

THE QUEBEC UNIONIZATION MODEL: CORRECTING THE ANOMALY

The members of the National Assembly will soon begin looking into a bill aiming to account for the new reality of teleworking by modifying those provisions of the *Labour Code* dealing with replacement workers during a strike or lockout. In North America, only the labour codes of Quebec and British Columbia systematically prevent recourse to replacement workers during labour disputes. Quebec therefore already distinguishes itself from the continent’s other regions by the very existence of these provisions. If it decides to make them more restrictive still, the Quebec government would accentuate the anomaly that is the Quebec unionization model.



This Economic Note was prepared by **Louis Fortin**, a certified industrial relations consultant and McGill University lecturer in industrial relations, in collaboration with **Michel Kelly-Gagnon**, president and CEO of the MEI.

Insofar as the goal is to make the Quebec unionization model take the interest of workers into account, however, it is a very different kind of concern that should motivate the National Assembly’s work. Indeed, we must remember that Quebec – and the whole of Canada in some cases – already distinguishes itself on several other fundamental questions as one of the places in the industrialized world where workers’ freedom of choice is the most limited.

This Economic Note examines three mechanisms currently in place in Quebec that impose considerable limits on employees’ rights. These are automatic union certification with no requirement to hold a secret ballot, compulsory union membership clauses and the mandatory payment of union dues even for employees who are not members of the union. By briefly comparing these mechanisms to what prevails in other developed countries, we shall see that the Quebec situation is already unusual by the standards that apply elsewhere.

Union certification without a secret ballot vote

The *Labour Code* sets up a certification procedure, or in other words a mechanism for forming a union and having it legally

recognized. Freedom of association guarantees that “every employee has the right to belong to the association of employees [union] of his choice.”¹

The *Labour Code* essentially provides two mechanisms for expressing this choice. If an application for certification is filed with the Commission des relations du travail [Quebec Labour Relations Board] with signed membership cards from 35 to 50% of the employees in the certification unit, a secret ballot vote must be held to obtain the approval of the majority of employees to the formation of a union. If, however, more than 50% of employees sign union membership cards, the application for certification is simply filed and the union can be formed on this basis alone.

This mechanism of certification through “card check,” since it sidesteps the requirement for a secret ballot, does not allow employees to express their definitive opinions free from scrutiny and pressure, as is customary in a democracy. In this respect, Quebec is one of a minority of Canadian provinces that still allow this practice since Saskatchewan adopted mandatory secret ballots in 2007.²



1. *Labour Code*, R.S.Q., ch. C-27, s. 3.

2. See also: Norma Kozhaya, *The consequences of a strong union presence in Quebec*, Montreal Economic Institute, September 2005. At the time, half of the provinces required a secret ballot and the other half did not. Since the legislative change in Saskatchewan, only Quebec, Manitoba, New Brunswick and Prince Edward Island allow certification without a secret ballot (as is the case for businesses under federal jurisdiction).

Interestingly, although the secret ballot can be bypassed during the certification procedure, it is required for electing union representatives, for launching strike actions, and for authorizing the signing of collective agreements. Of all these cases, only the most fundamental decision, that of whether or not to form a union in the first place, is not legitimized by a mandatory secret ballot.

Compulsory union membership

Once certified by the Commission des relations du travail, a union can negotiate the inclusion of various union membership clauses in the collective agreement to force all employees to become and remain members of the union as a condition of employment. The *Labour Code* does not require union membership, but neither does it prohibit clauses establishing such a requirement.

In practice, most workers represented by a union in Quebec are required by their collective agreement to be members of that union, under penalty of losing their jobs. The most recent analysis of collective agreements by the Quebec Department of Labour indicates that union membership was compulsory in 7,219 of 8,404 collective agreements in force in 2009, covering 73% of employees.³

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The very principle of compulsory membership was brought before the Supreme Court of Canada in the *Advance Cutting & Coring Ltd.*⁴ case, decided in 2001. According to Quebec law, a construction worker must belong to one of the five recognized unions in order to obtain his or her competency certificate and work on a construction site. The appellants asserted that this obligation is unconstitutional, since it undermines the freedom of non-association recognized as being a part of the freedom of association protected by Section 2d) of the *Canadian Charter of Rights and Freedoms*.

