

KEY POLICY REFORMS

Improving Bargaining Unit Certifications

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A RESEARCH PROJECT OF

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

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1 Executive Summary

THIS PAPER seeks to identify which labour policies have the greatest impact on bargaining unit certification and decertification rates. This is achieved through case studies of British Columbia, Saskatchewan and Ontario, three jurisdictions that have implemented significant labour reforms in recent decades.

The results show that where political conditions are favourable, union advocates should focus on first implementing or maintaining card check certification and second, ensuring that there are adequate unfair labour practices (ULP) protections in place. These two policies have the greatest impact on certification efforts. Reforms intending to facilitate decertification should be a lesser priority as they have little to no measurable impact on decertification rate. However, legislative reform alone cannot reverse declines in certification applications, and union activists must also seek to improve the public perception of unions among non-unionized workers.

Card Check vs Mandatory Vote

Card check systems, where a bargaining unit is automatically certified once a set number of employees sign membership cards, is the single most effective means of improving the number of successful certifications. Mandatory vote systems, by contrast, are the largest contributor to declines in successful certifications.

Card check improves certification rate because it minimizes the opportunity for employers to interfere in the certification process. For instance, in a card check system, employers will often be unaware of a unionization effort until organizers have signed the requisite number of employees and applied for certification, leaving little time for the employer to take retaliatory actions. Also, in card check systems, organizers can

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detect possible ULPs against members by taking note when an employee's membership is withdrawn. Lastly, card check reduces the uncertainty facing employees when they take the risk of attempting to certify.

In mandatory vote systems, by contrast, there are greater opportunities for employer interference. The mandatory campaign prior to an election period provides employers the opportunity to engage in hostile measures at a critical point in time. In addition, the anonymous nature of a secret ballot impedes organizers' ability to detect when an employee has been coerced by an employer to change their position—employees may remain members but vote against certification in the secret ballot. Employees may also be less willing to support a unionization effort when they know that they will be vulnerable to ULPs during the campaign period, or they may not wish to spark conflict with management prior to obtaining the protections of a bargaining unit.

Card check systems are on the decline in Canada and are frequently the first target in anti-union reforms. In jurisdictions that have retained card check, resisting reforms that aim to introduce mandatory vote should be a priority. In jurisdictions with mandatory vote certification, the re-introduction of card check should be a priority in any discussions of labour reform.

Where government is hostile and mandatory vote cannot be resisted, there are several ways of mitigating the effect of mandatory vote. First, the campaign period should be limited to 10 days to minimize the ability of employers to interfere. Second, it is important that election ballot boxes remain sealed pending any legal challenge with the pertinent labour relations board (LRB). Third, unions should be provided means of accessing employees, either through on-site access or through employer-provided contact information. Fourth, the delay period between certification attempts should be minimized.

Unfair Labour Practices

Ensuring that there are both substantive and procedural protections against ULPs should also be a priority for advocacy. Substantive reforms include limiting employer rights to campaign against certification, prohibiting mandatory employer-held meetings on certification and maintaining effective protections for employees during certification campaigns. Procedural reforms include ensuring LRBs have the power to grant temporary orders when ULPs are first discovered, order remedial certification in response to a ULP, extend the time limit for bringing ULP complaints and require LRBs to consider the importance of unionization when making decisions. ULP protections will be of most importance in jurisdictions with mandatory vote systems, as the campaign period increases the frequency and effectiveness of ULPs. Indeed, if there is no prospect of resisting the implementation of mandatory vote certification, ensuring that there are adequate ULP protections will be paramount.

Decertifications

While anti-unionization reforms typically include provisions that facilitate decertification, in none of the surveyed jurisdictions did such reforms result in significant increases in decertifications. In Ontario, despite several aggressive decertification reforms, decertification applications have trended downwards. Consequently, decertification reforms should be a lesser priority in advocacy efforts.

Other Factors

The observed changes in certification and decertification trends cannot be entirely explained by changes in labour relations legislation. For example, in British Columbia, after an initial doubling of certification applications following the re-introduction of card check, applications declined steadily afterwards despite favourable laws and a union-friendly government.

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While declines in unionization are frequently blamed on changes in the Canadian economy or on increased automation, labour scholars have found that changes in the economy and technology explain very little, if any, of this decline. Instead, the literature suggests that public perception of unions, particularly by non-unionized workers, is a key factor influencing unionization rate more broadly. While more research is needed on the role of public opinion on certification applications, these findings suggest that improving the perception of unions among non-unionized workers should be a priority for advocacy efforts.

The Canadian Labour Institute recommends that labour centrals at the national, provincial and territorial level as well as major national and regional unions work to develop a coordinated national strategy for labour law reform.

Recommendations

The following recommendations are based on the analysis and conclusion in this paper and could form the basis of a reform campaign:

Action Points

1. Prioritize the implementation/protection of card check certification.
2. Where mandatory vote is inevitable, mitigate by ensuring the law:
 - a. Limits the campaign period to 10 days
 - b. Requires ballot boxes remain sealed during a challenge to the LRB

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- c. Provides unions with the means to access employees during the campaign
 - d. Minimizes the delay period between certification attempts
3. Ensure there are adequate ULP protections:
- a. Implement clear restrictions on employer interference in certification
 - b. Provide LRBs the ability to effectively protect against ULPs through:
 - i. Powers to grant interim orders
 - ii. Powers to grant remedial certification
 - iii. Extended limitation periods for bringing ULP complaints
 - iv. Requirements to consider benefits of unionization in decision making
4. Engage in outreach to non-unionized employees to improve public perception of unions.

2 Background Literature on Certification Rate

THE ACADEMIC literature on factors influencing bargaining unit certification and unionization rates generally agrees that non-structural factors such as legislation, political climate and public perception are the primary explanatory factors. Structural factors such as economic and demographic ones, meanwhile, have little to no influence. In the Canadian context, studies show that legislation is the most important non-structural factor in explaining changes in certification rate. Further, several studies show that among all relevant labour policies, whether a jurisdiction uses card check or mandatory vote certification has the single greatest impact.

2.1 Structural and Non-Structural Factors

Statistical analyses of unionization rate suggest that changes are largely the result of domestic policy choices, political climate and public attitudes towards unions. Riddell and Riddell's study of union density in both the USA and Canada between 1984 and 1998 found that none of the decline in Canada's unionization rate was the result of declines in industries with a propensity for unionization. Their analysis compared the relative impact of structural factors (largely economic and technological change) to non-structural factors (legislation, political climate and public opinion). Riddell and Riddell found that in Canada, none of the decline in unionization rates could be attributed to structural changes, but rather the decline was entirely attributable to non-structural factors. The key takeaway is that the causes of declining unionization can be impacted by effective advocacy: Laws can be reformed, new governments elected and public opinion can be swayed.

That policy, politics and perception are more important factors than the economy and technology is further supported by Schmitt and Mitukiewicz's analysis of unionization rates in OECD countries between 1960 and 2010. They looked at the

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relative influence of politics, technology and globalization on unionization rate. Their study found that while technological development and integration into global markets had minor and even positive effects on unionization rate, national political agendas were strong determinants of overall unionization rate. In brief, states with policies characteristic of “liberal market economies” had the lowest rate of unionization while social democratic countries had consistently high levels of unionization. Such a broad definition of national policies did not distinguish between differences in law, government hostility to unions or public opinion. However, their findings lend further credence that unionization rate is effected largely by factors open to influence by union advocates.

2.2 Non-Structural Factors

More directed research in Canada on certification rate suggests that among “non-structural factors” (legislation, public opinion and political climate), labour legislation has the greatest impact. Martinello’s comparison of certification success rate in British Columbia, Saskatchewan and Manitoba attempted to measure the relative impact of economic conditions (i.e., employment growth and inflation), political climate (i.e., the governing party) and labour legislation. Martinello found that in all jurisdictions, labour legislation had much larger effects on both the number of certification applications and the success rate than did economic or political factors. Political factors had moderate but statistically significant impact on certification success only in British Columbia, while economic factors had a moderate impact only in Saskatchewan.

2.3 Labour Law Reforms

Among labour law reforms, whether a jurisdiction allows for card check certification or has a mandatory vote process has been repeatedly found to have the greatest impact on certifications. In a widely cited paper, Riddell conducted a statistical analysis of British Columbia labour reforms for 1984–1993,

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which included replacing card check certification with mandatory vote procedures and subsequently returning to card check certification. Riddell did not examine BC reforms that occurred following 2001, such as the reintroduction of mandatory vote certification and further loosening of ULP protections. The results showed that not only was the change in certification procedure almost entirely responsible for changes in certification success rate, but the introduction of mandatory vote doubled the effectiveness of management opposition (as measured through the frequency of ULP complaints).

Riddell argues that the data tend to support the thesis that mandatory vote systems suppress unionization because they enhance the opportunity for employer opposition. Card check systems lessen the opportunity for employers to oppose certification largely because they often do not have sufficient time to mount an anti-unionization campaign and union organizers are better positioned to detect individuals who have been coerced into not signing. This is opposed to secret ballot systems where union organizers have little ability to detect coercion. The increase in employer opposition and corresponding ULPs also disproves an alternative thesis (often repeated in conservative messaging) that membership drives do not reflect true levels of support for unionization in the workplace.

Riddell's findings are replicated in Johnson's larger comparative study of factors affecting certification success rate. Her analysis examined the relative effect of three policies: mandatory certification vote, first contract arbitration and dues check off. Johnson found that mandatory vote systems reduced the success rate of certification attempts by approximately 9%, while first contract arbitration and dues check off policies had no significant impact on certification success.

The importance of certification procedures was also highlighted in Warner's qualitative comparison of American and Canadian labour relations laws. Agreeing with prior research that structural difference between the US and Canada cannot

explain their diverging unionization rates, Warner argues that mandatory vote certifications in all US organizing drives and the existence of first contract arbitration in most Canadian jurisdictions are both linked to Canada's relatively higher unionization rate.

