

# *EMPLOYEE FREE CHOICE ACT :*

## ONTARIO EXPERIENCES AND POTENTIAL ECONOMIC IMPACT

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*“Democracy” is government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system.*

The *Employee Free Choice Act* (the “*EFCA*”) is bipartisan legislation that would, among other provisions, eliminate the requirement of a secret ballot vote during a union organizing campaign, and instead, require the certification of a union that is able to demonstrate that it has the support of a simple majority of employees in a workplace. During the 2008 United States presidential campaign, Barack Obama pledged his support for the *EFCA* and declared that its passage was a matter of “when”, not “if”. President Obama’s ardent support of these fundamental changes to the *National Labor Relations Act* (the “*NLRA*”) has led policy makers, labour practitioners, and lawyers to contemplate the impact that these amendments could have on workplaces across the United States.

Numerous papers and articles have commented on the effect the implementation of a “card check” certification process and resulting loss of a secret ballot certification vote will have on the rights of employees to freely choose representation within their workplace. Others have attempted to compare the situation the passage of the *EFCA* would create to that of a number of Canadian jurisdictions which have adopted a card check union certification system. In this paper, we will approach the issue from a different angle, considering the labour relations climate in Ontario over the past twenty years and identifying potential relationships between the legislation in place at specific times and the health of the provincial economy.

After reviewing the *EFCA* as it has been proposed and various labour relations provisions in place in Ontario over the past twenty years, we will contrast the increases in union density rates under a card check system with union density rates under a secret ballot system. We will then explore research indicating that unionized businesses are linked to stagnated or decreased productivity, profits, innovation, investment, and employment growth. Finally, we will review and analyze the possible economic impacts of one of the other notable provisions in the *EFCA*, which guarantees expedited and automatic access to first contract arbitration. The paper

will conclude by reinforcing the point that legislation such as the *EFCA* can have deleterious effects on the economy—particularly during uncertain economic times.

### **THE EMPLOYEE FREE CHOICE ACT**

The *EFCA* is bipartisan legislation that was first introduced by Senator Edward Kennedy and House Representatives George Miller and Peter King in 2007. Proponents of the *EFCA* claim that it is important remedial legislation that will help to strengthen the depleted American middle class by removing barriers to unionization and collective bargaining. The *EFCA* purports to accomplish these goals through three key amendments to the *NLRA* including:

- ◆ Eliminating the requirement of a secret ballot vote by mandating certification of a union that is able to demonstrate, through signed authorization cards, that it has the support of a simple majority of employees in the proposed bargaining unit.
- ◆ Ensuring that a newly certified union is able to achieve a first collective agreement by permitting either party (union or employer) to request mandatory federal mediation if a collective agreement cannot be reached within ninety days of the commencement of negotiations. If after thirty days of mediation the parties have failed to reach an agreement the dispute is referred to binding first contract arbitration.
- ◆ Establishing harsh penalties for employers that are found to have engaged in anti-union tactics intended to thwart unionization efforts during the organizing campaigns and first contract negotiations, including triple damages in certain unfair labour practice cases.

In the spring of 2007, despite passing in the U.S. House of Representatives and enjoying majority support in the Senate, the *EFCA* was blocked by a Republican filibuster. Labour law reformers renewed their hopes when then-Senator Obama promised during the 2008 Presidential campaign that he would include the *EFCA* as a fundamental part of his economic stimulus plan. However, since the election it has appeared that President Obama's enthusiasm for the bill is waning.<sup>1</sup> Some commentators have speculated that President Obama is reluctant to push legislation that promises to be deeply divisive early in his presidency, particularly in light of his stated desire to heal the partisan rift that grew during his predecessor's term. Others have cited the lack of a Democratic supermajority in the Senate and the current

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1 D. Sands, "Labor's 'priority' on back burner" *Washington Times* (29 December 2008) online: <http://www.washingtontimes.com/news/2008/dec/29/labors-priority-on-back-burner/>.

economic crisis in the United States as reasons the new administration appears to be placing a lower priority on the passage of the *EFCA* than was initially planned.

We suggest that it is this last reason, the current economic crisis, that is the most compelling explanation for the reduced urgency in pushing the legislation forward. To illustrate the impact that legislation similar to the *EFCA* can have on an economy, we will now review labour laws in Ontario over a twenty-year period as well as the economic performance of the province during that period.

### THE ONTARIO EXPERIENCE (1986-2005)

Ontario's experience with the secret ballot vote and card check systems between 1986 and 2005 can be broken into three discrete periods in which three discrete certification systems were used: the traditional card check system from 1986 until 1993, a modified card check system from 1993 until 1996, and a certification vote system from 1996 until 2005.

The details and effects of each of these systems will be further explained below but will make reference to the information found in Figure 1 and Charts 1 and 2.

