

The Crisis in Union Organizing under the BC Liberals

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INTRODUCTION

There is a crisis in union organizing under the present Liberal government in British Columbia.

This may sound like a bit of an overstatement to some, but unfortunately the numbers demonstrate that it is indeed the case. Successful union organizing has come to an almost complete halt in this province under the present government. Unions organized up to 10,000 new members a year under the previous NDP government. Last year, in contrast, unions only organized 1500 employees – a number that did little more than offset the 800 employees that were decertified in the year. Not only are the numbers under the Liberals much worse than they were under the NDP, they are also much worse than at any other time in the last thirty years – including during the days of the Sacred Industrial Relations Council.

History shows that successful union organizing is critical to maintaining the size and strength of the labour movement. Without it, overall union membership will likely go into quite rapid decline, with a devastating effect on the labour movement.

The current crisis in union organizing cannot be explained by any one factor alone. The success of union organizing is affected by a wide variety of economic, political, and social factors. However, major factors contributing to the current decline in union organizing can be found in both the Liberal amendments to the *Labour Relations Code* and the administration of that legislation by the present Labour Relations Board.

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Quite simply, there has been a failure by both the government and the Labour Relations Board to fully appreciate the fundamental power imbalance that exists between employees and employers, and the consequent need for laws and administrative procedures that serve to protect the fundamental right of employees to associate together in unions².

This paper will describe the magnitude of the present decline in certifications as well as exploring possible causes, in the hopes of contributing to debate and action to reverse this trend.

THE MAGNITUDE OF THE CRISIS

The *Labour Relations Code* is administered by the Labour Relations Board³. In addition to adjudicating disputes under the legislation, the Labour Relations Board has maintained and published various statistics for the past thirty years. Amongst other things, these statistics show the number of certifications that are granted each year and the number of employees covered by those certifications.⁴

To fully appreciate the significance of these certification statistics, it is important to bear in mind that British Columbia has switched back and forth between two fundamentally different certification systems during the past thirty years: the traditional card-check system and the mandatory vote system that is presently in place.

² This fundamental power imbalance has been recognized repeatedly by the Supreme Court of Canada. See e.g. *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 424.

³ The modern Labour Relations Board has been in existence since 1973 (under what was called the *Labour Code* until 1987), although it was named the “Industrial Relations Council” from 1987 to 1993 (under what was then called the *Industrial Relations Act*).

⁴ See Appendix 1 for the annual number of certification applications disposed of and granted, and Appendix 2 for the number of previously unorganized employees covered by the certifications granted.

Under a card-check system a union becomes certified to represent a group of employees based on a required majority of the employees being union members, as demonstrated by signed union membership cards (a 55% majority in British Columbia prior to the present mandatory vote system being imposed). The Labour Relations Board inspects these membership cards, which expressly authorize the union to represent the employee in collective bargaining, to ensure that the required level of employee support is present.

Under a mandatory vote system, employees must instead demonstrate their support for the union *twice*. First the required percentage of employees must sign union membership cards (with a slightly lower threshold figure of 45% presently). Then, once the union establishes that the required number of membership cards have been signed, a representation vote is conducted. The union only becomes certified if the majority of employees then vote in favour of union representation.

From 1948 until 1984, certifications were granted under a card-check system in British Columbia (in common with almost all other Canadian jurisdictions). If the majority of employees in an appropriate bargaining unit had signed union membership cards, the union would be certified.

In 1973, while the card-check system was maintained as the primary means of obtaining certification, the NDP government of the day introduced representation votes as an *additional* method of obtaining certification where a union could demonstrate membership support of more than 35%, but less than the majority required for card-based certification.⁵ In 1977 the level of support required for a card-based certification was increased from a simple majority to 55%, and the threshold for obtaining a representation vote was increased from 35% to 45%.

⁵ Prior to 1973, representation votes were only required when there was uncertainty as to whether the majority of employees were union members.

In 1984 the Social Credit government of the day amended the legislation to eliminate the card-check system and replace it with a mandatory vote system for all applications⁶. Unions now had to first sign up over 45% of employees and then subsequently go on to win a representation vote.

In 1993 the newly elected NDP government returned to a card-check system, although with 55% of employees signing membership cards now being required to obtain a certification (rather than the simple majority required prior to 1977). Support between 45% and 55% continued to result in a representation vote.

Most recently, one of the first legislative acts of the newly elected Liberal government was to amend the *Labour Relations Code* on August 16, 2001 to again eliminate the card-check system, replacing it with a mandatory vote system for all applications.

The statistics show that certifications have decreased since the mandatory vote system was reintroduced in 2001. This alone is hardly surprising – it was quite clear from the previous introduction of mandatory votes in both British Columbia in 1984 and Ontario in 1995 that the general effect of mandatory votes is to reduce the success of certification applications⁷.

However, what *is* particularly striking under the present Liberal government is the degree to which the certification numbers have decreased this time, and the fact that the certification numbers are now much lower than they were when there were mandatory votes under the Socreds (despite the fact that unemployment rates are considerably lower

⁶ With the exception of rarely used “project certifications” in the construction industry.

⁷ See e.g. C. Riddell, “Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998” (2004) 57 *Indus. & Lab. Rel. Rev.* 493, and S. Slinn, “An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification” (2004) 11 *C.L.E.L.J.* 259

today⁸). This is seen whether one looks at the success rate of certification applications, the number of certification applications granted, or the number of previously unorganized employees covered by those certifications.

The most significant of these measures in practical terms is probably the number of previously unorganized employees certified⁹. During the ten full years of the card-check system from 1974 to 1983¹⁰, the number of unorganized employees that were certified averaged 7,411 per year.¹¹

Then, during the eight full years of the Socred mandatory vote regime that followed from 1985 to 1992, the number of unorganized employees that were certified dropped to an average of 4,106 per year.¹²

Next, during the seven full years from 1994 to 2000 when the card-check system was reintroduced, the number of unorganized employees that were certified increased to an average of 8,762 per year – similar to the level previously seen during the 1974 to 1983 period of card-check certifications.

