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Canadian strike ballot laws: Barely a tempest in a teapot

Sara Slinn and Eric Tucker*

This article locates strike ballot laws at the intersection of two of labour law's primary goals, promoting collective bargaining by responsible unions and reducing industrial conflict. Depending on their design, strike ballot laws may aim to protect democratic voice or to create an obstacle to engaging in lawful strikes. Strike ballot requirements in Canada were initially imposed during World War II primarily to reduce industrial conflict. The requirement was controversial and after the war most provinces opted not to make a strike ballot a condition of lawful strike action. Between the 1960s and the late 1990s, however, strike ballot votes became universally required in private sector collective bargaining laws. Focusing on three Canadian jurisdictions, this article explores the circumstances in which these laws were enacted and the forms they took. Overall, the article finds that Canadian strike ballot laws do not unduly burden unions when they seek a mandate to conduct a lawful strike from their members and that they have been interpreted by labour boards and courts as a way to protect trade union democracy rather than to limit industrial conflict. For this reason, the issue of strike votes is not currently a controversial topic in Canada.

Conceptual Introduction

Collective bargaining regimes are usually said to have two aims: facilitating workers' ability to bargain collectively and reducing industrial conflict. The balance between these two objectives, however, varies over time and place, in response to a variety of factors, including labour militancy and the predilections of governments. The potential for conflict between these two aims can be reduced by modifying the first. Instead of promoting unionisation in all its forms as the path to collective bargaining, policymakers may clarify that the goal is to promote only certain kinds of unionism: responsible unionism that accepts constraints on collective action, while discouraging or repressing other kinds that are seen to promote labour militancy. In Canada, and elsewhere, collective bargaining laws have often been designed to encourage responsible unions that respect the legal framework of collective bargaining and the employer's right to manage. Additionally, responsible unions are supposed to respect the democratic wishes of its members and, particularly under the Wagner Act model of collective bargaining, the wishes of the majority of workers in each of its certified bargaining units with respect to whether to strike or ratify a collective agreement. However, the extent of the regime's commitment to this particular norm is contingent in the sense that it is valued more highly where democratic voice restrains labour militancy rather than facilitates it.

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Strike ballot laws fit precisely at the intersection between the objectives of reducing industrial conflict and promoting responsible unionism. For example, the law may favour the former objective by prohibiting unions from conducting strike votes at times when strikes would be unlawful.¹ Responsible unionism here requires the suppression of democratic decision making. On the other hand, the law often requires unions to conduct strike votes as a precondition for a legal strike, supposedly because we value democratic unionism so highly that we cannot trust unions to behave democratically of their own accord. Underlying this combination of prohibitions on holding and requirements to hold strike votes is the desire to reduce strikes and to make unions behave responsibly *as the regime defines it*.²

The balance between the objectives of strike reduction, responsible unionism and union democracy, however, is variable. Strike ballot laws can be designed to suppress strike activity, even if it defeats the democratic wishes of union members, or they can be designed to protect the democratic rights of union members even though very little conflict reduction results. The overarching goal of this article is to examine the development and current practice of private-sector strike ballot laws in Canada with a view to understanding their role within this larger framework.³

The issue of strike ballots does not loom large in current discussions of collective bargaining reforms in Canada. We will return to the question of why this is so, but it is important to understand that in Canada, like in most developed economies, strike frequency has declined dramatically over the past three decades.⁴ There are many reasons for this decline, but neither repressive law in general, nor strike ballots in particular, explain very much of it. This very low level of private sector strike activity may contribute to Canadian governments' lack of interest in private sector strike suppression mechanisms.⁵

1 In Canada, strikes are expressly prohibited while a collective agreement is in force. As well, procedural requirements, such as strike votes, commonly must be complied with for a strike to be legal.

2 A recent study of Canadian private sector work stoppages between 1978 and 2008 found mandatory strike votes had no significant influence on strike incidence, but a significant reduction in strike duration: see M Campolieti, R Hebdon and B Dachis, 'The Impact of Collective Bargaining Legislation on Strike Activity and Wage Settlements' (2014) 53 *Industrial Relations* 394. The findings relating to duration accord with earlier research: see M Gunderson and A Melino, 'The Effects of Public Policy on Strike Duration' (1990) 8 *Journal of Labor Economics* 295; P Cramton, M Gunderson and J Tracy, 'The Effect of Collective Bargaining Legislation on Strikes and Wages' (1999) 81 *Review of Economics and Statistics* 475. However, it does not appear that these findings have influenced governments' decisions regarding strike ballot requirements.

3 The limitation to the private sector is pragmatic. Legislative authority over labour law is primarily vested in the provinces. Each province typically has one statute covering the large majority of private sector workplaces, but many different statutes for the public sector. For example, separate collective bargaining statutes exist in Ontario for police, firefighters, teachers, etc. A review of the dozens of public sector collective bargaining laws would require separate treatment.

4 E Tucker, 'Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes', in A Bogg and T Novitz (Eds), *Voices at Work: Continuity and Change in the Common Law World*, Oxford University Press, Oxford, 2014, p 455; J Godard, 'What Has Happened to Strikes?' (2011) 49 *BJIR* 282.

5 Strike frequency has also declined in the public sector, but not as rapidly as in the private

However, that was not always the case. Discussion of strike votes and other mechanisms to restrict strike activity and promote responsible unionism were much more prominent during earlier periods when strikes were seen as a threat to the national economy. Therefore, this article begins from a historical perspective, looking at the adoption of measures to reduce industrial conflict from the early twentieth century and the development of legal prerequisites for lawful industrial action, including strike votes, during World War II and in the post war era to 1960. We then trace the spread of strike ballot laws from 1960 through to the present day. For this latter period we focus on three, illustrative, jurisdictions: British Columbia, Ontario and the federal jurisdiction. We next look at how these laws have been interpreted and applied in Canada. In the concluding section we return to the larger question of the reasons why strike ballot laws in Canada are not contentious.

