

## “Let All Workers Vote”: Ontario Union Rules Are Undermining Workplace Democracy

Peter Shawn Taylor March 28, 2021

Surely everyone can agree on the necessities of the democratic process – engaged voters, secret ballots and no dirty tricks. So why are these rules, considered essential to picking governments, frequently ignored when it comes to picking unions across Canada? While most provinces require a mandatory vote to determine if workers wish to join a union, some omit this crucial step. Giving voice to a group of concerned small-business owners and their workers, Peter Shawn Taylor reveals how “card-check” union certification is abusing workplace democracy in Ontario’s vital construction sector.

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On Friday, August 28, 2020, business owner Carla Da Silva was thinking about a big contract her company had recently signed with Amazon. She was thinking about an RV trip she had planned for the upcoming Labour Day long weekend. She was perhaps thinking about a welcome stretch of pleasant summer weather. She was definitely *not* thinking about the possibility her company could soon be hijacked by a handful of transient workers. Or that her province’s labour laws could be so obviously undemocratic.

Da Silva owns CRME Inc., a Kitchener, Ontario-based firm that installs and maintains tractor-trailer loading docks for retail, courier and grocery store warehouses – a high-demand business, especially during recent Covid-19-related supply chain concerns. “We were overwhelmed with work,” Da Silva recalls in an interview. “And I had recently hired three new workers.” On that Friday last August, the core of her 16 regular staff were travelling to Edmonton to deal with a backlog at a new Amazon warehouse. Most of the remainder were on training or doing tasks later determined to be “non bargaining unit” work. “So that day I only had three guys working for me – those new hires,” she continues. “One had only started two days before.”

Before they knocked off work on Friday, those three new hires all signed union cards with local 804 of the International Brotherhood of Electrical Workers (IBEW). And just like that, Da Silva’s business was unionized.

According to Ontario Labour Relations Board (OLRB) rules, those three union cards represented the majority of her workforce that day. The other long-standing employees, including those on their way to Edmonton, had no say in the matter. Curiously enough, none of the trio of card-signers apparently wanted to work for CRME once it became unionized. “That one worker who’d just started, he quit the same day,” recounts Da Silva. “He signed his card and was done – I never saw him again.” The other two workers voluntarily quit soon afterwards. (One actually requested to be laid off.) The entire episode seems a travesty of workplace democracy.

Having exhausted her legal appeals last October, Da Silva now presides over a deeply-troubled, unionized workplace. “None of my regular guys want to be in the union, so they’re all unhappy,” she complains. Her labour costs have skyrocketed due to union rules and fees, affecting the profitability of her existing contracts.



*“I didn’t know it could happen to me”: Carla da Silva’s long-term employees did not want to unionize, but came to work one day to find that just three new hires had forced the entire workforce to join.*

Worse, a dispute with the IBEW over her remaining employees meant she had to shut down operations for four full days last fall because she had no union-certified electricians to send out on jobs. Union representatives can now exert control over the most basic aspects of how she manages her own company. “They have put my business upside-down,” Da Silva laments. “It’s just beyond wrong.”

### **Union Manipulation – A Remarkably Common Problem**

Da Silva’s experience is far from unique. She is part of a newly-formed group of several-dozen small business owners that contacted *C2C Journal* to complain about the unionization process in Ontario’s construction industry. Most have nearly identical stories to tell about how a few employees – many with only a very temporary attachment to their jobs – were able to permanently unionize the company without consent from the majority of their regular staff. They’re also deeply concerned about the way unions are able to insert operatives into their business for the sole purpose of imposing a union, only to see them quit immediately thereafter – moving on to catch another unsuspecting owner off-guard. “We are a group of entrepreneurs responding to what we see as an injustice,” says Gio, who acts as the unofficial spokesman for the growing group. Gio helps manage a family-owned business in the construction sector and asked that his full name be withheld because of ongoing OLRB proceedings.

