



# MODERNIZING

THE UNION CERTIFICATION PROCESS

THE BENEFITS OF

ELECTRONICALLY SIGNED

UNION MEMBERSHIP CARDS

A RESEARCH PROJECT OF

CFLR CANADIAN FOUNDATION FOR LABOUR RIGHTS  +  CLI CANADIAN LABOUR INSTITUTE FOR SOCIAL & ECONOMIC FAIRNESS

DECEMBER 2017

The [Canadian Foundation for Labour Rights](#) (CFLR) is a national voice devoted to promoting labour rights as an important means to strengthening democracy, equality and economic justice here in Canada and internationally.

The key activities of the Foundation include:

- creating greater public awareness and understanding of labour rights as a key critical component of human rights;
- building effective political momentum and public support for progressive labour law reform;
- promoting fundamental labour standards in Canada that enhance union organizing and collective bargaining;
- providing a voice against any future regressive labour law being contemplated or introduced by a government in Canada; and
- monitoring and helping to coordinate legal challenges to regressive labour laws.

CFLR is a partner organization of the [Canadian Labour Institute for Social and Economic Fairness](#) (CLI).

The goal of at the CLI is to strengthen Canadian society and contribute to positive social change by providing progressive research, analysis and insights into the lives of everyday working Canadians, policy development based on what we find, and by initiating and planning campaigns in support of efforts to achieve social and economic fairness for all.

Both CFLR and CLI gratefully acknowledge the support of [NUPGE Canada](#)

**MATTHEW BYRNE    DECEMBER 2017**

## Overview

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THIS PAPER explores for the allowance of electronic signatures as proof of an employee's interest in joining a union during a union organizing drive. It is presented in four sections:

- an introduction to the union certification process in Canada
- a review of the use of electronic signatures in union organizing in Canada and the United States
- a consideration of the advantages of adopting electronic signatures in all eleven of Canada's federal and provincial jurisdictions
- a recommended path for changing labour relations boards' (LRBs) rules and procedures.

## Union Certification in Canada

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Unions can achieve legal and official status to represent employees in the workplace through voluntary recognition or through a certification process. In some jurisdictions, employers can agree to voluntary recognition of a union without going through a formal certification process. However, the instances where unions are voluntarily recognized by the employer are rare.

In Canada there are two processes for union certification. The first is the card check system. Prior to 1977, the 11 jurisdictions – the federal government and the 10 provinces – employed the card check system as the legislative gateway to unionization. Unions were certified if, depending on the jurisdiction, 50-55% of employees in a proposed unit signed union cards.<sup>1</sup> This constituted evidence that enough of the employees supported the union for it to be legally recognized as their bargaining agent. This card check system of certification was seen as a fair and efficient measure of workers' true wishes for unionization, as it minimized employers' ability to interfere in a union organizing campaign and enhanced the ability of workers to join unions. Today, only three provinces and the federal jurisdiction use card check systems.

The second is a two-step process for union certification; a card check process is conducted followed by an election. In the first step, the union must obtain support by having a minimum percentage of workers sign cards. Depending on the jurisdiction, this minimum is 35-50% of the potential bargaining unit.<sup>2</sup> The union then serves notice on the employer and files its application for certification with its respective LRB. The LRB will then review the evidence submitted by the union to confirm that

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<sup>1</sup> Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998," *Industrial and Labour Relations Review* 57, no. 4 (2004): 493.

<sup>2</sup> Derived from labour relations act/codes of the 11 provincial and federal jurisdictions.

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it has met or exceeded the jurisdiction’s required support of 35-50%. The employer is then given a certain period of time to respond to the application. This second step usually involves a certification vote. The LRB organizes a vote shortly after the application is filed. If 50%+1 of the employees who vote, vote for unionizing, then the union becomes certified. Seven provincial jurisdictions – British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia and Newfoundland and Labrador – have enacted certification vote procedures (Table 1).

**Table 1: Certification system by jurisdiction**

Card Check Certification	Vote Certification Only
<ul style="list-style-type: none"> <li>• Federal jurisdiction</li> <li>• Quebec</li> <li>• New Brunswick</li> <li>• Prince Edward Island</li> <li>• Alberta*</li> <li>• Ontario**</li> </ul>	<ul style="list-style-type: none"> <li>• British Columbia</li> <li>• Saskatchewan</li> <li>• Manitoba</li> <li>• Nova Scotia</li> <li>• Newfoundland and Labrador</li> </ul>

\* In June 17, 2017, the Alberta legislature amended the province’s Labour Relations Act, bringing back the card check system and grant automatic certification when a super majority of at least 65% of employees sign union cards.

