An Analysis of the Effects on Parties’ Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model

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Abstract
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Keywords
Labor unions--Recognition

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AN ANALYSIS OF THE EFFECTS ON PARTIES' UNIONIZATION DECISIONS OF THE CHOICE OF UNION REPRESENTATION PROCEDURE: THE STRATEGIC DYNAMIC CERTIFICATION MODEL

SARA SLINN

This article proposes a new theoretical framework—the strategic dynamic certification model—to explain how union certification processes operate. Statutory certification procedures are not neutral. Instead, they produce particular incentives, disincentives, and opportunities for employers, unions, and employees, and these affect the outcomes of the procedure. Empirical evidence confirms this model's ability to analyze the certification process and the outcomes of unionization attempts. In particular, this model explains why the change from a card-check to a mandatory representation vote encourages unlawful employer conduct, enhances the effectiveness of union avoidance activities, and deters employee participation in the unionization decision. The article concludes that, in order to accommodate a mandatory vote procedure within the existing labour relations framework, it is necessary to counteract employer unfair labour practices during union organizing through modifications to the certification procedure. Finally, the strategic dynamic certification model is applied to develop specific proposals for legislative reform aimed at reducing the negative effects of the mandatory vote procedure, thereby enhancing the validity and credibility of the certification process and of the labour relations system.

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I. INTRODUCTION

A baker making a pie knows that each ingredient reacts with the others to produce the finished dessert. If the baker substitutes just one ingredient without accounting for this in the rest of the recipe—such as replacing apples with oranges—the outcome will be a very different kind of pie. In this respect, creating a well-functioning labour relations system is like baking a pie. Each element must be viewed in its relation to the whole, and a change to one essential ingredient will alter the entire system.

The Canadian labour relations system is closely modelled on the Wagner Act, passed in 1935 by the United States Congress, which sought to create a coherent and integrated labour relations system based on a set of fundamental principles.\(^1\) These principles are that: workers have the right to organize unions of their choice, workers have the right to be free of employer interference or control in organizing, and employers are required to negotiate with unions. A card-check certification procedure was established to effectuate these principles.\(^2\)

This system was also adopted in Canada. However, in subsequent years—and most notably over the last decade—several provinces have altered this key element of the labour relations framework by replacing card-check union certification procedures with a mandatory representation vote procedure. No longer is a union able to be recognized by the labour relations board as representative of a group of workers by submitting union membership cards from a specified proportion of employees. A union must now win a representation election among employees in order to become a certified representative of workers. In other words, our legislative bakers have substituted one

\(^1\) National Labor Relations Act, 29 U.S.C. § 151—169 [NLRA or Wagner Act].

\(^2\) When the Wagner Act was first passed, trade unions gained the right to exclusively represent a group of employees by demonstrating to the National Labor Relations Board (NLRB) that a sufficient proportion of these employees had signed “union authorization cards” that indicated that the employee wished to be represented by the union. The NLRB matched signatures on these “union authorization” cards with employer payroll records and, if a majority of employees had signed cards, certified the union. This was called “card-check certification.” It was not until the mid-1940s that the NLRB required representation votes rather than card-check support for certification, even though the legislation did not expressly require elections. See Richard N. Block, John Beck & Daniel H. Kruger, Labor Law, Industrial Relations and Employee Choice: The State of the Workplace in the 1990s, (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1996) at 13.
essential ingredient of the certification process (the card-check procedure) for a new one (the mandatory vote procedure), changing the nature and effect of the certification process and altering the labour relations system as a whole.

This legislative shift has tended to occur in tandem with the election of conservative and neo-liberal provincial governments that view unionization as contrary to economic success. The choice of certification procedure (card-check or mandatory vote) is contentious. Unions generally prefer the card-check procedure, while employers favour the mandatory vote procedure. Each argues that the procedure preferred by the other is an inaccurate gauge of employees’ true wishes regarding union representation. Employers generally prefer that certification be decided by mandatory vote in every case, arguing that it protects employees from being pressured into signing membership cards against their will or without understanding the effects of signing. Employers argue that card-check makes it overly easy for unions to be certified without real proof of desire from the workers. Also, employers want the opportunity to address the union campaign with their employees, arguing that a vote allows the employees to make a more informed choice. Therefore, they argue, votes are more reliable proof that their employees want a union. Unions argue that the mandatory vote procedure will not be more accurate because it encourages employer misconduct, and even holding the vote within short time limits will not protect against these consequences.

A theoretical framework is proposed in this article—the strategic dynamic certification model—to explain how union certification processes operate. The model explains how differences in incentives, disincentives, and opportunities for each of the actors in the certification process (employers, unions, and employees) are created by a change from the card to the vote procedure. It explains why the

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3 For an excellent analysis and critique of the application of the ideal of political democracy to representation elections in the United States, see C. Becker, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law" (1993) 77 Minn. L. Rev. 495.


change from a card-check to a mandatory vote procedure encourages unlawful employer conduct, enhances the effectiveness of union avoidance activities, and deters employee participation in the unionization decision. Previous research has examined the effect of a change from card-based to mandatory vote certification. The framework proposed in this article explains these effects. In other words, instead of considering what has occurred as a result of the change in certification procedures, this article is concerned with explaining why we observe these effects.

The article concludes that in order to accommodate a mandatory vote certification procedure within the existing labour relations framework, modifications to the labour relations system are necessary to remedy or offset the distortions introduced by the mandatory vote. Alternative proposals for these changes include different means of increasing confidentiality in voting and accelerating elections.

The article is organized as follows. Part II briefly describes the two alternative statutory certification procedures that currently exist in Canada (the card-check and mandatory representation vote), providing background for the discussion in the remainder of this article. Part III describes two existing models used to explain unionization outcomes: (1) the utility-maximization model and (2) the strategic choice framework, and proposes a new model—the strategic dynamic certification model—to explain the actions of the three actors in the unionization process: employees, unions, and employers. In Part IV, the new model is applied to the two existing procedures. After summarizing the differences highlighted by the new model, four hypotheses are generated concerning the predicted effects of a mandatory vote procedure. In Part V the proposed model is tested—its predictions are compared to empirical evidence of the effects of such a change in certification procedure and are found to be consistent with this evidence. Part VI uses these results to make recommendations for reforms to the labour law system that will reduce the distortions resulting from this change from a card-check to a vote-based certification procedure. Finally, Part VII offers some concluding comments.
II. CERTIFICATION PROCEDURES

Union certification is the process by which a labour relations board grants a trade union the exclusive right to represent a specified group of employees (the "bargaining unit") for the purposes of negotiating and administering a collective agreement with the employer. This Part provides a brief introduction to the requirements for certification and the two alternative statutory certification procedures in Canada.

Although the particulars vary among jurisdictions, applicant unions must satisfy four basic requirements in order to obtain certification: (1) qualification (the applicant must be a trade union within the meaning of the relevant labour legislation), (2) appropriateness (the bargaining unit applied for must be appropriate for collective bargaining), (3) timeliness, and (4) evidence of sufficient support for certification among the employees. This fourth criterion, adequacy of support, is determined by one of two alternative procedures: the card-check procedure or the mandatory representation vote procedure.

The card-check procedure was one of the elements of the Wagner model of labour relations adopted in Canada. It has come to be widely identified with labour relations in this country, such that this process for testing support for union representation has been referred to as the "Canadian system." All Canadian jurisdictions employed the card-check certification procedure until, in the 1970s and 1980s, Nova Scotia, Alberta, and for a time British Columbia, adopted mandatory representation votes. Since the mid-1990s, the shift towards requiring representation elections to establish certification rights has become more pronounced as three of the largest provinces, Ontario in 1995, British Columbia in 2001, and Manitoba in 1997, as well as Newfoundland and Labrador in 1994, have replaced their card-check procedures with mandatory vote requirements. More recently,

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7 A mandatory representation vote system has been in place in Nova Scotia since May 1977, Alberta since November 1988, and in British Columbia between June 1984 and December 1992.

Manitoba has reverted to card-check certification, and Ontario recently began allowing unions applying for certification in the construction industry to elect to proceed under a card-based procedure. As a result, almost as many jurisdictions in this country now require a representation election as those that will grant certification based solely on cards.

A. Card-Check Certification Procedure

Under a card-check procedure, the applicant union submits an application for certification to the labour relations board, including a description of the bargaining unit the applicant seeks to represent. If the union is able to demonstrate that it has signed cards from a specified percentage of the employees in the bargaining unit (usually at least 55 per cent), then it is generally entitled to "automatic certification" as the sole bargaining agent of the employees in that unit, provided the other statutory requirements for certification are met.

Development and Labour Statutes Amendment Act, 2001, S.B.C. 2001 c. 33 ss. 3, 4 (in force 16 August 2001) (B.C. Reg. 206/2001) reintroduced mandatory representation elections. A representation vote procedure, requiring that a vote be held unless the union and employer agree otherwise, was introduced in Newfoundland and Labrador in February 1994 with the Labour Relations Act, R.S.N. 1990, c. L-1, s. 47(1), (2) as am. by S.N. 1993, c. 58, s. 1.