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*‘We say let the workers vote,’ Gio states firmly. ‘If democracy is good enough for choosing our government, why isn’t it good enough for the Ontario construction sector?’ It’s a great question.*

🐦 (<https://twitter.com/intent/tweet?text=%E2%80%98We+say+let+the+workers+vote%2C%E2%80%99+Gio+states+fi>)

To be clear, the issue of joining a union can only be decided by the workers themselves; this is their legal right. Such a decision, however, can have a significant impact on the employer as well. Beyond higher costs that can arise from union-scale wage rates, dues and benefit requirements, unionization can erode an owner’s control over certain management functions, as Da Silva’s experience reflects. It can also impose closed-shop rules on a firm, preventing it from contracting

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 with other non-unionized firms. Such rules dramatically reduce competition in the bidding process, which further raises costs and reduces flexibility. For these reasons, owners have a strong stake in ensuring any unionization decision involving their company fairly and fully reflects the will of all their workers.

To correct what they see as the undemocratic nature of the existing union certification process, Gio’s group is asking Ontario’s Ford government to ensure all workers have a say on unionization applications via secret ballots. “We say let the workers vote,” Gio states firmly. “If democracy is good enough for choosing our government, why isn’t it good enough for the Ontario construction sector?” It’s a great question.

*Is it democratic for a bare handful of workers to sign cards that unionize all other employees without their knowledge, agreement or a vote?*

### **Two Paths to Unionization**

Canadian provinces can use one of two methods for determining whether a majority of employees wish to join a union. One system, familiar to all federal, provincial and municipal voters, sees workers cast secret ballots on a specific day. To trigger such a vote, it is usually necessary for a certain percentage of employees to first sign union cards requesting a vote be held. Unionization through secret balloting is thus called a “two-step” process. The other method relies solely on submitting signed union cards. If enough workers sign cards – often between 55 percent and 65 percent of the workforce – then a union can be automatically certified on the day those cards are submitted. This is called “card-check” or the “one-step” method.

From the 1940s to 1977, card-check was the only path to unionization across Canada. Concerns about how that system operated led Nova Scotia in 1977 to add the second step of secret ballots to ensure the outcome properly reflected the wishes of all employees. British Columbia followed in 1984, and Alberta in 1988. Since then, most provinces have shifted to ballots, although some have subsequently shifted back to card-check. During Alberta NDP Premier Rachel Notley’s one term in office, for example, Alberta’s long-standing ballot system was replaced with card-check (<https://www.cbc.ca/news/canada/edmonton/union-membership-grows-alberta-notley-barnetson-mcgowan-1.4713431>). UCP Premier Jason Kenney then quickly returned the province to mandatory balloting when he took office in 2019. It was, in fact, his second piece of legislation (<https://edmontonjournal.com/news/politics/ucp-to-unveil-labour-law-changes-monday>), hinting at its significance.

*Constant back-and-forth (clockwise from top-left): In Alberta, NDPer Notley's one-step card-check system was recently replaced with two-step mandatory balloting by UCPer Kenney; at the federal level, Liberal Trudeau undid Conservative Harper's secret balloting. (Image sources, clockwise from top-left: dave.cournoyer, licensed under CC BY-SA 2.0; Policy Exchange, licensed under CC BY 2.0; London Summit, licensed under CC BY-NC-ND 2; European Parliament, licensed under CC BY-NC-ND 2.0)*

The same process played out in reverse at the federal level. Conservative Prime Minister Stephen Harper introduced balloting for federally-regulated workplaces for the first time in 2014; Liberal Prime Minister Justin Trudeau undid that three years later (<https://hicksmorley.com/2017/06/27/federal-post-secret-ballots-no-more-card-check-certification-returns-to-federal-sector/>). Manitoba as well as Newfoundland and Labrador have both switched several times based on which party is in power.