Eight of the nine justices were of the opinion that freedom of association includes the freedom not to associate. By a five-to-four vote, they established that mandatory union membership violates the freedom of association protected by the *Charter*.

However, again by a vote of five to four, the Supreme Court decided that this violation was justified and refused to quash it.

Mandatory payment of union dues

Since 1977, the *Labour Code* stipulates that employees represented by a union in their workplace, whether members of the union or not, must pay union dues. It is this mandatory union dues mechanism that is commonly referred to as the “Rand formula.” The employer must take responsibility for this by making deductions at source.

Contrary to union membership, the law leaves absolutely no latitude in this regard. The justification of this mandatory payment of union dues rests on the premise that “all will benefit from the union’s collective action.”⁵ The dues collected, however, are not used solely for purposes of collective bargaining and defending union members.

Unions lent their support to provincial or federal political parties when financing rules allowed it, or disbursed funds to foreign unions, like a health care workers’ union in Nicaragua.⁶ Today, funds from union dues are also used to extend loans of several millions of dollars to entrepreneurs⁷ or to finance organizations like FRAPRU concerned with social demands having nothing to do with labour conditions.

Now, workers might prefer to use that money themselves and decide for themselves which causes they want to support rather than finance those selected by their union representatives. Nonetheless, the *Labour Code* does not distinguish between different uses to which union dues may be put and requires an employee to fund all of the initiatives of its union.

Is the Quebec system unique?

The three mechanisms discussed above make Quebec quite unusual in the Western world. Indeed, workers’ freedom of association – and of non-association – is much better protected in the United States, in Europe, and in Australia.

3. Ministère du Travail du Québec, *Portrait statistique des conventions collectives analysées au Québec en 2009*, June 2010, p. 177. We added the collective agreements with so-called *full union shop* and *modified union shop* union membership clauses, even though this second category allows employees who are not members when the union is formed to remain outside the union. However, since new employees must join the union, “we can nonetheless suppose that this clause will inevitably become, in effect, a full union shop clause.” (see: Linda Bonenfant, *Les clauses d’adhésion syndicale*, Ministère du Travail du Québec, March 2003).

4. *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70.

5. Linda Bonenfant, *op. cit.*, footnote 3, p. 2.

6. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

7. Agence QMI, “Prêts à Tony Accurso : un syndicat examine ses pratiques,” *Canoe.ca – ARGENT*, December 16, 2010.

TABLE 1

Workers' rights in certain jurisdictions

	Union certification with mandatory secret ballot	Freedom of non-association	Voluntary union dues*
 United States	✓**	✓	✓
 Council of Europe (47 countries)	Depends on each country	✓	✓
 Australia	Not applicable	✓	✓
 Canada	✓***	✗	✗
 Quebec	✗	✗	✗

* This refers either to total dues, or to dues for purposes other than collective bargaining, depending on the country (as mentioned below).

** Unless the employer voluntarily decides to recognize the union.

*** Except Quebec, Manitoba, New Brunswick, Prince Edward Island and businesses under federal jurisdiction.

United States

The union certification procedure in the United States includes a requirement to hold a secret ballot vote for certification. This rule has only one exception: the secret ballot is not required if the employer chooses to voluntarily recognize a union that presents union cards signed by a majority of employees.

Nonunionized employees in the 47 member countries of the Council of Europe have no obligation to join a union or to pay union dues for purposes other than collective bargaining.

The Taft-Hartley Act (*Labor-Management Relations Act*) allows individual states the freedom to outlaw compulsory union membership clauses and the mandatory payment of union dues. Even if the law says that a collective agreement can require an employee to become a member of the union starting 30 days after being hired, subsequent case law⁸ has interpreted this clause as requiring only the payment of union dues to cover the costs of collective bargaining (what is called an “agency fee”).