A mandatory representation vote procedure is presently in place under British Columbia's Labour Relations Code, R.S.B.C. 1996, c. 244, s. 24, Alberta's Labour Relations Code, R.S.A. 2000, c. L-1, s. 34, Ontario's Labour Relations Act, 1995, supra note 8, s. 8, Nova Scotia's Trade Union Act, R.S.N.S. 1989, c. 475, s. 25 and Newfoundland's Labour Relations Act, supra note 8, s. 38.

If the trade union does not succeed in showing the requisite support for automatic certification, but does demonstrate that it has obtained signed cards from a specified, lesser proportion of unit employees (usually 40 to 55 per cent), then it is entitled to a representation vote. Where the applicant receives a majority of the votes cast in a representation election, the labour board will grant the certification, if the other statutory requirements for certification are satisfied. Very few representation elections are held under the card-check certification procedures and most certifications are obtained on the basis of authorization cards. For instance, between January 1993 and November 1995 in Ontario, fewer than 10 per cent of certification application cases required an election. Sara Slinn, The Union Certification Experience in Ontario, 1993 to 1998 (Ph.D. Thesis,
Hearings to deal with any objections to the application raised by the employer will be held before the board decides whether or not to issue a certification, and may substantially delay the holding of an election.\footnote{12}

**B. Mandatory Representation Vote Procedure**

Under a mandatory representation vote certification procedure, the applicant union must win a representation election in order to obtain certification. Although union membership cards are also collected and submitted under this procedure, their use is limited to determining whether or not there is sufficient employee support for a representation election to be held—certification is not available on the basis of card support alone. Although the process differs somewhat among jurisdictions, the essential elements are similar. First, the applicant union submits a certification application to the board for a particular bargaining unit. The employer is promptly notified of the application by the labour board or applicant, and may file a reply to the application. The union will be entitled to a representation vote if its application is accompanied by signed union membership cards from a legislatively determined minimum percentage of employees in the proposed bargaining unit (generally 40 per cent). The legislation directs the time frame for the vote to be held, generally within five or ten days of the date the application is received by the labour board, depending on the jurisdiction.\footnote{13} Unlike elections held under the card-check

\begin{footnotes}
\item[12] Ontario, between 1993 and 1995, provided an alternative procedure to permit elections to be held expeditiously to prevent employers from seeking to delay the vote in order to weaken support for unionization: the pre-hearing representation election. Unions obtaining cards from at least 35 per cent of employees in the proposed unit could apply for a pre-hearing representation election. The Board had the discretion to order that the vote be held prior to any certification hearings. However, this procedure was seldom used: only 2.7 per cent of all non-construction, non-raid certification applications (ninety-six cases) were decided under this procedure. \textit{Ibid.} at 135.

\item[13] In contrast, the \textit{NLRA} provides no time limit for elections to be held; in the United States the median time between certification application and vote is fifty days. United States Commission on the Future of Worker-Management Relations, \textit{Fact Finding Report, 1994} at 82. In contrast with this, certification votes in Canada have come to be referred to as "quick votes." Alberta simply requires that the vote occur "as soon as possible." \textit{Labour Relations Code, supra} note 10, s. 34(3).
\end{footnotes}
procedure, mandatory elections are not delayed by certification hearings, which are routinely held after the vote has occurred. If a majority of the ballots cast in the vote are in favour of the union, it will be entitled to be certified as the exclusive representative for that bargaining unit, provided that the other legal requirements for certification are satisfied.\textsuperscript{14}

C. \textit{Stages of the Certification Process}

Under either procedure, the certification process consists of six stages, including three key events (initiating organizing, filing the application for certification, and the election if one is required), and three key periods (the organizing period, the post-application period, and the post-election period, if an election occurs). These stages are set out in the order that they occur in Figure 1 below.

Figure 1: Stages of the Certification Process

\begin{center}
\begin{tikzpicture}[node distance=2cm, >=stealth]
  \node (init) {Organizing Initiated};
  \node (cert) [right of=init] {Certification Application Filed};
  \node (elec) [right of=cert] {Election};
  \node (org) [below of=init] {Organizing Period};
  \node (postapp) [below of=cert] {Post-Application Period};
  \node (postelec) [below of=elec] {Post-Election Period};
  \draw [->] (init) -- (org);
  \draw [->] (cert) -- (postapp);
  \draw [->] (elec) -- (postelec);
\end{tikzpicture}
\end{center}

III. THEORETICAL MODELS EXPLAINING UNIONIZATION DECISIONS

A number of theoretical models have been developed seeking to explain unionization decisions and outcomes. Primary among them are the utility-maximization model and the strategic choice model, which I

\textsuperscript{14} Note that British Columbia's \textit{Labour Relations Code, supra} note 10, s. 24.3 and Newfoundland's \textit{Labour Relations Act, supra} note 8, s. 38(2), require that a minimum proportion of eligible voters cast ballots in order for a representation election to be valid.
explain below. In this Part, I propose an alternative model of the union certification process: the strategic dynamic certification model. This model draws elements from both the utility-maximization model and the strategic choice framework, and includes several unique elements. It approaches the certification application outcome as the result of decision making by employees, the union, and the employer; it regards this decision making as being both utility-maximizing and strategic; and it recognizes that actors have multiple opportunities for decision making during the certification process. The strategic dynamic certification model is offered as a more comprehensive explanation of certification activity, and one that applies to both card-check and mandatory representation vote procedures.

A. Utility-Maximization Model

Theorists in economics and industrial relations have long regarded the unionization decision as a utility-maximization decision made by the individual worker. Under the utility-maximization model of union certification, and in the context of a certification application, a worker’s decision about unionization is based on that individual’s subjective evaluation of the expected costs and benefits of unionization to him or her. Although early expressions of this approach focused only on employee decision making, this model was later extended to include the subjective weighing of costs and benefits by all three actors affected by union certification: employees, unions, and management. Thomason further refined the utility-maximization model by suggesting that the unionization decision could be viewed as a collective, utility-maximizing decision made by the proposed bargaining unit as a whole.
This perspective contrasts with the traditional view that unionization is the product of numerous, separate, utility-maximizing decisions made by individual employees.

B. **Strategic Choice Model**

Lawler's strategic choice model addresses what he perceives as key weaknesses of other approaches: that they either exclude or improperly downplay the role of strategy in the certification process and in the unionization decision, and that they primarily attribute unionization outcomes to exogenous contextual forces rather than to the actors' strategic choices. In contrast, the strategic choice model focuses on the interlinked and interdependent strategic choices and discretionary actions of two actors (employers and unions) to explain unionization outcomes. This model also recognizes the role of power in organizing campaigns and that the balance of power between unions and employers is influenced by how each actor responds to the constraints and possibilities it faces. Strategy, in this model, refers to actors' attempts to gain power, with the main objective being control of the employees in the proposed unit. Lawler identifies actors' strategic responses as either adaptive, whereby actors operate within the limitations of the established context, or proactive, in which an actor seeks to change the context within which the unionization attempt is occurring to increase that actor's own power. The role of employees is limited to being a contextual factor, with the strategic choices of the union and employer affecting employees' tendency to unionize.

C. **Strategic Dynamic Certification Model**

The strategic dynamic certification model provides an alternative approach to explaining unionization decisions. While it is based on the utility-maximization model and the strategic choice framework, it includes several novel elements capturing important

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20 Lawler, supra note 15 at 11-12. Exogenous contextual factors include such influences as market factors, political influences, social support for unionization, technology, demographic characteristics of employees, and union and employer structures (ibid. at 20-21).

21 Ibid.

22 Ibid. at 20.

23 Ibid. at 21.
aspects of decision making. The strategic dynamic certification model has three dimensions: the actor, the stage of the certification process, and the certification procedure (card-check or vote). This model is represented diagrammatically in Figure 2.

Figure 2: Actors’ Decision Points in the Strategic Dynamic Certification Model

<table>
<thead>
<tr>
<th>Stage of Certification Procedure</th>
<th>Organizing Initiated</th>
<th>Organizing Period</th>
<th>Filing Application</th>
<th>Post-Application Period</th>
<th>Election</th>
<th>Post-Election Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actor</td>
<td>Card</td>
<td>Vote</td>
<td>Card</td>
<td>Vote</td>
<td>Card</td>
<td>Vote</td>
</tr>
<tr>
<td>Employee</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Union</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Employer</td>
<td>-</td>
<td>-</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Note: ✓ Indicates opportunity for decision making. * Indicates this opportunity exists if the employer is aware of the organizing attempt at that time.

This model builds on earlier approaches by incorporating three actors: employees (both individually and collectively), the union, and the employer, recognizing that all are active participants in efforts at certification. It does not view the unionization decision as a one-time choice made by each actor, which is an implicit premise of much of the existing certification literature and of the utility-maximization theory. Nor does this model regard actors’ decision making as a continuous process, as the strategic choice framework suggests. Instead, certification application outcomes are seen as the result of a series of discrete decisions made by employees, by unions, and by employers.