**Figure 12: Ontario Labour Relations Board**

#### Number of Applications for Certification Disposed of

Year	Total	Certified	Dismissed	Percentage Certified
1986-1987	655	496	159	75.7%
1987-1988	627	493	134	78.6%
1988-1989	532	441	91	82.9%
1989-1990	506	390	116	77.1%
1990-1991	478	373	105	78.0%
1991-1992	474	409	65	86.3%
1992-1993	461	396	65	85.9%
1993-1994	785	711	74	90.6%
1994-1995	693	630	63	90.9%
1995-1996	533	425	108	79.7%
1996-1997	443	297	146	67.0%
1997-1998	474	348	126	73.4%

2 Ontario, *Ontario Labour Relations Board, Annual Reports* (Toronto: Queen's Printer, 1986 to 2005).

Note: Statistics are compiled for the fiscal year of the Ontario Labour Relations Board which is April 1 to March 31 and therefore, the "Year" 1986-1987 is April 1, 1986 to March 31, 1987. These statistics do not consider applications for certification in the construction industry or applications which were withdrawn.

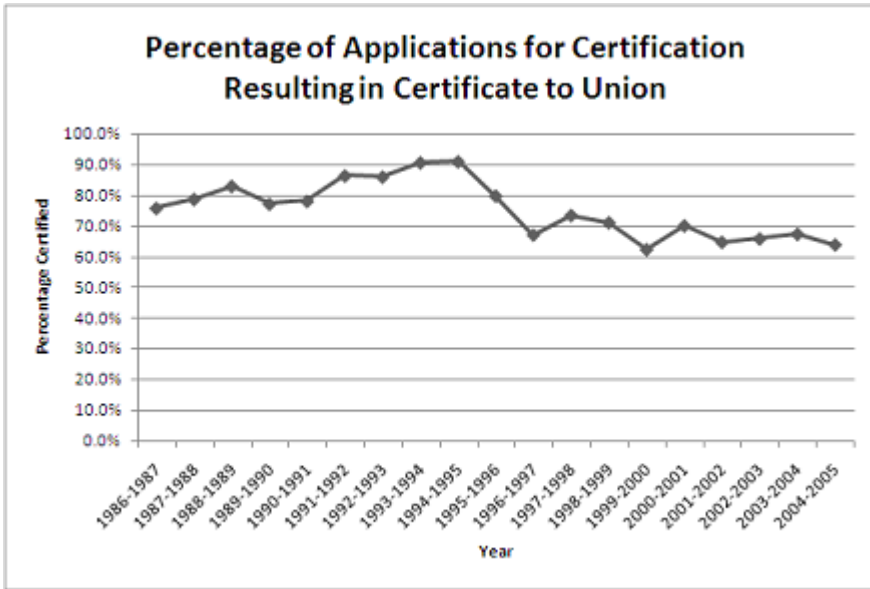
1998-1999	484	344	140	71.1%
1999-2000	411	256	155	62.3%
2000-2001	661	463	198	70.0%
2001-2002	391	253	138	64.7%
2002-2003	380	250	130	65.8%
2003-2004	352	237	115	67.3%
2004-2005	368	235	133	63.9%

Chart 1<sup>3</sup>



<sup>3</sup> Ibid.

Chart 2<sup>4</sup>



**Traditional Card Check System (1986 to 1992)<sup>5</sup>**

From 1986 until 1992, the *Ontario Labour Relations Act* (the “Act”) provided for a card check certification process without the requirement of a secret ballot vote. Under this version of the *Act*, a trade union could apply to be certified without a vote if it supplied the Ontario Labour Relations Board (the “Board”) with authorization cards signed within the previous six months on behalf of more than 55 percent of employees in an appropriate bargaining unit. Alternatively, if the union had authorization cards signed within the previous year on behalf of at least 35 percent of employees in an appropriate bargaining unit, it would be entitled to request a secret ballot vote.

This period of labour relations regulations also had the following significant provisions:

- ◆ A fifteen-day period after an application for certification was filed during which an employee or employees could

<sup>4</sup> *Ibid.*

<sup>5</sup> *Labour Relations Act*, R.S.O. 1980, c. 228, as amended.

submit a “petition” which would negate their previously signed authorization card;

- ◆ The Board had the discretion to order a secret ballot vote even if the union exhibited membership support on behalf of more than 55 percent of employees;
- ◆ Remedial certification where an employer violated the *Act* such that the true wishes of employees were not likely to be ascertained in a vote and the union exhibited card-based support adequate for the purposes of collective bargaining;
- ◆ Access to first contract arbitration where collective bargaining had been unsuccessful because of; (a) the refusal of the employer to recognize the bargaining authority of the trade union; (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification; (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or (d) any other reason the Board considered relevant; and
- ◆ Mandatory union dues deductions if requested by the union.

Given the availability of the card check certification process, it is not surprising that the Board certified the applicant trade union in approximately 80.6 percent of the applications it disposed of during this period. It is notable, however, that during this period, trade union support across the province was dropping and the Board considered a steadily decreasing number of applications for certification each year (655 in fiscal 1986-1987 dropping to 461 in fiscal 1992-1993).

### **Modified Card Check System (1993 to 1996)<sup>6</sup>**

In 1990, a provincial election radically changed the ideological orientation of the government of Ontario as a left-wing political party, the New Democratic Party (the “NDP”), came into power. The NDP has historical roots in the former Cooperative Commonwealth Federation, which was based on a commitment to a “planned system of social economy for the production, distribution and exchange of all goods and services” and “social ownership, development, operation and control of utilities and natural resources”.<sup>7</sup> Simply put, the NDP platform was based on a commitment to democratic socialism and providing a voice for workers within the province.