⁸ Historically, prior to the present Liberal regime, there was a strong positive correlation between low unemployment and organizing success.

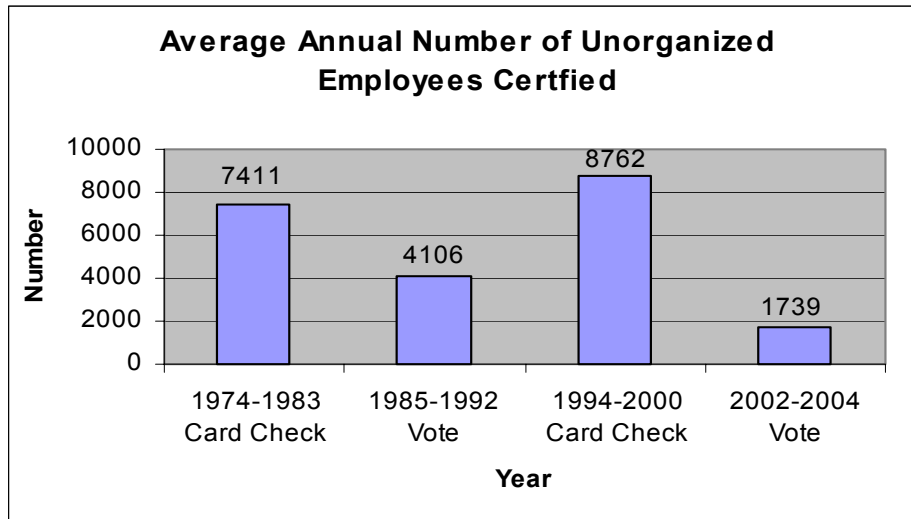
⁹ The number of previously unorganized employees certified does not include employee covered by certifications issued as a result of raids. The numbers of previously unorganized employees referred to in this article are from the Labour Relations Board annual statistics (see Appendix 2).

¹⁰ I am restricting this analysis to *full* years under each regime because the published statistics do not break down the certification numbers by date within a year.

¹¹ This figure excludes the anomaly of the certification of 34,972 employees of the British Columbia Government in 1974 following the removal of legislative bars to collective bargaining by provincial government employees.

¹² This figure similarly excludes the anomaly of the certification of 31,588 teachers in 1988 following the removal of legislative bars to collective bargaining by teachers.

However, during the three full years of the present mandatory vote regime from 2002 to 2004, the number of unorganized employees certified has declined to an average of just 1,739 per year. This number is *considerably less than half* of what it was under the Socred mandatory vote regime. Indeed, the number of unorganized employees certified in any of the past three years is considerably lower than in *any* previous year – including during the depths of economic recession in the early 1980s under the Socred mandatory vote regime. The following chart graphically illustrates this decline in the average annual number of employees certified during each of the four British Columbia certification regimes set out above.



Similarly, if one looks to either the annual number of certifications granted or the success rate of certification applications, the numbers are significantly lower under today's mandatory vote regime than at any time during the last 30 years, including during the Socred mandatory vote regime.¹³

¹³ See Appendix 1 for the annual number of certifications granted and Appendix 3 for the annual success rate of certification applications. The decline in the number of employees organized over the past thirty years is all the more striking when one considers that the overall size of the workforce has increased substantially over this period.

What long term consequences can be expected as a result of the present decline in certifications? Some historical perspective is useful when considering this question. If one looks at the period of 1976 to 2004¹⁴, there has been a slow but relatively steady increase in the number of union members, from 384,600 to 561,600. However, during that same period there has also been a slow but relatively steady *decrease* in union density, from 41.2% to 33.6%. In other words, while the number of union members has been growing, it has not been growing as fast as the overall workforce and consequently unions are representing a decreasing proportion of the workforce¹⁵.

It is also important to note that new certifications are of course not the only way that unions gain new members (just as decertifications are not the only way that unions lose members). Existing bargaining units may expand and voluntary recognition agreements may be entered into for new bargaining units¹⁶. Nonetheless, obtaining new certifications has clearly been a very significant source of new union members for decades. Consequently one would expect that any decline in new certifications would aggravate the existing trend of decreasing union density. However, the present decline is of such a magnitude that it can reasonably be expected to actually reverse the existing trend of increasing membership numbers as well.

An indication of the long term consequences of the present certification rates on union membership numbers can be seen if one applies the present certification rates to the

¹⁴ See Appendix 4 for annual union density and absolute union membership figures from 1976 to 2004 (this is the time period for which these statistics are readily available from Statistics Canada).

¹⁵ It is important to note that the extension of collective bargaining rights to certain public sector employees in the 1970's and 1980's significantly contributed to the increase in absolute union membership numbers and served to reduce the magnitude of the decrease in union density. Most notably, as noted previously above, 34,972 provincial government employees were certified in 1974 and 31,558 teachers were certified in 1988.

¹⁶ Voluntary recognition agreements are likely of considerably less significance in this regard today than they were prior to the decimation of the unionized construction industry in the 1980s, as this was an industry where voluntary recognition agreements were particularly prevalent.

seven full years of the card based system from 1994 to 2000. As noted above, during those seven years the number of unorganized employees that were certified averaged 8,762 per year – for a total of 61,333 employees. During those same seven years the total number of union members in BC increased from 551,300 employees to 561,600 employees – an overall gain of only 10,300 employees over the seven years, despite six times that number being organized.

However, today the number of unorganized employees being certified is averaging only 1,739 per year, or less than 20% of the yearly average from 1994 to 2000. With this vastly reduced number of new employees being organized, one would expect it to be reflected in declining union membership numbers over the longer term¹⁷. If employees had been organized at the present average rate of 1,739 employees per year during the period of 1994 to 2000, there would have been only 12,173 employees organized (instead of the 61,333 that were actually organized during this period). This would have resulted in total union membership declining by almost 39,000 employees over the seven years (instead of the increase of 10,300 that was actually experienced)¹⁸. This decline would have been an unprecedented drop of over 7% in the absolute number of union members during a seven year period – which gives a good indication of the long term consequences that might be expected if the current decline in certifications is not reversed.