The History of Strike Votes

Origins

The history of government controls on strikes in Canada begins in the first decade of the twentieth century. The number of strikes tripled in this decade compared to the previous one, reaching unprecedented levels and the government became alarmed at their impact on the national economy, particularly because of strikes on the railways and in the coal fields.⁶ Some nineteenth century provincial legislation attempted to encourage dispute resolution by creating voluntary conciliation procedures, but these measures were unused. The federal government adopted a more coercive approach in the 1907 Industrial Disputes Investigation Act (IDIA).⁷ The IDIA applied to mining, transportation and other sectors of the economy where labour disruptions could have substantial economic effects. It prohibited strikes and lockouts until the parties underwent a process of conciliation and violators could be prosecuted, although this was rarely done.

The federal government's constitutional authority over labour relations was successfully challenged in 1925, and the application of the IDIA was limited to federally regulated sectors of the economy.⁸ However, within a few years most provinces either opted to apply the federal law or enacted similar legislation. Therefore compulsory conciliation as a precondition for industrial conflict remained the norm in many important economic sectors. Substantive (rather than procedural) prohibitions on strikes were first introduced as a temporary measure toward the end of World War I but had no lasting impact. This did not change significantly during the Great Depression, although some

sector, consequently its share of strikes has increased: see J B Rose, 'Constraints on Public Sector Bargaining in Canada' (2016) 58 *JIR* 93 at 104–6. This is true despite the fact that the freedom to strike in the public sector is more restricted than in the private, and that those restrictions have increased in recent decades: see L Panitch and D Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, Garamond Press, Aurora, 2003.

6 D Cruikshank and G S Kealey, 'Strikes in Canada, 1891–1950' (1987) 20 *Labour* 85; J Fudge and E Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900–1948*, University of Toronto Press, Toronto, 2004.

7 Industrial Disputes Investigation Act SC 1907 c 20.

8 *Toronto Electric Commissioners v Snider* [1925] AC 396.

provinces required compulsory conciliation in all labour disputes, while others adopted stripped-down versions of the 1935 American Wagner Act. None of these statutes added further substantive or procedural restrictions on the freedom to strike.⁹

The situation changed dramatically during World War II when a strike wave swept the country, affecting war industries.¹⁰ The federal government's authority was greatly expanded under the War Measures Act, which allowed it to govern by order-in-council and to extend its jurisdiction into matters normally within provincial authority.¹¹ The federal government was reluctant to impose substantive restraints on striking and focused instead on procedures and guidelines. It first extended the IDIA to all war-related industries and then adopted wage guidelines, but the combination of measures failed to reduce conflict. In September 1941 the federal government shifted direction, permitting the Minister of Labour to order a government supervised strike vote if the minister was of the opinion that the strike might interfere with efficient production. In announcing PC 7307, the minister explained its goal was to 'to prevent the calling of strikes by snap decisions of minority groups and to ensure minimum interference with war production'.¹² Consequently, strikes in war industries were illegal until conciliation had been completed, the employees notified the minister they were contemplating a strike and, if a strike vote was ordered, a government-supervised strike vote was conducted and a majority of the employees affected by the dispute voted in favour. Anyone who struck in violation of the order, or who incited others to do so, was liable to a fine of up to \$500, or imprisonment up to 1 year, or both.¹³

Needless to say, the order was very unpopular with unions, but not because they opposed strike votes in principle. To the contrary, most international union constitutions required strike votes, if only because the leadership was concerned with irresponsible local action that could drain the union's coffers or disrupt its larger bargaining strategy. What unions objected to was government supervision and the regulatory framework it imposed. Although PC 7303 provided that the vote, if ordered, had to take place within 5 days of notice being given, all employees whose employment might be affected by the strike could vote, which could include supervisors and clerical staff. It also required a majority of all those entitled to vote rather than those who voted. Finally, the order prevented unions from conducting strike votes prior to conciliation. This was problematic because unions often held strike votes as a pressure tactic to convince the employer and the government there was a real strike threat.¹⁴ This odd combination of prohibiting unions from conducting strike votes before the completion of conciliation and requiring supervised strike votes after, suggests that the goal of strike prevention took precedence

⁹ Fudge and Tucker, above n 6, pp 51–88, 139–227.

¹⁰ J Webber, 'The Malaise of Compulsory Conciliation: Strike Prevention in Canada During World War II' (1985) 15 *Labour* 57.

¹¹ War Measures Act SC 1914 c 2.

¹² Canada Department of Labour, 'Restriction of Right to Strike in Canadian War Industries', *Labour Gazette*, Ottawa, 1941, at 1209.

¹³ Order in Council PC 7307, 1941.

¹⁴ W Cuthbertson, *Labour Goes to War: The CIO and the Construction of a New Social Order, 1939–1945*, University of British Columbia Press, Vancouver, 2012, pp 64, 79.

over any genuine concern with union democracy.

PC 7307 was amended later that year to slightly modify how the voting constituency would be determined by giving the minister discretion to decide which employees 'in his opinion are affected by the dispute'¹⁵ and then repealed in September 1944, 6 months after PC 1003 introduced a new collective bargaining regime to Canada.¹⁶ While PC 7307 was in force, 75% of strike votes succeeded, suggesting that generally union members were aligned with their leaders rather than being the hapless victims of their organisations. However, strikes were averted in two-thirds of all the disputes in which applications were made, suggesting that the threat of a strike vote itself helped produce a negotiated compromise.¹⁷

The new regime brought in by PC 1003 was modeled on the American Wagner Act, which provided for government administered certification of unions and required employers to bargain with certified unions. The certification procedure was designed to reduce industrial conflict by eliminating recognition strikes, which it did, but PC 1003 went further by also prohibiting strikes during the term of the collective agreement. Instead, disputes over the interpretation and application of collective agreements were to be resolved by binding arbitration. Notably, PC 1003 did not require a strike vote.