Shortly after entering office, the government proposed Bill 40, legislation

<sup>6</sup> *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended.

<sup>7</sup> W.S. Wallace, ed., *The Encyclopedia of Canada*, Vol. II, (Toronto: University Associates of Canada, 1948) at 125-126; *Ibid.*

which would radically change Ontario's *Act*.<sup>8</sup> This legislation was passed in late 1992 and came into force on 1 January 1993. The Bill 40 amendments maintained the card check certification process already in the *Act* and added the following significant amendments:

- ◆ The purpose of the *Act* was amended to read:
  1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.
  2. To encourage the process of collective bargaining so as to enhance,
    - i. the ability of employees to negotiate terms and conditions of employment with their employer,
    - ii. the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
    - iii. increased employee participation in the workplace.
  3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.
  4. To provide for effective, fair and expeditious methods of dispute resolution.
- ◆ The petition system permitting employee(s) to cancel authorization card(s) after an application for certification was filed was repealed;
- ◆ The Board was required to order a secret ballot vote if the trade union provided membership evidence on behalf of at least 40 percent and not more than 55 percent of employees in an appropriate bargaining unit;
- ◆ Unions were provided with statutory access to workplaces in public locations (i.e. shopping malls) for the purposes of organizing;
- ◆ The Board was provided with both the authority to expedite hearings and to order the interim reinstatement of an employee in circumstances where a trade union asserted that the termination of the employee occurred during the union's organizing campaign and was based, in part, on anti-union animus;
- ◆ In circumstances where the true wishes of the employees were not likely to be ascertained because the employer had violated the *Act*, the Board had the discretion to cer-

<sup>8</sup> Bill 40, An Act to amend certain Acts concerning Collective Bargaining and Employment, d.2<sup>nd</sup> Sess., 35<sup>th</sup> Leg., 1992.

tify the employer, even in circumstances where the trade union could not exhibit card-based support adequate for the purposes of collective bargaining;

- ◆ Parties were granted automatic access to first contract interest arbitration thirty days after parties were in a legal strike or lockout position and the Board also had the power to settle collective agreement terms where one party breached its duty to bargain in good faith; and
- ◆ Employers were prohibited from employing replacement workers during strikes or lockouts.

Notably, Bill 40 repealed the “petition” system which had allowed employees who had a change of heart after having signed an authorization card to revoke the card within a period of time following the filing of the application for certification. Under the Bill 40 amendments, any employee who had a change of heart was required to contact the Board prior to the filing of an application for certification to revoke or cancel an authorization card (not on or following the date that the application was filed).

The amendments were clearly a reaction to the support trade unions had provided to the NDP and were welcomed by the labour movement. Buoyed by these newfound opportunities to organize, the number of applications for certification jumped 70 percent in the first year after the enactment of Bill 40. The percentage of applications that resulted in certification of the union also rocketed to over 90 percent.

### *Certification Vote System (1996 to 2005)*<sup>9</sup>

After approximately four years of NDP government that included increases in corporate taxes, increases in government spending and a protracted recession, the Progressive Conservative Party won the 1995 provincial election. This party campaigned on a platform of reduced government spending and modifications to what it termed “anti-employer legislation” including the removal of most of the Bill 40 amendments to the *Labour Relations Act*.

Shortly after its election, the Progressive Conservative Party proposed and passed Bill 7, which removed virtually all of the amendments made in 1993 by Bill 40 and made a number of additional amendments to the *Act*.<sup>10</sup> Most notably, the card check certification system in Ontario was repealed and replaced with a mandatory secret ballot process for every application for certification where a trade union was able to demonstrate to the Board that it had authorization cards on behalf of 40 percent or more of the employees in an appropriate bargaining unit. Additionally, under the new *Act*, the Board lost the power to automatically certify an employer, regardless of any unlawful conduct committed by an employer during an organizing campaign.

<sup>9</sup> *Labour Relations Act, 1995*, R.S.O. 1995, c. 1, Sched. A.

<sup>10</sup> Bill 7, *Labour Relations and Employment Statute Law Amendment Act*, 1<sup>st</sup> Sess., 36<sup>th</sup> Leg., 1995.

Other amendments in Bill 7 included:

- ◆ Repeal and replacement of the Bill 40 “purpose section” to read that the purpose of the *Act* is:
  1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
  2. To recognize the importance of workplace parties adapting to change.
  3. To promote flexibility, productivity and employee involvement in the workplace.
  4. To encourage communication between employers and employees in the workplace.
  5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
  6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
  7. To promote the expeditious resolution of workplace disputes.
- ◆ A one-year bar on any subsequent application for certification after an application was dismissed following a certification vote; and
- ◆ The first contract arbitration provisions found in the *Act* prior to 1993 were re-introduced.