In the course of the unionization process each actor has at least one, and often several, distinct opportunities to decide how to act or react to the possibility of unionization. Opportunities for decision making occur at each stage in the certification process: at the outset of organizing, during the period the union is attempting to organize a unit of employees, at the time for submission of the certification application with the labour relations board, and in the period following submission of the certification application. In circumstances where a representation election is required, two additional opportunities for decision making exist: the election itself, and the period following the election but before
the board has disposed of the application. The strategic dynamic model focuses on these decision points.

It is important to note that each actor does not necessarily have an opportunity for decision making at each stage of the process under either certification procedure, and the effectiveness of an actor's action at each point is also dependent on the decisions and conduct of other actors and on the procedural context. Figure 2, above, identifies the decision points available to each actor at each stage of the process, for both the card-check procedure and for the mandatory vote procedure. Opportunities for decision making differ between the two certification procedures for each actor, both with respect to the number of opportunities for decision making and the timing of these opportunities.

Under this model, decision making has two aspects: it can be both utility maximizing and strategic. Decision making is utility maximizing in the sense that the actors seek to obtain the greatest utility in the existing circumstances. Decisions and actions may also be strategic where actors seek to change the context and constraints within which they operate, in order to shift the balance of power among the actors in their favour.

Unlike earlier models, the strategic dynamic model is designed to apply to both card-check and mandatory vote procedures, and is capable of accounting for the different utility-maximizing calculations that actors undertake under both procedures. As in Lawler's strategic choice framework, this model appreciates the importance of the balance of power during organizing attempts, and allows for shifts in the relative power (in terms of ability to influence the outcome of a certification attempt) of different actors over the course of the certification process and between the two certification procedures.

Finally, this model explicitly recognizes that changes to certification procedures may influence parties' decision making. It proposes that the relative importance of the decision making by the three actors, the opportunities for decision making, and the contextual factors influencing these decisions, are influenced by which certification procedure is in place. In particular, the number of decision points each actor faces and the potential effect on the outcome of actors' decisions differs between the card-check and vote procedures.

The stages of the certification process are set out in Figure 1, above.
As a result, this model focuses on the interconnection between process and procedure as determined by the legislation and actors' utility-maximizing and strategic decisions, offering insights into why the choice of certification procedure produces changes in the certification experience and outcome.

IV. APPLICATION OF THE STRATEGIC DYNAMIC CERTIFICATION MODEL

In this Part, I apply the strategic dynamic model from the perspective of each of the three actors in the unionization process (employees, the union, and the employer), identifying the opportunities for decision making first under the card procedure, then under the mandatory vote procedure. For each decision point, I explain the utility-maximizing and strategic decision making that the model predicts will occur at each stage.25

Applying the model illuminates several aspects of the certification procedure and of the consequences of the choice of legislative procedure governing this process. It is evident that the differences resulting from the choice of procedure are of several kinds. First, the two alternative procedures introduce differences in the opportunities for each actor to take action or express their views on unionization. Such opportunities occur at different stages, and a greater or lesser number of opportunities arise under the two procedures. Second, the incentives and disincentives for supporting or opposing unionization also differ significantly between the two regimes. Further, the effectiveness of parties' actions differs depending on whether card-check certification is available or whether a representation election is required. Finally, application of the strategic dynamic model also reveals that the overall balance of power among the actors is different under different certification procedures.

In particular, the model illustrates four propositions:

1. The costs to employees and to unions of supporting unionization are greater under the vote procedure than under the card procedure, while the benefits to

25 As noted, these three dimensions of the model, including decision points, are set out in Figure 2, above.
unionization remain virtually the same. Therefore, employees and unions have less incentive to seek certification under mandatory votes.

2. Under the mandatory vote procedure employers have more opportunities and greater incentives to engage in union avoidance, including unfair labour practices (ULPs).  

3. Union avoidance tactics, including ULPs, are more effective under the mandatory vote procedure than under card-check certification.

4. With the introduction of a mandatory vote certification procedure, the balance of power shifts in favour of employers.

A. Employee Decision Making

The strategic dynamic certification model predicts that employees will decide to support unionization if their perception of the benefits of supporting certification is not outweighed by the expected costs of doing so. The potential costs and benefits to workers of unionization are recognized to be both economic and psychological. Economic benefits include an expectation of increased wages and benefits, employment security, and improved conditions of work, while economic costs include payment of union dues, and the risk of losing income from strikes and lockouts. Psychological benefits include working under more equitable employer practices, such as greater equity and less arbitrariness in workplace rules and administration, and standardized wage structures. A key benefit to workers from unionizing is access to collective bargaining and a collective agreement as tools for altering the work rules governing their work lives. Non-economic costs

26 For the purposes of this article ULPs are defined as unlawful employer union-avoidance tactics.


28 Ashenfelter & Pencavel, supra note 15 at 436; Becker & Miller, supra note 17 at 311; Scott, Seers & Culpepper, ibid.

include the risk of employer retaliation against employees, the psychological costs of violating professional or community norms, and inconvenience of union membership.\(^3\)

If anticipated benefits are greater than, or at least equal to, the expected costs of supporting unionization as subjectively perceived by the employee, the model predicts that the employee will support certification. According to the model, the worker will be expected to sign a union membership card, participate in an election, and vote for the union. Conversely, if costs exceed benefits then the model predicts that the employee will not support unionization and will not sign a membership card or, having done so, the employee may opt to either not cast a ballot or vote against certification if an election is held.

Even though employees are the object of any unionization attempt, and are the ones who will either obtain or reject union representation, employees have the most limited strategic role of the three actors. Employees may act strategically by inviting a union to organize the workplace or by choosing to respond to a union's overtures and actively supporting a unionization effort. These actions are described as "strategic" because, although they may not appear rational based on a cost-benefit calculation by the employee (for instance, knowingly risking employer retaliation by choosing to be prominent in the organizing campaign), they may be directed at the longer-term goal of altering the balance of power in the workplace in employees' favour.

1. Card-Check Procedure

Under the card-check procedure, employees generally have two distinct opportunities to make cost-benefit calculations and to express their preference for or against unionization.

The first opportunity occurs during the first stage of the certification process, when one or more employees invite a union to organize their workplace, or when employees are approached by a union organizer. Employees have a second opportunity to make and express a decision about unionization, during the organizing period, when employees may choose to sign a union membership card or

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\(^3\) Becker & Miller, supra note 17; Ashenfelter & Pencavel, supra note 15 at 436.
Therefore, in most cases under the card-check procedure workers have, at most, two opportunities to indicate whether or not they want to be represented by a union.

At both of these points the benefits of supporting union organizing are as described above, but there are additional costs for employees to assess. Employees thinking about seeking a union to represent them, or deciding how to respond to a union's organizing advances, will worry that their employer might learn of the union activity and may punish employees it suspects of being involved. Employees may also be concerned about being pressured by union organizers or co-workers about whether or not to sign a union membership card.

2. Mandatory Vote Procedure

Under the mandatory vote procedure, employees have four distinct opportunities to express their wishes about unionization. Unlike under the card-check procedure, employees have additional opportunities for making and expressing their preferences in the post-application period and in a representation election. As under the card-check procedure, employees may first decide whether to solicit union representation or to receive or reject an approach by union organizers, and then, if organizing proceeds, they may choose to support certification by signing a union membership card. During the post-application period, employees have another opportunity to decide whether or not they wish to be unionized, and then may express their choice in the representation election.

These additional decision points are accompanied by additional costs for employees to take into account, including a greater risk of employer retaliation and the inconvenience and effort involved in voting. During the post-application period the employer knows of the union threat (having been notified of the application by the labour relations board) and the employer has a period of several days before the election during which it may try to foil the certification attempt. The risk of retaliation by an employer against employees it thinks are supporting the union is greater in these circumstances than under the

\[31 \text{ As noted above, the majority of certification applications under the card-check procedure are determined on the basis of the level of membership evidence in the form of cards submitted with the union's certification application.}\]
card procedure, where the employer has less opportunity to try to thwart organizing. Employees must also consider the potential costs of participating in the election. While it is a "secret ballot" in the sense that the employee's vote is not disclosed, the election generally takes place in the workplace and the employer and its scrutineers see which employees cast ballots and which do not. Employees may reasonably worry that their employer may draw conclusions about their loyalty to the employer or support for the union from whether they vote or not, and from the number of votes cast each way in the election. Finally, by requiring employees to confirm their preference for certification by voting for the union in an election, the mandatory vote procedure imposes greater inconvenience and costs on workers.

In sum, this model shows that, relative to the card-check procedure, the costs to employees of supporting organizing are likely to be greater under the mandatory vote procedure, while the benefits of doing so are no different. Consequently, this model predicts that there will be lower employee support for union organizing under the vote procedure compared to the card-check procedure. Further, it is likely that this decline in support will be greatest in those workplaces, industries, and sectors where employer retaliation is expected to be more aggressive (such as small workplaces and the private sector), and among more vulnerable employees (such as part-time workers).