This leads us to the next part of this paper, an examination of factors that may be contributing to the present decline in certifications.

¹⁷ There has not been such a decline in 2002-2004, which has instead seen relatively stable absolute membership figures, but that is during a period of low unemployment (as noted above there is historically a strong positive correlation between union organizing success and low unemployment).

¹⁸ This assumes that employees who are newly certified are as likely to remain unionized as are union members in established bargaining units, which may not always be the case.

CONTRIBUTING FACTORS

This paper will now consider various actions of the Liberal government and the Labour Relations Board that may be contributing to the present decline in certifications. As noted above, these are not the only possible contributing factors. The success of union organizing is affected by a wide variety of economic, political, and social factors. In particular, many commentators have pointed to structural changes in the economy such as increasing part time and temporary employment, a shift to service sector employment, and the increasing numbers of small workplaces as contributing to the decline in union density discussed above. However, the possible role of factors such as these is beyond the scope of this paper (and is better dealt with by experts in those fields)¹⁹. This paper will stick to factors arising directly from the *Labour Relations Code* and its administration by the Labour Relations Board, and in particular the following:

1. The amendments the Liberals made to the *Labour Relations Code* in 2001 that reintroduced mandatory representation votes.
2. The further amendments the Liberals made to the unfair labour practice provisions of the *Labour Relations Code* in 2002 (and the subsequent interpretation of those amendments by the Labour Relations Board).
3. The Labour Relations Board's failure to provide effective remedies in the face of an increasing incidence of unfair labour practices.
4. The administrative procedures of the Labour Relations Board in the processing of certification applications.

¹⁹ Although it appears unlikely to the writer that these sorts of factors, all of which have been around for some time, can go very far in accounting for the recent and precipitous drop in certifications that immediately followed the election of the Liberals.

One additional and important area of Labour Relations Board policy that may also be contributing to the present decline in certifications is the approach taken to determining whether a particular bargaining unit is appropriate for collective bargaining. The Labour Relations Board will only certify a bargaining unit if it is considered appropriate for collective bargaining. A complex body of jurisprudence has developed concerning this issue, and providing access to collective bargaining is supposed to be the most important principle in determining appropriateness on an initial application for certification. There are indications in recent decisions that the Labour Relations Board may now be giving less weight to this principle of providing access to collective bargaining²⁰. However, this issue requires further study²¹ and is beyond the scope of this paper.

1. The 2001 reintroduction of mandatory representation votes

One obvious cause of the present decline in certifications is the imposition of mandatory representation votes in 2001. As noted above, it has been well documented that the introduction of mandatory representation votes adversely affects the success of certification applications. In 1992 the province's Committee of Special Advisors charged with examining overall industrial relations strategy for British Columbia (a committee which included experts from both management and labour) unanimously recommended a return to the card-check system, describing the effect of the mandatory vote system as follows:

²⁰ See e.g. *Wal-Mart Canada*, BCLRB No. B301/2005, and in particular the additional reasons beginning at paragraph 59.

²¹ Further study of this issue would be greatly assisted by statistics showing not just the number of certification applications dismissed, but also the numbers dismissed on various grounds (e.g. inappropriate bargaining unit, insufficient membership support for a vote, unsuccessful representation vote, etc.). Such statistics are unfortunately no longer published in the Labour Relations Board annual reports.

The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow. The statistical profile in British Columbia since the introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process.²²

Similarly, the 1998 Labour Relations Code Review Committee, which again included experts from both management and labour, unanimously rejected the reintroduction of mandatory votes:

We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally, and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity.²³

Notwithstanding expert views of this nature, the Liberal government reintroduced mandatory votes in 2001. There can be little doubt that this reintroduction of mandatory votes has contributed to the current decline in certifications. However, as noted above,

²² V. Ready, J. Baigent, and T. Roper, *Recommendations for Labour Law Reform* (Victoria: Queen's Printer for British Columbia, September 1992), page 26.

²³ V. Ready, S. Lanyon, M. Gropper, and J. Matkin, *Managing Change in Labour Relations*, February 25, 1998, page 52.

by any measure the state of certifications in British Columbia today is far worse than it was under the Socred mandatory vote regime in place from 1984 to 1993. Similarly, the decline we have seen in certifications since the Liberals were elected is far greater than the decline that occurred in Ontario after a mandatory vote regime was introduced by the Tory government in 1995²⁴. Given the much greater magnitude of the present decline in certifications than that experienced following the introduction of mandatory votes by the Socreds or the Ontario Tories, it appears extremely unlikely that all (or even most) of the responsibility for the current decline in certifications can be laid at the feet of the reintroduction of the mandatory vote system.

2. The 2002 amendments and the LRB's interpretation of them

In 2002, a year after imposing mandatory representation votes, the Liberals also amended the unfair labour practice provisions of the *Labour Relations Code*. The unfair labour practice provisions prohibit various employer actions, including interference with the formation, selection or administration of a trade union (section 6(1)), anti-union threats and promises (section 6(3)(d)), and anti-union intimidation and coercion (section 9). In addition, section 8 of the *Labour Relations Code* contains what is commonly referred to as the “employer free speech” provision, which has an impact on the scope of prohibited unfair labour practices²⁵. Prior to the 2002 amendments section 8 provided:

Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

²⁴ For instance, in Ontario the number of employees certified in the 5 years after mandatory vote was introduced actually exceeded the number in the 5 years prior, although the certification application success rate did decline by some 20% following the introduction of the vote (See Ontario Labour Relations Board annual reports for those years and S. Slinn, “An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification” (2004) 11 C.L.E.L.J. 259)

²⁵ There have been various permutations of such provisions in the *Labour Relations Code* since 1977.

