past three decades six provinces have replaced card check with a mandatory vote system, but the other five jurisdictions continue to use card check. First contract arbitration is currently in force in six provinces (including the three most populous) and in the federal jurisdiction.

Before addressing the specifics of card check and first contract arbitration, it is important to consider the meaning of ‘free choice’ in the context of collective representation by a union in the workplace. A founding principle of collective bargaining legislation is that employees may freely choose whether or not to join a union. Labour legislation gives employees who have chosen collective representation the right to bargain collectively and engage in lawful union activities. But what is necessary for workers to exercise free choice in this context? For employees to have a true choice their decision must be free of improper influence about whether to be represented by a union. Furthermore, once a union has been selected, the workers must have a genuine opportunity to engage in collective bargaining.

## **FREE CHOICE IN THE CERTIFICATION CONTEXT**

Certification under the NLRA currently requires that a majority of employees in a proposed unit vote in favour of collective representation. Although representation elections have been the norm in the U.S. historically, the law also allows the relatively common practice of an employer voluntarily

recognizing a union as bargaining agent based on evidence of majority support without a formal election. This option might be followed when a union has enough leverage to secure a commitment to voluntary recognition or neutrality from the employer in advance, and then is able to collect signatures from a majority of workers designating the union as their bargaining agent (Hurd, 2008). Alternatively, employers may decide (for various reasons) that it is in their own business interests to voluntarily recognize the union. EFCA proposes to elevate the signature process by allowing unions (with or without the company's consent) to use a card check procedure for certification instead of a vote. As under current neutrality campaigns, this procedure would grant representation rights to a union if a majority of employees signed union authorization cards. Although the substantive change introduced by EFCA would be that card check certification would no longer require the employer's consent, opposition to the proposal has been based on the sanctity of secret ballot elections.

Both in the U.S. and in Canada, three arguments are commonly raised against card check certification and in support of mandatory representation votes. It is contended first that cards are an unreliable index of employee true wishes for union representation; second, that employers are deprived of the ability to mount anti-union campaigns under card check; and finally, that employees are denied information from employers about unionization under card check.

### **CARD RELIABILITY**

Opponents of EFCA contend that employees are likely to be deceived or pressured into signing cards, or they simply don't understand that signing a card indicates support for union representation. This criticism ignores the fact that it is a ULP (unfair labour practice) for a union to use fraud or to coerce a worker to sign a union authorization card; this type of union behavior would remain a ULP under EFCA. Furthermore, it appears that coercion, pressuring or misleading of employees into card-signing has been exceedingly rare in card check systems in Canada. Rather, what evidence does show is that employer interference is common under both card check and mandatory vote certification. In Canada and the U.S. aggressive employer interference is widespread. The most common manifestations are illegal firings (ULPs) and employer communications such as captive audience meetings (Bentham, 2002; Schmitt & Zipperer, 2007; Slinn, 2008). Evidence from British Columbia shows that between 1990 and mid-2007, covering both card check and mandatory vote certification, the overwhelming majority of ULP complaints and violations during certification campaigns were filed against employers (78% of all complaints and 88% of all violations) not unions (21% of all complaints 11% of all violations) (Slinn, 2008).

Although there is the possibility of union or employee interference in employee card-signing, there is little evidence from Canadian jurisdictions using this procedure that it is a significant or widespread problem. Indeed, cards are likely a reasonable indicator of whether an employee wants union representation and, given the frequent employer interference under the mandatory vote system, cards are likely at least as reliable as votes at indicating employee wishes about union representation. Concerns about card validity could be eased with additional safeguards, as has been done in some Canadian jurisdictions, such as providing a process for employees to revoke signed cards, performing frequent random audits of cards, or revoking any certification obtained through misconduct or fraud.

### **INFORMED EMPLOYEES & EMPLOYER CAMPAIGNS**

The other two objections to card check are interrelated. Perhaps the most common and compelling argument against card check, and in favour of elections and employer campaigns, is based on a political election analogy. Essentially the union representation question is likened to the question of citizens' political representation. In this context the secret ballot election becomes a powerful image, appealing to notions of free speech, informed choice and workplace democracy. This image is being embraced by opponents of EFCA, much as it has been used over the past quarter of a century in Canada when provincial parliaments have debated whether to replace card check with a mandatory vote. Because certification can occur quickly under the card check system – possibly even before the employer has a chance to mount a substantial response – some argue that employers are improperly denied a full opportunity to campaign against the union and, as a result, employees are deprived of full information about the potential effects of union representation. This raises the difficult question of the appropriate role of the employer – if any – in the certification process.