The impact of Bill 7 on labour relations in the province was felt almost immediately as the number of applications for certification filed with the Board decreased to the level experienced prior to the Bill 40 amendments to the *Act*. The number of applications for certification which were ultimately decided in favour of the trade union dropped dramatically to below 70 percent. This trend has continued throughout the decade following these amendments to the *Act*.<sup>11</sup>

### **CARD BASED APPLICATION AND ITS IMPACT ON UNION DENSITY**

Statistics from jurisdictions permitting a card check system of unionization, including Ontario until 1996, indicate that a card check system increases the number of applications for certification that are ultimately decided in favour of a trade union. The evidence from Ontario is particularly telling as it illustrates that trade unions were successful in their applications for certification between 75 and 90 percent of the time, while certificates were only granted 65 to 70 percent of the time when the secret ballot

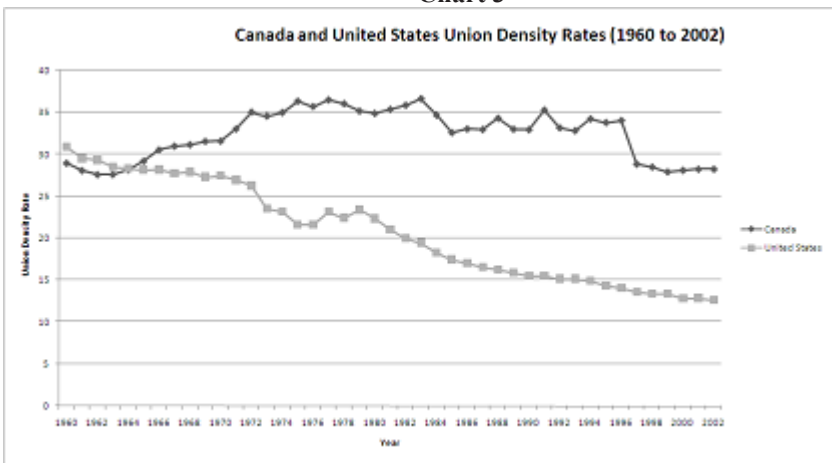
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<sup>11</sup> During the 2000-2001 fiscal year, the province experienced a higher than normal level of applications for certification in the health and welfare services sector as a result of the attempts of one union to displace another union within the sector. As a result, approximately 160 additional applications for certification were filed during this year.

process was required.

The remarkable divergence in union density in the U.S. and Canada since the late 1960s may be attributed to the existence of a card check system of unionization in some Canadian jurisdictions. Chart 3 below shows that, until the mid-1960s, unionization rates in the U.S. and Canada were essentially the same. In the early- to mid-1960s, union density in both countries was approximately 30 percent. Thereafter, the patterns and trends in union density diverged markedly. In 2002, union density in the U.S. and Canada stood at approximately 12 percent and 28 percent respectively.

Chart 3<sup>12</sup>



The modified card check system in place in the early 1990s led to an increase in the number of unionized employees, and union density across Ontario. It did so by fostering organizing efforts which resulted in a significant increase in the number of applications for certification filed and the percentage of applications in which certificates were issued.

Notably, a 2002 research paper written by Susan Johnson comparing card based and secret ballot vote certifications in Canada found that the use of a card check system likely resulted in at least a 5 percent increase in union density in jurisdictions where card check was utilized.<sup>13</sup> The paper further hypothesized that because certificates are granted in fewer than 65 percent of applications for certification in the United States (the approximate union “success” rate in Canadian jurisdictions with secret ballot votes), the country would experience an even greater increase in union density if the secret ballot vote system was changed to card

<sup>12</sup> Compiled from statistical tables available from Statistics Canada ([www.statcan.gc.ca](http://www.statcan.gc.ca)) and the U.S. Bureau of Labor Statistics ([www.bls.gov](http://www.bls.gov)).

<sup>13</sup> S. Johnson, “Card Check or Mandatory Representation Vote? How the type of union recognition procedure affects union certification success” (2002) 112 *Economic Journal* 344.

check.<sup>14</sup> As a result, one could reasonably estimate that passage of the *EFCA* could increase the union density rates by upwards of ten percentage points and possibly more when one considers the other proposed amendments to the *NLRA*.

## LABOUR RELATIONS AND ECONOMIC IMPACT ON ONTARIO

In the lead-up to Bill 40's passage in 1992, business leaders across Ontario warned that it was a "job killer" that would render the province "inhospitable to business".<sup>15</sup> Business leaders expressed concerns that Bill 40 would discourage both foreign and local investment from companies wishing to remain union-free, while driving up the cost of collective agreements for already unionized employers who feared being shut down by a strike.<sup>16</sup> The Canadian Manufacturers Association, the All Business Coalition, the Retail Council of Canada and the Automotive Parts Manufacturers' Association, groups representing over 85 percent of Ontario employers, agreed that the Bill 40 amendments would "divert investment from Ontario and result in lost jobs and a reduction in [Ontario residents'] standard of living."<sup>17</sup>

This position was supported by an Ernst & Young study commissioned in early 1992 which projected that, as a result of the legislation, Ontario would lose an estimated 300,000 jobs either through direct job loss or, possibly more importantly, foregone future investment.<sup>18</sup> One business expert explained, "The laws won't close industry overnight but when a company gets new orders it will merely place them outside the country. Subsidiaries with world product mandates will find their mandate will lapse...Canadian companies will open operations in the U.S. and U.S. subs will shift production."<sup>19</sup>

Several policy analysts remained neutral on the Bill 40 amendments, but questioned their necessity and possible ramifications for the province. For example, a C.D. Howe report which examined policy decisions of the Ontario government and their impact on competitiveness commented that if the cost of doing business rose, investment in an aggregate sectoral sense could be "hugely affected".