\*\* In November 2017, the Ontario Liberal government amended its Labour Relations Act to allow for card-based union certification for the temporary help agency industry, the building services sector and the home care and community services industry.

***A reverse trend back to the card check system appears to be underway.***

The general trend since 1977 has been away from the card check system. As recently as December 2014, the federal Harper government enacted legislation, Bill C-525, that removed automatic certification when the majority of workers sign union cards and that forced certification votes in all union drives in the federal jurisdiction. There are some signs, however, that this trend is reversing.

One of the first acts of the new federal Liberal government was to repeal through Bill C-4 two key anti-union laws passed by the Harper government, including Bill C-525.

In June 2017, the Alberta legislature passed several changes to the province's labour laws through the NDP government's Bill 17, the Fair and Family-friendly Workplaces Act, which among other positive changes, would bring back the card check system and grant automatic certification when a super majority of at least 65% of employees sign union cards.<sup>3</sup>

In November 2017, the Ontario Liberal government passed a series of labour law reforms, including changes to the Labour Relations Act to allow for card-based union certification for the temporary help agency industry, the building services sector and the home care and community services industry.<sup>4</sup>

Thus, a reverse trend back to the card check system appears to be underway.

### ***British Columbia***

In 2016, the British Columbia Labour Relations Board (BCLRB) recognized that electronic signatures on union cards may be sufficient to satisfy the strict requirements of Section 3 of the *Labour Relations Regulation*.

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<sup>3</sup> Alberta Government, "Workplace legislation changes: Changes to workplace legislation have been passed to ensure workplaces are fair, modern and family friendly." <https://www.alberta.ca/workplace-legislation-changes.aspx#toc-0> (accessed July 7, 2017).

<sup>4</sup> CUPE, "Overview: Ontario Employment and Labour Law changes announced, Draft preliminary review – May 31, 2017." <https://cupe.on.ca/wp-content/uploads/2017/05/Changing-Workplaces-Review-2017-05-31.pdf>. (accessed July 7, 2017).

## Electronic Card Checks

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Section 3 of the *Labour Relations Regulation*, in conjunction with Section 18 of the *Labour Relations Code*, requires unions making an application for certification to provide the BCLRB with sufficient union membership cards that: (a) were signed by a member of the proposed bargaining unit and were dated at the time of signature; (b) contained a statement that, to paraphrase, notes the union will use the employee's membership to apply for certification; and (c) were signed within 90 days of the application for certification being filed.<sup>5</sup>

These requirements create a strenuous threshold for electronic signatures to pass. The first difficulty is ensuring the authenticity of the signatures. The second is ensuring that each union card was dated at the same time as it was signed. And lastly, there is the need to ensure that each union card was signed within 90 days of the date of the application.

In 2016, the United Food and Commercial Workers International Union, Local 1518, managed to address each of these requirements through the use of commercially available software – Adobe E-Sign.<sup>6</sup> The BCLRB emphasized the importance of each of the above elements to the success of an application, and added “at present, [the Board] will expect trade union applicants to identify the audit trail for obtaining electronic signatures when their applications are filed, and the attendance of the trade union organizer with the device that originally received the electronic cards will be required.”<sup>7</sup>

Most importantly, the software allowed the employee to sign the electronic membership card on their phone or tablet using

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<sup>5</sup> Labour Relations Code, Labour Relations Regulation, B.C. Reg. 7/93.

<sup>6</sup> *Working Enterprises Consulting & Benefits Service Ltd. v United Food and Commercial Workers International Union, Local 1518* BCLRB No. B67/2016.

<sup>7</sup> *Ibid.*

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a stylus or their finger to write their actual signature, the same as using a pen on paper. It also kept an extremely detailed audit record or “paper trail” that was sent with the card to the union organizer.

This included the IP address information of both the organizer and the employee, the date and time when the organizer sent the electronic card for signature and the dates and times when the employee viewed the electronic card, signed it and sent it back to the organizer.<sup>8</sup>

Based on this ruling, employers will no longer be able to challenge a certification application on the basis of electronic signatures alone, at least in BC. The BCLRB did, however, reject one card which had a typed signature rather than one signed by stylus or finger.