3 Methodology

3.1 Jurisdictions

I chose three jurisdictions as case studies to examine what factors influence the certification/decertification process: British Columbia, Ontario and Saskatchewan. These jurisdictions were chosen because they all implemented major reforms to the certification process, each showed a unique trend in their historical unionization rate and their respective labour relations boards published sufficiently detailed data for subsequent analysis. The quality of available data has meant excluding other potentially interesting jurisdictions, such as Quebec and PEI, the only Canadian jurisdictions whose unionization rate has risen since the 1990s.

3.2 Indicators

This analysis chose five indicators as measures for changes in union certification applications:

- (1) certification applications per annum
- (2) certification success rate
- (3) decertification applications per annum
- (4) decertification success rate
- (5) unionization rate

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Indicators 1 and 3 include all applications filed within the reporting year. Indicators 2 and 4 measure successful applications as a proportion of all applications disposed of within the reporting year, including withdrawn and settled applications. Indicator 5 measures the number of employees that are members of a union or covered by a collective agreement as a proportion of all employees. Except for indicator 5, which is derived from Stats Can, all data is taken from the annual reports of each jurisdiction's respective labour relations board.

For the BC case study, I have also examined the total number of employees seeking certification and the average bargaining unit size for applications in each year. The BCLRB is the only body that publishes this information and only does so for 2002 onwards.

3.3 Variables

To identify relevant reforms, I surveyed academic articles on historical changes in Canadian labour legislation, downloaded data from the Canadian Foundation for Labour Rights database on restrictive labour law and reviewed the legislative history for each jurisdiction's labour relations statutes. In addition to legislative changes that directly impact the certification and decertification process, I have also included changes to excluded sectors from collective bargaining (e.g., domestic and farm workers), changes to relevant ULP provisions, changes to LRB powers to intervene in unionization campaigns and changes in LRB purpose.

I have not considered the voluminous legislation that restricts public sector bargaining rights. While such legislation may, in the aggregate, create an environment hostile to unionization and thus depress demand for certification, it is assumed that the individual effect of such legislation is too small to be noticeable.

In early exploratory analysis, I attempted to control for the

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impact of the economic climate on certification applications through comparison with raw GDP and change in GDP. However, those comparisons revealed no statistically significant correlation with changes in certifications or applications. Given these findings, and studies by Martinello and Riddell & Riddell that found that economic factors have a marginal influence on certifications, I have not attempted to standardize certification and decertification statistics by economic indicators, as originally planned. Instead, changes in economic conditions will be examined on a case-by-case basis as a possible explanation for changes in indicators.

3.4 Limitations

This paper is unable to measure other “non-structural factors” that may have influenced unionization attempts, such as changes in the public perception of unions or changes in the provision of union services by employers (such as employer-provided grievance arbitration). As such, trends that are not associated with recent legislative changes can only be attributed to hypothetical explanations.

There are also limitations on the available data, making analysis difficult. As noted above, the lack of data on the number of employees in proposed bargaining units is an impediment to determining if declines in certifications are the result of decreased demand for unionization, declines in small firms or impediments to organizing small bargaining units.

4 Case Studies

4.1 British Columbia

4.1.1 *Policy Changes*

Within the past 30 years, British Columbia underwent three major periods of labour law reform. The first reforms, in the 1984 Labour Code Amendment Act, were passed by the conservative Social Credit government. The Labour Code Amendment Act eliminated card check certification that allowed for automatic certification when 55% of employees signed union cards. Card check was replaced by a mandatory vote to be held once 45% of employees became members of a bargaining unit. The reforms also affected the decertification process. Prior to the reforms the BCLRB retained discretion as to whether to decertify a bargaining unit; this was replaced with a mandatory vote rule mirroring the certification process. The amendment also reduced ULP protections by expanding permissible employer action during unionization campaigns.

Subsequently, the NDP government's 1993 Labour Code Amendment Act reintroduced card check certification system with a 55% threshold. The reforms, however, left untouched the prior changes to ULP protections. The NDP period was also a period of relative government amiability towards unionization.

However, the return to card check did not survive the NDP government, as in 2001, the incoming Liberal government re-introduced the mandatory vote system. In addition, the 2001 reforms limited sectoral bargaining in the construction industry and removed the requirement for public works projects to hire unionized workers. In 2002, another suite of reforms was passed that changed the BCLRB's legislative purpose from promoting unionization to acting as a neutral body, enshrined employers' rights to speak on unionization and permitted employers to hold mandatory meetings on unionization efforts

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during a certification campaign. While the government has passed a large amount of legislation targeting the collective bargaining rights of public sector unions, since 2002 there have been no significant changes to the certification process or ULP protections.

Table 1 - Changes to BC Labour Relations Laws

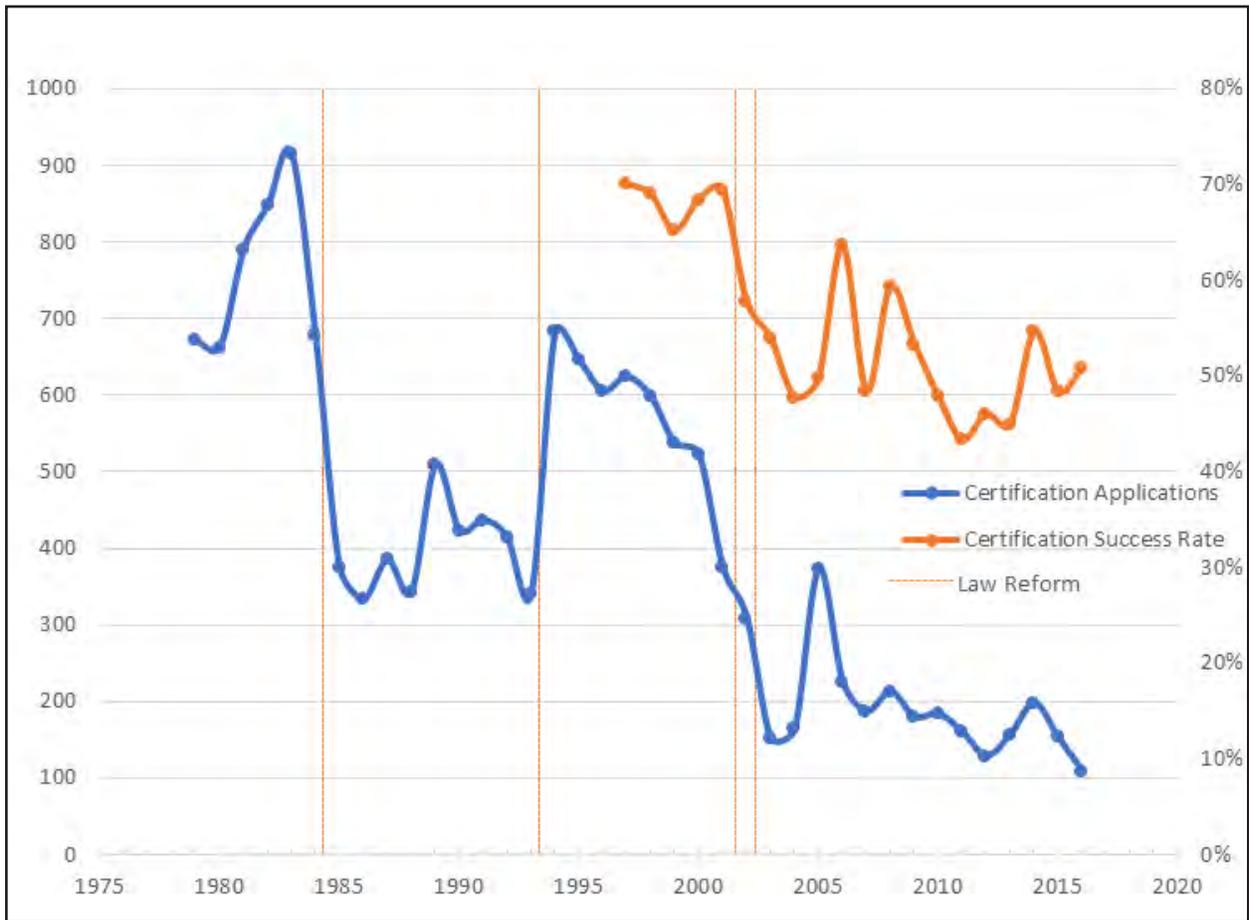
YEAR	LEGISLATION	KEY REFRORMS
1984	Labour Code Amendment Act	<ul style="list-style-type: none"> •Mandatory vote replaces card check system •Decertification changed to automatic vote •Broadened permissible employer action during organization period
1993	Labour Code Amendment Act	<ul style="list-style-type: none"> •Return to card check certification on 55% membership threshold
2001	Skills Development and Fair Wage Repeal Act, 2001 (Bill 22)	<ul style="list-style-type: none"> •Removed requirement to hire unionized workers for public works projects
2001	Skills Development and Labour Statutes Amendment Act	<ul style="list-style-type: none"> •Re-imposed mandatory vote after 45% membership threshold •Repealed sectoral bargaining in construction industry
2002	Labour Relations Code Amendment Act	<ul style="list-style-type: none"> •Changed the LRB's purpose from promoting unionization to acting as a neutral body •Employer's free speech on unionization efforts protected so long as they do not amount to coercion or intimidation

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4.1.2 Trends

4.1.2.1 Certification

Figure 1 - British Columbia Certifications (1979–2016)



• Applications

BC's certification application data shows marked sensitivity to labour law reform. The first major fall in certification applications occurred in 1984, coinciding with the Labour Code Amendment Act, 1984 and the shift to a mandatory vote certification process. The decline in applications persisted until 1993, when the NDP government's Labour Code Amendment

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Act, 1993 reintroduced card check certification after which the number of certifications rebounded sharply, doubling between 1993 and 1994 alone. However, following this initial rebound, the number of certification applications began to decline. By 2000, certification rate had fallen back to levels consistent with the mandatory vote period.