Political leaders also campaigned against the legislation, stating that it would imply Ontario was "closed for business", and attributed, at least in part, the

14 U.S., National Labour Relations Board, *Seventy-First Annual Report of the National Labour Relations Board for the Fiscal Year Ended September 30 2006*, (Washington, D.C., (2006).

15 "Bill 40 called job Killer: Big Three say new labour law could cripple auto industry" *The Globe and Mail* (2 September 1992) B19; "Lawyer blasts labor changes" *Financial Post* (28 November 1991) 4.

16 *Supra* note 21.

17 G. Scotton, "Business takes aim at proposed labor law" *Financial Post* (19 June 1992) 9.

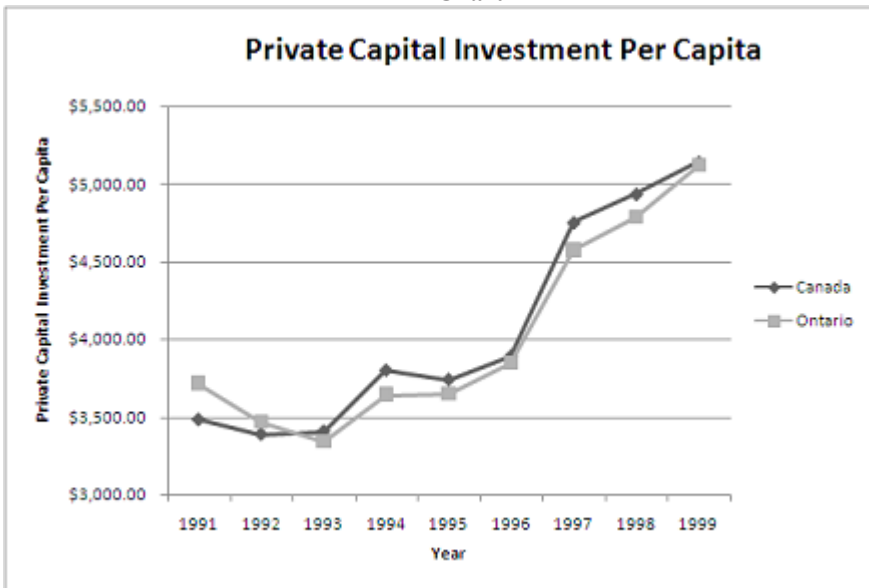
18 B. Papoe, "New labour laws would cost 300,000 jobs, report contends" *Toronto Star* (21 February 1992) F3.

19 D. Francis, "Union, government greed wreak economic havoc" *Financial Post* (14 November 1992) S3.

loss of over nine thousand jobs in the province in 1992 to the proposed legislation.<sup>20</sup>

Following the implementation of the Bill 40 amendments, anecdotal evidence indicated that thousands of jobs were created in Michigan and New York after companies determined that Ontario's combination of labour laws, government regulation and higher taxes decreased its attractiveness as a location for investment.<sup>21</sup> Statistics support this position, showing a drop in per capita private capital investment in Ontario during the period between 1991 and 1993 and a significant increase in investment following the election of the Progressive Conservative Party in 1995 (Chart 4). It is notable that this drop in investment was greater in Ontario than across the rest of the country, suggesting that the decrease in investment was not solely attributable to the recession.

Chart 4<sup>22</sup>



Business leaders attributed the depth and length of the recession in Ontario at least in part to the Bill 40 amendments. It is noteworthy that the recession in Ontario continued well into 1993 while it ended in 1991 in most other North American jurisdictions, including the United States.<sup>23</sup>

20 Wilson, Jim, Legislative Assembly, *Legislative Debates (Hansard)*, 35<sup>th</sup> Parl., 2<sup>nd</sup> Sess. (9 July 1992), online: Legislative Assembly of Ontario <[http://www.ontla.on.ca/house-proceedings/transcripts/files\\_html/1992-07-09\\_1049.htm](http://www.ontla.on.ca/house-proceedings/transcripts/files_html/1992-07-09_1049.htm)>.

21 G. Rennie, "The final straw' for many firms: Bill 40 has Ontario companies looking across the boarder" *The Windsor Star* (14 May 1993) A1 and G. Rennie, "Leaving the nest: Because of labor laws, businesses prefer to expect out of Ontario" *The Windsor Star* (15 May 1993) E1.

22 Canada, Statistics Canada, CANSIM, Tables 032-0002 and 051-0005.

23 National Bureau of Economic Research, "NBER Business Cycle Dating Committee Determines that Recession Ended in March 1991". NBER Online: National Bureau of Economic Research <<http://www.nber.org/March91.html>>.

