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# Collective Bargaining

Sara Slinn

Osgoode Hall Law School of York University, [sslinn@osgoode.yorku.ca](mailto:sslinn@osgoode.yorku.ca)

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# **CHANGING WORKPLACES REVIEW RESEARCH PROJECTS COLLECTIVE BARGAINING**

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**Prepared for the Ontario Ministry of Labour, to support the Changing Workplaces Review of 2015**

Statement of Work #9

Dr. Sara Slinn\*

11/30/2015

\* Sara Slinn is an Associate Professor and Co-Director of the Centre for Law and Political Economy at Osgoode Hall Law School, York University.

**This paper represents the views of the author and not necessarily those of the Ministry of Labour.**

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## ***Executive Summary***

This research project reviews and evaluates the academic literature relating to obtaining and maintaining collective bargaining rights under the OLRA. Research indicates that procedural changes to representation processes including the mandatory representation vote significantly reduced the likelihood of certification, and that these effects were concentrated in more vulnerable units. This may partly be due to greater opportunity for delay and employer resistance under vote procedure compared to under card-based certification. The research also indicates that delay has significant effects on certification outcomes, as do ULP complaints and employer resistance tactics. ULPs have negative long-term effects, and are associated with difficulties in bargaining and early decertification. Research also suggests that employer resistance, including ULPs, is common and often intentional. Little research on decertification exists, but offers some indication that employer actions contribute to decertification, and that decertification is concentrated in smaller, low-skill, low bargaining power units.

Alternative representation election formats, primarily electronic, telephone and internet (IETV), off-site manual or IETV kiosks as alternatives to on-site manual representation votes may offer greater privacy to employees and relieve them of union and employer scrutiny and improper influence. The Canada Industrial Relations Board has held IETV elections, and it is a long-standing practice at two US labour relations boards.

Research regarding union access to employees during organizing focuses on the imbalance between employer and union access to workers and how to address the disadvantage to unions. It offers several suggestions for revising rules governing union access to the workplace for organizing and for providing unions with a means of contacting workers during union organizing.

Canadian research on certification and US research on decertification suggests that market values of firms are sensitive to labour relations instability, rather than changes in representation status *per se*. The Canadian research found mandatory certification elections negatively affected stock prices while card based certification had no effect.

Aspects of OLRB bargaining unit determination, including definitions of employer and employee, occupational exclusion provisions, provisions for separate units for certain workers, the community of interest and appropriateness test, majoritarian requirements for representation, and the dual role of bargaining units as certification and negotiation units, tend to produce narrow, fragmented, homogeneous units. Limited ability to modify units post-certification under the OLRA aggravates this situation. This may reinforce workplace inequities relating to gender and other characteristics, and may not be justifiable, particularly in light of *Charter* freedom of association guarantees.

Research on first contract arbitration (FCA) is largely descriptive and the key questions about the effectiveness and long-term effects on the bargaining relationship have not been completely answered, largely due to limited available data. However, the research suggests that FCA is a sparingly sought and sparingly used mechanism and the research does not clearly indicate that it is associated with negative effects. There is some evidence to suggest that the mediation intensive FCA model introduced in BC (and a modified form adopted recently in Newfoundland) may offer improvements over other, older FCA models.

Review of the literature on labour board remedial jurisdiction consistently concludes that labour boards have jurisdiction to award remedies gauged to deter violations, but that existing remedial awards are not sufficient to achieve a deterrent effect. The research suggests that deterrent effect depends crucially on timely intervention with sufficiently weighty remedies that address the harm caused by labour law violations, not the benefit the violator receives from engaging in violations.

Review of five existing, and three proposed, models of statutory broader-based collective bargaining and the associated research, suggest that these models are best regarded as possible starting-points for designing an Ontario-specific system that would best address the intended group of workers. A common feature of many of the existing models is that they were each introduced in contexts where there was some form of pre-existing worker organization. This could be a significant consideration if these models were to be considered for adaptation to workers without any such pre-existing organization.

Finally, it is difficult to draw conclusions from the limited research available on successor rights provisions. However, it appears that relocation and contracting out decisions are complex, may be motivated by seeking lower input costs or access to markets, and can be related to firms' structural capacity. Existing research offers little guidance about which motivator will prevail in a given situation. There is little evidence on whether legal or collective agreement constraints are significant inhibitors of contracting out or investment decisions, although these conclusions are based on a limited number of studies.

A set of options for the Changing Workplace Review to consider are summarized below.