However, the political election analogy is seriously flawed. It ignores fundamental differences between political representation and union representation. First, results of a political election determine who will govern. With a political election citizens are voting between two or more possible representatives, and do not have the option of being unrepresented. Indeed, the unsuccessful party in the election generally continues to have a role in the government as a minority voice. By contrast, a union representation election only determines whether workers will have a collective voice to influence terms and conditions of employment. Even a win by the applicant union does not transform the basic employment relationship; employers continue to exercise authority over the workplace (Becker, 1993; Weiler, 1983).

The contention that mandatory elections better allow for informed employee decision making may appear to be the most convincing facet of the political election analogy and argument for mandatory votes in certification elections. However, this argument is based on a faulty presumption: that the employer can and does defend the rights and interests of employees (Weiler, 1983). Employers and employees have an inherent conflict of interest when it comes to the question of collective representation. Employers' interests are primarily those of the owners, and in the case of corporations, the directors and officers have a legal duty to act in the best interests of the company's shareholders. Frequently, the best interests of shareholders and employer differ from those of the employees. This brings into question the validity of not only employers' claim to a rightful place in the election, but also employers' arguments that employees benefit from an employer campaign in order to make an informed choice (Weiler, 1983).

Perhaps tellingly, one reason that the members of an expert, tripartite labour law review committee in British Columbia chose not to recommend adoption of mandatory vote certification in 1998 was that they found that it was *employers not employees* who favoured replacing the card check system then in place with a mandatory vote (Ministry of Labour, 1998).

## **FLAWS IN THE REPRESENTATION VOTE SYSTEM**

There are serious weaknesses in the representation vote system allowing, and perhaps even encouraging, improper employer influence over employee voting which bring the accuracy of such elections into question. One of the strongest arguments that the elections are more accurate is based on the secrecy of the voting procedure, itself. It is argued that because representation elections employ a 'secret ballot' procedure, employees are able to cast their vote free from concern that any party or fellow employee will know how that employee voted, and therefore workers will vote according to their true wishes. However, votes are not cast in truly neutral, laboratory conditions, where employees are free from the scrutiny of their employer, their fellow employees, or the union. Both unions and employers go to great lengths during the campaign to determine the voting intentions of individual workers. Furthermore, both union and employer representatives are present during balloting. Once the outcome of the vote is known, the employer, union and other employees often can accurately determine how particular employees voted. Therefore, the secrecy of the election is a factor which should not be given too great a weight when assessing the true objectivity of representation votes.

The greatest weakness of representation elections is found during the period between when the employer is made aware of the unionizing effort and the election. Under the NLRA this period now averages about two months. There

is ample evidence that delay significantly reduces the likelihood of certification (Campolieti et al., 2007). This is not surprising, given the distinct advantages the employer enjoys over the union in campaigning: the employer has daily contact with employees while the union lacks access to the workplace; employees see little or no real benefits from unionization until after an agreement is negotiated; and, the employer retains the power to unilaterally choose new employees (Weiler, 1980).

In recognition of this imbalance, all but one of the Canadian provinces that have replaced card check certification with mandatory vote systems have adopted provisions designed to minimize delays. This process has come to be known as *quick vote* certification; in four of the six provinces with mandatory votes there is a statutory or administrative deadline for holding the election, either within five working days of the union application (Ontario, Nova Scotia, Newfoundland), or ten calendar days (British Columbia).<sup>1</sup> The idea is that the quick vote prevents employers from being able to engage in an offensive campaign including intimidation, discrimination and illegal tactics. However even in jurisdictions with explicit deadlines, it is not uncommon that elections are held outside the established time limit and this delay is associated with a significant reduction in union certification success (Campolieti, et. al, 2007). It appears that these delays often arise from ULP applications and hearings related to employer conduct during organizing. Moreover, there is evidence that employer ULPs are substantially more effective at defeating unionization under mandatory elections than under card check certification (Riddell, 2001).

#### **RESEARCH NOTE: EFCA AND U.S. UNION DENSITY**

In addition to the misleading furor about secret ballot elections that has obfuscated the true underlying issue of free choice, another contentious topic in the public debate over EFCA relates to the potential impact of card check certification. U.S. union leaders have described pent up demand for union representation and have forecast a flood of new members if the legislation passes. Opponents of EFCA have seized on these predictions and issued warnings about dire consequences including reduced profits, increased unemployment and impeded economic growth.