The immediate post-war period (1945–59)

During the war emergency, Canadian provinces retained legislative authority over labour relations in industries that were not war-related. However, most followed the federal government's lead and abandoned strike votes when they, too, adopted Wagner Act laws in 1944. The exception was Alberta, which, just before the war's end, amended its provincial statute to require supervised strike votes in response to concern that a segment of Alberta unions was communist dominated and could not be trusted to act responsibly or in their members' interests.¹⁸ Thus, with the exception of Alberta, Canada emerged from the end of the war with a national labour relations regime that neither prohibited nor required strike votes.

After the war provinces resumed their jurisdictional authority and all governments adopted versions of PC 1003 prohibiting certification strikes and strikes during the life of the collective agreement, and requiring conciliation prior to work stoppages. However, there was no consensus on strike votes and several different approaches were taken.

The federal government's proposed 1947 legislation covering labour relations in the federal jurisdiction did not require strike votes but, following

¹⁵ Order in Council PC 8821, 1941.

¹⁶ Order in Council PC 6893, 1944; Order in Council PC 1003, 1944.

¹⁷ Calculated from F R Anton, *Government Supervised Strike Votes*, C C H Canadian Ltd, Toronto, 1961, p 11. Early in 1944 the National War Labour Board issued a report that criticised delays resulting from the strike vote requirement: see Canada National War Labour Board and C McTague, *Report of National War Labour Board Arising out of Its Public Inquiry into Labour Relations and Wage Conditions: Together with a Minority Report*, King's Printer, Ottawa, 1944, at 6, 17.

¹⁸ Industrial Conciliation and Arbitration Act SA 1945 c 63 s 4; Industrial Conciliation and Arbitration Act SA 1938 c 57 s 46(4); Anton, *ibid*, at 24.

the precedent of PC 7307, prohibited them while the collective agreement was in force and until conciliation had been completed. The Canadian Congress of Labour opposed this restriction while the Canadian Manufacturers' Association called for mandatory supervised strike votes as a condition of strike legality.¹⁹ Other provinces, including Manitoba, New Brunswick, and Newfoundland adopted similar legislation prohibiting strike votes until after certain conditions were met, but not requiring them.

In contrast, three provinces adopted mandatory strike votes. Nova Scotia required a majority of all employees in the unit to vote for a strike, but the vote was not required to be government supervised, it just had to be 'secret'.²⁰ Alberta retained its wartime government-supervised strike vote requirement, despite organised labour's opposition.²¹ The requirement that strikes had to be approved by a majority of the 'employees affected' was amended in 1950 to require majority approval by employees in the bargaining unit.²²

In British Columbia, strike votes were even more controversial. The Minister of Labour opposed requiring government-supervised strike votes, but the governing Liberal-Conservative coalition imposed them anyway, notwithstanding demonstrations by organised labour and challenges in the Legislative Assembly from the labour friendly opposition party, the Canadian Commonwealth Federation, which characterised the supervised strike vote as 'the most vicious system ever introduced in Canada'. The government, with support from the press, stood firm and the amended bill was passed. The BC provision was less onerous than the Nova Scotia or the Alberta laws in that only a majority of those casting ballots had to be in favour.²³

This was the legal landscape in Canada in the late 1950s when Frank Anton undertook his study of supervised strike votes in North America. He found no evidence to support the proposition that government-supervised strike votes tended to reduce the number of strikes and concluded that the question of whether such votes better enabled union members to express their true wishes than union-supervised secret ballot votes could not be empirically tested. Given these results, Anton questioned the justification for government supervision.²⁴

19 Canada Department of Labour, 'Industrial Relations Bill Introduced by Government', *Labour Gazette*, Ottawa, 1947, at 923–40; Canada Department of Labour, 'Fair Wage Conditions in Dominion Government Contracts', *Labour Gazette*, Ottawa, 1947, at 1003; Canada Department of Labour, 'Convention of Canadian Manufacturers' Association Considers Labour Relations', *Labour Gazette*, Ottawa, 1947, at 1114; Union representatives who authorized an unlawful strike vote were liable to a fine of \$300: see Industrial Relations and Disputes Investigation Act SC 1948 c 54 s 21.

20 Trade Union Act, SNS 1947 c 3 s 24(3); Canada Department of Labour, 'Labour Legislation Enacted by the Parliament of Canada and the Nova Scotia Legislature in 1947', *Labour Gazette*, Ottawa, 1947, at 1329. The original bill only required a majority of those voting.

21 Alberta Labour Act SA 1947 c 8; According to Anton, labour leaders promised to expel communists from their ranks to satisfy the concern about irresponsible unions, but this was not acceptable to the government. As a trade-off, the government granted unions a dues check-off clause: see Anton, above n 17, pp 24–5.

22 Act to amend Alberta Labour Act SA 1950 c 34 s 28(b).

23 Industrial Conciliation and Arbitration Act SBC 1947 c 44 ss 31A, 72.

24 Anton, above n 17, at pp 144–52. See also F R Anton, 'Strike Voting Under Government Supervision' (1960) 3 *Canadian Public Administration* 299. Writing shortly after Anton's study, economist Stuart Jamieson examined the historical experience of strikes in British

The expansion of mandatory strike votes: (1960-present)

The appeal of mandatory strike votes in the immediate post-war era had been rather limited as most Canadian governments were content to allow unions to regulate their internal affairs. This began to change in the 1960s, and by 1998 every Canadian jurisdiction required a strike vote as a condition of engaging in a lawful strike. As is evident from Table 1, below, this change occurred incrementally and there is no obvious pattern to this development. Rather, each jurisdiction seems to have acted in response to local events although as more provinces embraced mandatory strike votes it is fair to surmise that this had some influence on the others. Liberal and conservative parties were more or less equally responsible for the enactment of mandatory strike vote laws, while the more labour friendly parties, the New Democratic Party (NDP) and the Parti Québécois of that era, were responsible for only two of these laws. Space does not permit a thorough account of developments in each province, but to provide a flavour we have chosen to discuss British Columbia, Ontario and the federal jurisdiction.