B. Union Decision Making

This model predicts that a union will seek to organize a new unit if the expected benefits to the union outweigh the anticipated costs of doing so. The main benefit to a union of organizing a new unit is revenue from new membership dues, although this may be offset by the costs of obtaining the certification and servicing these new members. Unions may also obtain non-economic benefits from organizing an
otherwise costly unit if, for instance, doing so contributes to the union's broader organizing strategy.33

The union is the key strategic actor in the organizing context. It is the union that decides whether to attempt to organize, and decides whether to file a certification application. The union also makes reactive strategic choices, such as deciding whether to respond to employer challenges to the application. These strategic actions are primarily aimed at affecting the balance of power in the workplace in favour of the union and employees in the unit.

1. Card-Check Procedure

Under the card-check procedure, the board grants or denies most certification applications based on whether or not the union has submitted a sufficient number of union membership cards. Consequently, a union's key decision making occurs during the first three stages of the certification procedure as it decides whether to initiate organizing, whether to continue organizing, and whether to file a certification application.

At the first stage in the process, the union weighs the potential costs and benefits of certifying the particular group of employees to decide whether to seek enough cards to apply for certification. The union makes this calculation in light of the likelihood of certification success, and will continue to reassess the value of continuing the certification campaign throughout the second (organizing) stage.

During this stage, the employer may try to derail the certification attempt if it learns of the union's activity. The union must then decide whether and how to respond to the employer's actions. Filing and pursuing ULP complaints against the employer is expensive and time consuming. Furthermore, if the employer's tactics have dissuaded employees from supporting the union, it may need to increase its organizing efforts to counter this effect on employee support. Any of these responses increases the union's organizing costs and the union may re-evaluate whether to continue the organizing drive. If employer

33 These strategies include organizing several units of a particular employer's employees (for instance, a union may try to organize clerks at each store in a chain), or organizing all workers in a particular occupation in a geographic area in several units (such as all casino workers in a particular city). See Scott, Seers & Culpepper, supra note 27 at 705.
interference occurs before the union has filed a certification application, then the union may choose to abandon the organizing drive and not apply for certification. The union may even choose not to file a ULP complaint against the employer. The union may well decide to terminate the organizing at this point, particularly if the misconduct was so egregious as to make it virtually impossible, in the mind of the union, to regain sufficient employee support for the union to create a viable bargaining unit.

If the union opts to continue organizing, it may still decide not to file a complaint. Complaints may delay the board's certification application decision if the board chooses not to issue a certification decision until ULP allegations are determined. Where a hearing into the complaint is necessary, the delay may be lengthy. Such delays, in themselves, can wear down support for the union.

At the stage of deciding whether to file a certification application, the union weighs its chances of success and the benefits of certification against the costs of preparing and filing the application and its estimate of the costs it will incur in the post-application stage. Potential costs to a union in the post-application stage include the costs of responding to any legal challenges to the certification application raised by the employer and pursuing any ULP complaints. Although employer anti-union tactics at this stage will not directly affect the outcome of the certification application (assuming no election is required), even a successful certification may be defeated if the employer's conduct causes employees to withdraw their support for the union. In these circumstances, the longer-term viability of the unit is jeopardized and the unit is more likely to fail to reach a first collective agreement or to decertify. This may discourage the union, and even at the post-application stage, the union may decide to seek to withdraw or adjourn the application, rather than pursue certification.

2. Mandatory Vote Procedure

Union decision making at the initial and organizing stages is similar under the card-check and mandatory vote procedures. It is at the filing stage that union decision making under the two procedures

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34 In some of these cases, the employer may challenge the validity of the cards or such matters as the scope or appropriateness of the unit.
Strategic Dynamic Certification

diverges. Where a representation election is required, crucial union decision making occurs not only at the pre-application stages (deciding whether to organize and, if necessary, how to respond to employer anti-union tactics), but also at the application, post-application, and post-election stages.

While unions' pre-application costs are similar between the two certification procedures, they face greater post-application costs under the vote procedure than under the card procedure. However, the benefits of organizing are unchanged. These higher costs under the mandatory vote procedure arise from the increased opportunities and incentives for the employer to engage in union avoidance activities during the post-application stage, the necessity of maintaining employee support until the election, and ensuring that employees confirm their support in the election. In addition, the union has more decision points under the vote procedure: whether to respond to an employer campaign in the period between application and election; whether to pursue a vote, withdraw, or adjourn the application; and whether to continue with organizing or withdraw.

When deciding whether to apply, and again at the post-application stage, unions trying to certify under the mandatory vote procedure must consider election costs, including the cost of maintaining employees' support for the union between the time an employee signs a membership card and the time the ballots are cast. The election cannot, as a practical matter, be held the day the application is filed. Although there may be legislative time limits within which the vote must be held, this gives the employer several days to formulate and execute a strategy to avoid certification by dissuading employees from voting for the union. Maintaining employee support until the election can be costly even in the absence of employer resistance, particularly if the union decides to counter employer attempts to defeat the certification attempt.

Should the employer try to discourage employees from certifying, the union must decide whether and how to respond—as it would have to do if the employer engaged in union avoidance activities

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35 Under this procedure, sufficiency of employee support for certification is measured by the results of the representation vote, not by the cards submitted with the application. Membership cards are only relevant for determining whether the union has met the threshold of support necessary for a representation vote to be held.
at the organizing stage. Pursuing a ULP complaint may be expensive and time consuming, and complaints (particularly in the mandatory vote context) are often not resolved or even heard by the labour board until after the election has been held or the certification decision has been issued. Therefore, the effect of an employer's unlawful anti-union conduct will almost certainly not be offset by a declaration of wrongdoing or remedy issued by the board prior to the vote. This is exacerbated in jurisdictions such as Ontario where the board has been relieved of the power to make remedial certification orders or to order interim reinstatement of employees. ULP complaints may also delay the board's certification decision, which may weaken the unit in the longer term. Unions also consider whether it is worthwhile to continue the organizing effort, or whether the employer's conduct (legal or not) has eroded employee support for unionization so that either the application is likely to fail or, even if certification is granted, the unit has been irreparably weakened. In these cases the bargaining unit may not be viable, may fail to reach a first collective agreement, and may be quickly decertified. Further, if the employer raises legal challenges to the application or the voting list, the union will also have to consider the cost, and possibly lengthy delay involved in responding to these challenges. At this point, the union may conclude that it will not continue to pursue the application, and seek to withdraw or adjourn the application.

At the election stage, the union does not have an opportunity for decision making; the employees are the only decision makers. Post-election, and before the board has issued a decision, the union has the opportunity to decide, again, whether to continue to pursue the certification. The union will consider factors such as responding to any employer union avoidance tactics, and responding to employer objections to the application, voting list, or conduct of the election. Until the board issues its decision on the matter, the union may still seek to withdraw or adjourn the application.

In sum, this model predicts that, with a change from a card-check to a mandatory vote certification procedure, organizing activity will decline. Unions will be more cautious about initiating organizing activity because the vote procedure makes this a more costly, lengthy, and risky process, with a greater probability of anti-union activities by employers, leading to a lower chance of certification for the unit applied for. At the same time, the benefits to unions of organizing are unchanged. In particular, this model anticipates that, under the
mandatory vote, there will be fewer organizing efforts by unions and therefore fewer certification applications will be filed. A greater proportion of applications, and therefore of certifications granted, will be for units with characteristics making them relatively easy to unionize. That is, unions will tend to focus on what they perceive to be relatively less costly and less risky organizing targets, such as larger units, units in industries where support for unionization is likely to be higher (such as the manufacturing industry, a traditional source of union strength), and the public sector units (where less employer resistance to unions is expected). There will be a shift away from part-time units toward less vulnerable workers with greater commitment to the workplace. For these same reasons, it is predicted that unions will be more likely to discontinue organizing drives or apply to withdraw certification applications.

C. Employer Decision Making

Like the union, the employer is a key strategic actor in the unionization context. However, in contrast with the union, the employer's strategic actions are largely reactive, although there is scope for proactive strategic union avoidance—especially before the employer's workers are targeted for an organizing attempt.

Generally, employers expect unionization to increase their costs, primarily due to higher labour costs, reduced profits,\(^3\) greater costs for managing the workplace because of the necessity for bargaining and administering a collective agreement, and the costs of any union avoidance activities the employer chooses to engage in. Employers also recognize several sources of non-economic costs from unionization, such as the reduction in unilateral employer discretion and power in the workplace.

As Becker and Miller note, employers generally have difficulty identifying any benefits from unionization—at least until they have experience with a union—and these authors suggest employers' real calculus is a comparison of the costs of resisting unionization with the

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expected costs if the union succeeds in being certified. Therefore, employers' strategic decision making relates to deciding whether or not to resist unionization. Nevertheless, there are potential benefits to employers from unionization, such as increased productivity, greater employee satisfaction, and reduced conflict in the workplace.

