

# Protecting Fundamental Labor Rights

## Lessons from Canada for the United States

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## Executive Summary

This paper examines the decline in unionization in the United States that began to occur in about 1960. While various explanations have been put forward to explain this – with many focusing on some form of structural changes to the economy or to the workforce, usually related to globalization or technological progress – this paper focuses on the role that employer opposition to unions has played, together with relatively weak labor law. In order to fully flesh out the experience of the United States, it looks to the experience of Canada as the country most similar to it.

For the first half of the 20<sup>th</sup> century, the U.S. and Canadian unionization rates followed each other closely. But starting around 1960, when both rates were about 30 percent, they began to diverge. While Canada's rate has held fairly steady since that time, the U.S. rate has plummeted. In 2011, the U.S. rate stood at just 11.8 percent, while it was 29.7 percent in Canada.

Canada has two labor policies in widespread use that can help explain the differences between the two countries' unionization rates and how they came to diverge. Firstly, several jurisdictions in Canada have what is called “card-check authorization” as the process for forming unions, whereby a majority of employees at a workplace sign union authorization cards and then submit them to the labor board for verification and to have their union certified. In the United States, on the other hand, petitioning the labor board with signed cards is typically just the first step in the process. Unless an employer chooses to voluntarily recognize a union, an election will be scheduled and held. During the time between the petition and the election, which is often delayed by employer opposition and can last for months, employers usually run anti-union campaigns – often committing illegal acts of coercion, intimidation, or firing – in an attempt to discourage their employees from voting to unionize. The research presented here suggests that decreasing the opportunities for employers to conduct illegal practices – by implementing card-check authorization in the United States – would be the most effective way to curb this behavior.

Until the late 1970s, all jurisdictions in Canada certified unions through card-check authorization. However, in recent years, several Canadian provinces have switched to mandatory elections. During this period of adopting a U.S. approach to union certification, Canada's unionization rate has experienced a slight decline, driven by a steeper decline in the private-sector unionization rate. This is what one would expect from a process that gives employers additional time to influence their employees against unionization.

The second policy is first contract arbitration, which exists across most Canadian jurisdictions. Even after a union has been formed, employers continue to erect barricades in the face of employees' wishes to collectively bargain. Though employers are required by law to bargain “in good faith,” in reality, they can delay the process with little to no penalty for doing so, with the hope of remaining “union-free.” First contract arbitration allows for a way through stalling tactics and bargaining impasse. Given the positive Canadian experience, it appears to be a policy that would greatly enhance labor relations in the United States by ensuring that employees who vote to unionize are able to obtain a contract.

Compared to Canada, many workers in the U.S. are not able to exercise their right to freely join and form unions and participate in collective bargaining, in large part due to employer opposition, which current labor law fails to adequately address.

## Introduction

The unionization rate in the United States rose considerably after the passage of the National Labor Relations Act of 1935, but it has been on a steady downward trajectory since about 1960. Over the years, various explanations have been put forward for this, with many focusing on some form of structural changes to the economy or to the workforce, usually related to globalization or technological progress.<sup>1</sup>

The story goes that the United States is moving (or has already moved) from a manufacturing economy to a “post-industrial” one, with fewer male, blue-collar, and less-educated workers, who are more likely to be unionized, and more female, white-collar, and more-educated workers, who are less likely to be unionized. Though these changes in the composition of the workforce and the economy – including the detrimental effect upon manufacturing union workers – are undoubtedly real, what is less certain is the implied effect on unionization overall, particularly the likelihood of workers to choose unionization at their workplace. For this line of reasoning to be correct, it must also be true that today’s workforce has some characteristic that makes it inherently resistant to unions. There is, however, little evidence for this view.<sup>2,3</sup> In fact, women and white-collar workers make up an increasing portion of the unionized workforce, with women projected to be in the majority before 2020.<sup>4</sup>

Additionally, if the primary reason for the decline in the unionization rate in the United States was structural changes to the economy, we would expect to see similar trends in Canada, the country that is probably more like the U.S. than any other – economically, socially, and politically.<sup>5</sup> But Canada has not seen the same decline in its unionization rate, though its earlier experience with unionization paralleled that of the U.S. and its economy and workforce have largely gone through the same changes.

For nearly five decades, from 1920 to the mid-1960s, unionization rates in the United States and Canada moved more or less in step with one another (see **Figure 1**).<sup>6</sup> At the end of this period, however, the rates began to diverge, first increasing and then holding steady in Canada, while it plummeted in the United States. Then in about the early 1990s, Canada began to see a similar trend in the United States with a falling unionization rate, though from a higher level and at a slower pace.<sup>7</sup>

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1 See Schmitt and Mitukiewicz (2012) for a longer discussion on this topic.

2 See Freeman (2007).

3 Nor was there 30 years ago. Weiler discussed this argument in 1983 (fn. 6, pp. 1773-4): “One common explanation for the decline in unionism is that in the last quarter-century the stronghold of American unionism – older, male, blue-collar workers employed in manufacturing industries in the northern United States – has constituted a declining fraction of the work force, while sectors of the work force that include younger, female, and white-collar workers and workers employed in service industries and in the South, among whom unionism is weak, have grown.... There is no reason to believe that white-collar and service workers are inherently unreceptive to collective bargaining.” He goes on to cite Freeman and Medoff (1984), who provide survey data to corroborate this.

4 See Schmitt and Warner (2009).

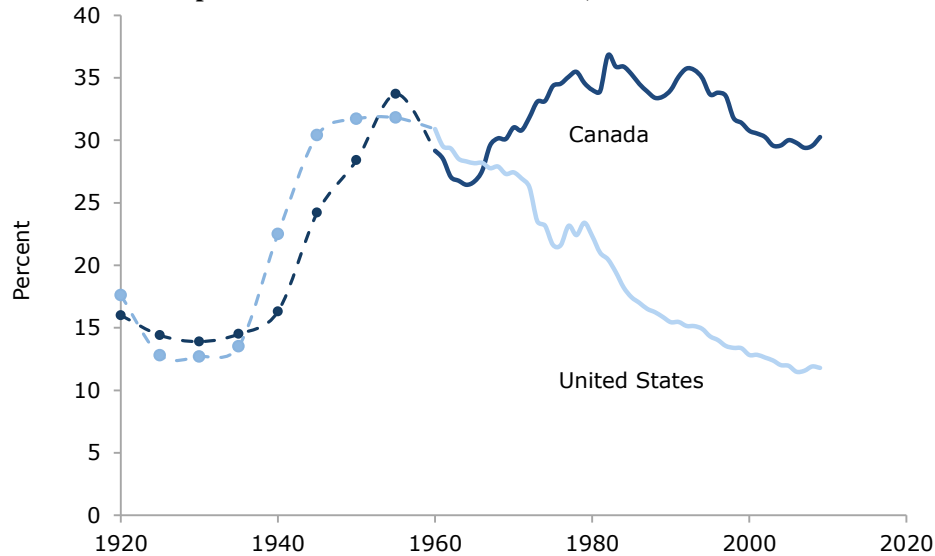
5 The different experiences of the two neighboring countries have been referred to as a “natural experiment.” See Card and Freeman (1993) and Riddell (1993).

6 The data for 1920-1955 cover only non-agricultural workers; the data for 1960-2009 cover all workers. The difference in coverage has no qualitative impact on the figure.

7 The public-sector unionization rate in both countries has actually held fairly steady over the past 30 to 35 years, and partially masks the decline of the private-sector unionization rate in both countries, though the decline is much larger in the United States. This will be discussed further in the third section.

In 2011, the U.S. rate stood at just 11.8 percent, while it was 29.7 percent in Canada. Obviously, there is something more to the story than simply the effects of structural changes to the economy.

**FIGURE 1**  
**Union Membership in the United States and Canada, 1920-2009**



Notes: 1920-1955 data is for non-agricultural workers. 1960-2009 data is for all workers. Data only goes to 2009 because this is the latest available in the source which constructs internationally comparable rates since 1960. Sources: 1920-1955: Riddell (1993); 1960-2009: ICTWSS Database.

Another explanation is that there has been a decline in the desire for unionization.<sup>8,9</sup> However, non-union workers' expressed desire for unionization bottomed out in the 1980s,<sup>10</sup> then increased slightly in the 1990s and significantly in the mid-2000s, when a majority of non-union workers said they desired union representation.<sup>11</sup> Moreover, there is a strong case to be made that employer opposition to unions likely has a large impact on non-union workers' desire for unionization. In 1994, the U.S. Dunlop Commission found that 41 percent of non-union workers thought they might be fired if they tried to organize a union at their workplace.<sup>12</sup>

Viewing this topic through the U.S.-Canadian lens, research found that, while there was greater interest in unionization in Canada, a bigger difference between the two countries was the likelihood that a worker desiring unionization would actually be unionized:<sup>13</sup> "Of Canadians who want to be unionized, 76 percent are in unions, compared to 44 percent of Americans, a difference that remains after controlling for differences in the characteristics of workers."<sup>14</sup>

8 See, for example, Farber and Krueger (1992) and Flanagan (2005).

9 This is distinct from approval or disapproval of unions in general. Freeman (2007, p. 7), discussing polls since 1947, shows that the proportion of Americans who approve of unions has always been larger than those who disapprove, by between 20 and 40 percentage points. Most recently, about 65 percent approve and 20 percent disapprove.

10 See Farber and Krueger (1992), Table 1.

11 Freeman (2007), p. 2.

12 U.S. Commission on the Future of Worker-Management Relations (1994), p. 40.

13 Riddell (1993).

14 Card and Freeman (1993), p. 14, citing Riddell (1993) in the same volume.

A final explanation looks to organized labor itself, suggesting that a lack of focus on organizing new members has been responsible for at least some of the decline in unionization.<sup>15</sup> Although this is most likely true to some extent, it is also likely to be highly entangled with both the other reasons for union decline and that decline itself (fewer members means fewer resources for organizing new members; more employer hostility means fewer successful organizing drives from the same scarce resources).