## Ontario

In the spring of 2017, the Ontario government published an independent study it commissioned on potential legislative changes to both employment standards and labour relations to address today’s modern workplace.<sup>9</sup>

The *Changing Workplaces Review* recommended the acceptance of electronic membership evidence. The report cited the convenience afforded by modern technology as a key factor: “[u]nions should be able to campaign on the internet and through emails, texting, and social media, and employees should be able to respond affirmatively, if they wish, from the comfort of their homes or on their portable devices without having to

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<sup>8</sup> David Woolias, “Labour Relations Board: Electronic signatures on union cards are OK (sometimes),” (24 May 2016), <http://www.harrisco.com/connect/labour-relations-board-electronic-signatures-union-cards-ok-sometimes/> (accessed July 7, 2017).

<sup>9</sup> Government of Ontario, “The Changing Workplaces Review: An Agenda for Workplace Rights,” (May 2017), [https://files.ontario.ca/books/mol\\_changing\\_workplace\\_report\\_eng\\_2\\_0.pdf](https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf) (accessed Jul 7, 2017).

arrange a physical meeting with someone or being required to sign a piece of paper.”<sup>10</sup>

In addition, two recommendations were made to the provincial government: Firstly, it recommended that the Ontario Labour Relations Board (OLRB) update its electronic membership rules by using the same tools as British Columbia or others it determined would be needed for authenticity and reliability; and secondly, it stated the government should provide the funds needed so the use of electronic information could be modernized.<sup>11</sup>

The government of Ontario reacted to these recommendations by proposing legislation, the Fair Workplaces, Better Jobs Act, 2017, which was proclaimed in November 2017. The new act allows the OLRB to conduct certification voting by telephone or electronically. Unfortunately it makes no mention of allowance of an electronic signature as proof an employee’s wishes to join a union..

### *The United States*

In the United States, the only certification process is automatic vote, regardless of number of cards signed.

The certification process must first include a petition or an authorization card with the signatures of at least 30% of the employees requesting a union which is then submitted to the National Labor Relations Board (NLRB). The board verifies the signatures and orders a secret ballot election.

In 2015, NLRB announced that unions could use electronic signatures on authorization cards before they file a certification petition with the board. The board’s general counsel outlined

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<sup>10</sup> Ibid., at 339.

<sup>11</sup> Ibid., at 340.

*NLRB open  
to expanding  
definition of a  
valid signature*

the minimum requirements for electronic signatures to be considered authentic and reliable.<sup>12</sup>

- the signer's name;
- the signer's email address or other known contact information (e.g., social media account);
- the signer's telephone number;
- the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no longer wishes to be represented by ABC Union for purposes of collective bargaining);
- the date the electronic signature was submitted; and,
- the name of the employer of the employee.

The NLRB not only supports the use of electronic signatures, but it is also considerably open to the interpretation of what constitutes a valid signature; it will accept a checked box.<sup>13</sup> It has accepted traditionally signed cards without further action unless evidence was brought forward suggesting that the signature was not authentic.

So long as public key infrastructure<sup>14</sup> is used, then the NLRB does not require further verification of the electronic signature. It simply accepts the checked box as a signature.

If public key infrastructure is not used by the union, then further authentication is required. The union will need to send a confirmation transmission to the signer inviting a response if any information is incorrect. The union must then forward any responses to the NLRB.<sup>15</sup>

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<sup>12</sup> [NLRB General Counsel Memorandum GC 15-08, September 1, 2015.](#)

<sup>13</sup> Timothy C. Kamin, "Click here to organize" – NLRB now accepts e-signatures on authorization cards," (2015), Ogletree Deakons, <http://www.lexology.com/library/detail.aspx?g=9880f6b7-460e-48c6-8b4d-9286c8e80fb6> (accessed July 7, 2017).

<sup>14</sup> Public key infrastructure refers to a standards-based technology that enhances security policies with communications protocols, mechanisms, and procedures to facilitate confidential and trusted exchanges of information between different parties within and outside an organization. The infrastructure framework also provides security services such as authentication, integrity checking, confidentiality, and non-repudiation.

<sup>15</sup> *Ibid.*

## Advantages of electronic card check

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An assessment of the advantages of electronic card checks for union certification suggests considerable potential. This potential can only be empirically validated after enough jurisdictions accept electronic signatures and adequate time has passed to collect data for such an analysis. That being said, the potential is well worth the effort. The advantages include reducing the incidents of unfair labour practices, improving access to diverse populations and trimming costs.

- ***Reducing early employer detection: Unfair labour practices***

It was found that 80% of employers in eight of Canada's jurisdictions engaged in some form of resistance to union certification.<sup>16</sup>

These employers used a combination of resistance tactics ranging from training managers to deal with a union drive to threatening to dismiss employees. These tactics have been found to contribute to lower rates of certification.<sup>17</sup>

Further, the more time available to employers to engage in such tactics, the more successful they are at preventing certification.<sup>18</sup> It is, therefore, not surprising to find that certification procedures requiring more time to complete reduce certification success rates. Any reduction in the time it takes to certify delays employer knowledge of a union drive and is highly beneficial.