Of most direct relevance here is the Layne-Farrar study (2009) which presents an empirical case against EFCA based on Canada's economic performance and relatively high union density. Others have questioned the economic analysis presented in the research, but we would like to limit our remarks to the basic union density assumptions. At the foundation of the study's catastrophic predictions is its uncritical acceptance of the most optimistic expectations voiced by U.S. union officials. Layne-Farrar assumes an immediate increase in U.S. union density of from 5 to 10 percentage points, or from the 2007

level of 12.1% to between 17.1% and 22.1%. Since EFCA does not apply to the public sector, this translates into a union density increase in the private sector from the 2007 level of 7.5% to between 13.5% and 19.4%.

The optimism of U.S. union officials notwithstanding, based on the Canadian experience it is virtually impossible that a density increase of this magnitude would result from EFCA. Because in recent years several Canadian provinces have moved from card check to mandatory vote, or from mandatory vote to card check, there is direct evidence available concerning the influence of card check on union organizing success (and implicitly on union density). Several research studies have measured this impact, and they concur that a relative increase of 10% to 20% in organizing success can be attributed to card check in comparison to mandatory vote (see Slinn, 2005 for a review of the research).

Princeton University scholars Farber and Western (2001) have developed a framework that measures the relationship between union organizing activity and private sector union density. Using their methodology we have been able to estimate the actual current level of organizing in the U.S. (representation elections plus card check under neutrality agreements). If we assume a 20% increase in organizing, the high end of the Canadian experience, the model forecasts only modest growth in private sector union density to approximately 8%.

There is, however, reason to believe that this estimate may be low. The Canadian research looks at card check in the context of existing Canadian labour law, which includes a number of other provisions that likely enhance union organizing and stability even under mandatory vote regimes: first contract arbitration, prohibitions on hiring replacement workers during strikes, absence of any right to work laws, and multiple other more subtle details that vary across the eleven jurisdictions. In the much less accommodating legal environment of U.S. labour law, EFCA's simultaneous introduction of card check and first contract arbitration could be expected to stimulate more union growth than would a simple shift from mandatory vote to card check in a Canadian province.

If instead of a 20% increase in organizing success we make what we believe to be an unrealistically optimistic assumption of a 100% increase, over a ten year period in the private sector we project that union density would grow to 9.5%. This would indeed represent a substantial expansion in union membership, but only one-third of that assumed in the lower bound of the Layne-Farrar analysis. Alternatively, we might apply the research of Canadian scholar Susan Johnson (2004). She estimates that perhaps as much as one-quarter of the difference in union density between the two countries can be attributed to labour law. With 2007 private sector density of 7.5% in the U.S. and 18% in Canada, even if EFCA could erase the entire difference Johnson attributes to the legal framework, U.S. private sector union density would rise only to 10%.

The point of this research note on density is that the opponents of EFCA have used grossly distorted forecasts of the potential impact of the legislation as a basis for dire warnings. Practically speaking, we know from Canadian experience that employers vigorously and effectively oppose unionization under both mandatory vote and card check regimes. Yes, union representation is more widespread in Canada than in the U.S., but private sector density has been declining steadily even in card check jurisdictions.

Yes, EFCA would make it easier for workers to form unions, and yes, collective representation would expand its reach. But based on the Canadian experience we believe that the growth in unionization would be relatively modest. And as argued above, we are convinced that card check certification is fully justifiable based on the premise that free democratic choice should be protected when workers consider whether to pursue collective representation.

### **FREE CHOICE IN THE BARGAINING CONTEXT**

Unions and employers in both Canada and the U.S. historically have had great difficulty achieving first collective agreements. Among the difficulties are: the sheer magnitude of the task of codifying all the terms and conditions of employment; the bargaining relationship between the parties is immature; unit members may have unrealistic expectations concerning what the union will be able to achieve; and finally, some employers are determined to resist the union and this continues at the bargaining table (Johnson 2008: 1).

Certification alone has limited significance given the substantial hurdle of negotiating an initial contract. To return to our fundamental question: what legislative structure provides employees with free choice about whether to have collective representation and with a fair opportunity to exercise this choice through collective bargaining? Simply protecting employees' right to certify clearly does not accomplish this. Although collective bargaining legislation imposes a duty on both parties to negotiate in good faith and, in most Canadian jurisdictions, to make reasonable efforts to reach agreement, it is notoriously difficult to enforce this requirement. It was long ago recognized in Canada that the first set of negotiations is particularly fraught and fragile, and especially susceptible to being derailed by resistant employers or, perhaps, employers who are inexperienced at negotiations. Beginning in 1973 in British Columbia, and later appearing in a half-dozen other jurisdictions, various approaches to supporting first collective agreement negotiation have been emerged in Canada, most of them including the option of *first contract arbitration* (FCA).