“The constant back and forth reflects a basic philosophical and political difference of opinion,” explains David Doorey, a labour law professor at York University in Toronto and author of the popular legal blog Canadian Law of Work Forum (<https://lawofwork.ca/>). “Conservatives prefer mandatory ballots because unions have a harder time getting certified under a two-step mandatory ballot model. The opposite reasoning applies to the more liberal parties who prefer the one-step card-check model.” Card-check allows unions to sign up employees in secret, by whatever means necessary, and then present the employer with a *fait accompli*. Only mandatory balloting allows workers to hear from both sides – employers and union officials – in the period prior to the vote,

and then to make their decision without fear of subsequent retaliation from either side.

*York University labour law professor David Doorey explains that a person's preference for one-step card-check or two-step balloting is consistent with their leaning liberal or conservative, respectively.*

Based on evidence from provinces that have switched between the two systems, Doorey notes that secret ballots appear to reduce the success of unionization efforts by 10-20 percent (<https://www.jstor.org/stable/798422?seq=1>). While labour groups (<https://nupge.ca/content/mandatory-voting-not-democratic-it-appears-reality-bill-c-525>) habitually complain this drop should be seen as proof that balloting is harmful to workers' rights, it is perhaps best regarded as evidence workers make more thoughtful decisions after carefully weighing both sides of the argument. It also suggests at least some card-signers have second thoughts about their initial response to a union request. The fact balloting is aligned with how Canadians pick their governments can be considered another argument in its favour.

Currently, voting is mandatory in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, Newfoundland and Labrador, and Ontario – but with one notable exception. In B.C., however, NDP Premier John Horgan's majority victory last year raised expectations

*In B.C., NDP leader John Horgan's convincing election victory may soon mean a return to card-check. (Source: B.C. NDP, licensed under CC BY 2.0)*

(<https://vancouversun.com/opinion/columnists/vaughn-palmer-bains-appears-set-to-scrap-secret-ballots-for-union-certifications>) his province might soon shift to card-check once again. Horgan had wanted to do so after winning a minority government in 2017, but could not convince Green Party leader Andrew Weaver, whose backing he required, to support the move. “I will never support legislation that will eliminate the secret ballot,” Weaver declared (<https://vancouversun.com/news/politics/b-c-greens-kill-ndps-proposed-change-to-unionized-secret-ballots>). With a majority now in hand, Horgan no longer needs the Greens onside.

#### **“Card-check is non-democratic” – But Still the Ontario Way**

The concerns expressed by the business owners who contacted *C2C Journal* cannot be ascribed to mere antipathy towards unions or collective bargaining. “I did my apprenticeship with a union,” says Randy Sommerfeld, owner of AKS Interior Systems, a commercial drywall installer based in Ariss, Ont. “If 50 percent of my people honestly wanted to join a union, I would say, ‘Go ahead.’ I’d honour that.” In 2018, however, Sommerfeld experienced the scope for abuse inherent to the card-check system when a handful of employees nearly certified his company without regard to the wishes of the majority. “I’m not anti-union,” he states plainly. “But I *am* pro-democracy. And card-check is non-democratic.

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*While Premier Doug Ford introduced a series of labour reforms early in his term, he didn't eliminate card-check in the construction industry. As a result, Ontario is alone in Canada in operating two distinct unionization regimes simultaneously.*

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Understanding complaints about the unfairness of union rules in Ontario's construction sector require a bit of history. In 1995, Progressive Conservative Premier Mike Harris moved the entire province to mandatory balloting, following the national trend of the time. In 2005, in keeping with the swing of the political pendulum, Liberal Premier Dalton McGuinty then reintroduced card-check. Yet McGuinty did not shift the entire province; only the construction industry returned to card-check, presumably as a favour to specific trade unions.

Despite expectations the current Conservative government would revert to ballots after unseating the Liberals in 2018, this did not occur. While Premier Doug Ford introduced a series of labour reforms early in his term, he didn't eliminate card-check in the construction industry. As a result, Ontario is alone in Canada in operating two distinct unionization regimes at once.