Table 1 Adoption of mandatory strike vote provisions in general labour legislation and government in power

1945–59 (Post War)	1960s	1970s	1980s	1990s
Alberta (1945, Social Credit)	Prince Edward Island (1962, Conservative)	New Brunswick (1971, Conservative)	Manitoba (1985, New Democratic Party)	Newfoundland (1993, Liberal)
British Columbia (1947, Liberal-Conservative coalition)	Saskatchewan (1966, Liberal)	Quebec (1977, Parti Québécois)		Ontario (1995, Conservative)
Nova Scotia (1947, Liberal)				Federal (1998, Liberal)

British Columbia

As we noted, British Columbia was one of the three provinces to adopt a mandatory strike vote law at the end of World War II, and it required government supervision. The legislation was tweaked in 1948, 1954 and 1960

Columbia and speculated that government supervised strike votes may have had the unintended effect of prolonging strike activity as government supervision offers an 'aura of official government sanction' to strikes: see S Jamieson, 'Regional Factors in Industrial Conflict: The Case of British Columbia' (1962) 28 *Canadian Journal of Economics and Political Science* 405 at 416.

to end mandatory government supervision while imposing a secret ballot requirement.²⁵ This was followed in 1968 by the termination of government supervision even on request.²⁶ In 1973 the new Labour Code of British Columbia included mandatory strike votes, but not government supervision.²⁷

In 1976 a conservative social credit government introduced additional procedural requirements for conducting strike votes, and expressly permitted the labour board to declare a vote void where it was satisfied it had not been held in accordance with the regulations.²⁸ Extensive regulations prescribing a significant role for the labour board in conducting strike votes were introduced in 1978.²⁹ However, following the election of an NDP government in 1991, a review of labour legislation by special advisers recommended removing the requirement for labour board involvement in votes, regarding it as unnecessary if the legislation contained rules for conducting the votes.³⁰ They also recommended permitting a union to continue a work stoppage by striking without a vote where the employer had initiated the stoppage with a lockout. These recommendations were reflected in Labour Code amendments the following year.³¹ Strike votes have not subsequently been an issue in this province.

Ontario

Ontario, Canada's most populous and industrialised province, enacted its first strike vote law in 1960, which required the protection of voters' anonymity but did not make strike votes mandatory.³² The issue did not arise again that decade, despite the strike wave that swept across the province in the late 1960s. Notably, a royal commission appointed to examine industrial conflict, headed by Mr Justice Ivan Rand, did not recommend mandatory strike votes even though it is generally regarded as advocating for stricter regulation of

25 Act to Amend Industrial Conciliation and Arbitration Act SBC 1948 c 31 ss 2, 77, 78; Labour Relations Act SBC 1954 c 17 ss 50(1)(a)–(b); Labour Relations Act SBC 1960 c 205 s 52; Anton, above n 17, pp 65–75.

26 Mediation Commission Act SBC 1968 c 26 s 70. Anton reported on the frequency and results of strike votes in BC for the periods 1952–58 and 1964–68, which were apparently the only years for which data was available during this time. During these 12 years, strike votes had nearly 90% voter turnout among the 184,268 workers eligible to cast ballots, and 79% of ballots supported strike authorisation: see F R Anton, 'Work Stoppages: Should Authorization be Mandatory?', in S M A Hameed (Ed), *Canadian Industrial Relations*, Butterworth, Toronto, 1975, p 347 at p 351.

27 Labour Code of British Columbia Act SBC 1973 c 122 ss 81, 82.

28 Labour Code of British Columbia Amendment Act, 1976, SBC 1976 c 26 s 4(a)(1).

29 BC Reg 39/78; British Columbia Government, Order in Council 242/78, 3 February 1978 amending BC Reg 522/73, later repealed and replaced by BC Reg 247/87, which imposed less detailed regulation of strike votes, but retained labour board control over some aspects of the vote.

30 J Baigent et al, *Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota, Minister of Labour*, Queen's Printer, Victoria, 1992, p 42.

31 Labour Relations Code SBC 1992 c 82 s 60; BC Reg 7/93 in force 13 January 1993, repealing BC Reg 247/87, repealing BC Reg 522/73.

32 Labour Relations Amendment Act 1960, SO 1960 c 54 s 25(2); courts held that violations of the secrecy requirement did not render the strike unlawful: see *Industrial Wire and Cable Ltd*; *Canadian Labour Congress* [1961] OLRB Rep March 451 cited in H W Arthurs, 'Book Review: Government Supervised Strike Votes' (1962) 40 *CBR* 139.

strikes.³³ Two years later the government tweaked the Labour Relations Act to require unions to provide voters 'ample opportunity to cast their ballots' in voluntary strike votes.³⁴

This is how matters stood until after the election of Ontario's first NDP government in 1990. The following year the government undertook a review of labour legislation. Reflecting the contentious nature of this inquiry, the Labour Law Reform Committee review produced separate management and labour reports. The management report recommended a mandatory secret ballot on the employer's last offer and contract ratification votes but did not recommend a mandatory strike vote.³⁵ The labour representatives' report, however, recommended considering mandatory strike votes provided that the union determined the timing of the vote.³⁶ This appears to have been something of a trade-off to try to secure tight restrictions on the use of replacement workers. However, strike votes were not required in the subsequent legislation.