Then, in 2002 the Liberal government amended section 8 to instead provide as follows:

Subject to the regulations²⁶, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

Section 6 of the *Labour Relations Code* was also amended at the same time to read as follows (with the new language in bold):

6(1)**Except as otherwise provided in Section 8**, an employer or a person acting on behalf of an employer shall not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

The previous section 8 only protected statements of fact or reasonably held opinions. Under the amended section 8 there is no such express restriction. In addition, the previous section 8 only protected employer statements of fact or opinion “with respect to the employer’s business”. Under the amended Section 8, there is no such express restriction on the scope of the protected views. These changes suggest that the amended section 8 was intended to provide greater expression rights. However, the amended section 8 also expressly prohibits the use of intimidation and coercion in the expression of views, which the previous section 8 did not do. It is up to the Labour Relations Board to determine what sorts of actions constitute intimidation and coercion in the labour relations context and consequently the Labour Relations Board had considerable latitude in determining the effect of the amendments to section 8.

Initial decisions of the Labour Relations Board under the amended section 8 took an extremely broad view of the effect of the amendments, effectively allowing any employer communications other than deliberate lies or express threats.²⁷ These same

²⁶ The regulations contemplated by the amended section 8 have never been promulgated.

decisions also expressly rejected the principle, which had long been a central feature of British Columbian labour law, that employers are not entitled to engage in political-style anti-union campaigns like those commonly used by employers in the United States.²⁸

More recently the Labour Relations Board appears to have placed some modest restrictions on the effect of section 8, and in particular on an employer's ability to force its employees to listen to anti-union communications.²⁹ However, it is clear that the Labour Relations Board is continuing to take a very hands off approach to the content of anti-union communications by employers, as well as continuing to allow employers to engage in political-style anti-union campaigns.³⁰ The 2002 amendments do not by any means compel such a *laissez-faire* approach to anti-union communications by employers.

The 2002 amendments to sections 6 and 8 of the *Labour Relations Code*, together with the interpretation of them adopted by the Labour Relations Board, have resulted in a wide range of employer activity that would previously have been considered unfair labour practices now being permitted. This has very likely contributed to the present decline in certifications.

3. The LRB's failure to provide effective remedies for unfair labour practices

A lack of effective remedies for unfair labour practices is also a factor that is likely contributing to the present decline in certifications. This can be seen most readily

²⁷ See e.g. *Convergys Customer Management Canada Inc.*, BCLRB No. 111/2003 (Leave for Reconsideration of BCLRB No. B62/2003); 90 C.L.R.B.R. (2d) 287 and *RMH Teleservices International Inc.*, BCLRB No. B345/2003; 100 C.L.R.B.R. (2d) 95.

²⁸ Ibid

²⁹ *RMH Teleservices International Inc.*, BCLRB No. B188/2005 (Leave for Reconsideration of BCLRB No. B345/2003), 114 C.L.R.B.R. (2d) 128.

³⁰ Ibid

in regard to the utilization of remedial certification as a remedy³¹. Remedial certification is where a certification is granted as a remedy for unfair labour practices, despite the fact that the union has not achieved sufficient support to be certified by the usual means (whether under a card-check system or a mandatory vote system). It is the one remedy that deprives an employer of exactly what it is attempting to achieve by committing the unfair labour practices – remaining uncertified – and it consequently has a uniquely powerful deterrent effect.

However, the Labour Relations Board has always used remedial certifications extremely sparingly, despite the fact that its remedial responses have not been effective in deterring unfair labour practices. This problem was recognized as long ago as 1977 when the Board concluded in *Beechwood Construction Ltd.*³² that remedial certification was not a working reality and that there had been no appreciable decline in unfair labour practices as a result of the Board's remedial responses. Consequently the Board in *Beechwood Construction* revised the approach to remedial certification to make it a working reality. However, as recognized some 20 years later in *Cardinal Transportation B.C. Incorporated*³³, despite the Board's brave words in *Beechwood Construction* the Board's remedial responses had continued to prove inadequate in reducing unfair labour practices. In *Cardinal Transportation* the Board again indicated it would strengthen its remedial responses if necessary to reduce unfair labour practices. However, again the Board did not do so. The use of remedial certifications has remained extremely limited to this day³⁴.

³¹ This is the only remedy for which the Labour Relations Board publishes statistics in its annual reports.

³² *Beechwood Construction Ltd.*, [1977] 2 Can LRBR 218

³³ *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), 34 C.L.R.B.R. (2d) 1

³⁴ See Appendix 5 for annual number of remedial certifications.

This reluctance to use remedial certifications is a longstanding problem, and certainly not one that can be laid entirely at the feet of the present Labour Relations Board. However, it has particularly grave implications today because, in addition to the precipitous drop in certifications over the past three years, there has been a significant increase in the incidence of unfair labour practices in recent years³⁵.

This increase in the incidence of unfair labour practices is particularly striking when one considers that the effect of the 2002 amendments has been to permit various employer actions that previously would have been prohibited as unfair labour practices. This suggests that, in addition to the fact that employers are committing unfair labour practices more frequently today, today's unfair labour practices are likely to be more serious in nature than was the case prior to the 2002 amendments.

Given this increased incidence of unfair labour practices (and quite aside from the present crisis in certifications), there is now a particular urgency for the Labour Relations Board to finally start granting remedial certifications more readily, as well as strengthening its remedial responses generally.