This paper focuses on the role that employer opposition to unions – together with relatively weak labor law – has had on the decline of unionization as a more compelling reason than those discussed above. In order to fully flesh out the experience of the United States and to put its industrial relations framework in a comparative perspective, it looks to the experience of Canada and the main components of that country's labor policy.

After first briefly comparing the current state of organized labor in the United States and Canada, this paper then discusses how unions are formed and analyzes how different methods interact with employer opposition to unionization and affect union campaign outcomes. Following this is a discussion of first contract arbitration, a policy existing across most Canadian jurisdictions that allows for a way through a bargaining impasse. Finally, some concluding remarks are offered on the current state of U.S. labor policy in light of the comparison to Canada.

## A Brief Overview of Labor in the U.S. and Canada

The United States and Canada have a broadly similar industrial relations framework through which workers are able to form unions and collectively bargain with their employers. In both countries, collective bargaining typically occurs at the “bargaining unit” level – that is, between a single employer and a group of that employer's workers who are deemed to have a similar “community of interest.”<sup>16</sup> Although broader collective bargaining can occur – as demonstrated by the agreements which spanned much of the U.S. steel industry in the middle of the 20<sup>th</sup> century – this is not the norm and rather has to do with the ability of unions to force employers to negotiate in this manner.

In contrast, collective bargaining in many European countries usually occurs at a much broader level – along multiemployer, industrial, or sectoral lines.<sup>17</sup> Additionally, the collective bargaining agreements negotiated by unions and employers in many of these countries will often extend to non-union employees and workplaces, creating large differences between union membership rates and union coverage rates.<sup>18</sup> This is not the case in either the United States or Canada, as can be seen by the virtually identical membership and coverage rates (see **Figure 2** below).<sup>19,20</sup>

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15 See Flanagan (2005), pp. 40-41 and Robinson (1990).

16 See NLRB (2008), pp. 127-43 for a discussion of the determinants of this in the U.S.

17 For a brief discussion on the development of union certification in the U.S. and comparisons to the Swedish, German, and British systems of union representation, see Adams (1994). Additionally, see <http://www.worker-participation.eu/> for information on contemporary European industrial relations, unions, and workplace representation.

18 Another large difference in the industrial relations systems of U.S. and Canada, on the one hand, and Europe, on the other, are “works councils,” which exist in most European countries. These democratically elected employee bodies are independent of unions and exist on the level of the individual workplace. They typically have no ability to participate in collective bargaining, as their main function is to provide an institutionalized and mandated

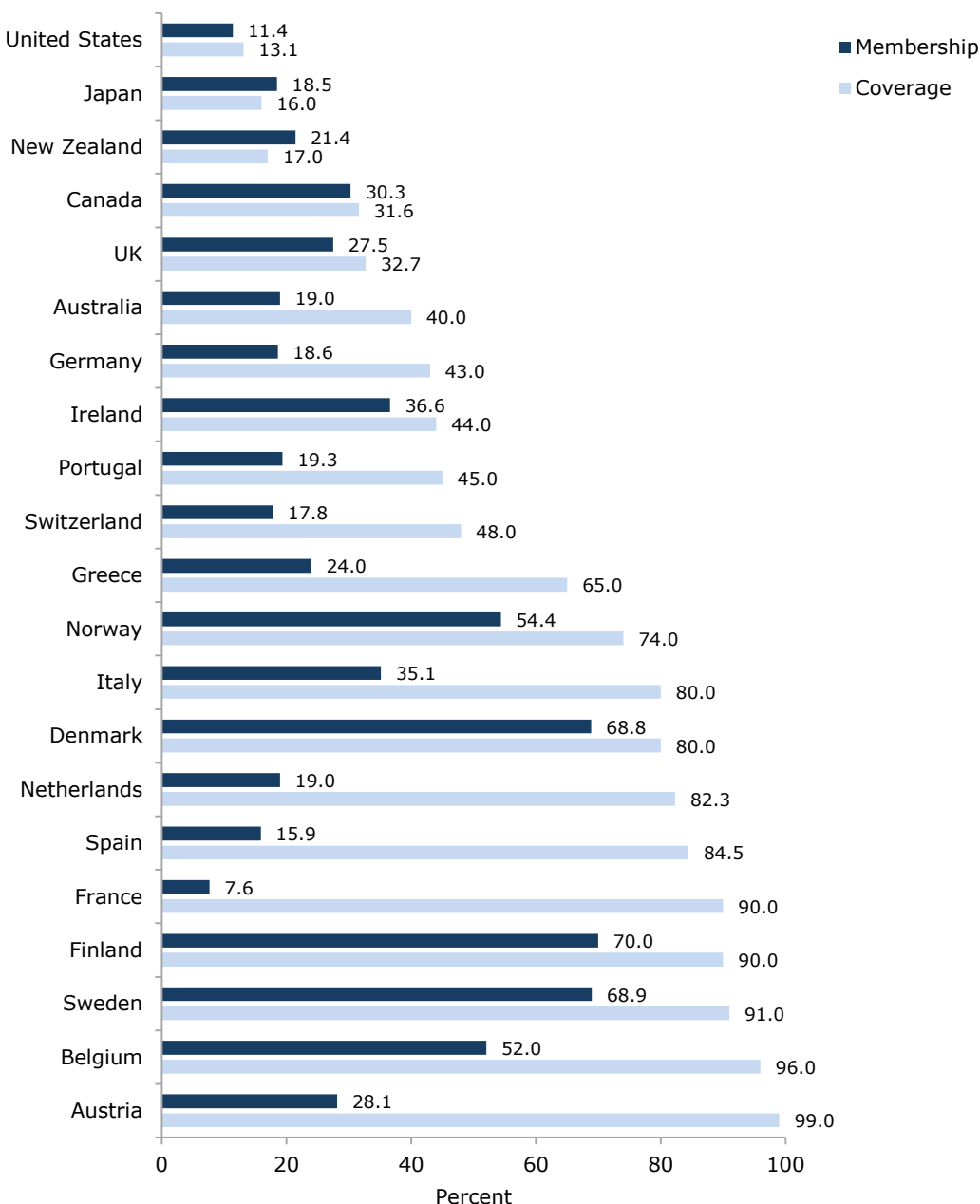
Labor policy is more decentralized in Canada than in the United States and is largely a provincial matter. While Canadian federal law covers some 10 percent of workers in federally regulated industries,<sup>21</sup> the remaining 90 percent are covered by provincial or territorial law.<sup>22</sup> In the U.S., on the other hand, the federal government has a larger role in labor policy, especially for private-sector workers, who fall under the jurisdiction of the National Labor Relations Act of 1935 (NLRA).<sup>23</sup> However, while Canadian provincial law generally covers workers in both the public and private sectors,<sup>24</sup> this is not true in the United States, where public-sector labor policy falls under state jurisdiction.

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communication channel. This “may be limited to information exchange, may entail consultation, or may end in negotiated co-decision making, or co-determination” (Rogers and Streeck, 1995, p. 8). See Rogers and Streeck for more information on works councils in general and their specific implementations across several European countries and <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Workplace-Representation2> for a brief discussion on the role of unions and works councils in employee representation across the European Union. Also, in addition to works councils as an employee representation institution, 16 of the 27 countries of the European Union, and Norway, have varying degrees of “board-level employee representation rights,” in which legislation requires employees to be represented – with voting rights – on company boards (Conchon 2011).

- 19 See Akyeampong (2000) for a discussion of non-union covered employees in Canada, including a comparison to the United States.
- 20 It would have been preferable to use union coverage rates throughout this paper – as they are a better measure of workers impacted by collective bargaining agreements – however, data on coverage rates is not as complete as membership rates, so membership rates are used for more consistency.
- 21 Banking; telecommunications; broadcasting; air, interprovincial rail, road and pipeline transportation; shipping and related services; uranium mining; and crown corporations. Canadian Department of Labor, <http://www.hrsdc.gc.ca/eng/labour/overview.shtml>.
- 22 Canada has 14 jurisdictions in all - the federal government, 10 provinces, and three territories. The territories account for less than 1/2 of 1 percent of the Canadian population and, following most other economic and labor policy research, are excluded from the analysis in this paper.
- 23 Employees of the U.S. Postal Service are also covered by the NLRA. Railway and airline workers are not covered by the NLRA but instead by the Railway Labor Act of 1926.
- 24 Block (1994), p. 250, fn. 1.

**FIGURE 2**  
**Union Membership and Union Coverage Rates in 21 Wealthy Countries, 2007-2010**



Notes: The year for the United States rates is 2010, for Canada 2009, and vary from 2007-2010 for the rest of the countries but are the most recent available. The membership rates for the United States and Canada differ slightly from those presented in the rest of the paper due to the source's attempt to provide internationally comparable data. Source: ICTWSS Database, version 3.0, May 2011.

While some commentators have pointed to the very high unionization rate in the public sector in Canada – and its slightly larger size relative to the United States – as a major factor explaining Canada's higher unionization rate;<sup>25</sup> as shown in **Table 2**, the unionization rate is higher across all

<sup>25</sup> Clemens, Veldhuis, and Karabegovic (2005).



categories of the workforce and economy. While much lower than its public-sector unionization rate, Canada's overall private-sector unionization rate is more than twice as high as in the United States. In a similar vein, **Figure 3** shows the unionization rate by U.S. state and Canadian province.