Another problematic feature unique to the Ontario construction industry is its irregular "day-of" rule. According to the OLRB, unions in Ontario can submit signed union cards on any day of the week. This includes weekends and public holidays. Further, only workers on the job *on that particular day* are considered part of the workforce for the purpose of determining if a majority approves of joining a union.

This is how all of Da Silva's long-time employees were denied a say in the IBEW's unionization of her company. Since only her three most-junior workers were declared to be working on that Friday, according to OLRB rules, they alone constituted CRME's "full" workforce. This rule thereby denies *all* affected workers the chance to vote on an issue of great importance. (It is also at odds with how the OLRB itself operates. Outside of card-check applications, all other submissions to the board must be made during business hours Monday to Friday.)

*"Card-check is non-democratic": Former union member Randy Sommerfeld, now owner of AKS Interior Systems, witnessed a handful of workers trying to unionize his entire workforce.*

Many of the business owners who talked to *C2C Journal* related similar stories of how a few workers asked to come in on a

Saturday, holiday or during some other unusual situation and then signed cards when everyone else was off work. One owner was presented with a union application after two workers skipped a Saturday golf tournament he was hosting for his employees and went to work instead.

Ontario's dysfunctional system has trapped more than just hapless small business owners. Large municipal governments have also been victimized by card-check manipulation, and with far greater consequences for taxpayers. In 2013, for example, two workers employed by the Regional

Municipality of Waterloo in southwestern Ontario were assigned to build a small garden shed behind a library on a weekend. After both signed union cards with the United Brotherhood of Carpenters and Joiners of America (<https://www.therecord.com/opinion/columnists/2013/05/02/back-to-the-shed-part-2-the-damage-continues.html>) – and it was determined they were the only workers on the job that Saturday – the entire regional government found itself trapped in a web of closed-shop rules that dramatically reduced the number of firms eligible to bid on public tenders.

When a nearly-identical stunt was pulled by the same union on the City of Hamilton in 2005, a city report two years later (<https://merit-canada.ca/wp-content/uploads/2018/05/open-tendering-transport-submission.pdf>) found the pool of potential bidders had dropped by 90 percent and overall tendering costs had risen by at least 10 percent. Other studies (<https://www.cardus.ca/research/work-economics/reports/skimming-off-the-top/>) have found costs for big public projects can grow by 25 percent or more under closed-shop rules.

“These are complaints I hear virtually every day,” says Erin Kuzz, a partner in the Toronto law firm Sherrard Kuzz and who frequently acts on behalf of employers in the construction industry. “It is a very real problem,” referring to deceptive day-of card-check applications. Kuzz notes the official rationale for treating construction differently is that it tends to be a fluid industry, with workers coming and going on a daily basis. This can make it difficult to determine who is a permanent employee and who is not, she admits. But it’s an issue other provinces using mandatory balloting have overcome. And regardless of its original purpose, Kuzz complains the day-of rule has become an impediment to ensuring just outcomes in certification disputes: “We have one side [i.e., unions] who can lawfully manipulate the result by choosing the day, whether it is a weekend, public holiday or religious event” to submit a successful unionization application. Such a glaring loophole is not present in other provinces with the card-check system.

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Even some unions admit the existing process is deeply flawed. Ian DeWaard is Ontario provincial director of the Christian Labour Association of Canada (CLAC), an alternative to the trade union system. Rather than unionize by specific occupation, such as plumbers, painters or electricians, CLAC represents all workers at a single site and strives for a more collaborative relationship with employers. It also refuses to gerrymander card-check applications. “It’s quite offensive,” DeWaard says of what he calls the “shenanigans” inherent to Ontario’s current system. “A small number of workers on a weekend will sign cards and all the other workers show up on the Monday to find out they’ve been unionized. A union should advocate on workers’ behalf. To come in the door in this way without permission is problematic.”