Moreover, 22 of the 50 states have exercised their right to outlaw the mandatory payment of union dues entirely. This concept is referred to as the “right-to-work” because the laws adopted by these states guarantee an employee the right to keep his or her job even if he or she refuses to join and pay dues to the union, as opposed to Quebec where an employee has no choice but to pay union dues, and often must join the union too, in order to remain employed.

As mentioned above, in the 28 other states, the obligation to pay union dues if stipulated in the collective agreement is nonetheless limited to the costs of activities connected to collective bargaining. Individual employees can decide not to give financial support to their union’s political and ideological activities and thereby receive a proportional reduction in their dues.

8. See: Charles W. Baird, “The Myth of Compulsory Union Membership,” *The Freeman*, Vol. 48, No. 3 (March 1998).

9. *Sorensen and Rasmussen v. Denmark*, nos. 52562/99 and 52620/99 (2006) for compulsory union membership; *Evaldsson and Others v. Sweden*, no. 75252/01 (2007) for mandatory union dues for political purposes and purposes other than collective bargaining.

Europe

Nonunionized employees in the 47 member countries of the Council of Europe have no obligation to join a union or to pay union dues for purposes other than collective bargaining. This situation stems from two decisions of the European Court of Human Rights rendered in 2006 and 2007 in which it declared that these two mechanisms violate freedom of association.⁹

In the case of the United Kingdom, the scope of mandatory union membership clauses had been gradually reduced in the 1980s, and these clauses were finally abolished in 1990, even before the European Court of Human Rights decision.

The union certification mechanism is left up to each member state.

Australia

Nonunionized employees in Australia are also not required to join a union or pay union dues.¹⁰ As for the union certification procedure, certain peculiarities of the Australian system are such that it includes neither a secret ballot, nor even the demonstration of a minimum level of support through the simple signing of membership cards.¹¹ It is therefore not easily compared with what prevails in North America.

Respect for freedom of association

The Universal Declaration of Human Rights specifies that “no one may be compelled to belong to an association.” The *Canadian Charter of Rights and Freedoms* proclaims freedom of association and the Supreme Court

of Canada has recognized that this includes the freedom *not to associate*. However, Quebec’s *Labour Code* retains mechanisms that violate all of these rights. In that respect, it differentiates itself from the conditions that prevail in Europe, in the United States and in most other free and democratic societies.

This anomaly is not supported by a majority of the population. Polls¹² indicate that 67% of Quebecers think union membership should not be mandatory for a worker hired by a unionized company. When asked if, in their former jobs, they would have wanted to be unionized, only 46% of formerly unionized workers answer in the affirmative.

With regard to union dues, more than three quarters of unionized Quebecers were opposed to their dues being given to advocacy groups whose objectives had nothing to do with the workers’ needs. Finally, 71% of Quebecers – and 80% of unionized Quebecers – believe that a secret ballot should automatically be required to form a union.

The Quebec unionization model is an anomaly that should be corrected, not made worse. When the time comes for the members of the National Assembly to examine the possibility of updating the *Labour Code*, it is the freedom of choice of workers that should be foremost in their minds.

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1010, Sherbrooke Street W., Suite 930
Montreal (Quebec) H3A 2R7, Canada
Telephone (514) 273-0969
Fax (514) 273-2581
Web site www.iedm.org

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Illustration:
Benoit Lafond

Graphic Design:
Valna inc.

10. Fair Work Australia, *Fair Work Act 2009*, ss. 353 and 772(1)(c).

11. See: Jeff Shaw, “Observations on Trade Union Recognition in Britain and Australia,” *UNSW Law Journal*, Vol. 24 (2001), No. 1, p. 221.

12. Nanos [poll commissioned by LabourWatch for the exclusive use of the *Journal de Montréal* and the *National Post*], *What Canada’s “Labourers” Are Really Thinking This Labour Day*, September, 2008; Léger Marketing [poll commissioned by the MEI], *Study on the Perceptions of Union Certification Methods and Strike Decrees*, August 2009.