4. The LRB's administrative procedures

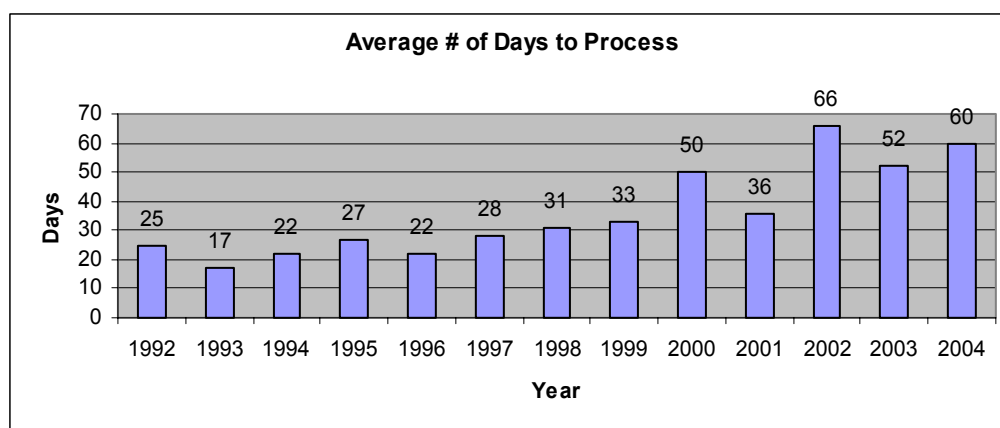
The administrative procedures of the Labour Relations Board regarding certification applications play an important role in the likelihood of successfully and expeditiously obtaining a certification, and are critical to a fair and balanced certification process.

³⁵ By incidence of unfair labour practices I mean the annual number of unfair labour practice complaints and orders *per certification application* (the vast majority of unfair labour practices are committed by employers during union organizing campaigns). See Appendix 6 for annual incidence of unfair labour practice complaints and orders.

The current administrative procedures of the Labour Relations Board are very likely contributing to the present crisis in union organizing. In particular, it is now taking much longer for certification applications to be decided, representation votes are not held expeditiously, and critical payroll inspections are no longer being performed on a regular basis.

The time it takes to decide certification applications

The average length of time it takes for the Labour Relations Board to process a certification application has approximately doubled in recent years as shown in the following chart.³⁶



Prior to the election of the Liberals, contested certification applications would frequently be heard and decided within days of the application being filed. This rarely happens today. While a hearing of sorts is held close to the expiry of the 10 day period for holding a representation vote, objections to the certification application are rarely if ever decided at this time. Instead, if there are objections, the Board generally orders that a representation vote be held but that the ballot box be sealed pending a further hearing scheduled weeks or months into the future where the objections are to be decided.

³⁶ From the Labour Relations Board annual statistics for these years, Table 10. Statistics in this regard are only available for these years.

The time it takes to hold representation votes

The *Labour Relations Code* requires that a representation vote be conducted “within 10 days” of an application for certification. However, in practice representation votes are almost always held at or very near the end of that 10 day period.

This length of time compares unfavourably to the three other jurisdictions in Canada where the legislation stipulates a time within which representation votes must be held. In each of these jurisdictions – Ontario, Nova Scotia, and Newfoundland – the time limit is a considerably shorter 5 working days³⁷.

Because the Labour Relations Board schedules representation votes at or very near the end of this province’s statutory 10 day period for holding the vote, employers have a considerable length of time to attempt, lawfully or unlawfully, to interfere with employees’ decision-making regarding unionization. The simple step of instead scheduling votes early in the 10 day period would reduce the opportunity for unlawful employer interference.

The abandonment of payroll inspections

Another action of the Liberals shortly after their election in 2001 was to lay off many of the Industrial Relations Officers (or “IROs”) employed by the government and to close most of their offices throughout the province.

IROs have various responsibilities, including investigating certification applications and preparing a report in that regard. The IRO report decides whether the union has met the required 45% level of membership support needed to obtain a representation vote. Making this decision requires the IRO to determine two facts: the number of employees in the bargaining unit and the number of those employees who are

³⁷ Ontario *Labour Relations Act* 1995, s. 8(2); Nova Scotia *Trade Union Act*, s. 25; Newfoundland and Labrador *Labour Relations Act*, s. 47.

union members. Prior to the layoffs of IROs, an IRO would regularly inspect both the union membership cards and the employer's payroll records to make these two determinations. Since the layoffs, the inspection of payroll records no longer takes place in most cases³⁸. Instead, the number of employees in the bargaining unit is determined based solely on the employer's say so. This gives employers a free hand to "pad" the employee list – which may result in certification applications being improperly dismissed for failing to achieve the required 45% level of membership support. In effect an employer, rather than an IRO, can now determine whether a union has the required level of membership support necessary to proceed to a representation vote.

In addition, there is a related problem that the Labour Relations Board generally refuses to disclose the employee list portion of the IRO report to unions that do not have the required 45% support (as calculated based on the employer's untested assertions as to who should be on that list)³⁹. This severely restricts the ability of unions to effectively challenge possible padding of the employee list, which again may contribute to certification applications being improperly dismissed for failing to achieve the required 45% level of membership support.

³⁸ IROs now only inspect payroll records occasionally, when directed to do so by the Labour Relations Board. However, the IROs still regularly inspect union membership cards, which are then inspected a second time by the vice-chair hearing the certification application. This difference between the treatment of payroll records and membership cards is particularly surprising given today's mandatory vote regime. All that padded membership evidence could do under the mandatory vote regime is cause a representation vote to take place (where absent employer interference the true wishes of employees would be ascertained), while a padded employee list may result in the certification application being improperly dismissed (depriving employees of any opportunity to express their true wishes).

³⁹ The present policy of the Labour Relations Board effectively requires a union to demonstrate that an employee list provided by the employer in secret is incorrect before the Board will disclose the employee list portion of the report to the union (despite a statutory obligation on the Board to disclose reports it receives to the parties: see section 124(2) of the *Labour Relations Code*).