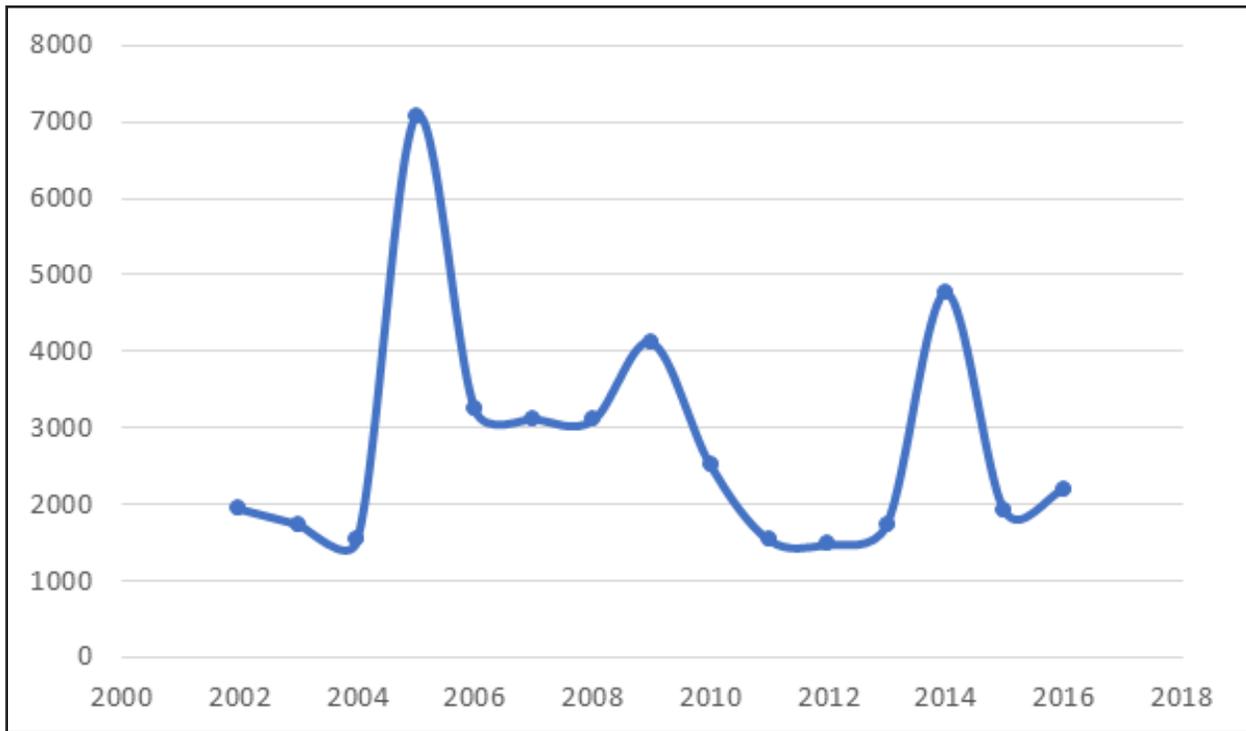
Following the 2001–2002 reforms, which saw the re-introduction of mandatory vote, certification applications continued to decline and have remained within the range of 150–200 a year (excluding a notable spike in 2005). This is markedly smaller than the 376–683 application range during the card check period. It should be noted that while certification applications have declined since 2000, the average proposed bargaining unit size has increased over the same period. The implications of this trend will be discussed below.

- Success Rate

While the BCLRB does not have published data for certification success rate prior to 1997, Riddell’s study reported that success rate declined prior to the introduction of mandatory vote in 1984 and rebounded following the re-introduction of card check in 1993. The published data does show that certification success rate fell significantly following the 2001 and 2002 reforms. Indeed, even though there was a decline in certification applications between 1998 and 2000 (under a card check system), the certification success rate remained stable between 1997 and 2000. Following these reforms, while there was increased volatility in the annual success rate, the average was approximately 51% as opposed to 68% prior to the reforms, a 25% decline in the average success rate between these two periods.

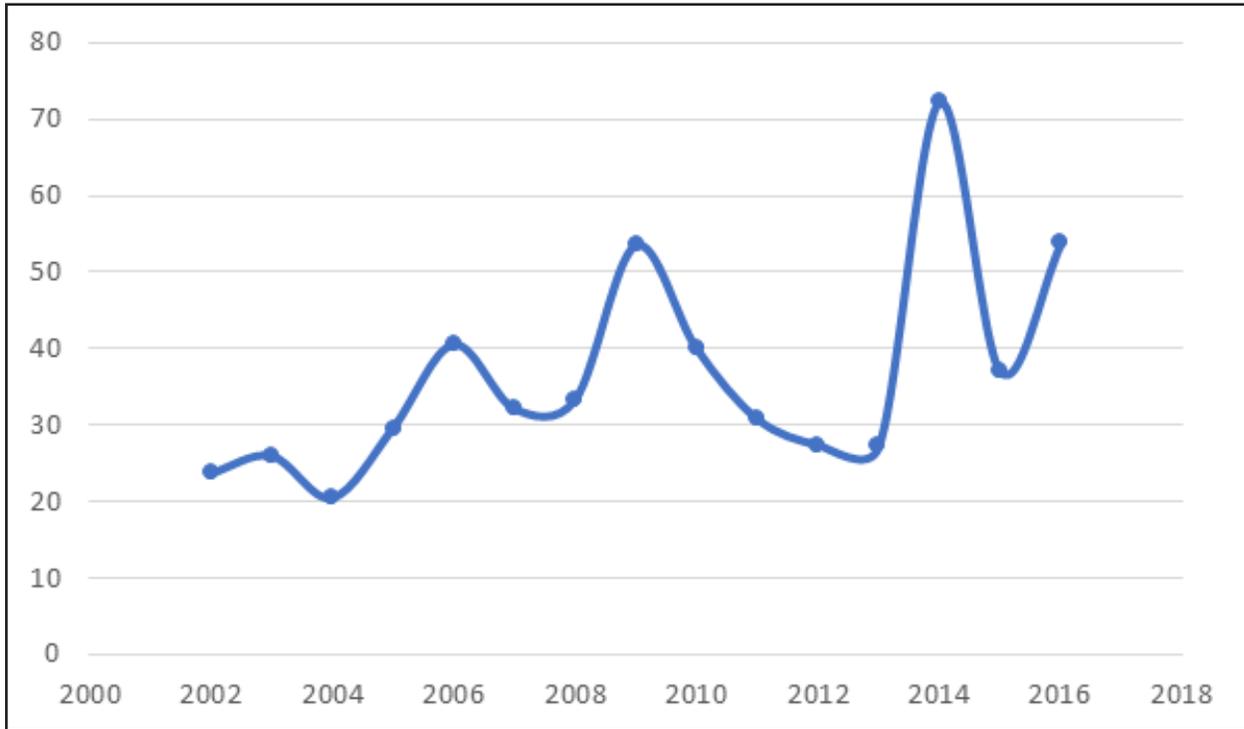
Employees Seeking Certification and Bargaining Unit Size

Figure 2 – British Columbia: Number of Employees Seeking Certification
(2002–2016)



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Figure 3 - British Columbia: Average Size of Proposed Bargaining Units (2002–2016)



The raw number of certification applications provides a proximate measure of demand for certification, with the caveat that it cannot account for changes in the size of proposed bargaining units. BC is the only jurisdiction that provides data on proposed bargaining unit size, and that is only for 2002–2016. This data shows that while during that period there was a 50% decline in annual certification applications, average bargaining unit size increased by 126% and the total number of employees proposing to be certified increased by 13%.

• Conclusions

The data clearly shows that the introduction of mandatory vote certification corresponds with dramatic declines in certification applications and certification success rate while the

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introduction of card check has corresponding increases. BC provides a strong case for the overarching importance of promoting card check certification as a policy reform.