Four years later the Progressive Conservative Party won the provincial election running, in part, on an aggressively anti-labour platform which frequently invoked the phrase 'workplace democracy' to justify proposed labour law changes. The new government quickly introduced extensive reforms, including mandatory strike votes and a restriction on when they could be held. This was introduced as a key element of the new legislation, and said to be necessary to ensure that 'the voice of an individual employee in the bargaining unit is heard in every instance in determining collective bargaining outcomes'.³⁷ The Minister of Labour claimed that strike votes were not held in many cases, and explained that restrictions on the timing of the vote were necessary because employees have difficulty making informed decisions about strikes early in bargaining. Nonetheless, the minister emphasised that strike votes would not be government supervised, but would continue to be administered by unions. These mandatory strike provisions remain in force today with the exception of the construction industry.³⁸

33 I C Rand, *Report of the Royal Commission Inquiry into Labour Disputes*, Ontario Royal Commission Inquiry into Labour Disputes, Queen's Printer, Toronto, 1968; H C Goldenberg, 'The Law and Labour Relations: A Reaction to the Rand Report' (1969) 24 *Industrial Relations* 308.

34 Act to amend Labour Relations Act SO 1970 c 85 s 24.

35 Labour Relations Act Reform Committee, *Report of the Management Representatives to the Labour Law Reform Committee of the Minister of Labour*, 14 April 1991, at 29.

36 Ministry of Labour, *Partnership and Participation in the 1990's: Labour Law Reform in Ontario*, Report of the Labour Representatives to the Labour Law Reform Committee of the Minister of Labour, Ontario, 14 April 1991 at 58.

37 Bill 7, Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity, Ontario, Ministry of Labour Media Kit, 4 October 1995.

38 Ontario, *Legislative Debates*, Legislative Assembly of Ontario, 18 October 1995, at 1630 (E Witmer); SO 1995 c 1, Sch A, as amended, s 79(3). In 1998, to reward construction unions for their support, the newly elected liberal government exempted the construction industry from mandatory strike ballots and certification elections: see SO 1998 c 8.

The Federal Jurisdiction

The federal government was the last jurisdiction to introduce mandatory strike votes, in 1998.³⁹ The question of strike votes had previously been considered, but rejected in the late 1960s. The Woods Task Force, which undertook the first major Canada-wide study of the post-war collective bargaining regime, released its report in 1968. The report rejected mandatory strike votes, but recommended that when votes were held that they be regulated to ensure secrecy and access. It also rejected a prohibition on premature strike votes; instead recommending that, where a strike vote was required by legislation, a vote would not be valid unless it was held after the union was in a legal strike position — that is after the conciliation process was completed.⁴⁰ The rationale for these recommendations was not framed in terms of strike prevention, but rather appeared in a section of the report dealing with union rights and responsibilities. Interestingly, the recommendations regarding strike votes differed from the views of expressed in a background study for the task force on the topic of union responsibility. There, Earl Palmer examined the constitutions of 50 unions and found that 32 contained strike vote provisions, including 29 specifying secret ballot strike votes. Although finding that constitutionally dictated secret strike votes were common, Palmer recommended a legislative requirement for a secret ballot strike vote among bargaining unit members as a precondition to a legal strike.⁴¹

The impetus for the 1998 introduction of a mandatory strike vote came from the 1996 report of the Sims Task Force, which had reviewed Part I of the federal Canada Labour Code.⁴² The task force noted the nearly unanimous employer support for mandatory strike votes, and reported that labour's key objections to these votes were that they might give rise to litigation and delay legitimate strikes. Although it recognised that most unions held strike votes, the task force appeared concerned that votes held early in the bargaining process, before the employer's bargaining position was clear, allowed the vote to become a strategic bargaining tool. The task force was also concerned that some unions only permitted members to vote, excluding non-members covered by the agreement from participating in what it characterised as a 'fundamental question'. The task force viewed these features as the source of employer skepticism about the validity of such votes.⁴³ Consequently, it concluded that:

We believe that a mandatory strike vote adds an important element to collective bargaining. Unions and the employees they represent are not disconnected from one another. Unions, as democratic organizations, customarily take their mandates from their members, particularly on crucial questions like the decision to take industrial

³⁹ An Act to amend the Canada Labour Code SC 1998 c 26 ss 37, 38.

⁴⁰ Canada Task Force on Labour Relations and H Woods, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations*, Privy Council Office, Ottawa, 1968, pp 152–4.

⁴¹ E E Palmer, *Responsible Decision-Making in Democratic Trade Unions*, Task Force on Labour Relations, Ottawa, 1969, pp 148–9. See especially Table XXVII.

⁴² Sims Task Force, *Canada Labour Code, Part I: Review: Seeking a Balance*, Public Works and Government Services Canada, Ottawa, 1996.

⁴³ *Ibid*, at 104–5.

action. A visible and proximate reaffirmation of that fact is healthy because it reinforces the legitimacy of the union's position in the eyes of the employer, the employees and the public at large.⁴⁴

Clearly the task force regarded unions incapable of ensuring legitimate strike vote procedures. It recommended mandatory secret ballot strike votes, with all employees in the bargaining unit eligible to vote, advance notice of the poll to be posted in the workplace, with the decision to be based on the majority of ballots cast, and results to be filed immediately with the Federal Mediation and Conciliation Service. It also recommended that the labour board be permitted to set out rules for conduct of the vote and determine whether these have been satisfied. Notably, the task force recommended that a strike vote should not be required for a strike that is in response to an employer lockout. However, it cautioned that the strike ballot provision was not meant to provide employers with a way to avoid or delay legal strike action. It recommended short time limits for challenges to strike vote validity and that the board should only hear challenges that raised serious questions about the vote outcome.⁴⁵ Finally, the task force recommended that unions continue to administer strike votes, but that a strike vote could be taken no more than 60 days prior to strike notice in order for the vote to be valid.⁴⁶

The federal liberal government subsequently enacted strike vote provisions in substantially the form recommended by the report. In introducing the strike vote provisions, the government echoed the task force's concerns about exclusion of non-member employees from voting, and ballots held early in bargaining not reflecting true support for a work stoppage.⁴⁷ By imposing a time limit on early votes the government sought to ensure strike ballots are 'less of a bargaining tactic to pressure employers and more of an authentic expression of the employees' wishes'⁴⁸ and that employees would 'fully realise the importance of such action and not make any rash decision'.⁴⁹ It is clear from debates on these amendments that concern about economic harm from work stoppages and fear of wildcat strikes strongly influenced legislators.