FCA procedures were introduced into Canadian law because of the ineffectiveness of existing approaches and remedies for dealing with bad faith bargaining and employer resistance. In this context employer misconduct is difficult for labour boards to detect as it easily can be disguised as simply hard

bargaining. While the employer is not obligated to prove good faith, the union and labour board effectively bear the burden of establishing that the underlying intention of the employer is tainted by bad faith. Moreover, remedies for bad faith bargaining are often ineffective. The overarching objective of FCA provisions is to ensure that fair and reasonable agreements are concluded with a minimum of conflict, and that in the process the foundation will be laid for more enduring relationships (McCormack, 1991; Backhouse 1980).

A variety of approaches to FCA have emerged in Canada. Some require that the applicant for arbitration demonstrate that negotiations have broken down due to the other party's misconduct. Others simply require evidence of bargaining breakdown before the arbitration process is set into motion. One province provides virtually automatic access to first contract arbitration upon application by either side. Another jurisdiction requires participation in a mediation process before determining eligibility for FCA. These first contract models have several elements in common with provisions included in EFCA.

Many objections are made to the EFCA first contract proposal: it involves a third party imposing terms on the parties; interest arbitration is costly and time-consuming; employers are burdened with maintaining the *status quo* during arbitration; and, it removes free choice from employers and employees. However, first contract provisions look much less objectionable when it is recognized that parties are not precluded from resuming negotiations even after an application for or direction to first contract arbitration has been made. A review of first contract cases in Ontario from 1996 to present suggest that even where an application for arbitration has been filed, it is common for the parties to settle the contract on their own before arbitration concludes, and sometimes even before it commences. Therefore, it ultimately remains within the parties' control whether arbitration occurs or not. If parties are able to settle even some of the terms on their own or, as happens in some Canadian jurisdictions, submit a reasonable proposed collective agreement to the arbitrator, this can substantially reduce the time and cost of arbitration.

Regarding the *status quo* requirement, the Canadian approach has been to impose a "freeze" on terms and conditions of work during bargaining. This is not a "deep freeze": employers are able to make unilateral changes in some circumstances. Therefore, this requirement may not be as onerous or inflexible as it first appears.

Finally, the purpose of first contract provisions is to preserve employee free choice by protecting the opportunity to engage in bargaining in the first collective agreement context. To allow one party to deprive the other of the opportunity to engage in real negotiations would be to truly deprive a party of free choice. Concerns about whether an arbitrated agreement has been ratified by employees or the employer is addressed in most Canadian jurisdictions by

setting a maximum life of one or two years on such arbitrated contracts, and by expressly permitting the parties to agree to modify the contract.

Another concern raised by opponents to the EFCA first contract provision is that it may lead to outcomes that the employer cannot afford. This concern likely arises from renewal awards that have occasionally arisen in the U.S. public sector where the employer argues that the outcome is beyond its ability to pay. In reality, pattern-breaking arbitration awards deviating from established labor market standards are rare in the U.S. public sector and even less likely in the Canadian private sector. Canadian labour boards and arbitrators have consciously taken a very conservative approach to first contract awards, limiting those awards based on the employer's financial capacity, and recognizing that arbitrated first agreements should not contain breakthrough or novel provisions.

Overall, the Canadian experience has been that FCA applications are seldom filed and infrequently granted; even when the process is set in motion, parties can and do reach agreements on their own (Johnson, 2008). It is especially important to note that although first contract provisions were initially highly controversial and opposed by both labour and management, FCA is now largely a non-issue, and simply one more feature of the labour relations landscape.

## **FREE CHOICE, EFCA AND THE NATIONAL LABOR RELATIONS ACT**

As EFCA continues to be debated, American workers, voters, employers, and politicians may do well to recall the purpose of the NLRA set out in the first, 'Findings and Policies', section of the Act. The concluding words of the drafters may provide some guidance today as the labour relations policy is being revisited in difficult economic times:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

We would like to reiterate our initial proposition: true freedom of association - the right to free choice about workplace representation - is of fundamental importance. Based on our review of the EFCA proposal and relevant Canadian experience, we are convinced that the proposed amendments to the NLRA would indeed serve the initial purpose of the Act and reinforce employee rights to free choice.

## NOTES

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1. Saskatchewan is the exception, with no statutory or administrative time limit for holding the mandatory representation vote. The Alberta legislation does not specify a time limit for elections but does direct that elections occur "as soon as possible."

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