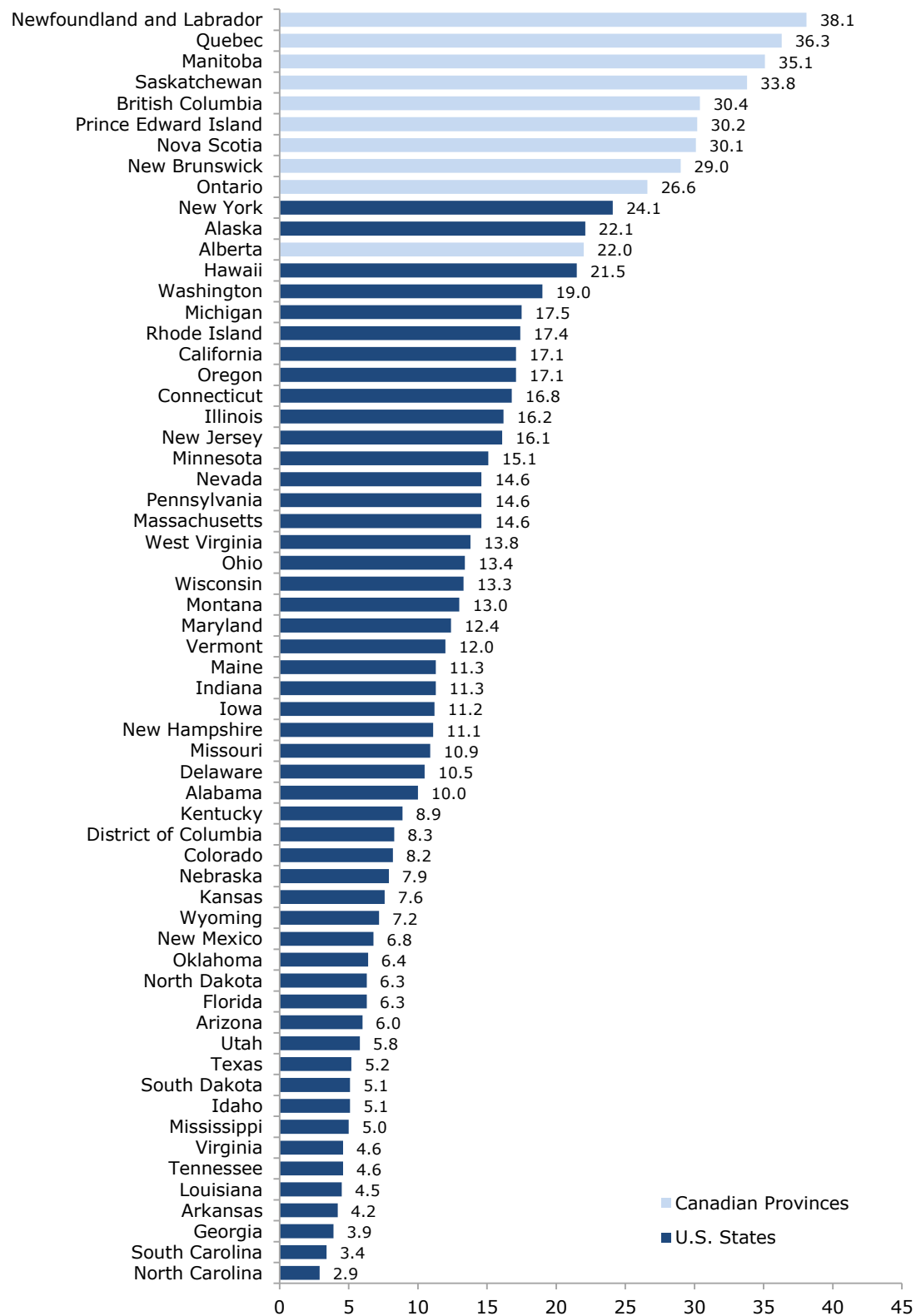
**TABLE 1**  
**Union Membership Rates in the United States and Canada, by Selected Characteristics, 2011**

	United States (percent)	Canada (percent)	Difference (percentage points)
All	11.8	29.7	17.9
Gender			
Male	12.4	28.2	15.8
Female	11.2	31.1	19.9
Age			
16 to 24*	4.4	14.5	10.1
25 to 54	12.5	32.1	19.6
55 and over	14.5	34.3	19.8
Education			
Less than High School	6.0	20.2	14.2
High School	11.1	24.8	13.7
Some College	11.8	21.7	9.9
College and Advanced	13.8	33.8	20.0
Sector			
Public	37.0	71.1	34.1
Private	6.9	16.0	9.1
Selected Industries			
Mining	7.2	19.3	12.1
Construction	14.0	30.3	16.3
Manufacturing	10.5	24.9	14.4
Utilities	25.0	63.8	38.8
Services	5.8	30.4	24.6
Healthcare and Social Assistance	7.5	52.7	45.2
Employment Status			
Full-time	13.1	31.1	18.0
Part-time	6.4	23.6	17.2

Notes: \*15 to 24 in Canada. Canadian rates are for the first half of 2011 only.

Sources: U.S.: CEPR analysis of Current Population Survey and <http://bls.gov/cps/cpslutabs.htm>;  
Canada: Uppal (2011), Table 1.

**FIGURE 3**  
**Union Membership Rates in U.S. States and Canadian Provinces, 2011**



Note: Canadian rates are for the first half of 2011 only.

Sources: U.S.: Bureau of Labor Statistics, Current Population Survey, <http://bls.gov/webapps/legacy/cpslutab5.htm>;

Canada: Uppal (2011), Table 1.

## Unionization

In a market economy, it is common for businesses to be created and for existing businesses to close. Insofar as those that close are unionized and those that are created are not, there will be a downward effect on the unionization rate. Under the particular arrangement of the industrial relations systems of the United States and Canada, where all new businesses start off non-union,<sup>26</sup> this effect is more pronounced than in many European countries, where many new businesses will often be union from the start, due to industrial or sectoral agreements.<sup>27</sup>

Given this arrangement, the method by which employees form unions at their workplaces, in particular, how easy or how difficult it is to form a union, has important implications for organized labor and the unionization rate of a country.

### Methods of Forming Unions

In both the United States and Canada, there are three methods by which a union can be formed in a workplace: recognition, imposition, and certification.<sup>28</sup> In recognition, employers can voluntarily recognize unions – because they accept that a majority of their employees want a union or because employees force them to do so by striking or otherwise applying pressure. Though there are no official data on the number of employees organized in this way, evidence suggests this method is used by a growing portion of unionization campaigns.<sup>29</sup> Imposition, a rare occurrence in both the United States and Canada, occurs when the labor board determines that employer actions have created such an atmosphere as to deny employees a free and fair choice, certifies the union without a vote, and orders the employer to the bargaining table.<sup>30</sup>

Finally, there is certification, which as Freeman (1987) and Ferguson (2008) note, has been the predominant method of forming unions and is the way workers can attempt to unionize in the face of employer opposition. Thus the following discussion will center on the certification processes in the two countries. Generally speaking, certification involves a labor board verifying that a majority of workers at a workplace have chosen to form a union for purposes of collective bargaining. This is typically done against the wishes of employers, who would prefer to operate in a non-union environment.

### Certification in the United States

The National Labor Relations Board (NLRB) administers the provisions in the NLRA – which covers most private-sector workers – including those for union certification. The NLRB conducts

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26 See Farber (2005) pp. 6-10 for a lengthier discussion of this topic and the different dynamics in the private and public sectors.

27 As Adams (1994, p. 260) notes: “In comparative perspective, the North American practice of union certification is very unusual. Generally, other countries do not divide the labor force into tiny bargaining units and do not require representatives of employee interests to win the support of the majority of employees in each microunit to acquire government support for recognition.”

28 See Mayer (2007) for a longer discussion on the United States than that given here.

29 See Brudney (2005), Bronfenbrenner (2009) p. 9, and Schmitt and Zipperer (2009) pp. 7-9.

30 On the U.S.: Ferguson (2008), p. 4. Also see Weiler (1983) pp. 1793-1795 for more discussion of this. On Canada: Wood and Godard (1999), who note that a few jurisdictions prohibit this practice, though the requirements are less stringent than in those U.S. jurisdictions that allow it.

elections to do this.<sup>31</sup> In order for the NLRB to hold an election, workers or their representatives must file a petition with the NLRB showing support, by signed authorization cards, of at least 30 percent of the employees in a proposed bargaining unit, although usually petitions won't be filed unless there is upwards of 65 percent support.<sup>32</sup> Typically an existing union, which the employees have worked with during the organizing drive and whose ranks they will join if their drive is successful, files the petition to the NLRB. The labor board will then verify the signed cards against the employer's payroll. At this point, the employer may voluntarily recognize the union if a majority has signed cards. If not, the NLRB will schedule and hold an election. If a majority of employees who participate in the election vote to unionize, the NLRB certifies their union and contract negotiations may begin. If the majority votes against unionization, no union is formed and another petition cannot be filed for one year.<sup>33</sup>

Public-sector employees make up approximately 15 percent of employees in the United States. Just as there is no nation-wide law that governs their collective bargaining rights, there is no nation-wide method of certification. Some states, such as Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts have card-check authorization (see below),<sup>34</sup> while others have elections similar to those conducted by the NLRB.

### **Certification in Canada**

Like almost all labor law in Canada, the union certification process varies by jurisdiction (province, territory, or the federal jurisdiction), and generally applies to both private- and public-sector workers.<sup>35</sup> Six jurisdictions currently have mandatory elections, while the remaining five jurisdictions have card-check authorization.<sup>36</sup>

The mandatory election process in Canada is very similar to that in the United States: a labor board must be presented with proof of employee support for unionization, ranging from 35 to 45 percent. Like organizing in the U.S., though, petitions for elections aren't typically filed without strong majority support.<sup>37</sup> The board will then schedule and hold elections, and will certify a new union if the majority of voters support unionization.

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31 At least, they have exclusively done so since 1939. In the first few years after the passage of the NLRA, the NLRB allowed certification to happen by card-check authorization. See Weiler (1983) fn. 137.