CONCLUSION

As Paul Weiler, the architect of the modern labour relations system in British Columbia, stated many years ago:

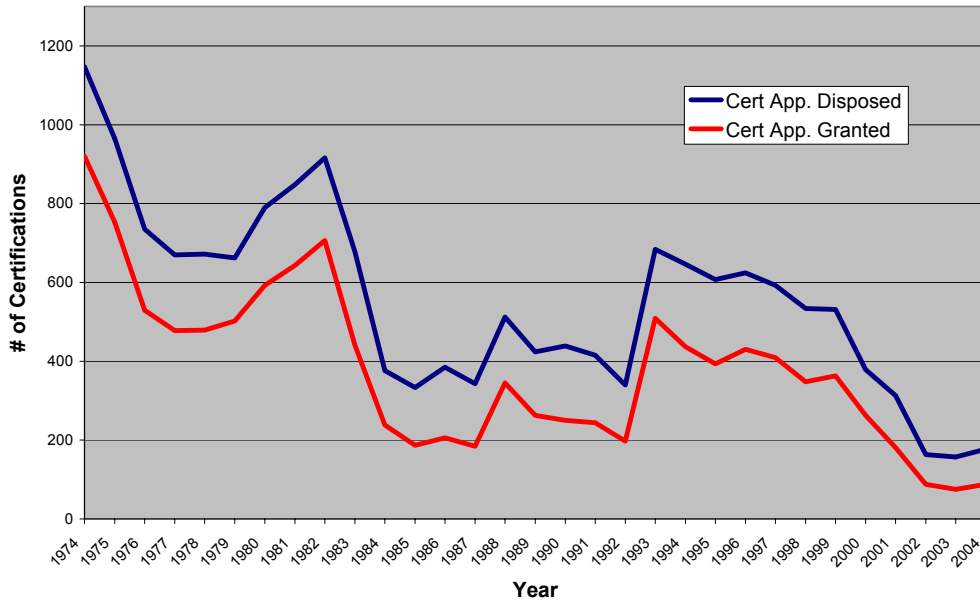
There are two parts of a labour code which are central to the balance of power between union and employer. One is the use of the law to facilitate the growth of union representation of unorganized workers. The other is the use of the law to limit the exercise of union economic weapons (the strike and the picket line) once a collective bargaining relationship has become established.⁴⁰

These two central functions of labour legislation reflect the historic compromise between the labour movement and the state: the state protects the fundamental right of employees to associate together in unions and unions in turn submit to state regulation of industrial action. However, for many years the state has been steadily increasing the restraints placed upon industrial action. Now, under the present Liberal government and Labour Relations Board, the state appears to be largely abdicating its role of protecting the right of employees to associate together in unions.

Reversing the present decline in union organizing will be no easy task in these circumstances, but it is essential that it be done. It is my hope that this paper may contribute in some small way to this task.

⁴⁰ P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), page 5.

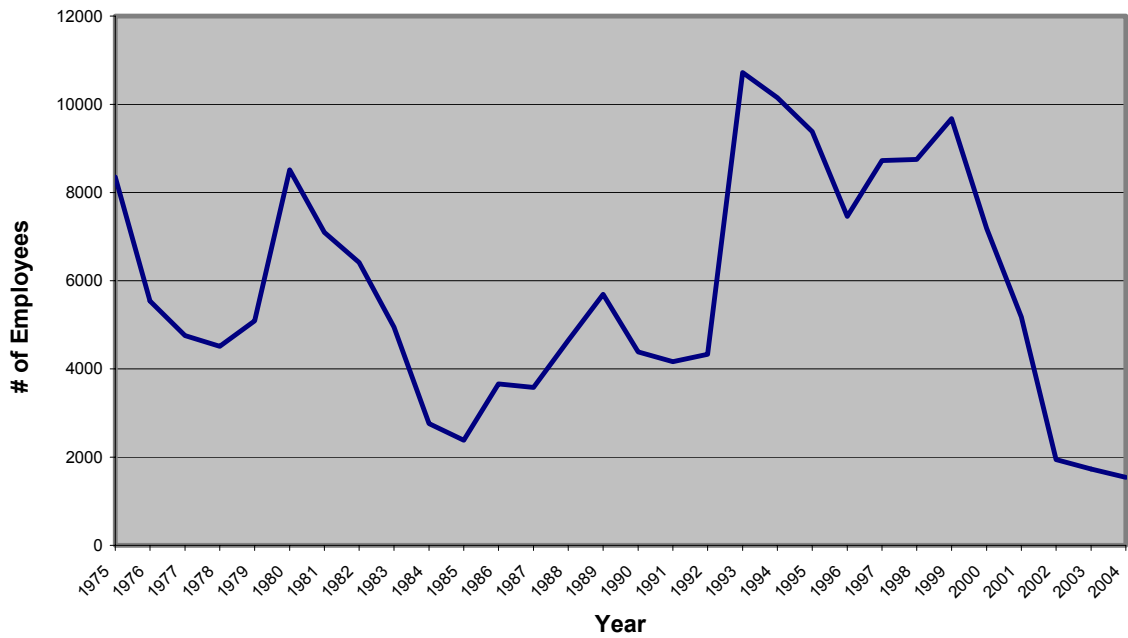
**Appendix 1:
Number of Certifications Disposed of
and Granted per year**



Notes

1. Source LRB annual statistics, Table 1.

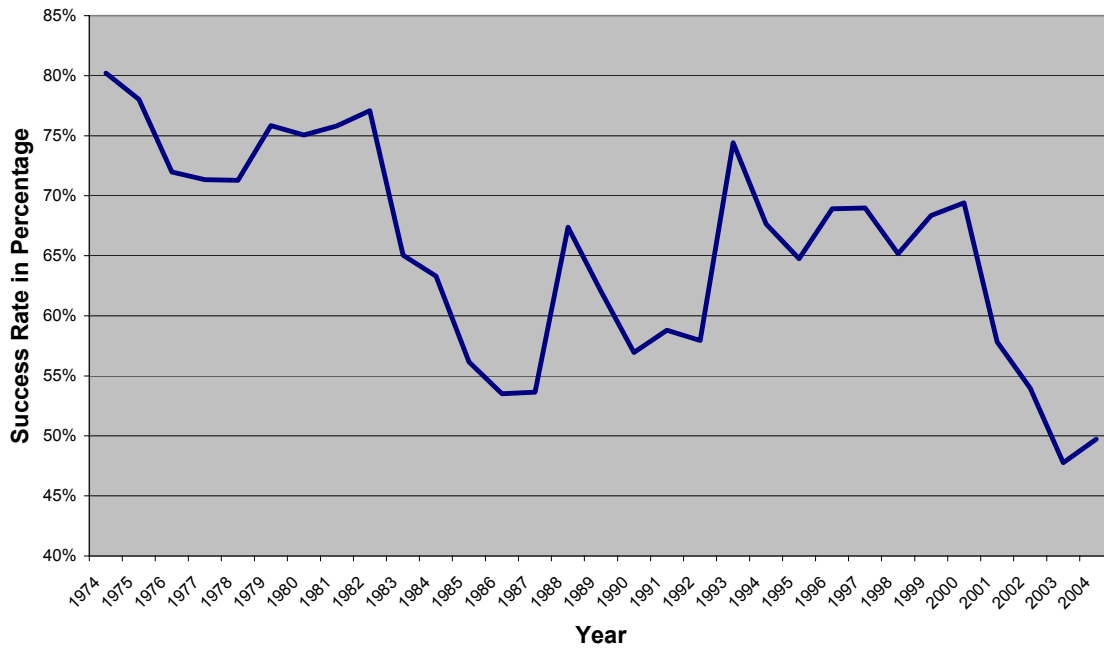
**Appendix 2:
Number of Unorganized Employees Certified per Year**