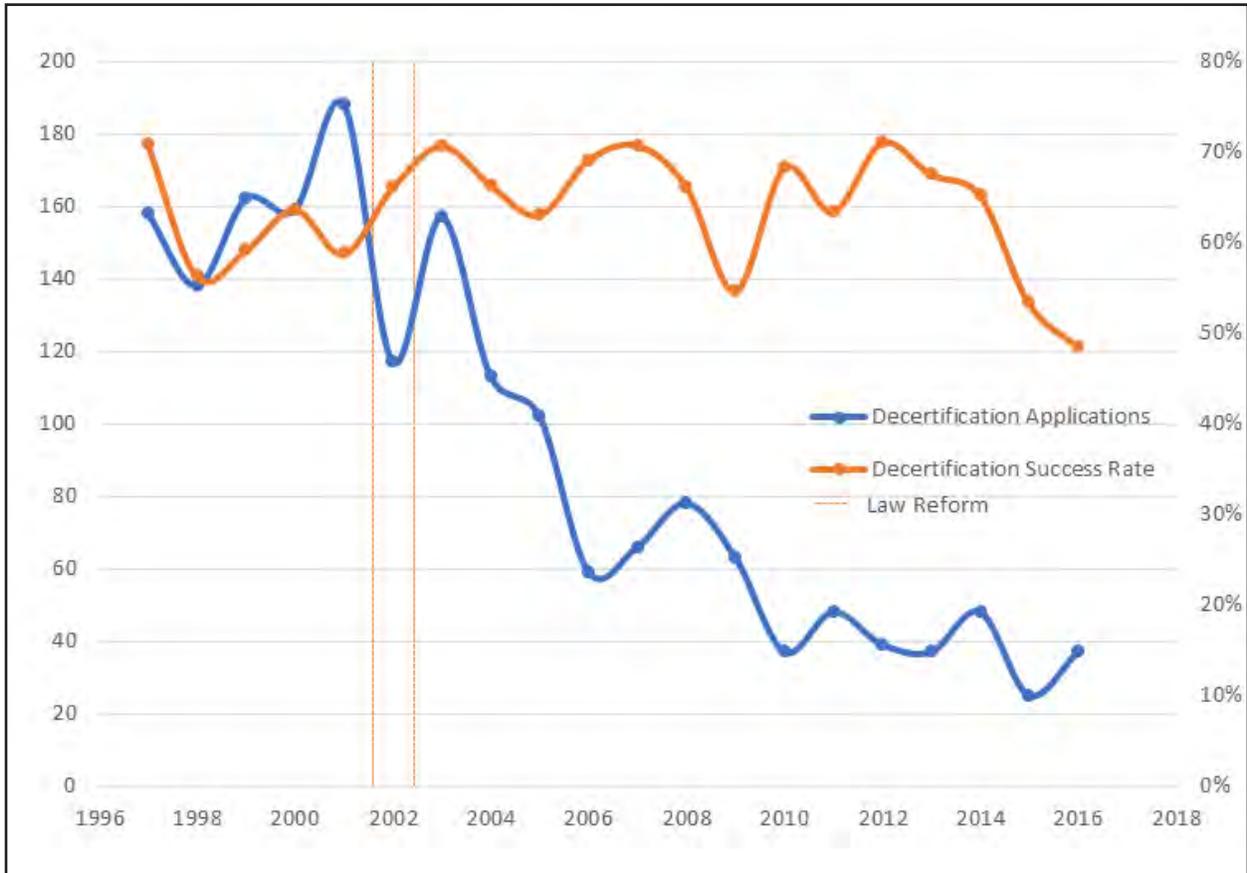
What is less clear, however, is why the number of certification applications declined during the NDP period following the initial rebound in 1994. Between 1994 and 2000 there was no major economic downturn or other economic shift that could explain the decline. One possible explanation is that the decline in applications simply reflected the increasing concentration of bargaining units, as is seen in the data from 2002–2016. However, without data from the BCLRB covering the NDP era, this cannot be confirmed. An alternative explanation is that the decline in certification applications was influenced by shifting public perception of unions. Notably, the labour-aligned NDP government had lost significant popular support prior to the 2001 election which corresponds with the sharpest declines in certification applications.

In the post-2002 reform era, certification applications have declined while success rate has largely stagnated. It should be noted that the decline in certification applications is belied by the increasing number of employees seeking certification. One explanation is that this is simply the result of broader trends in the concentration of bargaining units. An alternative explanation is that larger bargaining units are more likely to succeed in a hostile unionization environment as they are more resilient to aggressive employer tactics.

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4.1.2.2 Decertification

Figure 4 - British Columbia DeCertifications (1997–2016)



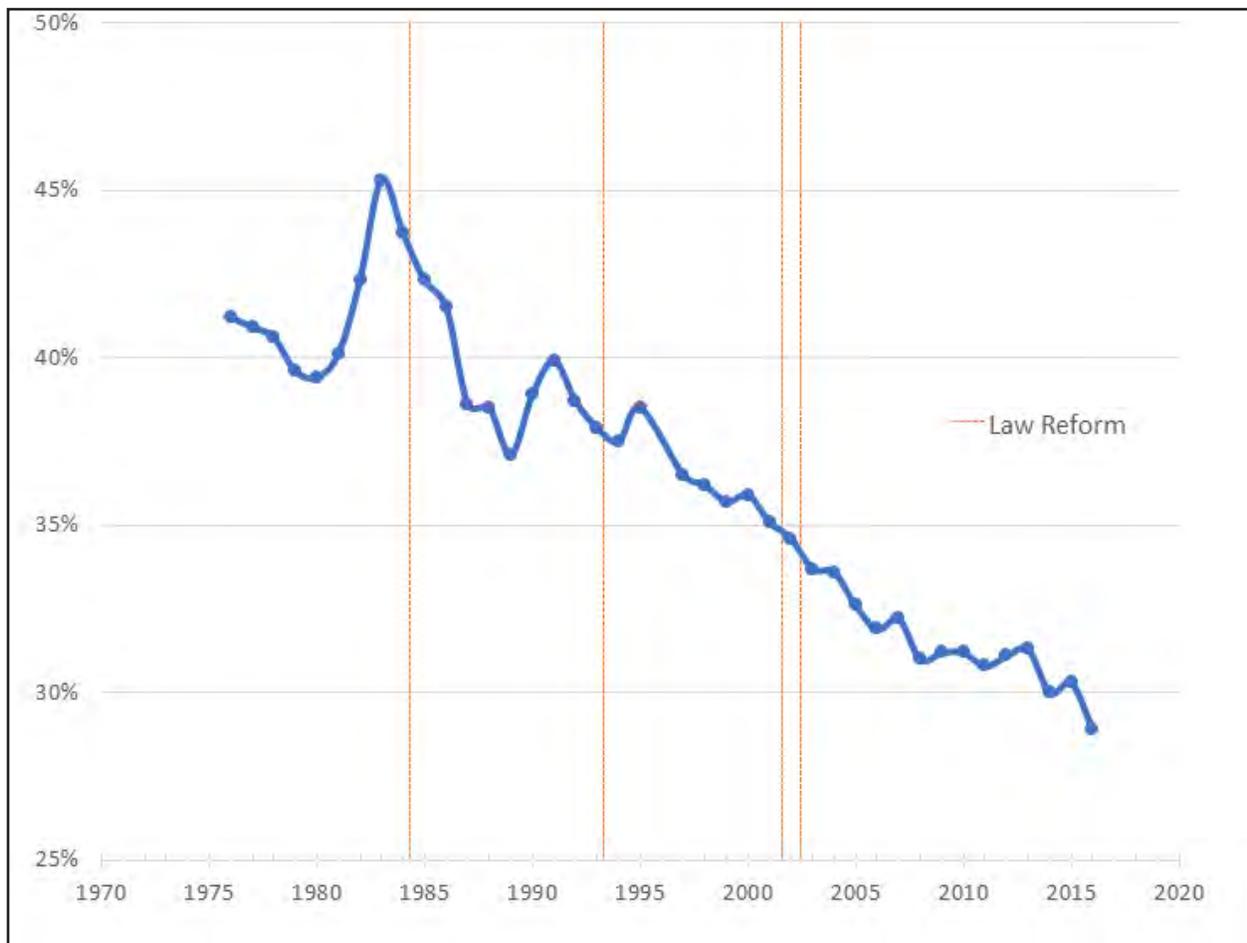
BC has seen a significant decrease in applications to terminate certification following the 2001 reforms. However, the 2001 and 2002 labour law reforms did not alter the standing legislation on decertification, meaning that the sustained decline in decertifications is the result of other factors. This is further supported by the relative stability in the success rate for decertification applications. If legislative or jurisprudential change had made decertification more onerous or difficult, one would expect a corresponding decline in the success rate.

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One possible explanation for the decline in applications is that there is a widening disparity in working conditions between unionized and non-unionized workplaces. As such, the benefits of unionization would be clearer and the risks of decertification greater. An alternate, yet related, explanation is simply that there is a growing positive perception of unions among unionized workers, indicating successful outreach and/or advocacy by unions on behalf of their members.

4.1.2.3 Unionization Rate

Figure 5 - British Columbia Unionization Rate (1976–2016)



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BC has seen one of the largest drops in unionization rates in Canada, experiencing a 13%-point decline between 1981–2012. Union coverage rates declined in all provinces between 1981–1999, and BC’s decline in that period is characteristic of broader trends. However, between 2000–2012, while all other Canadian provinces experienced moderate declines or small growth in union coverage, BC experienced further major decline. Indeed, BC has experienced almost continual decline in unionization since the 1984 reforms. The unionization rate declined even under card check certification. These numbers suggest that while card check certification is an important mechanism for facilitating unionization, it alone is insufficient to reverse overall trends in declining unionization.

4.2 Ontario

4.2.1 Policy Changes

Ontario saw a series of changes to its certification process between 1993 and 2005. Prior to 1993, Ontario was a card check province. In 1993, the NDP government passed the Labour Relations and Employment Statute Law Amendment Act, 1992, which introduced a series of reforms to facilitate unionization efforts and expanded the coverage of Labour Relations Act (LRA) collective bargaining rights. Most notably, the reforms gave the OLRB greater power to intervene in unionization campaigns where there was a ULP, and expanded protections to employees between certification and the first collective agreement. Beginning in 1995, the Conservative government passed a series of reforms that rolled back unionization policies. Notably, in 1995 the Labour Relations and Employment Statute Law Amendment Act, 1995, introduced mandatory vote certification and lowered the threshold number of employees needed to decertify a bargaining agent. In 1998, the OLRB’s powers to remedy unfair labour practices were reduced, and in 2000, employers were mandated to distribute information on the decertification process and introduced other mechanisms to facilitate decertification. In 2005, the Liberal government

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restored the OLRB's power to grant interim orders and provide remedial certifications. However, other reforms from the Conservative era, most notably mandatory vote certification, have remained in place.