Consequently, this model predicts that an employer will try to avoid unionization if it perceives the costs of unionization exceed either the benefits, or if it estimates that the costs of unionization are greater than the costs of union avoidance. Employer resistance ranges from legal challenges to the certification application to committing ULPs, such as intimidating or threatening employees, to discourage them from supporting certification.

1. Card-Check Procedure

Under the card procedure the employer will often not be aware of an organizing effort until notified by the labour relations board that a certification application has been filed for a group of the employer's workers. As a result, an employer generally does not have an opportunity to decide whether or how to react to union organizing until the post-application period. It may then choose to engage in union-avoidance activity ranging from legitimate challenges to the union's application to illegal ULPs.

Many applications under the card-check procedure are determined on the basis of membership evidence submitted with the application. In these cases, post-application employer responses (other than legal challenges to the application) will likely have no effect on the outcome of the certification application. Therefore, in general, employer responses may be expected to be less effective at influencing employee certification decisions in the context of card-check certification than under the vote procedure.

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37 Becker & Miller, supra note 17 at 311.
38 Freeman & Medoff, supra note 36 at c. 11.
39 These employer activities may negatively affect the longer-term viability of the certified unit. Research on this effect is discussed below at note 52.
2. Mandatory Vote Procedure

Under the mandatory vote procedure, employer decision making occurs at both the pre-application (organizing) stage (if the employer becomes aware of the organizing drive before a certification application is filed) and the post-application period. However, the potential effectiveness of employer responses is likely to be greater than under the card-check procedure. Under the mandatory vote procedure, even if the employer first learns of an organizing drive after the application has been filed, the employer has a statutorily determined period of time (five working days in Ontario) before the vote is held. During this post-application period the employer can engage in a union avoidance campaign to influence employees' voting decisions. As a result, under the vote procedure, the effectiveness, and therefore the likely benefits, of employer resistance may be expected to be greater than under the card procedure.

The strategic dynamic certification model therefore predicts that the introduction of mandatory representation elections for certification will encourage employers to engage in union avoidance efforts, which may include ULPS. This change in the certification process does not alter the benefits or costs of unionization to the employer, or the costs of engaging in anti-union conduct. However, it does increase the benefits of, and opportunities for, employer resistance to unionization. The vote procedure gives employers a greater opportunity, in every case where an application is filed, to engage in union avoidance activities, and these opportunities can be exercised before the election is held. At this stage, employer actions can readily affect the outcome of the certification by influencing employees' voting behaviour. As a result, it is likely that these tactics will be more effective compared to resistance under the card procedure where, by the time the employer learns of the organizing, it may be too late to affect the outcome.

This model demonstrates that there is both greater opportunity and greater incentives for employer interference or influence on

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40 It is important to note that an increase in union avoidance activities will not necessarily be reflected in an increase in ULP complaints. It may be that because union avoidance tactics are expected to be more effective under the vote system, it is more likely that in these circumstances unions will conclude that it is not worthwhile to file a complaint, instead abandoning that organizing attempt. Therefore, no prediction is made about whether ULP complaints—as distinct from union avoidance and ULP activity itself—will change with a change in certification procedure.
employee decision making under the vote procedure than under the card procedure. Consequently, this model predicts that employers will be more likely to engage in union avoidance activities, including ULPs, under the mandatory vote procedure. As a result this model anticipates that union organizing efforts will be less likely to succeed under the mandatory vote, compared to the card procedure, and that these effects will be most pronounced in more vulnerable groups of workers, such as small units, those composed of part-time workers, and those in the private sector.

D. *Shift in Balance of Power*

Finally, application of the strategic dynamic model also reveals that the overall balance of power among the actors is affected by the certification procedure in place. With a change to a mandatory vote procedure the balance of power shifts in favour of employers. Under the vote procedure, employers are given more opportunities for a role in employees' decision making about union representation, and greater influence over the certification application outcome.

Under the card procedure the union is generally the most influential strategic decision maker. The union's decision whether or not to file the application is of greatest importance, since most applications under that procedure are determined on the basis of card support filed with the application. Once employees have signed cards, they lack an opportunity to influence the outcome, except in those few cases where card support is so low that an election is held. Employers are generally not aware of the organizing until after the application, so employers have relatively little opportunity to influence employees' or unions' certification decision making.

In contrast, with a mandatory vote, employer decisions about whether and how to respond in the post-application period and employees' decisions about whether and how to vote, can significantly affect the certification outcome. Employers' actions can influence both employee voting decisions and unions' decisions about whether to pursue the application through the election stage.

Therefore, in the post-application stage under the vote procedure, employer actions have a greater effect on the outcome compared to employee or employer responses at this stage under the card procedure. This reflects an overall shift in the balance of power towards employers.
E. *Hypotheses*

In sum, the strategic dynamic model of certification leads to the following hypotheses about the effects of introduction of a mandatory representation 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 complaints.
4. In part because of increased employer resistance efforts, the probability of certification application success will be reduced.

V. **EMPIRICAL EVIDENCE OF THE EFFECTS OF CHANGE IN CERTIFICATION PROCEDURE**

Several quantitative empirical studies have examined the effects of replacing card-check certification with a mandatory representation vote procedure. These studies conclude that this type of legislative change is associated with fewer certification applications being made, a reduction in successful certification applications, changes in the types of applicants and successful units, and an increase in the number of complaints of employer ULPs. Such research provides quantitative, empirical evidence that a discrete change to the labour legislation framework, such as a change to the certification procedure, has observable and measurable ancillary effects on the broader labour relations system. The results of these studies are summarized and tested against the hypotheses drawn from the strategic dynamic model. The predictions of this model are found to be highly consistent with the empirical evidence, suggesting that the strategic dynamic model is a useful instrument for explaining union certification.
A. Fewer Applications for Certification

Consistent with the hypotheses set out above, introduction of mandatory representation votes for certification has been linked with a reduction in the number of applications for certification, the proportion of applications that succeed, and with a reduction in the probability that an application will result in certification.

Examination of the Ontario Labour Relations Board’s (OLRB) aggregate statistics indicates that, since the introduction of the mandatory vote procedure to Ontario in November 1995, there has been a pronounced overall decline in the number of certification applications filed with the Board. Table 1 sets out the number of certification applications filed with the OLRB for each fiscal year from 1993-94 to the latest available data for the 2003-04 year (this information is also displayed in graph form in Figures 3 and 4). Further, a study using multivariate regression analysis determined that introduction of the mandatory vote procedure with Bill 7 in Ontario was associated with a statistically significant decline in certification applications of 19.4 per cent, compared to the 1987-90 period.


Table 1: Ontario Certification Activity

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Applications Filed</th>
<th>Disposed of</th>
<th>Granted</th>
<th>Granted as proportion of cases disposed of (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993-94</td>
<td>1166</td>
<td>1135</td>
<td>829</td>
<td>73.0</td>
</tr>
<tr>
<td>1994-95</td>
<td>1077</td>
<td>987</td>
<td>762</td>
<td>77.2</td>
</tr>
<tr>
<td>1995-96</td>
<td>797</td>
<td>759</td>
<td>510</td>
<td>67.2</td>
</tr>
<tr>
<td>1996-97</td>
<td>683</td>
<td>656</td>
<td>387</td>
<td>59.0</td>
</tr>
<tr>
<td>1997-98</td>
<td>733</td>
<td>664</td>
<td>424</td>
<td>63.9</td>
</tr>
<tr>
<td>1998-99</td>
<td>692</td>
<td>665</td>
<td>415</td>
<td>62.4</td>
</tr>
<tr>
<td>1999-00</td>
<td>700</td>
<td>567</td>
<td>313</td>
<td>55.2</td>
</tr>
<tr>
<td>2000-01</td>
<td>850</td>
<td>927</td>
<td>521</td>
<td>56.2</td>
</tr>
<tr>
<td>2001-02</td>
<td>624</td>
<td>686</td>
<td>307</td>
<td>44.8</td>
</tr>
<tr>
<td>2002-03</td>
<td>658</td>
<td>627</td>
<td>318</td>
<td>50.1</td>
</tr>
<tr>
<td>2003-04</td>
<td>729</td>
<td>584</td>
<td>301</td>
<td>51.5</td>
</tr>
</tbody>
</table>

Source: Ontario, Ontario Labour Relations Board Annual Reports, 1992 to 2001 (Toronto: Queen’s Printer); conversation with Kevin Jenkins, OLRB library for 2001-2004 figures.