As a result, there is little doubt that the card-based system, in conjunction with a number of labour related amendments enacted under Bill 40, contributed to a reduction in investment by both Ontario and foreign investors.

## ECONOMIC IMPACT OF UNIONIZATION

Shortly before the election of the NDP in 1990, the province of Ontario entered its deepest recession since the Great Depression. Consequently, upon taking office, the NDP had to address this financial crisis, while promoting and implementing its party platform of increased funding for social welfare programs. Among its actions were bailouts of several significant corporations, much like the financial measures that the government in the United States is currently undertaking.

At that time, business leaders commented that during difficult economic times the government should not saddle businesses with the additional “burden of unionization”—the strategic, administrative, and financial changes that occur following the certification of a business. Of particular concern are the financial changes resulting from the “rent seeking” behaviour of trade unions, which is a term used to describe the financial windfall enjoyed by a trade union for which it does not provide any additional productivity or other contribution to the employer. In short, a trade union uses its power as the exclusive representative of employees to extract additional monies that would otherwise be retained by the company. It is estimated that these additional monies can be as much as 15 percent of payroll.<sup>24</sup> A significant amount of these monies will be spent on expenses that do not increase the value of the firm or the wealth of employees, such as the costs associated with collective agreement negotiations and administration, grievance hearings, management training, and payments to union funds. Unfortunately, the Ontario government did not heed this advice from the business community and as previously mentioned suffered through reduced investment and a prolonged recession as a result.

Applying this information to the current issues facing the United States leads inextricably to the question of whether the implementation of the *EFCA* (which, if history provides a lesson, virtually guarantees an increase in union density rates) and the accompanying rent-seeking behaviour will be beneficial for the United States economy in the short, medium or long term. We suggest that the potential impact is of particular concern in three areas:

- ◆ Productivity and profits;
- ◆ Research, development, and investment expenditures; and
- ◆ Employment growth.

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<sup>24</sup> P. Kuhn, “Unions and the economy: what we know; what we should know” (1998) 31 *Canadian Journal of Economics* 1033.

## Productivity and Profits

If the increased costs caused by the rent-seeking behaviour of a trade union are offset with an equal or greater increase in productivity then a balance may be struck. Unfortunately, as discussed herein, studies have concluded that unionization generally results in stagnated productivity, increased absenteeism rates and, as a result, reduced profits.

With respect to absenteeism, the unionization of a firm could result in three outcomes.<sup>25</sup> First, the wage premium earned by the union could increase the opportunity cost of being away from work, creating an incentive for employees to return to work as soon as possible. Second, the increased attention to safety achieved by the union could reduce the number of absences connected with work-related illness or injuries. Third, the sick leave benefits often achieved by a union could provide the perverse effect of rewarding employees for missing work.

Research in both Canada and the United States has found that the first two outcomes appear to be overshadowed by the third, resulting in significantly higher rates of absenteeism for unionized employees compared to their non-union counterparts.<sup>26</sup> This higher rate of absenteeism reduces productivity, as unionized businesses are required to make do with a workforce prone to not attending work.

Early research by well respected labour scholars Richard Freedman and James Medoff indicated that unionized firms achieved higher rates of productivity than non-union firms.<sup>27</sup> However, over the past twenty years further research has indicated that a unionized firm is just as likely to see decreases in productivity as it is to experience increases.<sup>28</sup> Furthermore, the more recent studies have indicated that many of the unionized firms which experienced an increase in productivity fall into one of two categories. The first category consists of unions in the construction industry which have historically created sophisticated training programs that enhance the skills (and therefore productivity) of union members.<sup>29</sup> The second category consists of firms that use co-operative management programs such as “total quality management” and flexible compensation plans (for example, profit sharing).<sup>30</sup> In these firms, the company and union agree to forgo the traditional union approach of structured and inflexible management with defined wages (i.e. strict job classifications and wage rates), thereby avoiding rent-seeking behaviour.

25 J.P. Leigh “The Effects of Union Membership on Absence from Work Due to Illness” (1981), 2 *Journal of Labor Research* 329.

26 “Work absence rates” (2007), 19:2 *Perspectives on Labour and Income* 58.

27 R.B. Freeman and J.L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1994).

28 V.R. Fuchs, A.B. Krueger and J.M. Poterba, “Economists’ Views about Parameters, Values, and Policies: Survey Results in Labor and Public Economics” (1998) 36 *Journal of Economic Literature* 1387.

29 S. Allen, “Unionization and Productivity in Office Building and School Construction” (1986) 39 *Industrial and Labour Relations Review* 187.

30 S.E. Black and L.M. Lynch, “How to Compete: The Impact of Workplace Practices and Information Technology on Productivity” (2001) 83:3 *Review of Economics & Statistics* 434.

These studies lead to the conclusion that the unionization of a firm will likely have little if any positive impact and may potentially have a significant negative impact on productivity. The corollary is that the profits realized by a unionized firm will be less than those of an equally situated non-union firm, a conclusion supported by research indicating that a firm's share price can be expected to decrease by approximately 3 percent and its profits to decrease by approximately 15 percent in the first year following its unionization.<sup>31</sup> The reduction in profits has an impact on the other two areas affected by unionization, explored further below.