Notes

1. Source LRB annual statistics, Table 2 (1987 to present) and Table 8 (1974 to 1986).
2. The figures for 1974 are not included in this chart. In 1974 there were 53,846 previously unorganized employees certified. However, this figure includes the anomaly of the certification of 34,972 employees of the British Columbia Government in 1974 following the removal of legislative bars to collective bargaining by provincial government employees.
3. The figures for 1988 exclude the anomaly of the certification of 31,558 teachers following the removal of legislative bars to collective bargaining by teachers. If these teachers are included, the figure for 1988 rises from 4,468 to 36,206.

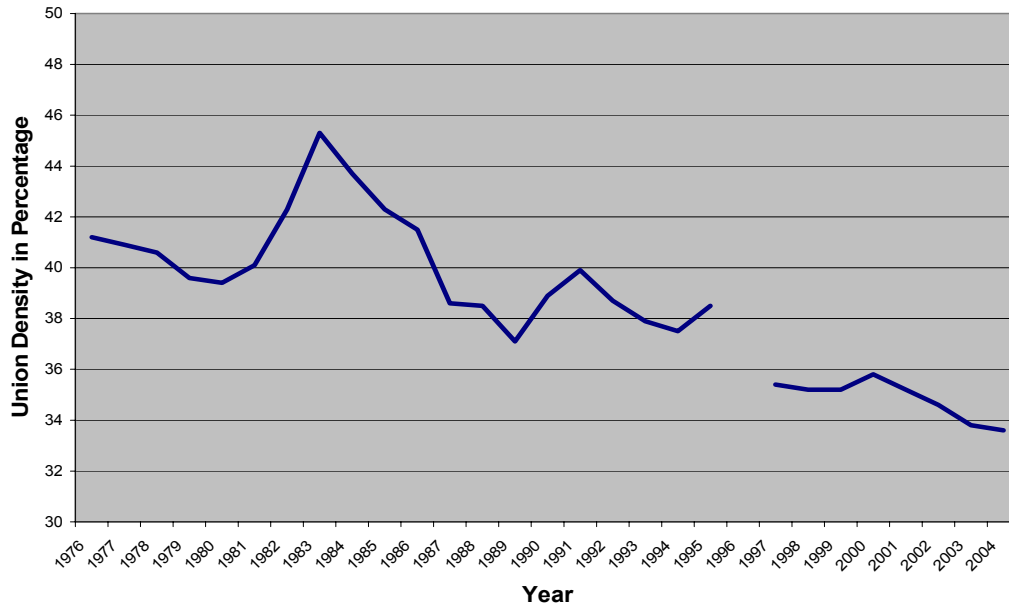
Appendix 3: Certification Success Rate per Year



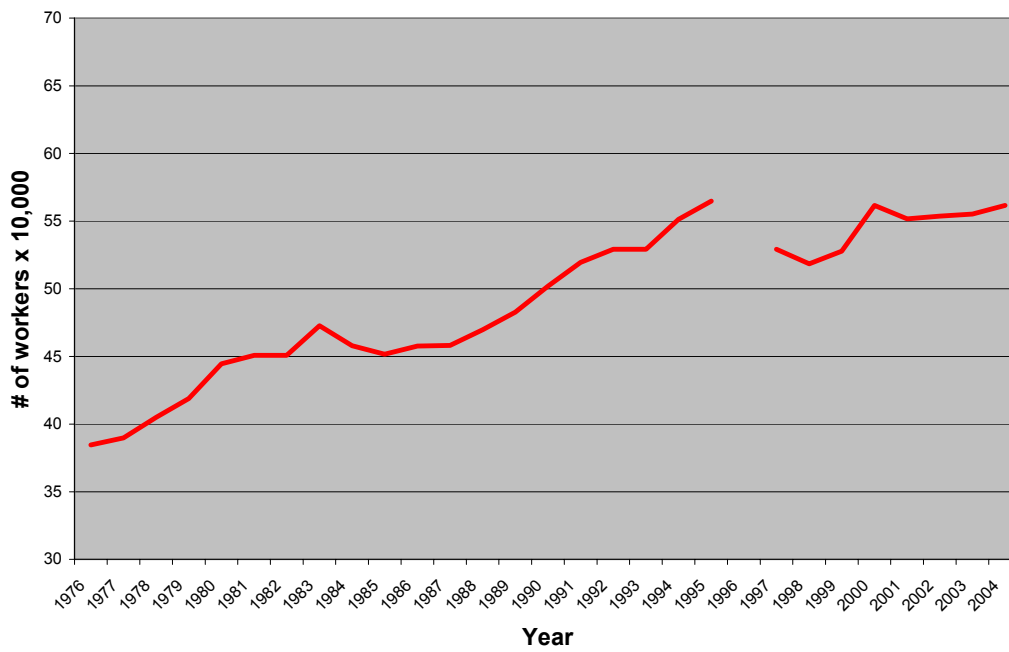
Notes

1. This annual certification success rate is calculated as follows: annual number of certifications granted over annual number of certifications disposed of (both figures from LRB annual statistics, Table 1).