32 Bronfenbrenner (1994), p. 78.

33 The process is significantly different in the railway and airline industries, which make up less than 1 percent of the private-sector workforce. However, one recent rule change has made elections in these industries more similar to those conducted by the NLRB: non-votes no longer count as votes against unionization (see Gants, 2010). The National Mediation Board administers the Railway Labor Act, which governs collective bargaining in these industries. For a brief overview of the industrial relations regime in these industries, see the website of the Federal Railroad Administration: <http://www.fra.dot.gov/pages/955.shtml>.

34 Malin, Martin H. Forthcoming (2012). "The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements."

35 However, as Campolieti, Riddell, and Slinn (2007, p. 39) note, "[t]he certification process in the construction industry is very different from that in all other industries and is not comparable, particularly in Ontario..." (In Ontario, unions in the construction industry can choose between card check and elections when making certification applications. See [http://www.hrsdc.gc.ca/eng/labour/labour\\_law/dllc/2004-2005.shtml#ii\\_d.](http://www.hrsdc.gc.ca/eng/labour/labour_law/dllc/2004-2005.shtml#ii_d.))

36 Slinn and Hurd (2009), p. 105. See Human Resources and Skills Development Canada for a current list of certification methods by province, [http://www.hrsdc.gc.ca/eng/labour/labour\\_law/ind\\_rel/tuac.shtml](http://www.hrsdc.gc.ca/eng/labour/labour_law/ind_rel/tuac.shtml).

37 Slinn (2004), p. 291.

Card-check authorization (also called “automatic certification”), on the other hand, is more streamlined. Under card check, once a majority of employees sign up in support of unionization (ranging from more than 50 percent to 65 percent, depending upon the jurisdiction), a petition is made to the labor board for certification. The labor board validates (“checks”) the signed cards against the employer’s payroll. While the employer can challenge the appropriateness of certain positions being in the bargaining unit – just as in the election process in both the United States and Canada at this stage – generally speaking, the organizing drive is over. Presuming the employees favoring unionization do in fact constitute the majority, the bargaining unit is certified and the employees are officially unionized.

These two different certification regimes did not always co-exist in Canada. Prior to 1977, all jurisdictions had card-check authorization for organizing drives with support above a certain threshold (between 50 to 65 percent), and elections for those with support below that level.<sup>38</sup> This is still the way certification happens today for those jurisdictions that have card check.

In 1977, Nova Scotia became the first province to break with this tradition and began to *require* elections for *all* union certifications where the employer doesn’t voluntarily recognize the union. In 1984, British Columbia followed suit (and subsequently reversed this decision in 1993 before again reverting to mandatory elections in 2001), then Alberta (in 1988), Newfoundland (1994), Ontario (1995), Manitoba (1997), and Saskatchewan (2008).<sup>39</sup> Along with Manitoba, which repealed its mandatory election legislation in 2000, the federal jurisdiction, New Brunswick, Prince Edward Island, and Quebec currently have card-check authorization. As will be discussed later, this shift in certification method has reduced union success rates in organizing campaigns.

## Employer Opposition to Unionization and the Role of Delay

By adding an additional step to the process of unionization, mandatory-election certification has a built-in delay that card check does not. These delays can be significant in the United States. According to the NLRB, in 2011, the median number of days between a petition and an election was 38.<sup>40,41</sup> While there is also a delay in Canada, it is not nearly as long: elections must generally take place within 5 to 10 days after the petition for an election is filed (so-called “quick votes”).<sup>42</sup> Delays – especially in the United States – can affect the outcome of unionization drives. The longer employers know about a union campaign,<sup>43</sup> the longer they have to counter with an *anti-union* campaign.

Employers don’t typically stand by idly while their workers attempt to form unions. In fact, the bulk of labor history can be characterized as a battle between anti-union employers and pro-union

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38 Riddell (2004), p. 493. As Riddell notes, “few organizing drives actually went to an election.”

39 Johnson (2002), p. 349, Johnson (2004), p. 362, and Saskatchewan Labour Relations Board (2009), p. 9.

40 NLRB (2011), p. 35.

41 Bronfenbrenner and Warren (2011) looked at data from 1999 to 2009 and found that “there has been a slight increase in the number of representation elections being held between 21-30 days after the petition. But throughout the decade there have been virtually no election dates in the first 20 days after the petition is filed...” (p. 1).

42 Slinn and Hurd (2009), p. 109. They note (fn. 1, p. 114) that “Saskatchewan is the exception, with no statutory or administrative time limit for holding the mandatory representation vote. The Alberta legislation does not specify a time limit for elections but does direct that elections occur ‘as soon as possible.’”

43 Often the employer first learns of the campaign when the petition is filed (Riddell, 2004, p. 497). Weiler (1983, p. 1807) notes that this is especially true in small units, which make up the “vast majority of organizational drives in the United States.”

employees. Prior to the 1930s and 1940s, when major workplace legislation was passed in the two countries, employers had nearly free legal rein over the way in which they could oppose unionization attempts. They resisted passage of a series of laws<sup>44</sup> that made certain employer activities illegal and guaranteed workers' rights to belong to and form unions at their workplaces. Employers lost that set of legislative battles but have increasingly fought workers' attempts to form unions, particularly in the United States.

Many of the tactics that employers use to oppose unionization are illegal; however, in the United States there is little disincentive to engage in them. Unfair labor practice (ULP) charges can be filed with the NLRB, but the penalty for one of the most extreme acts – firing a worker for union activity, when it can be proven – is only reinstatement with back pay. Illegal tactics to oppose unionization are, therefore, a standard business practice:

Decades of experience in the United States have given rise to volumes of research and evidence showing that, under the NLRA as presently constructed, there is widespread, serious, and effective illegal conduct by employers that deprives workers of their opportunity to make a free choice about workplace representation.<sup>45</sup>

Employers usually don't act alone in their opposition to unionizing efforts. In the U.S., more than three-quarters of the time employers hire outside experts to help them stave off organizing attempts.<sup>46</sup> These experts of the “union avoidance industry” fall into four groups – consultants, law firms, industry psychologists, and strike management firms.<sup>47</sup> While not new, “[t]he tremendous growth in the size, scope, and sophistication of the union avoidance industry since the 1970s...is a recent development – and one that has contributed significantly to the current crisis of organized labor in the United States.”<sup>48</sup> It has grown up from a cottage industry in the 1950s to being worth several hundred million dollars today;<sup>49</sup> its legitimacy within the industrial relations framework in the United States is unique in the developed world.<sup>50</sup>

Overall, the employer's expert-assisted anti-union campaign will consist of such things as one-on-one meetings with supervisors, captive audience meetings, anti-union leafleting, media campaigns, surveillance of employees, promises of improvement, bribes, interrogation of employees about union activity, threats of cuts to benefits or wages, threats to close the workplace, and threats to file for bankruptcy. Furthermore, “[e]mployers penalize workers [for attempting to unionize]...by transferring them to more onerous work assignments, cutting wages or benefits, layoffs, contracting

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44 This is not to say that opposition to worker-friendly legislation has decreased in the past ¾ of a century. See Weil (2008) for a discussion on employer opposition to more recently proposed workplace legislation in the United States. Weil notes that opposition is highest to legislation which would expand the basic workplace representation rights of the NRLA.

45 Slinn and Hurd (2009), p. 104. See, for instance, Prosten (1978), Roomkin and Juris (1978), Dickens (1980), Weiler (1983), Freeman (1985), Riddell (1993), Bronfenbrenner (1994), Benz (1998), Riddell (2001), Flanagan (2005), Ferguson (2008), Bronfenbrenner (2009), Schmitt and Zipperer (2009), and Bronfenbrenner and Warren (2011), amongst numerous others.

46 Bronfenbrenner (2009), p. 13.

47 Logan (2006), p. 651. See Logan for a description of the union avoidance industry and an excellent analysis of its growth and impact on organized labor.

48 Ibid, p. 652.

49 Ibid, p. 651.

50 Ibid, p. 652.

out, and, most egregiously, discharging workers or shutting down, contracting out, or outsourcing all or part of the facility.”<sup>51</sup>

While opposition to unionization takes many forms, they all have the same aim – to influence employees to not sign cards in favor of unionization or to vote against unionization:

Typically, the firm will mount a vigorous campaign to fend off the threat of collective bargaining. It will emphasize to its workers how risky and troubled life might be in the uncharted world of collective bargaining: the firm might have to tighten up its supervisory and personnel practices and reconsider existing, expensive special benefits; the union would likely demand hefty dues, fines, and assessments, and might take the employees out on a long and costly strike with no guarantee that there would be jobs at the end if replacements had been hired in the meantime; if labor costs and labor unrest became too great, the employer might have to relocate.<sup>52</sup>

Employer opposition to unionization has not only increased in frequency but also in intensity.<sup>53</sup> Noting the changes in employer anti-union campaigns from 1986 to 2003, Bronfenbrenner (2009) commented that “[i]t seems that most employers feel less need to bother with the carrot and instead are going straight for the stick.”<sup>54</sup> Employers are less and less often offering bribes, improvements to working conditions, and the like, and focusing instead on more aggressive tactics such as threatening to close workplaces (29 percent did so in 1986-1987 compared to 57 percent in 1999-2003). Additionally, in 1986-1987, no employers used more than 10 different anti-union tactics in their campaigns, while nearly half (49 percent) did in 1999-2003.<sup>55</sup>

Firing workers for union activity is perhaps the biggest stick that employers have. Schmitt and Zipperer (2009) estimated that workers were illegally fired in approximately 30 percent of certification elections in 2007, above the average of 26 percent from 2001 to 2007, and up from an average of 16 percent from 1996 to 2000.<sup>56</sup> Over the whole period from 1951 to 2007, the only time this figure was higher than in 2007 was from 1981 to 1985, when illegal firings occurred in 31 percent of unionization campaigns.<sup>57</sup> Such illegal firings by themselves can be a substantial factor in blocking unionization drives. However, the impact is even greater due to the amount of time it takes to resolve the cases filed with the NLRB: they typically will not be resolved before any election happens (if it occurs at all), creating a large chilling effect on any other workers considering unionization.<sup>58</sup>

Employer opposition to unionization appears to be slightly more muted in Canada than it is in the United States. In certification elections in the U.S. between 1999 and 2003, 96 percent of employers engaged in anti-union campaigns, with varying levels of aggressiveness and illegal practices.<sup>59</sup> On the

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51 Bronfenbrenner and Warren (2011), p. 4.