### ***Options for Consideration:***

#### ***Certification and Decertification Procedures - Options for Consideration:***

- *Reintroduce card-based certification.*
- *Identify and reduce sources of delay in the certification process.*
- *Impose greater penalties for employer union-avoidance tactics, including but not limited to ULPs, during union organizing.*
- *Greater use of imposed first contracts in the case of illegal employer union-avoidance tactics. This practice and that of reducing delays and other penalties for illegal union-avoidance tactics merit particular attention in voting regimes*
- *Provide alternative formats or locations for certification elections, including internet and telephonic elections (IETV), off-site kiosks for manual or IETV voting.*
- *Increase worker access to union information and organizers during organizing, including adjusting restrictions on workplace access for organizers, and provide unions with means to contact employees at an early stage of the organizing.*

#### ***Bargaining Unit Determination - Options for Consideration:***

- *Reconsider occupational exclusions and provisions for separate units for certain types of workers.*
- *Provide a more inclusive approach to "community of interest" and "appropriateness requirements" for bargaining units*

- *Provide mechanisms for post-certification modification of bargaining unit boundaries, including consolidation of units and variance of unit boundaries.*
- *Consider alternative approaches to the definition of “employee” as a threshold requirement for OLRA coverage.*
- *Consider a role for non-majoritarian worker representation in workplaces*

### **Successorship Rights - Options for Consideration:**

- *Additional research would be beneficial to formulating options regarding OLRA successorship rights.*

### **First Collective Agreement Arbitration - Options for Consideration:**

- *Provide support for first collective negotiations that is available prior to the point that negotiations have become “unsuccessful”.*
- *Introducing mediation as part of the first contract arbitration procedure.*

### **OLRB Remedial Jurisdiction - Options for Consideration:**

- *Explicitly incorporate the anticipated deterrent effect of a remedy as a factor the OLRB considers in formulating remedial awards, focusing on the “harms caused”, not on the “benefits received” by the violation.*
- *Better align remedies with harm caused by ULPs by explicitly incorporate full compensation for all forms of harm as a factor the OLRB considers in formulating remedial awards.*
- *Give the OLRB authority to impose specified financial penalties, in addition to compensatory remedies, including OLRB discretion regarding whether the penalty is payable to the government, the employer, the union, or one or more employees, or any combination of these.*
- *Introduce mechanisms such as expanded scope for interim relief and expedited ULP hearings for complaints of ULPs arising during union organizing with the goal of providing effective remedies prior to a representation vote.*
- *Reintroduce a greater scope for remedial certification awards.*



### ***Broader-Based Bargaining - Options for Consideration:***

- *Key features that may be appropriate to incorporate in statutory broader-based bargaining structures, depending on the particular characteristics of the relevant industry or occupation, include: providing for inclusion of workers not meeting the standard definition of “employee”; providing recognition rights to “most representative” organizations; including a mechanism for extending certain negotiated provisions beyond the original scope of recognition; and, either providing incentives for, or mandatory, employer joint bargaining. Providing support for pre-bargaining associations and central agencies in industries characterized by very small workplaces or homeworkers.*

## ***Background***

The Ontario *Labour Relations Act*, 1995 (OLRA) set outs the means by which workers can organize into unions, and establish bargaining rights through certification. Legal regulatory procedures establishing recognition of collective representation rights and collective bargaining rights may affect access to these rights. These issues are of great concern to the parties involved and to the public.

# ***Research Findings & Analysis***

## **1.0 Introduction**

This research project examines relevant academic literature addressing specific aspects of legal regulation of collective bargaining, particularly as it relates to the OLRA. These matters include: certification and decertification processes, including union access to employees during organizing, employee lists and alternative formats for representation elections; determination of bargaining unit configuration; successor rights; sectoral and multi-employer approaches to bargaining unit structures; first collective agreement arbitration; and, labour board remedial jurisdiction (excluding remedies for violation of the duty to bargain in good faith). This project also comments on the availability of data to measure relevant trends and whether new or better sources of data are needed.

## **2.0 The Certification and Decertification Processes**

Certification is formal authorization granted by labour relations boards to unions to act as the exclusive bargaining agent for a specified bargaining unit of employees. Decertification results in termination of these rights. In order to be certified a union must demonstrate that it is a trade union within the meaning of the legislation, that the proposed bargaining unit is composed of “employees”, that the application is timely, and that the applicant union has sufficient support from within the proposed unit. The final criterion, sufficient support for certification, has given rise to the two alternative certification procedures that we see in general collective bargaining legislation in Canada, including the OLRA: card-based certification (CBC) and mandatory vote certification (MVC) procedures. Six of eleven Canadian jurisdictions currently employ MVC procedures in general collective bargaining statutes (Alberta, BC, Nova Scotia, Ontario, Newfoundland & Labrador, and Saskatchewan). The OLRA provided for CBC prior to October 1995, at which time MVC was introduced as part of Bill 7’s extensive

amendments to the OLRA.<sup>1</sup> The OLRA was further amended in 2005 to provide a CBC option for the construction industry.<sup>2</sup> The termination of certifications is primarily due either to certification of another union (referred to as a “raid”) or by application by employees for removal of their union without replacement (referred to as “decertification”). This report addresses the employee decertification procedure, not raids. OLRA decertification applications are determined by a representation vote procedure.<sup>3</sup> The decertification procedure involves a mandatory vote; no card-based procedure for decertification exists in Canadian labour legislation.