For Kuzz and the owners’ group, the solution is to bring the construction industry into line with the rest of the province, and most of the country, by requiring mandatory ballots across the board. “I have never heard a cogent explanation for why we can’t have votes in the construction industry,”

Kuzz says. CLAC's DeWaard argues that even just fixing the bizarre day-of rule to ban weekend and holiday applications would avoid the majority of questionable card-check claims, greatly reducing the number of future complaints.

In the face of such criticisms, Ryan White, a union-side labour lawyer specializing in construction law at the Toronto law firm Cavalluzzo, offers a stiff defence of card-check. Cards are meant to provide a "snapshot in time"

*"Quite offensive": Christian Labour Association of Canada Ontario director Ian DeWaard doesn't think much of his province's "day of" certification rule.  
(Source: Ian DeWaard)*

of the will of the workplace, he says in an interview, even if that snapshot happens to reflect a weekend, public holiday or day when most of a company's workers happen to be golfing at the employers' expense.

"I'm aware of just as many cases where employers are also engaging in gamesmanship," argues White. He says bosses will often try to expand their list of workers by whatever means possible to keep the number of cards submitted below the necessary 55 percent of the workforce on the day in question. "Card check is quick and effective," White maintains, whereas holding a proper vote is time-consuming, expensive and often leads to protracted conflicts. Besides, he notes, if a majority of workers don't actually want to belong to a union, they can apply for a decertification.

While this might sound like a reasonable work-around to undemocratic card-check results, Kuzz notes that decertification is a far more laborious and time-intensive process than unionization itself. For one thing, the workers affected must take on the task entirely by themselves. Owners are not allowed to provide any legal advice or support for a decertification effort, unlike how well-financed unions can bankroll the unionization process in the first place.

*Strong views on card-check: Lawyer Erin Kuzz (left), a partner in Sherrard Kuzz in Toronto, often represents business owners; Ryan White (right) is a union-side labour lawyer at Cavalluzzo in Toronto.*

And decertification can take up to three years to complete and always requires mandatory balloting. Kuzz points out that unhappy workers can't simply sign a card saying they no longer want to belong to a union on a specific day. "There must be a vote in every case," she says, her voice rich with irony.



### **Salts in the Wounds**

Beyond the loophole-ridden nature of Ontario’s card-check system, the small business owners are also raising concerns about how unions are able to plant workers inside their businesses for the sole purpose of engineering a union, only to see them promptly quit once unionization has been achieved. Similar to CRME, Gio believes his company was infiltrated by “salts”, as such employees are known in workplace lingo. “Their objective was to get us certified, and then they quit as soon as the application was submitted,” he says. “It just seems very deceitful. If they think a union is such a good idea, why don’t they stay?” It is another great question.

Surely the point of holding a vote, or submitting a sufficient number of cards, is to reveal the true interests of the workers themselves. For this reason, salts remain highly controversial. Often salts are actually *paid* by unions for their undercover services. Another member of the owners’ group says: “The salt was sent in with just one purpose, to certify us using the weekend/holiday legal loophole.” Business owners who’ve had experience with salts say it has left them more suspicious of the entire hiring process – if a worker seems overqualified, does that mean he or she has a hidden agenda? In a review of recent OLRB rulings, Gio found several recurring names in card-check applications by certain unions, suggesting the salting process is both repetitive and lucrative.

Again, democratic principles ought to require that the workers who vote on the union question have an actual stake in the outcome. The apparent effort by some unions to sign up workplaces like so many trophies – for the purposes of collecting more dues and enforcing an ever-wider net of closed-shop restrictions – should be considered another abuse of process. And the system often seems designed to the advantage of the unions. When, at the OLRB hearing, Da Silva raised the fact her card-signing workers quit as soon as they’d unionized her company, the board dismissed her information as irrelevant.