52 Weiler (1983), pp. 1777-8.

53 For a careful analysis of the topic, see Bronfenbrenner (2009).

54 P. 14.

55 Bronfenbrenner (2009), p. 13.

56 P. 3.

57 Ibid.

58 Weiler (1983), p. 1793.

59 Bronfenbrenner (2009), p. 10.

other hand, one 2002 Canadian study estimated that “80 percent of employers overtly and actively oppos[ed] union certification applications.”<sup>60</sup>

There are two main reasons for the lower incidence of employer opposition in Canada. Canadian employers have more disincentive to engage in illegal tactics in unionizing campaigns because penalties are harsher and are doled out more quickly than in the United States.<sup>61</sup> Secondly, as discussed above, employers have fewer opportunities to engage in illegal tactics because of the existence of card-check authorization in about half the provinces.

However, this does not mean that employer opposition to unionization does not exist in Canada. The change from card check to mandatory elections is a fairly new phenomenon, and it has allowed employers more opportunity to oppose unionization. In recent years there has been an increased focus on the subject.<sup>62</sup>

In studies on British Columbia<sup>63</sup> and Ontario,<sup>64</sup> which together account for about half of the Canadian labor force,<sup>65</sup> the evidence suggests that the delay inherent in mandatory elections had a significant, negative effect on union wins in certification campaigns.<sup>66</sup> In the first period that British Columbia had mandatory elections (from 1984 to 1992), there was a 19 percentage-point reduction in private-sector certification success rates compared to the preceding period under card check. When mandatory elections were repealed in 1993 and card check was re-instituted, success rates returned to their previous levels.<sup>67</sup> Virtually the entire drop in union success rates during the mandatory election period could be explained by the switch from card check to mandatory elections, with employer opposition (measured by ULPs) estimated to be twice as effective under elections as under card check, and accounting for at least 25 percent of the total reduction in certification success rates.<sup>68</sup>

The study on Ontario examined the outcomes of certification applications from 1993 to 1998, with roughly 3 years under card check and 3 years under mandatory elections. After the change to mandatory elections, there was a decline in overall certification success rates by 8.4 percentage points. This study concluded that, controlling for factors such as bargaining unit size, type of employment, and initial level for support, a unionization attempt under the mandatory vote regime was 21 percentage points less likely to be successful than one under card check.<sup>69</sup>

Another study, looking at data for nine Canadian provinces from 1978 to 1996, found that mandatory elections reduced union success rates in certification campaigns by 9 percentage points compared to what they would have been under card check.<sup>70</sup> Following up on this, and looking at

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60 Bentham (2002), p. 159.

61 See Freeman (1987) and Bruce (1994).

62 See Riddell (2001), Johnson (2002), Johnson (2004), Riddell (2004), Slinn (2004), Slinn (2005), Campolieti, Riddell, and Slinn (2007), and Riddell (2010).

63 Riddell (2004).

64 Slinn (2004).

65 Campolieti, Riddell, and Slinn (2007), p. 33.

66 There was also a considerable decrease in organizing activity when mandatory elections replaced card check (Ibid, p. 34).

67 Riddell (2004), pp. 495-6.

68 Ibid, p. 509.

69 Slinn (2004).

70 Johnson (2002).

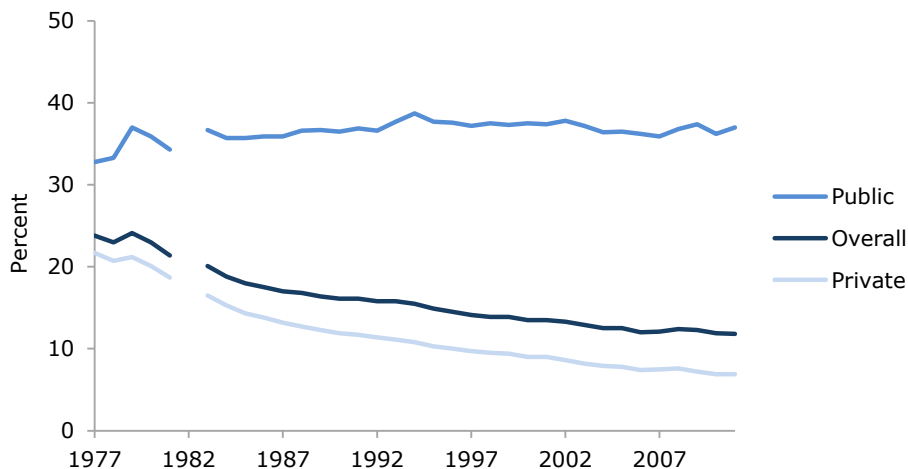


the period from 1980-1998, further research estimated that Canada's unionization rate would have been 3.3 to 4.6 percentage points lower by 1998 if all jurisdictions had mandatory elections from 1980, and 1.0 to 1.2 percentage points higher if all had card check from 1980.<sup>71</sup>

Success rates decrease further when the time limits to hold quick elections are exceeded.<sup>72</sup> Employer objections to the certification application or ULP filings (by employees, the union, or employer), for example, can, in the absence of expedited hearings, delay elections and lower the ultimate probability of union victory.<sup>73</sup>

Finally, further evidence that employer opposition has been a leading cause of the decline in the unionization rate in the United States can be found by comparing the experiences of the public and private sectors. Public-sector employers have less incentive to oppose unionization than private-sector employers,<sup>74</sup> and so opposition to unionization is not nearly as prevalent or intense in the public sector, "where workers organize relatively free from the kind of coercion, intimidation, and retaliation that so dominates in the private sector."<sup>75</sup> The same research cited above showing that nearly all (96 percent) of private-sector employers in the United States engaged in anti-union campaigns over the period 1999-2003 found that only about half (52 percent) of public-sector employers did.<sup>76</sup> Additionally, as mentioned above, some states have card-check authorization as the means to certification, which greatly diminishes the opportunity to oppose unionization. The result of this can be seen in the union membership rate of the two sectors: while the rate in the private sector has experienced a precipitous drop over the past 30 years, the rate in the public sector has actually increased slightly, as shown in **Figure 4**.

**FIGURE 4**  
**Union Membership Rates for the Public and Private Sectors in the United States, 1977-2011**



Note: 1982 data not available.

Source: Union Membership and Coverage Database from the CPS available at <http://unionstats.com>.

71 Johnson (2004).

72 Ibid, pp. 46-49.

73 Campolieti, Riddell, and Slinn (2007), pp. 42-46.

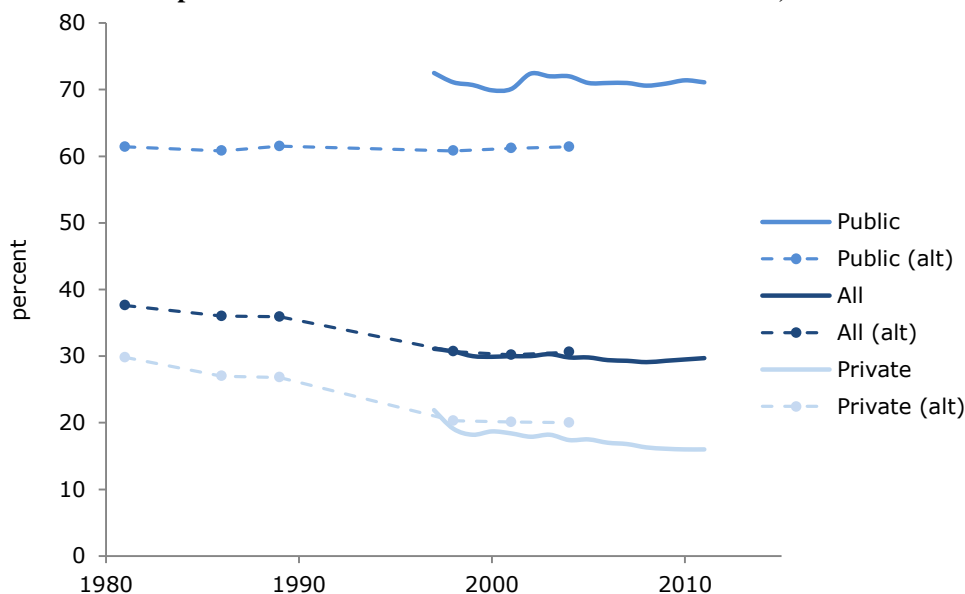
74 See Freeman (1987) for an extended discussion of both this topic and the differences between unionization campaigns in the private and public sectors overall.

75 Bronfenbrenner (2009), p. 2. She goes on to note that "Most of the states in our public-sector sample have card check certification as the primary means through which workers are organizing..."

76 Bronfenbrenner (2009), p. 23.

The United States is not alone in this situation. Though Canada's overall unionization rate has held fairly steady over the past half century, as noted in the introduction, the private-sector unionization rate has declined since the early 1980s, though not nearly as much as it has in the United States (see **Figure 5**). This is the same period in which some provinces – covering approximately 75 percent of the Canadian workforce<sup>77</sup> – switched from card check to mandatory elections, and is consistent with the idea that mandatory elections allow for more employer opposition – and thus lower union success rates – in unionization campaigns.<sup>78</sup>

**FIGURE 5**  
**Union Membership Rates for the Public and Private Sectors in Canada, 1981-2011**



Note: Consistent data for public and private sector union membership rates do not exist for the period covered in Figure 4, so two different series are combined here, one spanning select years from 1981 to 2004 (dashed lines) and the other from 1997-2011 (solid lines).