Table 2 - Ontario Legislative Changes

1993 Labour Relations and Employment Statute Law Amendment Act, 1992

- Expanded LRA coverage to include domestic workers and certain professionals
- Full and part-time workers were grouped into a common bargaining unit at time of certification
- Expedited hearings provided for complaints arising from discipline or discharge during organizing campaigns
- Granted OLRB power to issue interim orders during organizing campaigns
- Granted limited access to third-party property for organizing efforts
- Expanded remedial certification to cases where ULP made ascertaining true wishes of employees unlikely
- Provided “just cause” termination protection for employees between certification and first collective agreement

1995 Labour Relations and Employment Statute Law Amendment Act, 1995

- Replaced card check certification with mandatory vote certification
- Lowered threshold for employees to decertify a bargaining agent
- Reintroduced exclusions for domestic workers and professional workers

1998 Economic Development and Workplace Democracy Act, 1998

- OLRB power to order remedial certification replaced with power to order a second vote
- Employers given power to challenge union estimate of number of employees in a bargaining unit
- OLRB interim order powers reduced

2000 Labour Relations Amendment Act, 2000

- Employers mandated to post and distribute information on decertification process
- Introduced mandatory certification bar of one year following a failed certification effort
- Extended the “open period” for decertification
- OLRB was required to address decertification applications prior to addressing first contract arbitration applications

2005 Labour Relations Statute Law Amendment Act, 2005

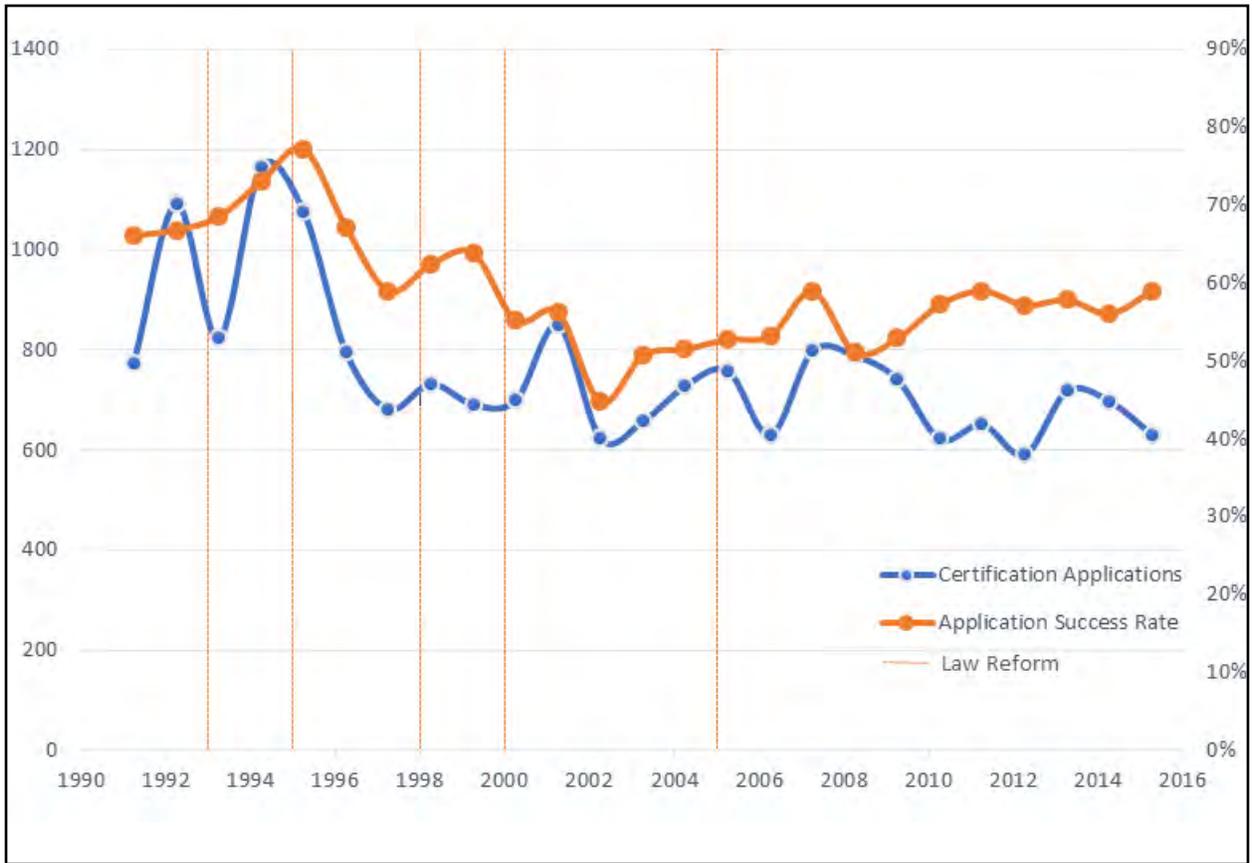
- OLRB power to order remedial certifications restored and interim orders restored

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4.2.2 Trends

4.2.2.1 Certification Applications

Figure 6 - Ontario Certifications (1991–2016)



While the 1993 NDP reforms were short lived, they did coincide with the highest number of certification applications between fiscal year 1991 and 2015. The 1994 high of 1,161 applications was a 50% increase in applications over 1992.

However, certification applications declined following the implementation of a mandatory vote system in 1995, and between 1994 and 1997, they had declined by 70%. Notably, while further Conservative reforms were passed in 1998, 2000

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and 2005, there was no appreciable change in the trend in certification applications. It is not clear why such reforms had limited impact on certification application rate. It is possible that public perception of unions within Ontario remained high despite government animus.

The reforms had a largely analogous effect on certification success rate. Between the implementation of the NDP reforms to their repeal, the success rate progressively rose from 69% to 77%.

Following the implementation of mandatory vote, the success rate declined to below 59% within two years. Notably, while there was a continued decline in certification success rate following subsequent Conservative government labour reforms, this decline was moderate.

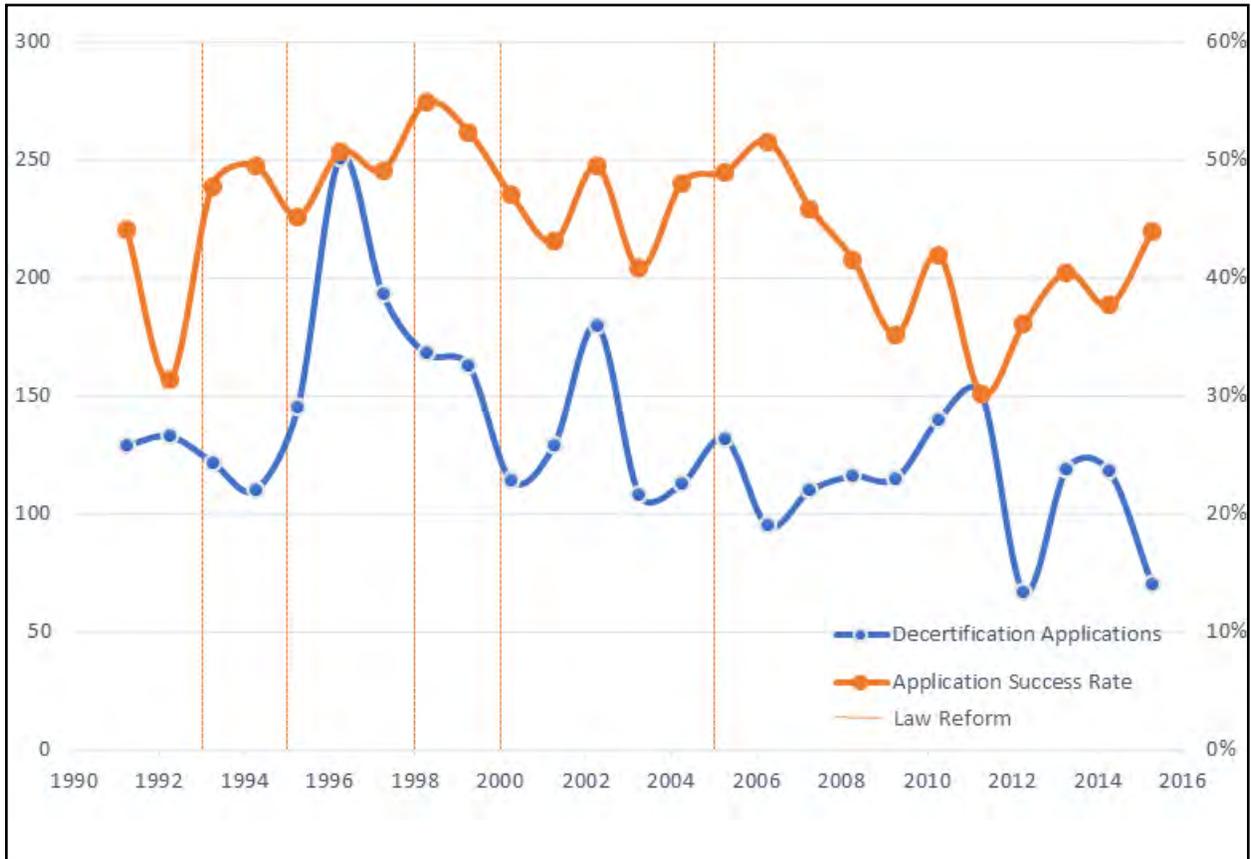
It should also be noted that the observed decline between 2000 and 2005 is unlikely to be the result of the 2000 reforms, which primarily affected decertification efforts. It is difficult to see how the only relevant 2000 reform, the introduction of a one-year wait period between certification attempts, would have had a dramatic effect.

Rather, it is likely that declines were the result of the 1998 reforms that reduced ULP protections and limited the OLRB's power to remedy ULPs, as the 2005 reforms that partially reversed these policies saw a gradual increase in certification success. It is significant that the improved success rate following 2005 are not reflected in increased certification applications, suggesting that the greater ULP protections did not substantially impact overall demand for unionization.

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4.2.2.2 Decertification Applications

Figure 7 - Ontario Decertifications (1991–2015)



Overall, between 1991–2015, decertification applications appreciably declined. However, following the 1995 reforms, there was a significant increase in decertification applications, peaking at 251 applications, nearly 94% above the prior average annual amount.

It is quite likely that this increase in decertification applications was the result of the lowering of the threshold number of employees needed to decertify a bargaining agent. However, following this spike in applications, the overall number of applications declined to pre-reform levels.

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There was a second spike in applications in 2002, which may have been the result of the 2000 introduction of a requirement for employers to post instructions for decertification applications at worksites. The trend in the decertification success rate largely follows the trend in decertification applications; however, there was a second decline in the success rate following 2007.

While it does appear from the data that decertification success rate increased sharply following the 1993 NDP reforms, it is also possible that the low success rate in 1992 was an outlier. Given that the 1993 reforms did not directly change the law on decertification, it seems unlikely that any rise in decertification success is related to the law reform.