### **Innovation and Research and Development**

In 2006, American companies spent approximately \$348 million on research and development ("R&D").<sup>32</sup> Approximately 66 percent of that amount was funded by industry.<sup>33</sup> Companies often derive a large part of their R&D budgets from profits attained in previous years.

Research has indicated that unionized companies spend less on R&D than their non-union counterparts. For example, a study reported in the *Canadian Journal of Economics* attempted to determine whether a link existed between unionization rates and R&D rates (research and development expenditures divided by output).<sup>34</sup> The study considered a number of industries over an eighteen-year period and determined that unionized companies in an industry with an average unionization rate will experience a reduction in R&D expenditures of between 28 percent and 50 percent. Results in this range are also found in studies of American companies which determined that the effect of unionization is comparable to that of doubling the corporate tax rate.<sup>35</sup>

A decline in R&D expenditures has both short and long term effects on a company. In the short term, it directly causes job loss as funding reductions force the company to lay off scientists, engineers, and others within the R&D department. Over time, the reduction in R&D will decrease innovation resulting in reduced competitive advantages and, more importantly, a reduction in investment. For example, one study of newly certified companies between 1964 and 1984 indicated an immediate reduction in investment to capital ratios following certification.<sup>36</sup> This reduction primarily affected investment in physical assets, in-

31 *Supra* note 32.

32 M. Boroush, "New Estimates of National Research and Development Expenditures Show 5.8% Growth in 2007" National Science Foundation (August 2008) online: National Science Foundation <<http://www.nsf.gov/statistics/infbrief/nsf08317>>.

33 *Ibid.*

34 J.R. Betts, C.W. Odgers & M.K. Wilson, "The effects of unions on research and development: an empirical analysis using multi-year data" (2001) 34:3 *Canadian Journal of Economics* 785.

35 B.T. Hirsch, "Firm investment behaviour and collective bargaining strategy" (1992) 31 *Industrial Relations* 95.

36 B.C. Fallick & K.A. Hassett, "Investment and union certification" (1999) 17 *Journal of Labour Economics* 570.

cluding new technologies that would permit the companies to remain competitive in the long term. It follows that the reduction in R&D and investment will further reduce profits as it will reduce the long-term returns realized by the business.

### **Employment Growth**

Given the evidence that the unionization of a company will likely result in stagnated productivity levels and lower profits, which in turn results in a reduced emphasis on innovation and investment, it is not surprising that employment growth in unionized firms lags behind that in non-union firms. One Canadian study found that unionized firms grew between 3.7 percent and 3.9 percent more slowly than their non-union counterparts.<sup>37</sup> Furthermore, heavily unionized industries are more prone to employment contractions and decreases in expansions and new ventures.

The same studies that provide evidence of impaired employment growth within unionized firms also indicate that complete shutdowns and bankruptcies within unionized firms do not, as many perceive, outpace those of non-union firms.<sup>38</sup> A common theory as to why unionized firms can remain solvent is that, as put by one researcher, “like successful viruses, unions are smart enough not to kill their hosts.”<sup>39</sup> As previously discussed, unions are generally successful in achieving a wage premium as a component of their rent seeking behaviour. As a result, union leaders know that the firm is operating with a certain level of “fat”, which can be cut away through concessions when issues arise which threaten the long-term viability of the firm. Such a result is not available for a non-union firm which does not pay a premium as its sole option is to cut “meat” from its operations, thereby further damaging itself. However, this ability to survive should not be viewed as an ability to thrive or effectively compete in a rapidly changing marketplace. Instead, it is confirmation that unionization creates inefficiencies that hamper the long term growth and success of the business.

### **FIRST CONTRACT ARBITRATION**

Studies have shown that the few unionized firms that experience increases in productivity following certification are those that have implemented proactive human resources and operations strategies that they administer jointly with the union.<sup>40</sup> In these comparatively rare situations, management and the union work together to achieve mutually beneficial gains and resolve issues before they cause problems in the workplace.

Such a result is incongruent with any legislation pertaining to first contract arbitration. Under first contract arbitration, both parties have a collective agree-

37 R. Long, “The effect of unionization on employment growth of Canadian companies” (1993) 46 *Industrial & Labour Relations Review* 691.

38 R.B. Freeman and M. Kleiner, “Do unions make enterprises insolvent?” (1999) 52 *Industrial & Labour Relations Review* 510.

39 *Supra* note 32 at 1039.

40 *Supra* note 32.

ment imposed on them, one that may upset both parties and will rarely foster trust or communication. Furthermore, these decisions often result in higher levels of wages and benefits than those which would be achieved by free collective bargaining.

Proponents of first contract arbitration will point to statistics which indicate that it is not used in a significant number of cases. For example, during the three years it was available in Ontario between 1993 and 1996, a request for first contract arbitration was filed on thirty-eight occasions and arbitration was actually ordered only three times.<sup>41</sup> Similarly, statistics from Quebec indicate that 10.8 percent of collective agreements were signed following a request for first contract arbitration, but only 2.3 percent of those agreements were actually imposed on the parties.<sup>42</sup> The remainder were settled prior to a decision being rendered at arbitration.