Sources: Dashed lines from Morissette, Schellenberg, and Johnson (2005); solid lines from Statistics Canada, *Perspectives on Labour and Income*, various years.

**Table 2** compares the percentage-point changes in the unionization rates by sector in the United States and Canada. In the period from 1981 to 2004, the United States' overall rate decline by 8.9 percentage points, while it declined by 7.0 percentage points in Canada. Similarly, the private-sector unionization rate declined by 10.8 percentage points in the U.S. and 9.8 percentage points in Canada. On the other hand, the public-sector rate in the U.S. actually increased slightly over this time period, while it remained unchanged in Canada.

Looking at the more recent period, from 1997 to 2011, we see less change in the rates. In the U.S., the overall rate decreased by 2.3 percentage points, in Canada, by 1.4 percentage points. But in contrast to the earlier period, the United States' private-sector rate actually decreased less than Canada's, in fact by only half as much (2.8 compared to 5.9 percentage points). Finally, the public-

77 Riddell (2004), p. 294. As Riddell notes, "Many observers believe it is no coincidence that unions declined concurrently with the abandonment of the card-check system."

78 The studies on the effect of changing from card check to mandatory elections in British Columbia (Riddell, 2004) and Ontario (Slinn, 2004) discussed above found that unionization attempts in the private sector were significantly more adversely affected than those in the public sector.

sector rate in the U.S., rather than increasing during this period as it did from 1981 to 2004, was essentially unchanged, while Canada's decreased by 1.4 percentage points.

**TABLE 2**  
**Change in Union Membership Rates, 1981-2011**  
(percentage points)

	1981-2004		1997-2011	
	U.S.	Canada	U.S.	Canada
All	-8.9	-7.0	-2.3	-1.4
Private	-10.8	-9.8	-2.8	-5.9
Public	2.1	0.0	-0.2	-1.4

Source: See Figures 4 and 5.

While Canada, in the later period, had a greater percentage-point decline in its private-sector unionization rate, **Table 3** shows that, in proportional terms, the U.S. actually had larger declines in both periods. From 1981 to 2004, the private-sector rate decreased by 57.8 percent in the U.S. and 32.9 percent in Canada. From 1997 to 2011, this decrease slowed significantly in the U.S. but only slightly in Canada. Overall, the unionization in the U.S. declined by 41.6 percent from 1981 to 2004 and by 16.3 percent from 1997 to 2011, and in Canada it declined by 18.6 percent from 1981-2004 and by 4.5 percent from 1997 to 2011. Again, the public-sector unionization rate in both countries changed little.

**TABLE 3**  
**Change in Union Membership Rates, 1981-2011 (percent)**

	1981-2004		1997-2011	
	U.S.	Canada	U.S.	Canada
Overall	-41.6	-18.6	-16.3	-4.5
Private	-57.8	-32.9	-28.9	-26.9
Public	6.1	0.0	-0.5	-1.9

Source: See Figures 4 and 5.

While the relatively stable public-sector rates slightly mask the overall decline in unionization rates in both countries, the decline in the private sector is certainly driving it.

### Criticism of Card Check

Employers in the United States have two main arguments against card check, both stemming from their supposed concern over employees' best interests.

The first is that some employees would be pressured or deceived into signing authorization cards by pro-union employees or union organizers, and a secret-ballot election would give them the anonymity required to express their true opinions. This ignores the fact that union intimidation would be an unfair labor practice, as it currently is in Canada and that, in Canada, complaints of such activity have been "rare" and findings that it actually occurred have been "rarer."<sup>79</sup> Furthermore, survey data from workers in the United States who have gone through both election and card-check campaigns show similar results, with the researchers noting that "management pressure on workers

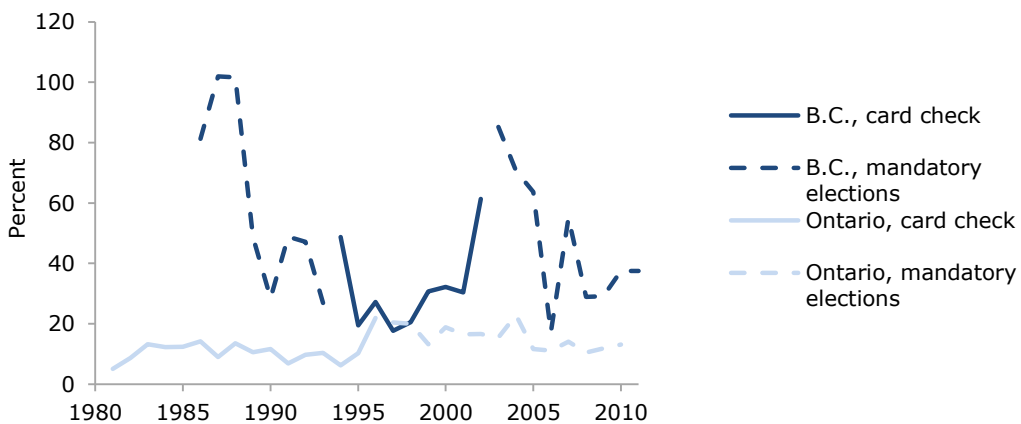
<sup>79</sup> Godard, Rose, and Slinn (2009), p. 117.

to oppose unionization was considerably greater than pressure from co-workers or organizers to support the union in both card checks and elections.<sup>80</sup>

The other common criticism of card check is that employees cannot make a fully informed choice when unions are formed by this method. They argue that unions would have an unfair advantage in convincing employees that unionization is in their best interest. By requiring first a petition for an election and then an election (typically delayed as much as possible by employers), employers argue they would have enough time to present employees with their position – in other words, to run an anti-union campaign.<sup>81</sup>

If this were true, one would suspect to see a large number of decertifications<sup>82</sup> during card-check regimes. If employees were duped by their fellow workers or union organizers into signing authorization cards, presumably they would realize this fairly quickly and would want to decertify the union in order to continue their employment relationship, as they had prior to unionization. However, data from British Columbia and Ontario – again, the two provinces containing more than half of the Canadian workforce and where both card check and mandatory election systems have existed – do not show any indication of this. **Figure 6** shows decertifications as a percent of the prior year's certifications in both provinces, under both systems. Contrary to what we would find if employers' criticism was correct, the level of decertifications was almost always higher during the periods of mandatory elections, not during the periods of card check. In British Columbia, the percentage of decertifications to the prior year's certifications averaged 46.1 percent overall, 32.0 percent during card check, and 53.5 percent during mandatory elections. Ontario had much lower levels of decertifications to certifications, but shows a similar trend. The percentage of decertifications to the prior year's certifications averaged 13.1 percent overall, 11.0 percent during card check, and 15.4 percent during mandatory elections. Similar figures result whether the lag (in this case, one year) is two years, three years, or more.

**FIGURE 6**  
Decertifications as a Percent of Prior Year's Certifications, British Columbia and Ontario, 1981-2011



Note: British Columbia data is for 1986-2011 and Ontario data is for 1981-2011.

Source: Author's analysis of annual reports of the British Columbia and Ontario labor boards.

80 Eaton and Kriesky (2009), p. 157.

81 Though it is certainly true that some employers – particularly small employers – are unaware of organizing efforts until petitions are filed, it is unlikely that this is the case in a majority of organizing campaigns.

82 Decertifications are the opposite of certifications – unions' certifications are revoked and employees no longer have access to the collective bargaining process.

## Reducing Opportunity for Employer Opposition

Nearly 30 years ago, Paul Weiler, in a seminal article<sup>83</sup> on the subject, argued that the incentives for employers to break the law were too great, and rather than combatting these with increased penalties, reducing the opportunities for employer to engage in illegal activity was the appropriate approach. He argued for what he called “instant elections,” based off the practice in Nova Scotia, which in 1977 became the first Canadian jurisdiction to have mandatory elections held shortly after filing a petition showing support for unionization.

The research presented here lends credence to the view that decreasing the opportunities to commit unfair labor practices will be more effective than increasing disincentives.<sup>84</sup> However, the evidence of employer opposition in Canada suggests that even “instant” elections are not quick enough. Given the opportunity to engage in illegal activity that elections provide (through delays in the process), employers have shown that they will take it. Card-check authorization may be the best possible way to curb illegal employer opposition in the unionization process in the United States. The Employee Free Choice Act (EFCA)<sup>85</sup> – organized labor’s unfulfilled legislative hope for the Obama administration – would have done this. While the legislation may currently be politically unfeasible,<sup>86</sup> it’s difficult to realistically argue that another policy change would make as significant strides towards guaranteeing employees’ right to freely choose whether or not to have collective bargaining representation.<sup>87</sup>

## First Contract Arbitration

A union is not fully effective unless it is able to negotiate a collective bargaining agreement with the employer of its members. A collective bargaining agreement – or contract – is a legally enforceable document which spells out such bread-and-butter issues as wages, raises, cost of living adjustments, health insurance benefits, and paid time off, as well as such non-monetary issues as grievance and disciplinary procedures, scheduling policies, work rules, performance reviews, and a host of other things, many of which can be unique to particular industries or individual workplaces.

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83 Weiler (1983).

84 However, this is not to argue against increasing disincentives. As Weiler commented, expedited proceedings and increased penalties for unfair labor practices should be part of broader labor law reform. See Campolieti, Riddell, and Slinn (2007) for a discussion on delay in the context of quick votes and expedited ULP procedures.