Appendix 4: Union Density per Year



Number of Unionized Workers per Year



Notes

1. Source: Statistics Canada (Statistics Canada has no data available for 1974, 1975, or 1996).

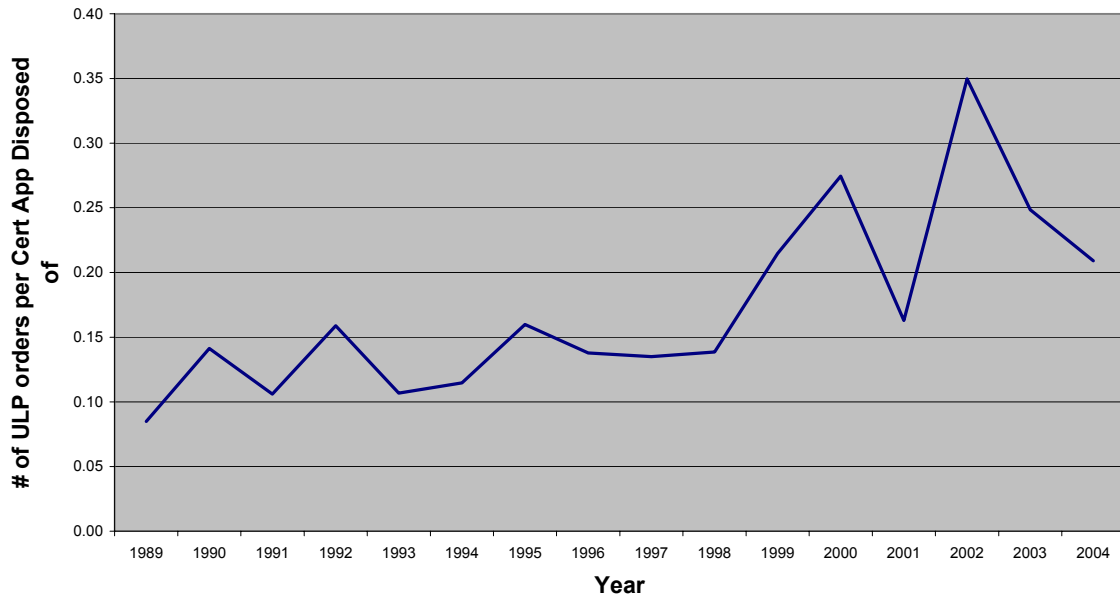
**Appendix 5:
Annual number of remedial certifications granted per Year**

1977	1	1991	1
1978	1	1992	6
1979	1	1993	2
1980	0	1994	2
1981	2	1995	0
1982	2	1996	1
1983	0	1997	3
1984	3	1998	0
1985	2	1999	0
1986	2	2000	1
1987	0	2001	0
1988	0	2002	3
1989	0	2003	0
1990	3	2004	1

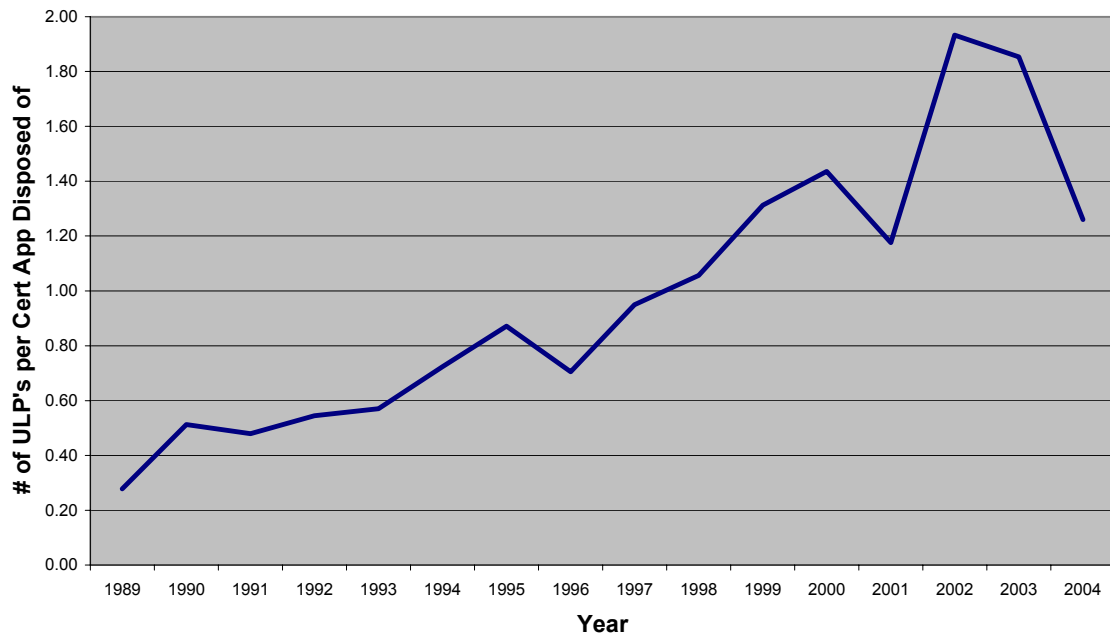
Notes

1. Source LRB annual statistics, Table 12.

**Appendix 6:
Number of Unfair Labour Practice (ULP) Orders Granted per
Certification Application Disposed of**



**Number of Unfair Labour Practice (ULP) Complaints per
Certification Application Disposed of**



Notes

1. Source: LRB annual statistics, Table 1 (see 1996 Annual Report, page 80, for figures for 1989 to 1995).
2. The number of ULP orders and complaints excludes complaints regarding internal union affairs, the duty to bargain in good faith, and the duty of fair representation. Statistics of this nature are only available for 1989 on.