Labour lawyer White counters that whatever the owners may think of such behaviour, it remains entirely legal and commonplace. “The Labour Board has said that is legitimate,” he states, citing case law that backs up Da Silva’s experience. In many situations, he says, salts wear their reputation “like a badge of honour.” White also says he is personally unaware of any salt quitting immediately after helping to engineer a union certification.

### **The Campaign Continues**

Having felt the bite of Ontario’s card-check system first-hand, the business owners are now seeking to reform it. In addition to telling their stories to *C2C Journal*, they’ve been meeting with Ontario government officials, chambers of commerce and local politicians. They are demanding a return to secret ballots so that unionization rules will once again be consistent across the province, as well as other rule-changes to ensure all relevant employees are able to participate in unionization decisions.

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What puzzles many is that Ford has not already taken these actions. His government did pass a major labour reform package soon after taking office, undoing many of the pro-union policies established during the final months of Kathleen Wynne’s Liberal administration. This included eliminating a newly-granted right to card-check in the home care and building services industries, as well as offering an escape hatch for municipalities such as Hamilton and Waterloo Region. So why did the Progressive Conservative government let the oddity of card-check remain for the rest of the construction sector?

“Part of the answer is that the construction unions have provided important support for [Ford’s] government when most unions have not,” says law professor Doorey, who admits he also expected Ford to scrap card-check across the board. “Ford’s willingness to work with construction unions contrasts sharply with a more combative stance when it comes to the rest of the labour movement.” While Ford has waged several high-profile battles with public-sector unions, especially teachers’ unions, he seems to have a soft spot for the construction trades, and the Labourers’ International Union of North America (LiUNA) in particular. The premier frequently appears at LiUNA rallies and events (<https://ontarioconstructionreport.com/political-payback-liuna-wins-section-14-rollback-as-premier-doug-ford-attends-unions-queens-park-rally/>), and greatly benefitted from the union’s campaign against his predecessor Wynne during the 2018 provincial election. “Quite frankly,” adds lawyer Kuzz, “the construction trade unions have a lot of political power.”

*Substantial soft spot: Ontario Premier Ford (seen at left at a LiUNA event) apparently covets the support of construction unions. Others, such as Ontario’s teachers’ union (right), have felt the effects of Ford’s sweeping labour reforms. (Image sources: (left) LiUNA Facebook photo; (right) Nathan Denette/Canadian Press)*

This assessment of the current balance of power in the construction industry upends conventional wisdom that holds owners always enjoy an unfair advantage over workers. And also that union-friendly labour laws are necessary to ensure détente between these two competing interests. The evidence instead suggests it is the unions that are holding the whip hand. Their ability to manipulate certification efforts by exploiting loopholes regarding weekend and holiday work has produced outcomes that fly in the face of basic democratic principles. In essence, a major decision affecting an entire workforce can be handed to a tiny minority of workers.

The fact salts can deliver signed cards and then immediately quit, leaving the permanent workers to live with a situation they had no say in creating, adds to the situation’s obvious injustice. Surely those who wish to be unionized should also be prepared to stay and work under the conditions they have engineered. If unions truly seek to represent the will of workers, they should focus their efforts

on companies in which a demonstrable majority wish to join, or have complaints about their employer. Instead, certain unions appear to be exploiting the rules for their own purposes – unionizing unwilling workers in the process.

Finally, if the goal is to achieve true workplace democracy, no decision can ever be considered entirely legitimate in the absence of secret ballots. This system alone allows participants to vote as their best interests and genuinely-held beliefs dictate, without intimidation from any party.

Whatever the reasons for the status quo's continued durability, the business owners involved say they remain determined to spread their story – if only to warn other fellow entrepreneurs. "We are joining forces to help get the word out that any company that does construction work is at risk," says Da Silva. "I didn't know it could happen to me, and that means it could happen to anyone."

*Peter Shawn Taylor is senior features editor at C2C Journal.*

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