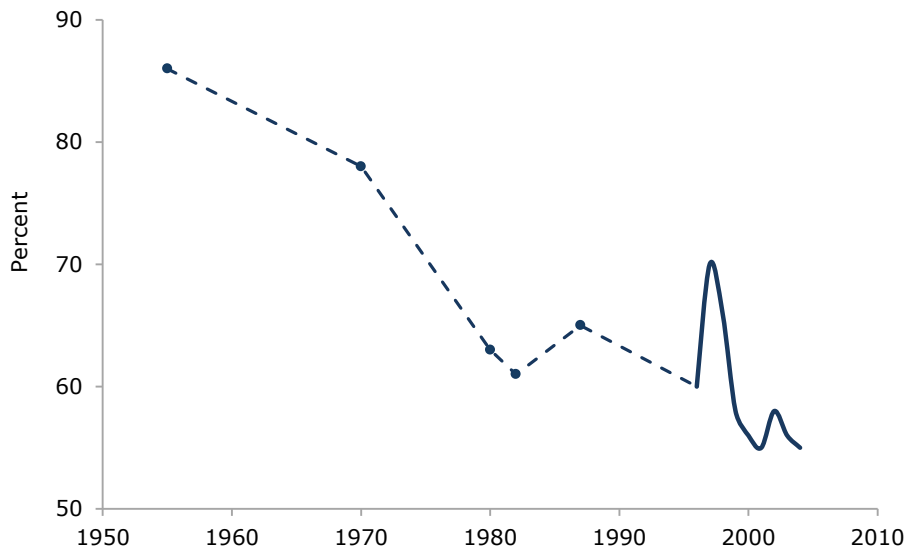
85 Employee Free Choice Act of 2009, S 560, 111th Congress, 1st Session.  
<http://www.govtrack.us/congress/bill.xpd?bill=s111-560>.

86 Though President Obama said he supported passage of EFCA during the 2008 election campaign, there was little to no effort to pass this bill from his administration after the election. Moreover, Republicans in Congress appear to be vehemently opposed to any sort of labor law reform which would make the unionization process easier. Proposed rules to streamline the election process (and even a ruling simply requiring employers to post notices informing employees of their rights under the National Labor Relations Act) were met with resounding denunciations, and both are currently held up in court. Legislation in the late 1970s to reduce time from petition to election was met with similar resistance. As Weiler (1983, p. 1812) noted: “The American commitment to the extended campaign is readily apparent in Congress’ response to a provision in the [1977] Labor Reform Act that would have directed the NLRB to conduct an election within fifteen days of the filing of a certification petition. In successive versions of the bill, this time was increased to twenty-five, thirty, and finally thirty-five days before the bill was at last defeated.”

87 One more feasible idea is “just cause” legislation, which would replace employment-at-will with requirement that employers prove just cause before terminating employees. As Wilson (2012) notes, this would not only grant non-union workers more job security, but could also be used to combat illegal firings during unionization campaigns.

In the United States, a large percentage of workers who organize unions at their workplace are unable to obtain a first contract after their union has been certified. Recent research has found that just under half of newly certified unions in the U.S. are unable to negotiate a contract two years after certification.<sup>88</sup> Previous research found higher success rates in the past, indicating that unionized workers are having an increasingly difficult time reaching the ultimate goal of collective bargaining, as shown in **Figure 7**.<sup>89</sup>

**FIGURE 7**  
**First Contract Success Rates in the United States, 1955-2004**



Source: Johnson (2010) pp. 585-6.

Note: Rates as of at least two years after initial unionization.

Part of the decrease in contract success rates is because negotiating a first contract can be quite difficult:

First, the magnitude of the task is large—the parties are negotiating and codifying all the terms and conditions of employment, not simply modifying an existing collective agreement. Second, this task occurs in the context of a bargaining relationship that is immature. Third, the negotiators are often inexperienced. Fourth, these problems may be compounded by hostility that developed during organizing that spills over into negotiations. Fifth, bargaining unit members may have unrealistic expectations concerning what the union will be able to achieve in a first agreement. Finally, and perhaps most importantly, even after a union has been certified, an employer determined to prevent unionization may use various strategies, both legal and illegal, at the bargaining table to oppose unionization.<sup>90</sup>

88 See Johnson (2010) and Ferguson (2008).

89 Bronfenbrenner (1994) found an 80 percent success rate for unions certified from June 1986 to July 1987, however, it is excluded here because it was based on a small sample and it differs substantially from the other available research.

90 Johnson (2010), p. 586.

The other part of the decrease, however, has to do with employer opposition to unions even after they have been certified. Despite the fact that employers and employees are mandated by the National Labor Relations Act to negotiate “in good faith,” research focusing on data from 1999 to 2004 shows that the already-dismal success rates were even lower in those negotiations where unfair labor practice charges were filed.<sup>91,92</sup> Much of this can be explained by employers having little incentive to negotiate in good faith: if they are found not to be doing so, they are simply ordered back to the bargaining table.<sup>93</sup>

Canada provides an example of one possible solution to this particular problem, in the form of “first contract arbitration.”<sup>94</sup>

### First Contract Arbitration in Canada

First contract arbitration (FCA) was initially introduced in Canada in 1974, as a way to prevent disruptive work stoppages resulting from first contract negotiations<sup>95</sup> and to ensure that workers who voted to unionize were able to negotiate a contract despite continued employer opposition.<sup>96</sup> Today eight of the 14 jurisdictions in Canada have some form of FCA, covering approximately 85 percent of the workforce.<sup>97</sup>

Generally speaking, either a union or an employer (or both) can apply to the appropriate authority for FCA if bargaining has come to an impasse or certain conditions have been met. Depending upon the enacting legislation, access to the FCA process can be granted automatically or after a review has found it to be merited. If the case proceeds to FCA, the first step is often conciliation or mediation to help the parties reach a voluntary agreement (if this had not already been required as one of the conditions for application). Should this fail, the last resort is arbitration, in which a neutral arbitrator or arbitration panel will hear from both sides and then impose a legally binding contract that will usually include any provisions the parties were able to agree on.

Though this is the basic outline of FCA, specific implementations vary. Researchers have identified four different FCA models that have developed in Canada: “exceptional remedy,” “no-fault,” “automatic access,” and “mediation intensive.”<sup>98</sup>

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91 Ferguson (2008), p. 6.

92 Bronfenbrenner (1994) describes and estimates the effectiveness of employers’ “broad range of legal and illegal tactics to resist the unions’ efforts to reach a first agreement” (p. 83).

93 Johnson (2010, p. 586) notes that: “The order to bargain in good faith can be filed with the courts. If it is proved that the employer continues to bargain in bad faith, the employer can be convicted of contempt of court. A conviction can result in serious damages to the employer. This difficult, expensive, and time-consuming process is rarely pursued.”

94 See Eagan-Van Meter and Eisenbrey (2009) for a similar discussion.

95 Research indeed shows that “the presence of FCA legislation reduces first agreement work stoppage incidence by at least 50 percent” (Johnson, 2010, p. 585).

96 Goddard, Rose, and Slinn (2009).

97 Slinn and Hurd (2011), p. 80. At the time of the Slinn and Hurd study, Nova Scotia had not yet passed FCA legislation (enacted at the end of 2011; see Slinn, 2012), however, Nova Scotia has less than 3 percent of the population of Canada – though presumably some workers are already covered by the federal jurisdiction – so the 85 percent figure is still roughly accurate, if perhaps low. Additionally, they note that while Prince Edward Island passed FCA legislation in 1994, it has never been brought into force (p. 45).

98 Slinn and Hurd (2011), p. 41. The brief descriptions of these models that follow are based on the more in-depth analyses of each in that work, pp. 44-54. In her work on the topic, Johnson (2010) uses slightly different terminology: “fault,” “no-fault,” “mediation-supported,” and “automatic.”



The exceptional remedy, or “fault,” model was the first type of FCA introduced in Canada, in British Columbia in 1974. It was subsequently replaced with the mediation intensive model in that province in 1993, though Quebec (since 1978), the federal jurisdiction (also since 1978), and Newfoundland and Labrador (since 1985) currently have it. It is the most restrictive form of FCA, and requires there to be demonstrated bad-faith bargaining or an irreparable breakdown in negotiations. In the federal jurisdiction and in Newfoundland and Labrador, there is a double screening process in order for applications to FCA to be accepted, with applications first being made to the Minister of Labour, who then decides whether or not to refer the matter to the labor board, which then decides whether or not the application has merit and if arbitration is appropriate. In Quebec, the application is made to the Minister of Labour, who then decides whether or not to send it to arbitration. In these cases, the arbitrator first acts as a mediator and only arbitrates if this is unsuccessful.<sup>99</sup>

The no-fault model is less restrictive than exceptional remedy, and has been in place in Ontario since 1986 and in Saskatchewan since 1994. There is no double screening process, and rather than having to prove bad-faith bargaining or a bargaining impasse, negotiations must be found to be unsuccessful for one of several statutory reasons. In Ontario, the labor board cannot decline to direct the parties to arbitration if one of these has been proven, whereas the board may refuse to intervene in Saskatchewan. In Saskatchewan, at least 90 days must have passed since certification of the union before arbitration can begin and the labor board can first direct the parties to conciliation if they have not already gone through such a process.

The automatic access model is less restrictive than either the exceptional remedy or no fault models, and is available in two Canadian provinces – Manitoba and Nova Scotia. Manitoba originally had the exceptional remedy model for two years before abandoning it, in 1984, for this form, which had been the first and only of its kind until Nova Scotia passed similar legislation at the end of 2011.<sup>100</sup> There is no discretionary screening process; two conditions must be met: that a certain amount of time has passed since certification of the union and that the parties were unable to reach an agreement even after conciliation. If the union and the employer cannot agree on an arbitrator, the labor board has the option of requiring that the two parties continue negotiations, perhaps with the guidance of a conciliator, but must ultimately impose a contract if they fail.

The mediation intensive model is also less restrictive than either the exceptional remedy or no fault models, and only exists in British Columbia (since 1993). It is not conditional on the bargaining atmosphere as in the exceptional remedy and no fault models, and there is no time requirement as in the automatic access model. Like the automatic access model, there is no discretionary screening process; two conditions are required for application to the labor board to be made (and granted) to the FCA process – that the parties have not reached an agreement and that a strike vote has been carried out successfully. At that time, a mediator is appointed, who has 20 days to help the parties reach an agreement. At the end of this period, the mediator must report back to the labor board and recommend terms of the agreement for the parties to consider and/or a process to conclude

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99 Murray and Cuillerier (2009), p. 89.