However, what these statistics do not expose is the underlying reason the parties agreed to a collective agreement prior to having one ordered by an arbitrator. For example, research has indicated that switching from a situation where employees have the ability to strike to one where unsuccessful collective bargaining results in mandatory arbitration will increase wages by between 1 percent and 2 percent.<sup>43</sup> Other research indicates a much greater difference between the two systems, with some research finding that wages dictated by an arbitrator were seventeen per cent 17 percent to 61 percent higher than in other workplaces.<sup>44</sup> A recently imposed collective agreement at a Wal-Mart facility in Quebec mandated wage increases from approximately \$8.50 per hour to at least \$11.54 per hour, with further increases to almost \$16.00 per hour in 2010.<sup>45</sup> When one considers the entirety of the agreement, the union claims it achieved 98 percent of the provisions it requested of the arbitrator.<sup>46</sup> On 16 October 2008, Wal-Mart announced that it would be closing the facility that had been the subject of the first contract arbitration. The financial impact of the arbitrated collective agreement was cited as one reason for the closure.<sup>47</sup>

Based on the foregoing, it is reasonable to hypothesize that the reason so few agreements are imposed by an arbitrator is that an employer, believing that there is nothing to be gained by proceeding to first contract arbitration, may choose to sign an inferior and financially damaging collective agreement.

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41 *Supra* note 2.

42 "First Agreement Arbitration in Quebec" (2003) 14:4 *The Worklife Report* 1.

43 J. Currie and S. McConnell, "Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages" (1991) 81:4 *American Economic Review* 693 at 710.

44 W. Imberman, "First-contract arbitration plan 'tilts' labor-business balance" *Financial Post* (11 January 1986) 17.

45 *Wal-Mart Canada Corp. et Travailleurs et Travailleuses Unis De L'Alimentation et du Commerce, Section Locale 486 (FTQ)* (2008), (unreported decision of Arbitrator Corriveau dated August 13, 2008).

46 J. Bertrand, "Quebec Wal-Mart gets union deal" *Canada.com* (15 August 2008) online: [Canada.com <http://www.canada.com/topics/news/story.html?id=bc6f05c8-c597-472b-8740-ffa2c180d3a0>](http://www.canada.com/topics/news/story.html?id=bc6f05c8-c597-472b-8740-ffa2c180d3a0).

47 *The Canadian Press*, "Wal-Mart to close unionized auto shop in Quebec" *TheStar.com* (16 October 2008) online: [TheStar.com <http://www.thestar.com/Business/article/518683>](http://www.thestar.com/Business/article/518683).

A further problem with the proposed *EFCA* system is that it fails to provide guidance as to the considerations to be applied by the arbitrator. For example, the *EFCA* does not state whether the arbitration is to be a “final offer selection” or if the arbitrator can craft his or her own best result. It also does not identify comparators to be applied by the arbitrator when determining the contents of the collective agreement. When the *Public Service Staff Relations Act* was created in Canada, the legislation specifically contemplated criteria to be considered by the arbitrator, including:

- ◆ The needs of the Public Service for qualified employees;
- ◆ The conditions of employment in similar occupations outside the Public Service, including such geographic, industrial, and other variations as the Board may consider relevant;
- ◆ The need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
- ◆ The need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
- ◆ Any other factor that to it appears to be relevant to the matter in dispute.<sup>48</sup>

Identifying criteria such as those above permit the parties to understand the framework within which the arbitrator will make his or her decision. At present, the *EFCA* does not provide this framework, which adds further confusion and economic uncertainty to the arbitration process. This economic uncertainty will further hamper a newly certified employer’s ability to react to the rules and procedures inherent in a unionized workplace, which will only exacerbate the issues described in the previous sections of this paper.

## CONCLUSION

A number of articles written about the *EFCA* have focused on the effect that the legislation might have on employee voice and choice within the workplace. This paper attempts to look beyond the value-based arguments for and against the card check certification system and instead focus on the long-term economic implications for United States businesses if the Bill is put into place as proposed.

Prior to the passage of Bill 40, a policy analysis suggested that the Ontario government undertake a competitiveness audit that would ask the following questions:

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<sup>48</sup> *Public Service Staff Relations Act*, R.S., c. P-35, s. 1; *Ibid* at s. 67

- ◆ Do the proposed changes move the jurisdiction closer to, or further from, the labour relations regimes of competitor jurisdictions?
- ◆ Is it likely that the jurisdiction's competitors will be moved to emulate the regime established by the new legislation?
- ◆ Will the differences between the regimes provide incentives for resources to flow into or out of the jurisdiction?
- ◆ Will the changes increase the efficiency with which the jurisdiction's economy makes use of its existing resources of people, capital, technology and natural resources?<sup>49</sup>

This paper suggests that completing a competitiveness audit for the *EFCA* would result in a finding that the proposed changes move the United States away from the labour relations regimes of other countries, including most of Canada. Furthermore, study after study has shown that legislation like the *EFCA*, by increasing the cost of business, is likely to have a detrimental effect on employment growth, innovation, and resource flow into the United States.

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<sup>49</sup> *Supra* note 27 at 16.