Figure 3: Certification Applications Filed and Granted in Ontario
B. **Different Characteristics of Applicant and Successful Units**

It was hypothesized above in Part IV that the reduction in applications and certification activity resulting from introduction of the mandatory vote would be most evident in relatively difficult to organize units and among more vulnerable employees, such as workers in the private sector and in traditionally difficult to organize industries such as the service industry, part-time workers, and smaller units. Indeed, there is evidence that statistically significant differences exist between the two certification regimes in Ontario with respect to the particular characteristics of applicant units and of certified units. First, there is evidence that more organizing and certification activity occurred in the public sector than the private sector under Bill 7 than under Bill 40. The proportion of all certification applications arising from the public sector was approximately 8 per cent higher under Bill 7 than it had been under Bill 40. Further, public sector applicants have a much higher likelihood

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of being certified than private sector applicants, and this public sector advantage is larger under a mandatory vote procedure (15.3 per cent) than under the card procedure (5.8 per cent).\footnote{Slinn, "Empirical Analysis," supra note 42 at 370.}

Introduction of the mandatory vote saw a shift in organizing activity towards industries such as manufacturing, which are a traditional source of union membership, and away from industries that are regarded as more difficult to unionize, such as the service sector. The proportion of both applicants and certified units in the manufacturing industry was considerably greater during the Bill 7 period (25 per cent of applications and 24.7 per cent of certifications issued in this period were for manufacturing units compared to 16.9 per cent of applicants and 15.7 per cent of successful cases under Bill 40). Meanwhile certification activity from the service sector was distinctly lower under Bill 7 than it had been under Bill 40. The proportion of applicants from this sector was only 67 per cent under Bill 7, while it had been 76.9 per cent under Bill 40; and, the fraction of successful service industry cases fell from 77.3 per cent to 66.2 per cent.\footnote{Slinn, "Compulsory Certification Votes," supra note 42 at Table 3.}

Research also indicates that the influence of the type of employment in the unit differs between Bill 7 and Bill 40. Under Bill 7 only, there was a significant relationship between units of full-time employees and the likelihood of certification success. Under this certification procedure, full-time units enjoyed a 73.1 per cent probability of certification success, which was 8 per cent greater than for all-employee units and only 0.8 per cent greater than for part-time units.\footnote{Ibid. at 376.}

Further, the mean size of units applied for was significantly larger under Bill 7 than under Bill 40: 63 employees compared to 40 employees.\footnote{Slinn, "Certification Experience," supra note 11 at 158, 166.} This difference was even more pronounced among public sector applications than among applicants from the private sector. The average number of employees in applicant private sector units was 36 workers under Bill 40, but rose to an average of 49 workers under Bill 7. Meanwhile, public sector applications under Bill 40 averaged 48 workers, and 89 employees under Bill 7.\footnote{Slinn, "Certification Differences," supra note 44 at Table 3.}
Not surprisingly, then, it has also been found that the average size of bargaining units granted certification under Bill 7 was substantially larger, on average (approximately 63 employees), compared to those units certified under Bill 40 (with a mean of approximately 36 employees).\(^{50}\) Again, this difference was even more distinct among public sector cases than among private sector units, with the average size of public sector units being 43 employees under Bill 40, and 89 employees under the subsequent legislation. The mean size of private sector units was 33 workers under Bill 40 and 44 employees under Bill 7.\(^{51}\)

Therefore, as predicted by the model, the evidence demonstrates that less organizing activity was seen in weaker and more vulnerable groups of employees such as the private sector, more difficult to organize industries, among part-time workers, and for smaller units of employees.

C. Increased Union Avoidance Activity

The strategic dynamic model of certification predicts that the level of union avoidance activity employers engage in will be substantially greater under a mandatory vote procedure than under card-based certification. However, labour relations boards only collect data on union avoidance activity if it gives rise to an ULP complaint, and no surveys of union avoidance activity have yet compared the frequency of employer anti-union efforts between certification procedures. Consequently, there is no direct empirical evidence available to test this hypothesis, and we will only be able to examine data and research on ULPs.\(^{52}\)

\(^{50}\) Slinn, “Certification Experience,” supra note 11 at 158, 166.

\(^{51}\) Slinn, “Certification Differences,” supra note 44 at Table 4. More precise measurement of the relationship between unit size and probability of certification has been difficult to achieve, and regression analysis has suggested that this relationship may be complex and non-linear. Slinn, “Empirical Analysis,” supra note 42 at 374.

\(^{52}\) Considerable research has investigated the effect of employers’ union avoidance tactics on certification outcomes and on the longer-term viability of certified units. Particular tactics have been found to significantly reduce the likelihood of certification. Karen Bentham, “Employer Resistance to Union Certification” (2002) 57 R.I. 159; Chris Riddell, “Union Suppression and Certification Success” (2001) 34 Can. J. Econ. 396; and Terry Thomason & Suzanne Pozzebon, “Managerial Opposition to Union Certification in Quebec and Ontario” (1998) 53 R.I. 750. Even the existence of a complaint of employer ULP is associated with a reduced probability of certification (Riddell, ibid.); Thomason, supra note 19. Further, union avoidance activities by
The majority of studies do not find that the number or proportion of ULPS increases with introduction of a mandatory representation vote; rather, evidence suggests that ULP complaints decline substantially. Two recent examinations of ULP complaints in Ontario find that the number of complaints was significantly lower under the Bill 7 mandatory vote procedure than under the card-check procedure in place under Bill 40. For instance, Lebi and Mitchell found that the number of complaints filed in 2001-02 (under mandatory vote certification) was 30 per cent lower than in 1994-95 (the final year of card-check certification). Further, Martinello found that relatively more ULP complaints were filed with the OLRB during the Bill 40 period of card-check certification than in the pre-Bill 40 period (also card-check certification).

These two studies also suggest that these changes in numbers of complaints do not necessarily reflect any change in employer behaviour but instead reflect the union's evaluation of the utility of making a ULP complaint. The authors note that these results do not necessarily lead to the conclusion that employers are committing fewer ULPS under the vote procedure, but may stem from unions' lack of confidence in the Board's ability to effectively adjudicate or remedy employer misconduct. Martinello suggests that this rise in complaints under Bill 40 may reflect the fact that making such complaints was more attractive to unions under Bill 40, because this legislation gave the OLRB broader powers to remedy ULPS. As a result, the increase in complaints during this period may have been due to unions' greater tendency to file ULP complaints rather than reflecting any change in employers' behaviour. Notably,
Bill 7 substantially reduced the Board's remedial powers, in particular by removing its power to order interim reinstatement of terminated employees, and by making the test for remedial certification more difficult for unions to meet. Therefore, arguably, Bill 7 made it less desirable for unions to pursue ULPs and may have led to a reduction in complaints. Another aspect of board ineffectiveness is delay. Lebi and Mitchell suggest that the substantial increase in the length of time the Board takes to process complaints that has occurred since Bill 7 was introduced is another source of lack of confidence in the Board's ability to usefully address unlawful employer conduct.58

In contrast with these results, an early study of certification in British Columbia between 1984 and 1987 found that the ratio of employer ULP complaints to certification applications averaged 15.9 per cent over the 1974-83 period of card-check certification, but rose to an average of 42.7 per cent for the 1984-87 period when representation votes were required for certification.59 The authors concluded that this reflected a tremendous increase in employer ULPs during organizing following introduction of the mandatory vote. However, these results should be read with caution, as the British Columbia Labour Relations Board does not distinguish, in its collection of aggregate statistics on ULPs, between those complaints that arise in the context of certification and those that do not. Therefore, it is not possible to determine how accurately these ULP statistics reflect the occurrence of complaints arising from organizing.

In evaluating this evidence against the model's prediction, it is important to recognize that the number of ULP complaints is not necessarily related to the incidence of ULPs being committed and is an even less exact indicator of the level of anti-organizing activity that is occurring. Therefore, the evidence from the two studies of the Ontario experience discussed above is not sufficient to reject the hypothesis that union avoidance activity will increase under a mandatory certification vote regime.

58 Lebi & Mitchell, supra note 42 at 478.
D. Fewer Certifications Granted and Lower Chance of Success

The OLRB's aggregate statistics also indicate that there has been a marked overall decline in the number of certifications issued by the Board in the years since the mandatory vote procedure was introduced in 1995 (see Table 1 and Figure 3 above). Similarly, it is evident that the certification success rate (measured as a ratio of the number of certifications issued to the number of certification applications disposed of, for each fiscal year) has also declined in the years following Bill 7. This information is set out in Table 1 and is represented in graph form in Figure 4, above. A statistically significant difference in overall success rates in certification applications has been found: with a reduction from 72.7 per cent under Bill 40 to 64.3 per cent under Bill 7.60

More sophisticated statistical analyses, using multivariate regression techniques, have concluded that the isolated effect of the introduction of Bill 7, including the mandatory representation vote, had a significant negative impact on certification success rates. One study found that, compared to the 1987-90 period, the number of certification applications granted was reduced by 28.7 per cent, and the certification success rate fell by 11.9 per cent.61 Other research estimates that Bill 7 reduced the probability of certification success by approximately 21.5 percentage points, relative to applications filed during the Bill 40 period.62 These findings accord with earlier quantitative empirical studies involving other Canadian jurisdictions. An examination of the 1984 introduction of mandatory certification elections in British Columbia concluded that this legislative change resulted in an estimated 10.3 percentage point reduction in certification application success rates.63 Similarly, a study including certification data aggregated across nine Canadian jurisdictions, several of which had mandatory vote requirements, determined that the presence of a vote procedure was

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60 Slinn, "Empirical Analysis," supra note 42 at 359. Studies have also found a statistically significant drop in the certification application success rate between the Bill 40 and Bill 7 periods within each of the private and public sectors, with the decline in the private sector being substantially greater than that in the public sector. Slinn, "Certification Differences," supra note 44 at 280; Slinn, "Compulsory Certification Votes," supra note 42.