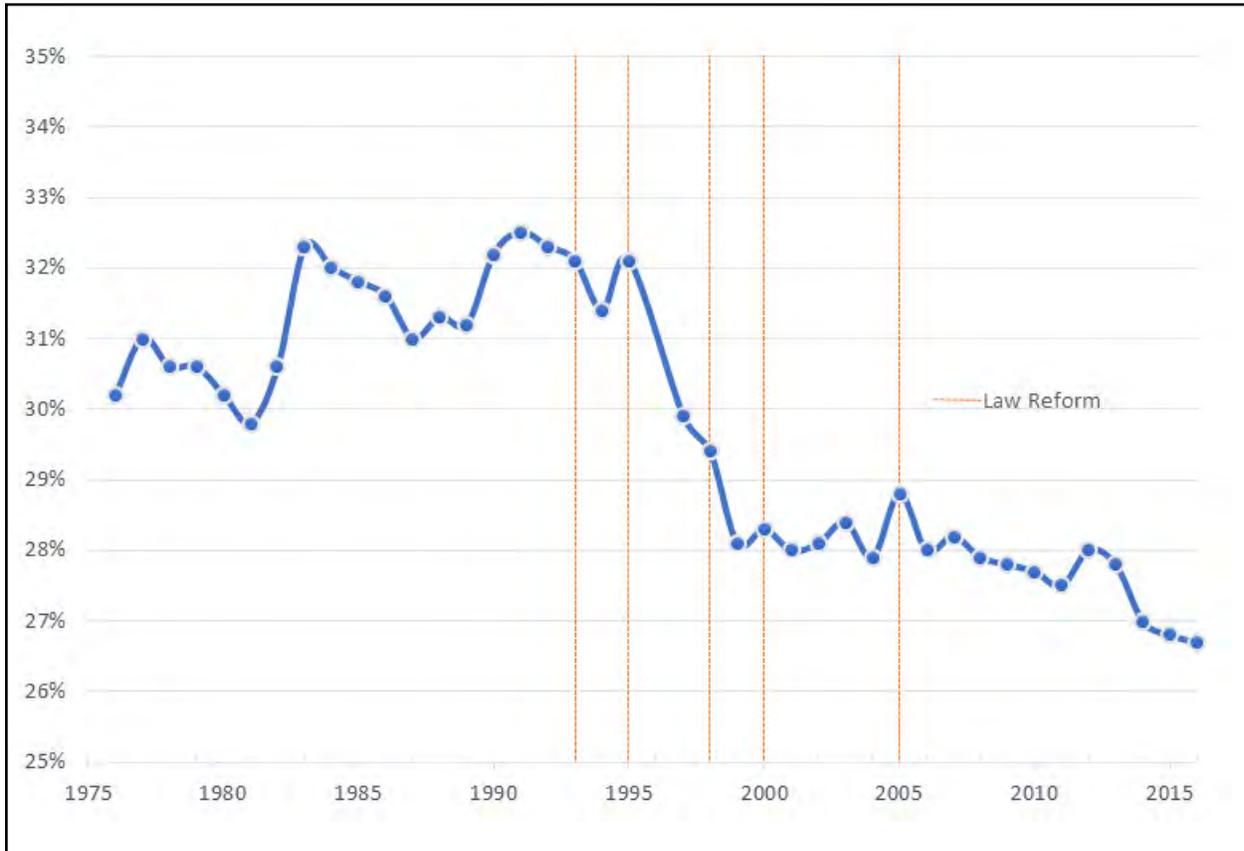
What is most notable about the changes in Ontario's decertification rate is that while Ontario saw several significant changes to decertification laws, their impact appears to have been short term, encouraging a wave of decertification applications followed by a return to the mean.

The lowering of the threshold required for decertification votes appears to have the most significant impact on decertification. However, by 2000 decertification applications had fallen to pre-1995 levels. The 2000 reforms caused a second rise in decertification applications; however, these too only had short term impact. While not as dramatic as in BC, the overall decline in decertification applications and the limited impact of pro-decertification reforms both suggest that, once unionized, workers prefer to remain in a unionized environment.

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4.2.2.3 Unionization Rate

Figure 8 – Ontario Unionization Rate (1975–2016)



Next to Alberta, Ontario has the lowest unionization rate in Canada. However, Ontario’s unionization rate increased between 1976 and 1993, growing by 6%, a 0.3% average annual increase. Following the 1995 reforms, unionization went through a sharp decline that reached its nadir in 1999, a total decline of 12% or a 3% average annual decline. Since 1999, the decline in unionization rate has been far more modest, only 5% between 1999 and 2015, a 0.3% average annual decline. The data, while not conclusive, suggests that the shift to mandatory vote in 1995 likely played a major role in decreasing the rate of unionization.

4.3 Saskatchewan

4.3.1 Policy Changes

Saskatchewan has undergone a series of restrictive labour reforms beginning in 2008, implemented by the Saskatchewan Party. The Trade Union Amendment Act, 2007, introduced numerous barriers to the certification process, including introducing mandatory vote certification, raising the membership requirement prior to vote, shortening the expiration period for membership cards, easing evidentiary requirements for obtaining damages against a union following an unsuccessful certification bid, entrenching employer speech rights and introducing a short limitation period on ULP complaints. In 2009, the government introduced major reforms to the construction industry that aimed to replace province-wide and trade-specific bargaining units with general project-based bargaining units. In 2014, the province consolidated 12 labour and employment law statutes into the Saskatchewan Employment Act. The act restricted union membership for employees whose duties were “confidential in nature” and broadened the open period during which decertification applications could be made.

Table 3 - Saskatchewan Legislative Changes

2008 Trade Union Amendment Act, 2007

- Replaced card check certification with mandatory vote certification
- Raised membership requirement for representation vote from 25% to 45%
- Reduced time period of membership card effectiveness from 6 months to 90 days
- Removed Saskatchewan Labour Relations Board’s (SLRB’s) discretion to refuse vote where another trade union has a clear majority support
- Lowered evidentiary threshold for ordering damages in favour of an employer following an unsuccessful certification
- Broadened employer speech rights
- Imposed a 90-day limitation period for ULP complaints

2009 Construction Industry Labour Relations Amendment Act, 2009

- Granted employers ability to “voluntarily recognize” union of their choice, as opposed to a certification, allowing for employer-dominated unions
- Replaced province-wide trade-specific unions with project-based collective agreements
- Vastly broadened employers’ ability to decertify unions for abandonment; abandonment provisions do not apply to employer-dominated unions
- Excluded “maintenance” workers from Construction Industry Labour Relations Act provisions

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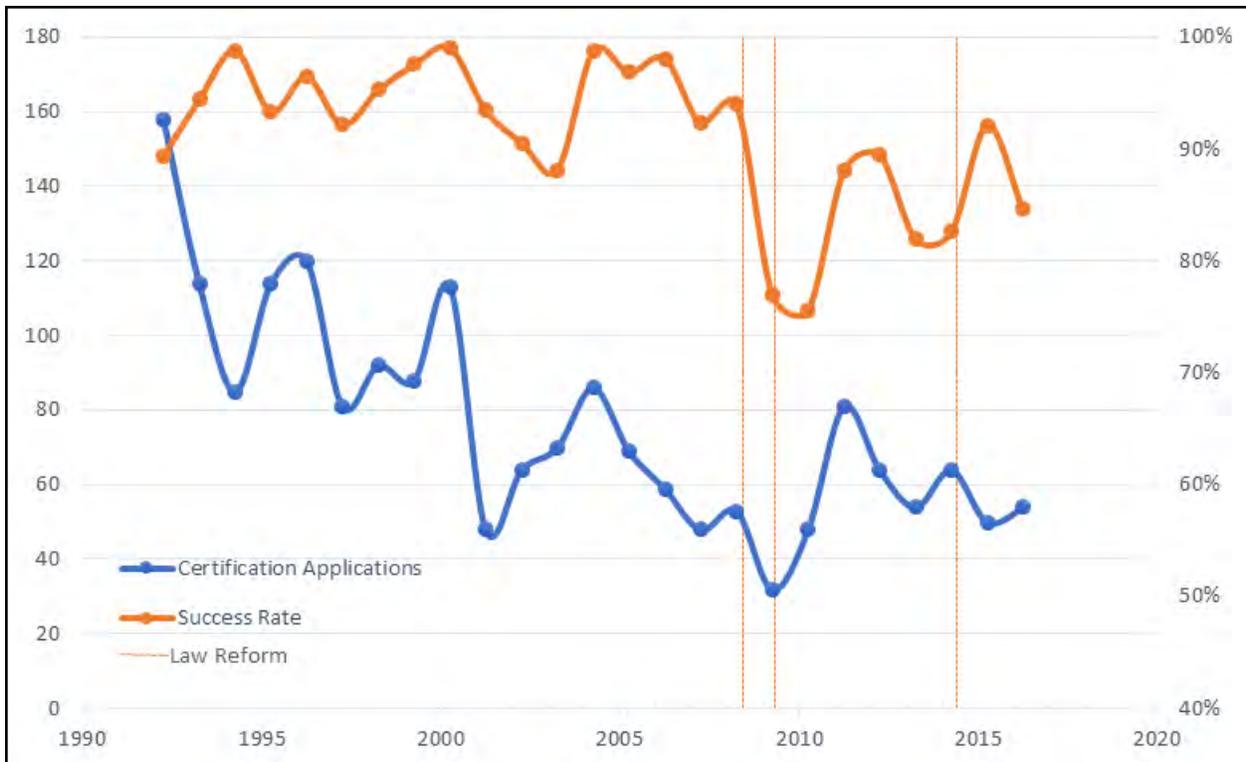
2014 Saskatchewan Employment Act

- Repealed and replaced 12 employment and labour relations statutes
- Prohibited union membership for any employee whose primary duties include activities of a confidential nature
- Requires that supervisors be members of a separate bargaining unit
- Open period for decertification expanded to any time except for 2 years following certification and 1 year following the last unsuccessful decertification attempt

4.3.2 Trends

4.3.2.1 Certification Applications

Figure 9 – Saskatchewan Certifications (1992–2016)



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Saskatchewan certification applications were on a downward trend between 1992 and 2008, falling by 66%, an average decline of 7% per year. Certification success rates during this period remained stable, rising a total of 5% over the same 16-year period.