Employers are often first made aware of a union certification process when they are delivered notice. This is ideal because it prevents them from intentionally or accidentally engaging in

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<sup>16</sup> Karen J. Bentham, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions," *Industrial Relations* 57, no. 1 (2002): 172.

<sup>17</sup> *Ibid.* p. 175—181

<sup>18</sup> Chris Riddell, "The Causal Effect of Election Delay on Union Rates: Instrumental Variable Estimates from Two Natural Experiments," *Industrial Relations* 49, no. 3 (2010): 379—384.

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an unfair labour practice such as one of the resistance tactics outlined above.

Unfortunately, employers often discover that the process has begun prior to that. Anti-union advocates have identified spotting strangers and paper union materials at or around the workplace as an effective way to enhance early detection of a union certification process.<sup>19</sup> Electronically signed union cards provide a means to limit such detection and reduce the time that employers have to engage in resistance or accidentally interfering.

● ***Improving access to the harder-to-organize workforce***

For unions to grow and prosper in the 21<sup>st</sup> century, it is essential that they diversify and increase coverage in harder-to-organize workplaces. This includes, but is not limited to, the private sector, small- and medium-sized enterprises and businesses with young, part-time and contingent workers.<sup>20</sup>

Though unions have adopted innovative organizing strategies to unionize these harder-to-organize employees,<sup>21</sup> coverage rates for these workers have experienced only minor improvement or, in some cases, decline. Developing additional ways to reach out to them is not only important for increased union coverage; these employees have higher than average latent demand for unions.<sup>22</sup>

Completely computerizing the certification process would greatly facilitate contact with harder-to-organize workers. Access is hindered whenever there is a requirement to use pen and paper signatures on union cards. Electronic signatures can provide a means to overcome that limitation and allow hard-

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19 Walter Orechwa, *Proof Positive: Building A Work Environment Where Unions are Simply Unnecessary*, (Indianapolis: Dog Ear Publishing 2016), 70-71.

20 Joseph B. Rose and Gary N. Chaison, "Unionism in Canada and the US in the 21st Century: The Prospects for Revival," *Relations Industrielles/Industrial Relations* 56, no. 1 (2001): 34–65.

21 Julie Guard, Jorge Garcia-Orgales, Mercedes Steedman, and D'Arcy Martin, "Organising Call Centres: The Steelworkers' Experience" in *Paths to Union Renewal: Canadian Experiences*, ed. Pradeep Kumar and Christopher Schenk (Toronto: Broadview Press, 2006), 277–292.

22 Andrew Jackson, "Rowing Against the Tide: The Struggle to Raise Union Density in a Hostile Environment" in *Paths to Union Renewal: Canadian Experiences*, ed. Pradeep Kumar and Christopher Schenk (Toronto: Broadview Press, 2006), 61–78.

***Completely computerizing the certification process would greatly facilitate contact with harder-to-organize workers.***

er-to-organize workers ready access to the union certification process and the gains that union membership can provide.

This is most evident in nontraditional workplaces such as homecare workers and employees who work from their homes. These employees are very difficult to reach by traditional means. Certification drives have struggled in part from ongoing difficulty getting enough cards signed and defining the unit.<sup>23</sup> The primary vehicle for organizing in these areas has, therefore, become the internet, especially social media. Electronically signed cards would be very useful, allowing these employees to access the full union certification process, from initial contact to signatures, from their computers.

This issue might also be very pertinent to young workers whose generation has become synonymous with computerized communication. Though a fully electronic certification process may not help bridge the entire gap between unions and young workers, it seems that it is an excellent introduction and handshake.

● ***Trimming the costs of organizing***

Survey evidence indicates that almost all unionized employees, 95.9%, consider protection of wages and benefits extremely or very important, whereas a minority, 36.3%, consider organizing to be extremely or very important.<sup>24</sup> Lastly, organizing expenses such as travel and vehicle rental are cited by anti-union organizations as factors that employees should consider when deciding whether to unionize.<sup>25</sup> Any improved cost efficiencies in organizing are, therefore, worth pursuing.

Most of the research on electronic voting supports the claim that it comes with significant potential to realize cost reductions for

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<sup>23</sup> Eileen Boris and Jennifer Klein, "Labor on the Home Front: Unionizing Home-Based Care Worker," *New Labour Forum* 17, no. 2 (2008): 37.