61 Martinello, supra note 43 at 24; Slinn, "Certification Experience," supra note 11.


63 Felice Martinello, "Correlates of Certification Application Success in British Columbia, Saskatchewan and Manitoba" (1996) 51 R.I. 544.
associated with approximately a 9 per cent reduction in the certification success rate in that jurisdiction.\(^6^4\)

These observations and empirical results support the hypotheses that certification rates and likelihood of certification success would be reduced under the mandatory vote procedure.

VI. PROPOSED LABOUR RELATIONS SYSTEM AMENDMENTS

Accepting that we are unlikely to see a widespread return to the card-check procedure, due to the political cost of such a change,\(^6^5\) the more pressing question becomes: Can we lessen the undesirable consequences of the existing mandatory vote procedure? The strategic dynamic certification model identifies the most important undesirable outcomes of the vote procedure, and the elements of the procedure producing these negative outcomes: the encouragement of unlawful employer conduct and the deterrence of employee participation in the unionization decision. Thus, this model allows us to focus our reforms on these elements. Therefore, procedural revisions must concentrate on these two aspects of the certification process, with the following goals in mind: first, decreasing incentives and increasing disincentives for employers to engage in unlawful union-avoidance activities; and second, reducing the costs and risks that deter employees from engaging in the unionization decision. Recommendations addressing these two elements will improve the accuracy and legitimacy of this certification procedure by allowing it to better gauge employees’ wishes regarding union representation.

These objectives would be furthered by introducing changes such as providing greater confidentiality to employees; introducing a

\(^{64}\) Susan Johnson, “Card Check or Mandatory Vote? How the Type of Union Recognition Procedure Affects Union Certification Success” (2002) Econ. J. 344.

\(^{65}\) In Ontario, for instance, the recently-elected Liberal government has not proposed reversing the previous Conservative government’s changes to labour legislation by re-instituting card-check certification for any industry other than construction (Bill 144, supra note 9 at s. 8). Although return to the card-check system is proposed for only a single industry, Bill 144 met great resistance from the opposition, employers, and employers’ groups. A private member’s bill proposed by a New Democratic Party Member of the Legislature, Bill 151, Labour Relations Amendment Act (Certification), proposed re-introducing card-check certification for all other industries covered by the OLRA. This Bill did not progress beyond First Reading, on 25 November 2004.
quicker vote; and providing timely and effective processing and remedies for ULPs, which would be facilitated by developing and applying more readily used bright-line rules for distinguishing unlawful conduct. More certain communication of these rules to both employers and employees would also be helpful. A final focus for change is to remove or reverse accompanying legislative amendments that exacerbate the undesirable effects of the mandatory vote procedure.

A. **Confidential Voting**

Representation elections, as they are presently run, provide employers (and unions) with a great deal of information about which employees voted and about the ballots cast.\textsuperscript{66} Elections take place at the workplace, with employer and union scrutineers present and able to observe which employees vote. Later, the board releases detailed information about the ballots cast. This level of worker scrutiny is unnecessary, and encourages employers and unions to draw conclusions about, and possibly punish, individual employees' choices. Employees should have the opportunity to freely choose both whether and how to vote.

There are several options for providing employees with greater privacy in elections. These include using alternative voting mechanisms or replacing elections with board-conducted employee polls, and limiting the amount of election information released by the board. These alternatives offer several benefits. Allowing voting outside of the workplace through mail-in or electronic voting, or conducting board polls rather than elections, would relieve employees' fears of employer and union scrutiny over their voting choices. Additionally, mail-in or electronic voting may remove employer resentment at having board officers invade their property and set up polling stations, which may taint the bargaining relationship as an early demonstration to the employer of the board (and the union's) ability to seize control of the employer's own workplace. These alternatives could also reduce expenses the board incurs in setting up and staffing certification polls at different worksites.

Employees could be relieved of scrutiny and allowed a truly "secret" ballot by introducing an alternative vote mechanism, such as

\textsuperscript{66} Representation elections under the OLRA are used as an example here.
mailed-in ballots or electronic voting. Mailed-in ballots are currently used in circumstances such as remote worksites where some employees, though eligible to vote, are not reasonably able to attend at the workplace to cast their votes. This could be provided as an option available to all eligible voters, although it is a slow and cumbersome process. "Regional poll site" internet voting, "kiosk" internet voting, or remote online voting are three forms of electronic voting that could be useful in certification elections. The main weakness of regional poll site or kiosk electronic voting is that the polling locations—although any provincial government facility, or public facilities such as libraries could be used—may not be conveniently accessible to all employees. Another possible difficulty arises where individuals not on the voters’ list seek to cast ballots. Current board practice is to double-seal these ballots and to determine whether or not to count them after a hearing has been held on the issue. This may be difficult to accommodate with unstaffed kiosks or online voting.

Electronic voting is still in its infancy and gives rise to a number of concerns such as difficulty with remote voter authentication; technical problems, including deliberate interference with the service, causing voters to be unable to access online voting; concerns about whether ballot secrecy can be ensured if votes are cast by employees on their employer’s computer or if the computer is infected by a virus; the potential for alteration or loss of ballots; reliability of vote transport and storage to ensure no votes are lost or altered; and preventing individuals from casting multiple votes. However, these limitations should be assessed in view of the fact that these methods may be used as an alternative, rather than the sole, means of voting, and that representation elections are of a much smaller, more manageable scale than political elections. Even at this early stage of technological development, online voting has been used in a number of political and

67 “Regional Poll Site” or “kiosk” voting systems provide computers at staffed and unstaffed polling places, respectively. “Remote” online voting allows voters to cast their vote from any internet-connected computer (and possibly digital television and mobile phone), at either a public or private terminal. For a comprehensive overview of online voting systems see Parliamentary Office of Science and Technology, “Online Voting” Number 155 (May 2001) 2, online: U.K. Parliament <http://www.parliament.uk/post/pn155.pdf>.

68 California, Report of the California Internet Voting Task Force (January 2000), online: California Secretary of State <http://www.ss.ca.gov/executive/ivote/>. This report’s concerns about internet voting are summarized in Parliamentary Office of Science and Technology, ibid. at 4.
private elections. Although a union representation election has not yet been held electronically, this may not be far off.

Another option is to replace elections with board-conducted polls of employees. Without employer or union scrutiny, board officers would confidentially poll each employee regarding which of three alternatives the employee preferred: certification for the applicant union; status quo (no certification for the union); or whether the employee has no preference between the first two options. There are several benefits of this alternative: it is secret, and unlike the vote procedure it is truly confidential—the number and identity of participants is not information that an employer (or union) could use against employees; the board officer could answer any questions the employee might have about the choices before them or the effect of their selection; employees do not have to decide whether to vote or not; there is no employer or union scrutiny; and it is a census of employee wishes, removing any uncertainty about the wishes of employees who would have chosen not to cast a ballot in an election. The main barrier to implementing such polls would be the amount of board time and resources that would be required, although some costs could be recovered if the board charged unions and employers fees for this service.

Apart from the lack of confidentiality employees endure at the voting booth, labour boards disclose detailed information about elections, including the total number of ballots cast, the number of votes

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69 Online voting services have been provided for both political and union elections by a company called Election.com. In 2001 Accenture purchased the public sector assets of this company, and continues to provide these “eDemocracy Services.” Accenture Press Releases, online: <http://www.accenture.com/xd/xd.asp?it=enweb&xd=dynamicpressrelease_624.xml>; <http://www.accenture.com/xd/xd.asp?it=enweb&xd=dynamicpressrelease_189.xml>. For examples of electronic political and union elections, see Parliamentary Office of Science and Technology, supra note 67.

70 The Trades Union Congress (TUC) coordinated an “e-Democracy” e-mail campaign, held 20 January 2003, that succeeded in urging the British Minister for Employment Relations to amend the Employment Relations Act 1999 to allow unions to conduct statutory elections electronically. Trades Union Congress, online: <http://www.tuc.org.uk/the_tuc/votesupport.cfm>. Although not an election, the United Food and Commercial Workers (UFCW) offered union authorization cards on its website for employees to sign and mail in during its 1999 campaign to organize a Las Vegas Wal-mart. UFCW, online: <http://www.walmartworkerslv.com/organize/sign.htm>.
for and against the union, and the number of spoiled ballots. Especially in close elections or smaller workplaces, this information may tempt an employer to speculate about the voting of individual workers, and employees may be concerned that they will be punished for voting—or perhaps for not voting.