Between 2008 and 2016, certification rates went through some variation and returned to 2008 levels, whereas success rate declined by 10%. The immediate rise in certification applications following a shift to a mandatory vote system is puzzling, as it runs contrary to the trend in Ontario and British Columbia.

It is, however, quite possible that the rise in certification applications can be largely explained by 2009 reforms to the construction industry collective bargaining regime. These reforms created mechanisms to replace province-wide sectoral bargaining units with bargaining units restricted to individual construction projects.

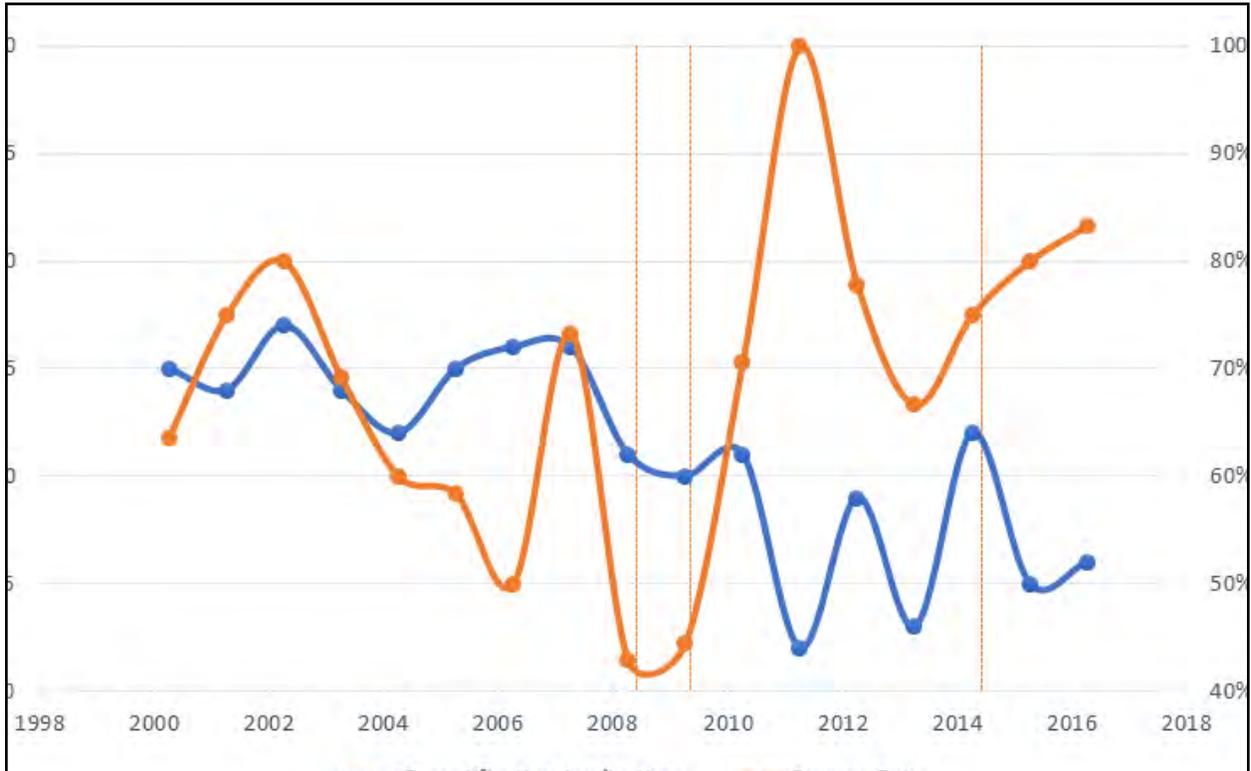
The rise in certifications could thus be attributed to the increase in project bargaining units at the initiative of employers in the construction industry. This would be consistent with the change in the certification success rate, which declined sharply following the introduction of mandatory vote provisions but recovered following the 2009 construction reforms.

The SLRB does not publish sufficiently detailed reporting information to determine how many of the new applications are a result of the 2009 reforms.

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4.3.2.2 Decertifications

Figure 10 - Saskatchewan Decertifications (2000–2016)

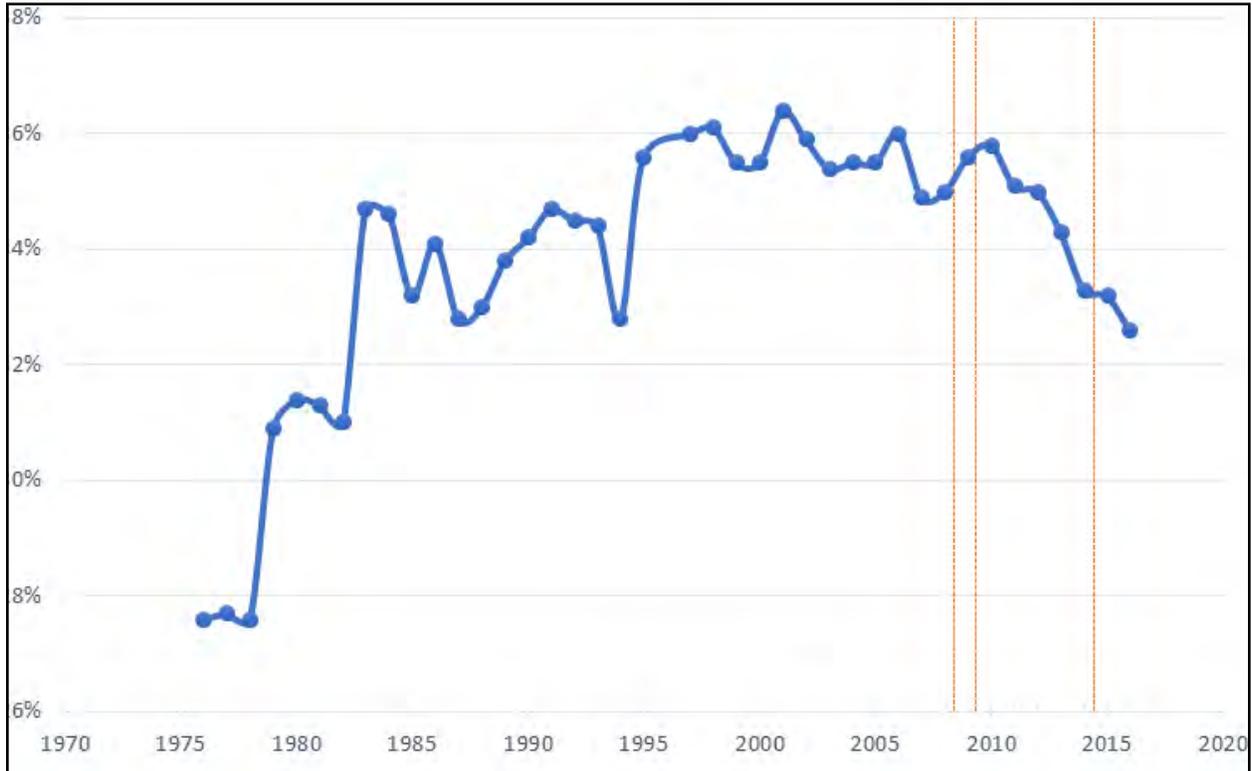


Given that Saskatchewan has very few annual decertification applications, caution should be taken in generalizing from changes in decertification numbers. Decertifications began to decline in 2007, prior to the 2008 reforms, and have remained below pre-2007 levels since. There has been significant variability in the success rate of decertification applications between 2000 and 2016. A large part of this variability can be explained by the low number of decertification applications. For instance, while 2011 saw a peak 100% success rate, there were also only two applications disposed of that year, the lowest number of applications over the same period. Thus, while the data indicates a moderate rise in the success rate following the 2014 reforms, which facilitated decertification applications, it is unclear whether such an increase is significant.

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4.3.2.3 Unionization Rate

Figure 11 - Saskatchewan Unionization Rate (1976–2016)



Between 2000 and 2010, unionization rates in Saskatchewan were stable. Following 2010, the unionization rate began a sharp decline, falling a total of 9% between 2010–2016. The decline in unionization rate corresponds with the anti-union reforms of the Saskatchewan Party.

5 Policy Changes

5.1 Certification Process

Certification by card check or mandatory vote appears to have the clearest and strongest impact on the number of certification applications and the success rate of those applications. Following introductions of mandatory vote certifications, the number of certification applications fell sharply in BC and Ontario, while declines in Saskatchewan were tempered by changes in the construction industry. Certification success rate also declined immediately in BC and Saskatchewan, though in Ontario the decline did not occur for another five years. It should be noted that this data is limited, and that mandatory vote reforms were generally accompanied by other restrictive labour laws. As such, it is quite possible that the shift to a mandatory vote system is as much an indicator of an anti-union legislative environment as it is a direct factor in and of itself. However, the statistical studies by Johnson and Riddell both suggest that the impact of certification processes is definitive.

The impact of certification processes on certification rate vote is widely cited in the literature and, as such, is the target of both unionization and anti-unionization advocates. Riddell suggests that mandatory voting systems drive down successful claims because they provide management a campaign period in which they can persuade and/or coerce employees into voting against a union drive. Moreover, the anonymous nature of mandatory voting makes it difficult for union activists to identify individuals who have been targeted by ULPs and pressured to remove their support. Indeed, the shift to a mandatory vote may heighten the effect of other reforms that weaken ULP protections. By contrast, in card check systems, employers often have little notice of a pending unionization effort and thus have less time to interfere in certification. In addition, as certification is automatic once a threshold is reached, ULPs cannot defeat a certification bid once an application has been made.