<sup>24</sup> Pradeep Kumar and Gregor Murray, "Innovation in Canadian Unions: Patterns, Causes and Consequences" in *Paths to Union Renewal: Canadian Experiences*, ed. Pradeep Kumar and Christopher Schenk (Toronto: Broadview Press, 2006), 79–102.

<sup>25</sup> "Labour Watch: Informed Employees. Informed Choices," *Labour Watch*, <http://www.labourwatch.com/faqs/while/on/general> (accessed July 8, 2017).

all parties involved: unions, employers and LRBS. In the United States, the NLRB now prefers electronic communications in part for this reason.<sup>26</sup> It is unclear to what extent it will reduce the costs of union organizing in Canada because data are lacking. That being said, a fully computerized certification process would likely reduce organizing expenses. For example, the travel costs alone associated with signing physical cards would be eliminated. As well, costs for information transmission, communications and meetings would likely be reduced.

## Changing LRB Rules and Procedures

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There are two approaches to having rules changed so electronically signed cards will be permitted as evidence of an employee's support for union certification. The first approach would be to lobby the 11 governments for amendments to their labour board acts or codes that establish the LRBs. The primary advantage of this approach is that the lobbying effort could focus on ensuring that the broadest interpretation of electronic evidence is provided in the wording of the amendments such that typed electronic signatures or returned email confirmation would be accepted.

This would maximize the advantages listed above as the technological threshold for electronically signed cards would be computer access of any kind rather than a device with a touch screen, not yet common on personal computers or specialized software.

The disadvantage of this approach, and why it is not recommended here, is that it would likely face considerable resistance by governments and could be seen to disrespect the autonomy of the LRBs. Labour relations acts and codes set up LRBs as in-

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26 Federal Register vol 79 No 240 December 15, 2014 Part 3 National Labour Relations Board 29 CFR Parts 101, 102, and 103 RIN 3142-AA08 Representation—Case Procedures; Final Rule., <https://www.gpo.gov/fdsys/pkg/FR-2014-12-15/pdf/2014-28777.pdf> (accessed July 7, 2017)

*Use electronically signed cards as evidence in a test case*

dependent administrative tribunals to allow for the impartial mediation and adjudication of labour relations. The labour relations acts and codes clearly leave assessment and interpretation of evidence in the hands of the LRBs. It is, therefore, unlikely that governments will be receptive to such lobbying efforts.

The second approach, recommended here, is to use electronically signed cards as evidence in a test case within each jurisdiction, other than BC where this has occurred. In so doing, each LRB would make a judgement on the validity of electronically signed cards. This approach offers respect to the autonomy of individual LRBs to decide what is valid evidence. It is also very likely that the LRBs' decisions would favor electronically signed cards, as the BCLRB does. Given the BCLRB's decision and the general proliferation and acceptance of electronic signatures in e-commerce, it would seem unlikely that LRBs would reject them.

The disadvantage to this approach is that there is no guarantee what decision the LRBs would make; however, the BCLRB decision provides some insight. The BCLRB accepted electronically signed cards but only if the signature was provided on a touch screen with a stylus or finger.<sup>27</sup> The use of a typed signature option was rejected. This rather conservative interpretation suggests that other LRBs could make the same choice. In so doing, electronic signatures would not be an option for harder-to-reach employees without access to a touch screen. Even so, lobbying for this degree of specificity in evidence interpretation within a labour relations act or code would be significantly more challenging than trying to achieve recognition of electronically signed cards through test cases.

A further consideration to the test case approach is there is a risk that the LRB would reject the cards used in the test case and the union would fail to become certified. It is, therefore,

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<sup>27</sup> Working Enterprises Consulting & Benefits Service Ltd. v United Food and Commercial Workers International Union, Local 1518 BCLRB No. B67/2016.

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suggested that the test case should involve a small potential unit with a supportive employer. In that case, if the electronic card evidence were not accepted, the number of employees affected would be minimized and, given a supportive employer, it would be relatively easy to achieve certification for those employees in the short-term future.

## Conclusion

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This paper advocates for the use of electronically signed union cards as evidence in union certification. More specifically, small potential units with supportive employers should attempt the certification process using electronically signed cards. Further, such test cases should be informed by the results of the BCLRB.

Most electronic signed cards should be signed with a program like Adobe E-Sign and follow the criteria outlined by the BCLRB.

Also, at least one card should be signed using a typed function, rather than stylus or finger signature on a touch screen, to ensure that LRBs consider this option of that form of signature.

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