Conclusion

The apparent lack of government interest during the 1960s in using strike vote laws to reduce strike activity is perhaps somewhat surprising given that the mid- to late-1960s was a period of growing labour conflict, which included wildcat strikes while collective agreements were in force.⁵⁰ Governments' interest in and detailed regulation of strike votes expanded in the 1970s. Thus

44 Ibid, at 105.

45 Ibid.

46 Ibid, at 106.

47 Canada, *Parliamentary Debates*, House of Commons, 3 March 1997, at 8531 (G Proud).

48 Canada, *Parliamentary Debates*, House of Commons, 19 November 1996, at 6421 (R Nault).

49 Canada, *Parliamentary Debates*, House of Commons, 19 November 1996, at 6423 (Discepola).

50 P McInnis, 'Hothead Troubles: 1960s-Era Wildcat Strike Culture in Canada', in L Campbell, D Clément and G S Kealey (Eds), *Debating Dissent: Canada and the Sixties*, University of Toronto Press, Toronto, 2012.

for a while it appeared the risk noted by Paul Weiler (the prominent labour law scholar and first chair of the BC Labour Board), that once governments began requiring and regulating strike votes they will increase the level of detail of regulation, was going to materialise.⁵¹ However, we see that governments generally resisted this impulse and chose not to closely regulate strike votes. Indeed, it is telling that unions have not pressed to have mandatory strike vote laws repealed when labour friendly governments were in power.

The motivation for strike vote requirements remains a combination of strike prevention and the protection of worker voice in union decision-making, with the latter becoming more predominant over time. This is likely a result of a growing recognition that mandatory secret strike vote laws requiring a majority of the ballots cast by bargaining unit members do little to deter strikes. Strike votes are often seen as a way for unions to gain leverage in the bargaining game and so in most cases workers vote in favour of giving the union a strike mandate. However, there is perhaps less trust that left to their own devices unions will conduct strike votes fairly. This explains why many of the early strike vote laws did not require strike votes, but did stipulate that when they were held they must be by secret ballot. However, the distrust does not run so deep as to require government supervision.

The Current Law and Practice of Strike Votes in Canada

Summary of the current law

Table 2 below summarises the salient features of Canada's strike vote laws. Every jurisdiction now requires that a strike vote be held, and all strike votes are conducted by the union. In Alberta the labour board supervises the vote and provides fairly detailed rules about its conduct.⁵² Elsewhere, fairly minimal strike vote requirements are written into the statute, regulations or labour board rules.

Except in Quebec, all bargaining unit members have a right to vote, which outside of a closed shop, would include both union members as well as those who are not. The requirement to give all bargaining unit members a vote can be understood largely in terms of the North American model of exclusive bargaining agency, whereby unions represent all workers in the bargaining unit, not just their members, and thus have a duty of fair representation towards these non-members.

A secret ballot is required in all jurisdictions and, with the exception of Nova Scotia, a successful vote requires a majority of those voting to be in favour of a strike. Only Nova Scotia requires a majority of eligible voter. Some provinces stipulate when strike votes may be taken and a few make provisions about how long after the strike vote is conducted it remains valid. There are a variety of provisions regarding who may challenge the validity of

⁵¹ P Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell, Toronto, 1980, p 73.

⁵² Alberta Labour Relations Board, *Information Bulletin: #16, Strike and Lockout Votes*, Alberta, 2007.

strike votes and the consequences of invalidity.⁵³

This summary seems to indicate that strike ballot laws in Canada have not developed primarily as tools of strike suppression but rather as a manifestation of light regulation of union practices designed to insure that strikes do not occur without majority support. There is little data collected on strike votes because, except in Alberta, there is no need to apply to government to conduct one and there is no direct government supervision.⁵⁴ We therefore turn to the case law to get a sense of the types of issues that have arisen and whether these seem to be causing unions significant problems when they attempt to engage in lawful strikes.

⁵³ For a more detailed summary: see G W Adams, *Canadian Labour Law*, Westlaw, Online edn, L 11.7.

⁵⁴ The Alberta Labour Relations Board does not routinely publish statistics on strike votes and we have not requested data.

Table 2 Prerequisites to a legal strike in Canadian jurisdictions

Jurisdiction	Strike vote required?	Strike vote government supervised?	Who can vote?	Secret ballot required?	Majority of those voting or of those eligible?	When can strike vote be held?	How long after the strike vote is a strike authorized?	Does legislation specify who can challenge vote validity?	Does legislation specify the board's powers when strike votes are invalid? *	Strike notice required?
Canada (federal) (Canada Labour Code, RSC 1985, c. L-2, s. 87)	Yes	No	Bargaining unit members	Yes	Voting	N/A	Within 60 days of strike vote	Yes, employee in the bargaining unit can apply to board within 10 days	Yes, board can order a new vote be held in accordance with specified conditions	Yes, 72 hours notice to employer and Minister
New Brunswick (Industrial Relations Act, RSNB 1973, c. I-4, s. 94)	Yes	No	Bargaining unit members	Yes	Eligible	N/A	24 hours after employer receives notice	No, but Labour and Employment Board can hear references of a dispute with respect to the vote	Yes, board can revise returns on vote, set aside, order new vote, make such other disposition as the circumstances require	Yes, 24 hours notice to employer