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While the factors noted by Riddell help explain why success rate drops, that mandatory vote systems are linked with decreases in certification applications indicates that the very prospect of a vote is dissuasive. Likely, employees are less willing to support a unionization effort when they know that they will be vulnerable to ULPs during the campaign period, or they may not wish to spark conflict with management prior to obtaining the protections of a bargaining unit. However, the increase in bargaining unit size in BC, if generalizable, suggests that mandatory vote doesn't decrease the number of employees seeking certification but rather encourages the certification of larger bargaining units.

The general legislative trend has been to move away from card check models. British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, and Newfoundland and Labrador all require a mandatory certification vote. Only four provinces and the federal government maintain card check based certification. Interestingly, there is little correlation between the choice of certification model and overall unionization rate or change.

Table 4 - Certification Processes by Jurisdiction

MANDATORY VOTE	CARD CHECK
British Columbia (2001)	Federal
Alberta (1988)	Manitoba
Saskatchewan (2008)	Quebec
Ontario (1995)	New Brunswick
Nova Scotia (1977)	Prince Edward Island
Newfoundland and Labrador (1994)	

5.2 Unfair Labour Practices

All three studied jurisdictions made reforms to ULP protections. The reforms broadly fell into two categories, those that broadened or narrowed permissible employer action during unionization campaigns and those that changed the LRB's power to remedy ULPs.

BC's reforms in 2002 enshrined the employers' right to speak to employees about certification so long as such speech did not amount coercion or intimidation. Saskatchewan's 2008 reform provides effectively the same guarantee, though it is drafted in broader and more permissive language.

Employer expression guarantees are found in all Canadian labour relations statutes except for those in Quebec and Newfoundland. Given that employer speech guarantees in BC and Saskatchewan accompanied shifts to mandatory vote certification, it is difficult to parse the effect of these reforms, but they coincide with lower certification applications and success rate. A more detailed study of ULP complaints may give a better indication of such reform's impacts.

Ontario introduced the most extensive reforms to its LRB's power to remedy ULPs. In 1993, pro-unionization reforms gave the OLRB the power to intervene on an interlocutory basis to remedy ongoing ULPs, to expedite ULP complaints during a unionization campaign and to grant remedial certification. These reforms coincided with historically high certification applications and success rate.

However, the subsequent shift to mandatory vote certifications two years later reversed gains in certification applications but did not appear to affect certification success rate. Following a rollback of the powers to grant interim orders and remedial certifications in 1998, success rate declined, and it increased again following the reinstatement of these provisions in 2005. These trends suggest that the power to remedy ULPs does have a significant impact on the success rate for certification appli-

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cations. OLRB statistics do not provide enough data to determine to what degree ULP remedies dissuade wrongful employer action or whether the increased success rate is the result of remedial certifications being granted.

It is likely that lack of ULP protections enhance the negative effect of mandatory vote certification. In card check systems, employers are less likely to be aware of a unionization campaign until a majority of employees have become members. They have less time to react to a campaign as certification depends only on verification of the members, and unions are readily able to identify threats against members as they are made aware of revocations of memberships.

By contrast, in a certification vote, employers have a longer period in which they can freely communicate with employees, and it is more difficult for unions to detect ULPs because the nature of an anonymous vote means they will not be able to identify members who have changed their position on unionization because of employer coercion.

5.3 Decertifications

Changes to the law on decertification appear to have only moderate and short-lived impact on the actual decertification applications and the rate of their success.

In Ontario, where there have been the greatest efforts to relax decertification requirements, the decertification rate has effectively stabilized at pre-reform levels.

In BC, decertification applications have declined since the 2001 anti-unionization reforms (though notably none of the BC reforms targeted decertification).

In Saskatchewan, decertification applications have declined following reforms lowering the necessary threshold for a decertification vote.

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In Ontario, the most effective policy change appears to have been to lower the required number of non-member employees prior to triggering a decertification vote, as decertification applications rose by 73% within a year of the reform passing. Other reforms, such as mandating the posting of decertification information, reducing the open period for decertification applications and requiring decertification applications to be given priority by the OLRB, have not led to an increase in decertifications or their success rate.

One explanation for the low impact of decertification reforms is that while barriers to decertification are removed, demand for unionization among already-unionized workers remains high. In other words, simply facilitating decertification has little impact where unionized workers see benefits to collective bargaining (e.g., higher average wages, greater job security). This can be contrasted with reforms that raise barriers to certification, where non-unionized employees face greater risks (e.g., reprisals) and the benefits of certification remain hypothetical.

Essentially, policy reforms are better at maintaining a status-quo than encouraging change.

Decertification reforms do nothing to alter the risk of decertifying (e.g., decreased wages and lost job security); they simply reduce the barriers to taking the risk. Certification reforms, by contrast, increase the risk of unionization, either by decreasing protections against reprisals during the process, or increasing uncertainty about the result by subjecting certification to a secret ballot.

5.4 Exclusions

In the case studies, there is limited data for the impact of changes to exclusions to labour relations legislation. Only Ontario made significant changes to exclusions in the private sector, when domestic workers and several professions were

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included in the LRA in 1993. These coincided with other pro-unionization reforms and a spike in certifications and certification applications. However, these exclusions were rolled back in 1995.

In 2014, Saskatchewan added a broad categorical exclusion of employees whose primary duties involve confidential information regarding labour relations, business strategic planning, policy advice and budget implementation or planning. The Saskatchewan reforms did result in a decrease in certification applications, but with only two years of reports following the reforms, it is not clear whether this trend will be sustained.

However, despite limited data, it is logical that increasing the pool of potential bargaining units will result in increased certification applications, and vice versa. The inclusion of domestic workers and agricultural workers within collective bargaining legislation has been the subject of substantial union advocacy and litigation.

It should be noted that if such groups are included within collective bargaining legislation, they will face increased risks associated with unionization. Given that they are often in precarious employment situations, these workers will be the most vulnerable to ULPs arising during certification processes.

6 Conclusion

If anything is clear from the above study, it is that law reform has meaningful and observable impacts on the rate of unionization. Where a province's laws facilitate fair unionization campaigns, protect workers from employer retaliation and provide LRBs with the necessary powers to act against unfairness, there are more successful certifications. Where no such legal protections exist, there are simply fewer certifications. This may seem self-evident, but this study provides proof that unionization rate isn't controlled solely by over-arching economic forces. For union advocates seeking concrete results in improving the rate of unionization, law reform is a worthwhile use of time and resources.

It is absolutely clear from both the data and the literature that if you want to improve the certification rate, card check is the single-most effective law reform. In the three jurisdictions studied, the implementation or removal of card check had dramatic impacts on unionization. As such, the implementation and protection of card check certification should be the biggest target for union advocates. That being said, the efficacy of card check is also well known to anti-union governments. It is no coincidence that in all three jurisdictions the removal of card check occurred within the first year of an incoming anti-union government. As a consequence, if an anti-union government comes to power in a jurisdiction with card check, activists should be prepared for an attempt to implement mandatory vote. In jurisdictions with mandatory vote, activists should expect heightened political resistance to attempts to implement card check certification. If political resistance seems too great, it may be advisable to prioritize more innocuous reforms that would have a better chance of passing.

Among such more innocuous reforms are protections against ULPs, which the data shows improve the number of successful certifications. ULP protections are particularly meaningful in mandatory vote systems where employers have a guaranteed window of opportunity to engage in hostile tactics against a certification

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attempt. In other words, the impact of mandatory vote can be moderated if there are strong substantive and procedural protections against ULPs. This is not to say that activists in card check jurisdictions should not also seek the improvement of ULP protections, as they were seen in Ontario to have an overall positive impact on certifications even when card check was in place. ULP protections should include: limited campaign periods, ensuring the sanctity of ballot boxes, ensuring there are clear protections against ULPs in labour legislation, reversing the burden of proof in ULP cases and ensuring that LRBs have sufficient powers to remedy ULPs, such as the ability to order interim injunctions and to give remedial certifications.

There are also reforms that union advocates can safely de-prioritize, specifically, reforms that facilitate decertification, such as requiring employers to post instructions on decertification in the workplace and reducing the wait period after an unsuccessful decertification vote. These reforms appear to have little to no lasting effect on the number of decertification attempts or their success rate. Resisting such pro-decertification laws should be a lower priority for union advocates, particularly if more harmful reforms, such as implementing mandatory vote or removing ULP protections, are being considered.

Lastly, while law reform was clearly an important factor in changing certification rates, policy alone cannot explain all of the observed shifts. While not measured in this study, it seems quite likely from the academic literature that public perception of unions plays an important role in influencing the number of certification applications. Put simply, even the most favourable of laws will not lead to new certifications if workers do not view unionization as likely to improve their working conditions. It is recommended that further research be conducted in identifying the impact of public perception on unionization efforts and which factors have the greatest influence on public perception of unions. Law reform has its limits, and union advocates cannot lobby government at the expense of public-facing advocacy—both are imperative.

7 Recommendations

The following key recommendations, based on the analysis and conclusions in this paper could form the basis of those advocacy efforts.

1. Prioritize the implementation/protection of card check certification.
2. Where mandatory vote is inevitable, mitigate by ensuring the law:
 - a. Limits the campaign period to 10 days
 - b. Requires ballot boxes remain sealed during a challenge to the LRB
 - c. Provides unions with the means to access employees during the campaign
 - d. Minimizes the delay period between certification attempts
3. Ensure there are adequate ULP protections:
 - a. Implement clear restrictions on employer interference in certification
 - b. Provide LRBs the ability to effectively protect against ULPs through:
 - i. Powers to grant interim orders
 - ii. Powers to grant remedial certification
 - iii. Extended limitation periods for bringing ULP complaints
 - iv. Requirements to consider benefits of unionization in decision making.
4. Engage in outreach to non-unionized employees to improve public perception of unions.

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