Rather than releasing this detailed information, boards could simply disclose the proportion of eligible votes cast in favour of certification. This would better protect employees from employer retaliation by making it more difficult for the employer to discern how individuals voted. Employers may argue that this will reduce their confidence in election outcomes. Without knowing how many employees voted, the employer may believe that the election was not truly representative of the wishes of its employees. However, the legislatures in most jurisdictions have decided not to require that any minimum proportion of employees in the unit cast ballots in order for an election to be valid. For those jurisdictions requiring a minimum fraction of voters, as long as this minimum is met, then the legislature has effectively determined that no further requirement of representativeness is necessary.

B. Protect Employees During the Post-Application Stage

A key attribute of the card-check procedure is that employee support for unionization is measured, in many cases, before the employer is aware of organizing and, therefore, before the employer has a chance to unlawfully interfere with employees’ free choice. In contrast, under the vote procedure, elections are held several days after the employer receives notice of the application. During this post-application stage employer interference is most likely and employees are at their most vulnerable. The risks to employees during this period could be reduced by accelerating the vote, or by increasing supervision of the workplace. Each alternative would reduce the opportunity for unlawful employer interference.

Possible drawbacks to shortening the pre-election period by introducing an even sooner “quick vote” are that it may be difficult for the board to hold elections quickly, and that employers will still be

71 See e.g. Ontario, Ministry of Labour, OLRB Monthly Reports (Toronto: Queen’s Printer).
aware of the certification application prior to the election and may still be able to engage in unlawful conduct. Indeed, an abbreviated pre-election period may result in employer responses that are even less considered and more reactionary than is currently the situation.

Alternatively, increasing supervision of the workplace during the post-application period by permitting a union representative or a board representative to attend at the workplace to monitor for ULPs might discourage at least the most blatant forms of employer misconduct during this period. However, employers would likely object strongly to being required to allow a union or board presence in their workplace.

C. Expedited ULP Processing

Access to prompt processing of complaints of ULPs alleged to have been committed during organizing is vital to ensuring the integrity of representation elections and discouraging ULPs. For example, British Columbia's Code requires the board to hold an expedited hearing for any ULP complaint alleging unlawful discharge, suspension, transfer, layoff, or other discipline—whether or not it is in the context of organizing—as long as no collective agreement is in force. The board must commence the hearing within three days of the date the complaint is filed, is directed to proceed promptly with the hearing, and is required to issue a decision on the complaint within two days of the end of the hearing.72 Similar provisions should be incorporated into the legislation of all mandatory vote jurisdictions.73

D. Effective ULP Remedies

Hand in hand with expedited hearing of ULP complaints goes the need for timely and effective remedies capable of restoring the harm done by unlawful employer conduct and of discouraging employer misconduct. These are daunting requirements for a board to meet. In the certification context this requires that remedies be available prior to the election and that the board have the power to order the most

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72 British Columbia Labour Relations Code, supra note 10, s. 5(2).
73 Note that until 1995, Ontario had a provision for expedited hearings of ULP complaints. In 1995, Bill 7 removed the provision that had been introduced in 1993 by Bill 40 requiring the OLRB to hold an expedited hearing if one was requested (usually by the union, of course) on a ULP complaint of discharge or discipline during organizing. Supra note 41, s. 92(2).
effective remedies. The key challenge is to do so within the short time frame of the "quick vote": generally five to ten days from the date of application. While the "quick vote" element of the mandatory vote procedure was intended to prevent American-style campaigns and to allow elections to take place before significant employer interference can take place, the brief period between the certification application and election is also one of the greatest obstacles to effectively prosecuting and remedying ULPs.

Interim remedies and availability of expedited hearing of ULP complaints would make it possible for remedies to have the intended effect of reversing the effect of unlawful employer interference on employees when it still matters: prior to the election. Further, remedies such as remedial certification must be made available to be ordered by boards. Lebi and Mitchell argue convincingly that remedial certification is the single most effective deterrent and effective remedy for ULPs during organizing.74

E.  **Bright-line Standards for ULPs**

Whether or not particular conduct constitutes a ULP depends very much on the particular facts of the case, making it difficult for employers, unions, and employees alike to predict whether a given action will be determined to be unlawful. This uncertainty may encourage employers to engage in borderline conduct and may discourage unions and workers from pursuing complaints. Development of clearer rules and principles for ULPs would ameliorate this situation, although it would be a difficult challenge for boards to develop their jurisprudence in this manner.

Additionally, it would be helpful to have standards of conduct communicated to employers early in the certification process to ensure that employers were aware of at least those activities that are already clearly proscribed during organizing. This is particularly important for employers with little or no labour relations experience. Some labour boards already require the applicant union to provide the employer with copies of board certification information bulletins with the certification application the union must deliver to the employer. Information

74 Lebi & Mitchell, *supra* note 42.
bulletins on ULPs could also be included in this package of certification documents. Alternatively, employers may be more receptive to this guidance if it was received from the board rather than from the union, and these materials could be sent to employers by the board at the time it sends them confirmation of the application for certification.

F. Ancillary Amendments

A mandatory vote procedure was often introduced as one element of a package of amendments to provincial labour legislation. Although in none of these instances were ancillary changes included in the package with the intention of counteracting any anticipated negative effects of imposing a vote requirement for certification, in some cases accompanying amendments exacerbated the situation by enhancing the distortions in the system introduced by the change in representation procedure. These ancillary changes included: expanding the scope of employer anti-union conduct; restricting remedies for employer ULPs; and removing the requirement that allegations of ULPs during organizing, such as unlawful termination or discipline, be heard on an expedited basis.75

75 For instance, at the same time mandatory votes were introduced in Ontario in 1995, the requirement that the OLRB comply with a party's request for an expedited hearing on a ULP complaint of discharge or discipline during organizing (s. 92.2 OLRA) was removed, the Board's jurisdiction to order interim reinstatement of terminated employees was removed, and the Board's power to order remedial certification for employer unfair labour practices was restricted, and shortly thereafter removed altogether. Labour Relations and Employment Statute Law Amendment Act, supra note 8, ss. 97(2), 11(1). Remedial certifications were later removed altogether from the Labour Relations Act by the Economic Development and Workplace Democracy Act, 1998, S.O. 1998, c. 8 (in force 29 June 1998), but were just recently reinstated by s. 2 of Bill 144 (in force 13 June 2005).

In British Columbia, soon after mandatory votes were reinstated in August 2001 with the Skills Development and Labour Statutes Amendment Act, supra note 8, additional amendments were made to the B.C. Labour Relations Code, including changes to unfair labour practice provisions and the provision setting out employers' right to communicate with employees. Amendments to sections 2, 6(1), and 8 of the Labour Relations Code; R.S.B.C. 1996, c. 244, pursuant to ss. 3 and 4 of the Labour Relations Code Amendment Act, 2002, S.B.C. 2002 c. 47 (in force 1 September 2002) (B.C. Reg. 182/2002). The effect of these changes was to substantially broaden the scope for employer communications, such that previously unlawful conduct, including during union organizing, would now be lawful. Convergys Customer Management Canada Inc., BCLRB Letter Decision No. B62/2003 at paras. 102-04, online: <http://www.lrb.bc.ca/decisions/B62$2003.pdf>, upheld on reconsideration, BCLRB Letter Decision No. B111/2003, online: <http://www.lrb.bc.ca/decisions/B111$2003.pdf>.
Clearly, these types of ancillary legislative changes aggravate the weaknesses of the vote procedure by further encouraging employer misconduct during organizing. Therefore, these changes should be reversed: labour boards should have broad remedial powers and, particularly in the circumstances of a “quick vote,” boards should be empowered to hold expedited hearings into complaints of ULPS committed during organizing.

VII. CONCLUSION

The strategic dynamic model of certification, illustrating the interdependence and interconnection between the elements of the certification process, is an effective framework for analyzing the certification process, and explaining the conduct of actors and the outcomes of unionization attempts. Application of the model demonstrates that an alteration to the legislative framework, such as changing the certification procedure, cannot be made in isolation and without affecting the operation of the labour relations system more broadly. Such a change alters the incentives, disincentives, and opportunities for the participants in the system. In particular, the change from a card-check to a mandatory representation vote certification procedure increases the opportunities and incentives for employers to engage in unlawful union avoidance activities, reduces the incentives for unions to organize new members, and discourages employees from participating in the unionization decision.

Finally, this article offers several improvements, using the model to guide reform of the legislative framework. These proposals include measures that would increase confidentiality for employees voting, better protect employees from employer retaliation during the post-application stage, expedite processing of ULP complaints, offer more effective remedies for ULPs, and provide clearer standards defining unlawful conduct. These proposed changes have the potential to reduce the negative effects of the mandatory vote certification procedure, thereby enhancing the validity of the certification process and the labour relations system.