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Prince Edward Island (Labour Act, RSPEI 1988, c L-1, s. 41)	Yes	No	Bargaining unit members	Yes	Voting	N/A	N/A	No	No	No
Quebec (Labour Code, RSQ, c-27, s. 20.2)	Yes	No	Union members	Yes	Voting	48 hours after notice to union members	N/A	No	No	Yes, notice to Minister within 48 hours of strike declaration
Ontario (Labour Relations Act, 1995, c 1, Sch A, s. 79)	Yes	No	Bargaining unit members	Yes	Voting	30 days or less before collective agreement expires or any time after expiry	N/A	Yes, union or employer can apply to board for unlawful strike declaration	No	No

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Manitoba (Labour Relations Act, CCSM, c L10s, s. 93)	Yes	No	Bargaining unit members	Yes	Voting	N/A	N/A	No	No	No
Newfoundland & Labrador (Labour Relations Act, RSNL 1990, c L-1, s. 119)	Yes	No	Bargaining unit members	Yes	Voting	N/A	N/A	Yes, union or employer or the Minister may apply to the Newfoundland and Labrador Labour Relations Board for a declaration that an unlawful strike was authorized	No	No

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Alberta (Labour Relations Code, RSA 2000, c L-1, s. 73; ALRB Voting Rules, sw. 31-33)	Yes	Yes	Bargaining unit members	Yes	Voting	72 hours after notice given of opening of polls	Strike must occur within 120 days of strike vote	Yes, a person affected by the vote may file a written objection to board	Yes, board may order the vote to proceed on such terms as to segregation of ballots and sealing of ballot boxes as it considers appropriate, postpone the vote for such time as it considers appropriate, amend the list of voters, or make any other order it	Yes

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									considers appropriate in the circumstances	
British Columbia (Labour Relations Code, RSBC 1996, c 244, s. 59)	Yes	No	Bargaining unit members	Yes	Voting	N/A	3 months immediately following date of strike vote	Yes, a person directly affected by the strike	Yes, board may declare vote of no force or effect and direct that if another vote is conducted, the vote must be taken on terms the board considers necessary or advisable	Yes, notice to employer and board

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Nova Scotia (Trade Union Act, RSNS 1989, c 475, s. 47; Nova Scotia Labour Board, Board Procedures, s 25.1.2)	Yes	Yes	Bargaining unit members	Yes	Eligible	N/A	N/A	No	No	Yes, 48 hours notice to Minister must
Saskatchewan (Saskatchewan Employment Act, SS 2013, c S-15.1, s. 6-31-34)	Yes	No	Bargaining unit members	Yes	Voters	Unions shall not take a vote before the union and the employer have engaged in collective bargaining	N/A	No	No	Yes, 48 hours written notice to employer and notify Minister date and time of strike commencement

Case law

With 11 jurisdictions with subtly different strike vote provisions, we cannot provide a comprehensive review of contemporary labour board decisions in this area. Instead, we offer a representative examples of Canadian labour boards' approaches to strike vote requirements and consequences of their violation.

Labour boards tend not to adopt a formalist or rigid approach to strike vote requirements when faced with challenges, either by employers or dissident members of the bargaining unit, and explicitly discourage unnecessary litigation, particularly where the issue will not affect the vote outcome.⁵⁵

The Ontario Labour Relations Board has narrowly interpreted its authority to intervene in the conduct and form of strike votes, explaining that unions' decisions about calling and conducting strike votes are subject only to restrictions arising expressly, or by necessary implication, from the legislation.⁵⁶ The board characterised the question as: 'not how much employee democracy is *enough* — that is a choice for the Legislature to make — but how much employee democracy has been *prescribed*'.⁵⁷ The board dismissed the employer's argument that a ballot combining a ratification vote and strike vote was 'undemocratic':

[T]here is absolutely nothing 'undemocratic' about a ballot that requires a choice between the 'realistic' options that the Board has said present themselves when collective bargaining has reached an impasse, ie to accept the proposed agreement or to reject it and authorize a strike to do better.⁵⁸

Some board decisions explicitly recognise, and seek to avoid, unnecessary delay disadvantaging the union as a possible consequence of strike vote requirements. For example, the Alberta Labour Relations Board, which supervises votes according to a more detailed set of rules than other jurisdictions, rejected an employer's argument that all disputes over challenged voters be determined prior to ballots being counted. It concluded that if the board allowed the employer's claim 'we would in effect be abandoning our legislated neutrality and instead actively aiding one party to the labour dispute' as in the circumstances delay would have reduced the likelihood of a strike. The board also found that the employer's position would be inconsistent with its statutory obligation to supervise strike votes 'forthwith'.⁵⁹

Labour boards have also taken a generous view of who is eligible to vote,

55 See, eg, *Re Chatellier* [2008] CIRBD No 18; *Re Construction Labour Relations — An Alberta Association Roofers (Provincial) Trade Division* [2007] ALRBD No 79.

56 *Wal-Mart Canada Inc* [1998] OLRB No 4654 at [45].

57 *Ibid*, at [52].

58 *Ibid*, at [54]; The OLRB's judgment was upheld: see [1999] OJ No 2855, but the statute was later amended to prohibit combined ratification and strike votes in first contract negotiations: see Labour Relations Amendment Act SO 2000 c 38 s 11.

59 *Re Construction Labour Relations — An Alberta Assn Roofers (Provincial) Trade Division* [2007] ALRBD No 79 at [13].

the test being whether bargaining unit members have a sufficient and continuing interest in the outcome of the collective bargaining dispute. This may include members who have been laid off or dismissed for cause but who may challenge their termination.⁶⁰

While protection of worker voice may be the primary purpose of strike ballot laws, it would be an overstatement to say that there is no recognition in the legislation of their potential to reduce strikes. British Columbia's law emphasises this role by prohibiting strike votes until after parties have bargained. However, the board interprets this provision as requiring an exchange of proposals and some discussion, but does not require extensive negotiations.⁶¹ This approach encourages rational discussion, but minimises the opportunity to use the requirement as a means of postponing strike votes.