100 The legislation does, however, fit that of the automatic access model. Personal communication with Sara Slinn, Professor of Law at York University, Toronto and author of many research studies on labor and employment law. See Slinn (2012) for additional details on the Nova Scotia implementation.



negotiations, which may include further mediation, arbitration, or the authorization of a work stoppage.

### **The Employee Free Choice Act and Criticisms of First Contract Arbitration**

First contract arbitration was one of the main provisions in the unpassed Employee Free Choice Act in the United States. While not a perfect fit,<sup>101</sup> the EFCA version (which would have applied to private-sector workers currently covered by the NLRA) came closest to the automatic access model in Canada. If no agreement had been reached 90 days after the beginning of first contract negotiations, EFCA would have allowed either the employer or the union to notify the Federal Mediation and Conciliation Service (FMCS), an independent federal agency created in 1947 which “provides mediation and conflict resolution services to industry, government agencies and communities.”<sup>102</sup> The FMCS would then try to mediate an agreement between the two parties for the next 30 days. If an agreement could still not be reached, the FMCS would refer the dispute to an arbitration panel that would be tasked with deciding the terms of the first contract, which would then be imposed for a period of two years.<sup>103</sup>

While it could be argued that the time periods in EFCA could be expanded or that more emphasis could be placed on mediation, these were typically not the arguments made by opponents of the legislation.<sup>104</sup> Critics of the FCA provision of EFCA – usually employers, employers’ associations, or employers’ lawyers – had a different set of concerns. Two of these deserve special attention.<sup>105</sup> The first claim is that FCA would discourage voluntary collective bargaining by making one or both parties rely on the arbitration process rather than doing the hard work of negotiating. Another concern is that it would hand the reins of private business over to government arbitrators, resulting in onerous or unworkable conditions.<sup>106</sup>

Neither of these concerns appears to be borne out by the Canadian experience with first contract arbitration. In Canada, when FCA legislation was first being considered, employers opposed it for many of the same reasons that U.S. employers opposed its provision in EFCA.<sup>107</sup> However, nearly 40 years after the passage of the first FCA law, it is no longer considered a controversial piece of

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101 For instance, there is no provision for work stoppages to cease when application to FCA is made, whereas this is generally the case in Canada. Also, Slinn and Hurd (2011, p. 54) point out another “crucial difference”: “The EFCA approach does not envision any intermediate step between a FCA application and the matter going to arbitration, provided that a specified time has elapsed because union certification and the parties have unsuccessfully engaged in mediation for a specified time... In contrast, all four Canadian models include an intermediary step. At this step, an assessment is made either by the labor board or by the minister of labor, depending on the province, about whether the matter goes to FCA... Even in Manitoba, where access to FCA is automatic, the labor board may decide to refer the case back to the parties to continue negotiating before proceeding to an arbitration decision.”

102 Website of the Federal Mediation and Conciliation Service, accessed February 28, 2012.  
<http://www.fmcs.gov/internet/categoryList.asp?categoryID=13>.

103 Employee Free Choice Act of 2009, S 560, 111th Congress, 1st Session.  
<http://www.govtrack.us/congress/bill.xpd?bill=s111-560>.

104 See Zack (2009) for an extended discussion on the design of EFCA.

105 See, for example, a joint letter to Congress on March 19, 2009 from the U.S. Chamber of Congress and the U.S. Council for International Business. [http://www.uschamber.com/sites/default/files/hill-letters/090318\\_efca\\_hill\\_ltr.pdf](http://www.uschamber.com/sites/default/files/hill-letters/090318_efca_hill_ltr.pdf)

106 For additional discussion of criticisms of FCA, see Slinn and Hurd (2009), Slinn and Hurd (2011), Kochan and Zack (2009), and Zack (2009).

107 Slinn and Hurd (2011), p. 44. They also note that “Canadian unions were only begrudging supporters of FCA. The Canadian labor movement’s preferred resolution of first contract disputes was to rely on strike leverage.”

Canadian labor legislation.<sup>108</sup> Research has even shown that employers have constituted up to one-third of all FCA applications in one Canadian province.<sup>109</sup>

A study of the jurisdictions with FCA in Canada from 1986 to 2008 found that there was an application to the FCA process for about 4 percent of all first contract negotiations. However, not all applications are granted – just 1.4 percent of all first contract negotiations are directed to FCA.<sup>110</sup> Many of those cases which applied to the FCA process resulted in voluntarily negotiated agreements, and this was particularly the case in British Columbia which emphasizes mediation in the FCA process.<sup>111</sup>

Another study looked at data from the years 1976 to 2005 and also shows that FCA is rarely sought. The ratio of FCA applications to the previous year's certifications ranged from an average of just 1 percent (in the federal jurisdiction) to 17 percent (in Manitoba).<sup>112</sup> It also showed the imposition of first contracts was even rarer: the ratio of imposition of first contracts to the previous year's certifications ranged from an average of 0.3 percent (in the federal jurisdiction) to 8 percent (in Manitoba).<sup>113</sup>

This research also looked at work stoppage incidence in relation to first contract negotiations. It found that work stoppages were likely to be reduced, “because FCA provides an incentive for the parties to reach agreement rather than risk the possibility of a third party imposing the terms and conditions of the contract.” Rather than discouraging voluntary collective bargaining, first contract arbitration in fact *encourages* it.<sup>114</sup>

As to the second concern – that arbitrators “may impose sweeping terms and conditions of employment that will lead to disastrous results for both employees and employers”<sup>115</sup> – research has shown that arbitrators are usually conservative in the terms and conditions they write into contracts.<sup>116</sup> Additionally, one study looked to Manitoba, which has the distinction of being the Canadian jurisdiction with the highest rates of application to FCA and imposition of first contracts as well as one of the jurisdictions with the automatic access FCA model – the type most similar to that proposed in EFCA. It found that the rate of failure of those businesses which had a first contract imposed by an arbitrator between 2001 and 2007 was actually lower than the overall business failure rate.<sup>117</sup> Additionally, it is worth noting that there is nothing stopping the two parties from negotiating and modifying a contract once it has been imposed.<sup>118</sup>

Finally, rather than “government arbitrators,” most often arbitrators are from the private sector. In both the United States and Canada, arbitrators are skilled professionals who have experience in

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108 Ibid, pp. 41-44.

109 Ibid, p. 55.

110 Ibid, pp. 60-61.

111 Ibid, p. 77.

112 Johnson (2010), p. 597. The other jurisdictions' averages were: 3 percent in Ontario, 4 percent in British Columbia, 5 percent in Quebec, 7 percent in Newfoundland, and 10 percent in Saskatchewan.

113 Ibid, p. 599. The other jurisdictions' averages were: 0.5 percent in British Columbia, 1 percent in Ontario, 2 percent in Newfoundland, 3 percent in Quebec, and 5 percent in Saskatchewan.

114 Ibid.

115 See Clark (2009), in a letter to Congress on behalf of the U.S. Chamber of Commerce.

116 See Slinn and Hurd (2009), p. 113 and Slinn and Hurd (2011), p. 59.

117 Eisenbrey and Eagan-Van Meter (2010).

118 Zack (2009), p. 3.

labor-management arbitration. In the U.S., “the Federal Mediation and Conciliation Service (which is given rulemaking authority under [EFCA]) and the American Arbitration Association have many decades of experience in creating and maintaining rosters of arbitrators whom by education, experience, and the recommendation of both labor and employer professionals, have met the qualifications required to serve as expert, reliable, and neutral arbitrators.”<sup>119</sup> Additionally, the employer and union are usually first given the opportunity to choose an arbitrator together before one would be assigned. Or, alternatively, the parties could choose one arbitrator each to represent their interests and then jointly select a neutral one to create a three-person arbitration panel.<sup>120</sup>

Labor analysts in the United States have been arguing in favor of first contract arbitration at least as far back as the early 1990s.<sup>121</sup> The chorus has only grown since that time, reaching its crescendo with the Employee Free Choice Act. Given the barricades that employers erect in the face of employees’ wishes to collectively bargain and the benefits of first contract arbitration to the Canadian industrial relations system, it appears to be a policy that would greatly enhance labor relations in the United States by ensuring that employees who vote to unionize are able to obtain a contract.

## Conclusion

This paper has focused on two of the largest differences in labor policy between the United States and Canada – the union certification process and first contract arbitration. There are other policy differences that, while important, have not been discussed. For instance, some Canadian jurisdictions ban temporary or permanent striker replacement, whereas no such ban exists in the United States.<sup>122</sup> Nearly half of the U.S. states have so-called “right-to-work” legislation,<sup>123</sup> which prohibits employers and unions from including “union shop” provisions in contracts, requiring all employees covered by a union contract to pay representation fees to the union. In Canada, the situation is nearly the reverse – where such clauses are not explicitly included in contracts, legislation implicitly includes them.

Unfortunately, examining all of the differences between the industrial relations framework of the two countries would be a much larger project than that undertaken here. However, the legal process for unionization and first contract arbitration are perhaps the most important policy differences, and illustrate the vast difference in labor policy between the United States and the country most similar to it. Compared to Canada, many workers in the United States are not able to exercise their right to freely join and form unions and participate in collective bargaining, in large part due to employer opposition, which current labor policy fails to adequately address.

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119 Zack (2009), p. 3.

120 See Kochan and Zack (2009).

121 See, for instance, Chaison and Rose (1994).

122 See Singh and Jain (2001) for a comparative review of the striker replacement legislation and research in the United States, Canada, and Mexico and Duffy and Johnson (2009) for a discussion of the impact of striker replacement legislation on work stoppages in Canada.

123 The U.S. Department of Labor has a list current as of January 1, 2009, at <http://www.dol.gov/whd/state/righttowork.htm>.

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