Of course, not all challenges to strike ballot procedures fail, and boards will step in to maintain the procedural integrity of the voting process. These cases involve issues such as failure to notify members of the vote or adequately protect voter secrecy.⁶² In cases of extreme violations, the board will intervene even where the breach is not likely to affect the vote outcome.⁶³ However, there is not always agreement on where that line is. For instance, other boards have come to different conclusions than the Ontario board did about whether, and how, strike and ratification votes may legitimately be combined in a single ballot.⁶⁴

This leads to the question of what happens when a strike vote is found not to comply with legal requirements. Several jurisdictions specifically provide for challenging strike votes and offer remedies if a violation is found. Typically, boards are empowered to set aside the vote and order a new one. Of course, in the absence of a valid strike vote, a lawful strike cannot occur. Consequently, the union will be subject to all the liabilities that result from unlawful strikes.

Although further research is required, for the most part it seems as if most challenges to strike votes occur before a strike starts. This would be logical since most strike votes are taken to demonstrate the seriousness of the union's position and the strength of bargaining unit support. Andrew Sims, then chair of the Alberta Labour Relations Board, articulated this view clearly in a case where a union that was prohibited from striking nevertheless held a strike vote:

A strike vote is not just a poll of member opinions, or an authorization process. It is also a lever, an intimation of the ability and intent to strike, frequently taken to show the other side that the Union 'means business'. Strike votes are frequently timed for their effect upon bargaining.⁶⁵

60 For discussion of this line of cases: see *Re Citation Industries Ltd* [1988] BCLRBD No 299.

61 *British Columbia Public School Employers' Association v Okanagan Valley School Employees Union* 2000 CanLII 27783 (BC LRB).

62 *Blue Con Inc* [1995] OLRD No1672; *CAW-Canada Local 112 v Toromont* [1994] OLRB Rep 1149.

63 *Jim Pattison Industries Ltd v IWA Canada Local 1-3567* [2000] BCLRBD No 140 at [69].

64 *Saskatchewan Telecommunications and CWEC* [1987] May Sask Labour Rep 55; *Canada Steamship Lines Inc v Canadian Merchant Service Guild* [2002] CIRB No 201.

65 *Alberta Hospital Association v UNA* [1988] Alta LRBR 129.

This strategic use of strike votes may also explain their historic prevalence in union constitutions and practices even prior to statutory ballot requirements.

Finally, we need to remember that the law also limits the taking of strike votes precisely because the goal of preventing strikes trumps the protection of worker voice. In circumstances where the bargaining unit is statutorily deprived of the ability to strike (as is the case for many public sector workers), the calling of a strike vote, or the threat to do so, constitutes violation of statutory prohibitions on unions encouraging unlawful strikes. In these cases the board will direct that the strike vote not be taken. Violation of the board order may lead to proceedings for civil or criminal contempt. Even though the boards recognise that strike votes have a tactical role, they are not permitted where the group of workers is prohibited from striking.⁶⁶

In one sense, illegal, wildcat strikes can be viewed as ‘striking’ acts of democratic unionism — workers on the shop floor acting in concert to protect immediate concerns. Of course, such democratic expressions are not tolerated and laws are designed to impose significant costs on unions, officers and union members who defy the strike ban. A union official who conducts or calls a strike vote or sponsors a meeting at which untimely strike action is discussed could be prosecuted for violating the labour code and the union could be held liable for damages to the employer, even though the official tried to persuade members not to strike.⁶⁷ Certainly holding a vote to determine whether to comply with a court injunction, ordering workers to return to work is beyond the pale. In *R v United Fishermen & Allied Workers’ Union* the Supreme Court of Canada upheld a judgment of the BC Court of Appeal that a union and its leaders had committed criminal contempt of court by calling such a vote.⁶⁸ As well, the courts also held that even timely strikes would be illegal if the union failed to comply with the voting requirements. Not only did this expose union representatives to prosecution for violating labour legislation, but it also made the strike illegal for the purposes of the common law so that an injunction could issue to stop the strike and the union could be held liable for damages.⁶⁹

Conclusion

The current law of strike votes in Canada, both as it is written and as it is interpreted by labour boards and courts, helps explain why it is not a particularly controversial topic at this time. The legal requirements are fairly straightforward and do not unduly burden unions when they seek a mandate to conduct a timely strike from their members. While occasionally labour boards talk about the strike vote requirement in terms of its industrial conflict reduction function, it is more common for boards to view strike votes as legitimate tools in the bargaining game, provided that the strike vote is taken in a context when strikes are permitted. There is also fairly consistent expression of support for the role of strike votes as a requirement of union

⁶⁶ Ibid.

⁶⁷ Labour relations acts prohibit unions from threatening to call unlawful strikes or from doing anything to procure or encourage such strikes.

⁶⁸ *R v United Fishermen & Allied Workers’ Union* [1968] SCR 255.

⁶⁹ *Jacobson Brothers Ltd v Anderson* [1962] NSJ No 23. See also cases cited in Arthurs, above n 32.

democracy and as a mechanism that protects worker voice in decisions that will have an important impact on their lives. The picture is very different, however, where strike votes are taken in a context when strikes are not permitted. Then labour boards will view strike votes as fomenting and legitimating unlawful conflict and sanctions may be imposed on union officials who permit such exercises of worker voice. Because Canadian unions for the most part have accepted the 'normal' limitations on their freedom to strike, they do not seem to greatly object to the current state of the law and have made few efforts to challenge or change it.