### **2.1 Procedural Factors Relevant to Certification and Decertification Outcomes**

Numerous studies examine factors influencing certification outcomes in Canada; however, few substantial studies of decertifications exist. This section focuses on research results addressing relationship between choice of certification procedure, employer actions including unfair labour practices (ULPs), selected bargaining unit characteristics, and procedural delay, on certification and decertification activity.

#### **2.1.1 Choice of Procedure**

Numerous studies have sought to measure the effect of CBC compared to MVC certification procedures on organizing activity and outcomes. However, each study faces the same methodological difficulty: changes in certification procedure were always introduced in concert with other legislative changes that might affect certification, making it difficult or impossible to separately measure the effects of the legislative, and political changes. Much of the research focused on Ontario’s Bill 40 (1993) and Bill 7 (1995), both involving changes affecting certification including most prominently changing procedure from CBC to MVC in Bill 7.<sup>4</sup> Bill 7 also included changes to decertification provisions reducing the necessary support for a decertification and permitting greater employer involvement.

These studies consistently find that the presence of an MVC procedure is

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<sup>1</sup> Ontario, Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1 (Bill 7); OLRA, ss. 7-15.

<sup>2</sup> Ontario, Labour Relations Statute Law Amendment Act, S.O. 2005, c. 15, s. 8.

<sup>3</sup> OLRA, s. 63.

<sup>4</sup> Ontario, An Act to amend the Labour Relations Act, S.O. 1992, c. 21 (Bill 40).

associated with a statistically significant reduction in certification application activity, including success rates. This overall finding was consistent among studies analysing MVC as part of the legislative context in a study of multi-jurisdiction annual certification data (Johnson, 2002), and as part of a legislative package, such as Bill 7, in studies using monthly or individual case level OLRB data (Martinello, 2000; Slinn, 2004; Bartkiw, 2008).

A study of individual case level data for OLRB non-construction certification applications filed between 1993 and mid-1998, with multi-union applications excluded (as a proxy for raid cases), found significant differences in numbers and types of both applications and granted certifications between Bill 40 and Bill 7 (Slinn, 2004; 2005, pp. 436-438). These studies found that under Bill 7, private sector applications made up a significantly smaller proportion of applications and certifications; traditional industries such as manufacturing made up a larger, and service sector made up a smaller, proportion of applications and of successful certifications. Under Bill 40 there was no significant difference among types of units regarding certification success rates; under Bill 7 full-time units were significantly more likely to certify than all-employee or part-time units. Finally, the mean size of units applied for was significantly larger under Bill 7 (63 employees) than under Bill 40 (36 employees), and this difference was greater for private sector cases (33 compared to 44 employees). Similar increases in unit sizes were seen among certification applications.

Two aspects of the MVC which are identified as inhibiting certification are the greater opportunity for delay and, the related greater opportunity for employer ULPs compared to under CBC procedures (Slinn, 2005). Studies have examined both of these aspects of the certification procedure.

### **2.1.2 Procedural Delay**

Two Canadian studies have investigated the effects of delay in the certification process. The first study examined data from BC and Ontario over periods involving both CBC and MVC procedures in both provinces and with different approaches to scheduling votes, including the presence and absence of statutory time limits on holding votes, and different degrees of enforcement of this requirement (Campolieti, Riddell and Slinn, 2007). Election delay significantly reduced the likelihood of certification in

circumstances where there was either no statutory time limit for holding the vote or the time limit was not well enforced. For Ontario between 1995 and 1998, during which MVC applied and there was poor enforcement of election time limits, delayed elections led to a 32 percent reduction in the likelihood of success. Delay was also found to be associated with employer union-avoidance efforts (both legal and illegal), filing of ULP complaints against the employer, and employer objections to the certification application. The study concluded that the combination of statutory time limits which were enforced, along with expedited hearings for ULP complaints was the framework which most successfully limited the negative effects of certification election delay on certification outcomes. A subsequent study of the same Ontario data, using a different methodology, confirmed the conclusions of the first study, and suggested its findings may even have understated the effects of delay on certification outcomes (Riddell, 2010). Notably, throughout the period examined in these studies, 1995 to 1998, the OLRA provided that representation votes were to be held within five days of the application, excluding weekends and holidays, unless the OLRB ordered otherwise.<sup>5</sup> Therefore, election delay was due to the OLRB exercising its discretion to delay the vote.

### 2.1.3 Unfair Labour Practices

Several studies have investigated the effects of employers' union avoidance efforts on certification outcomes as well as on the longer-term bargaining relationship in cases where certification is granted. This research has found that significant reductions in certification success are associated with specific employer tactics including the tactic of frustrating union access to employees (Bentham, 2002). Reductions in likelihood of certification success are also associated with: illegal terminations (31% reduction), group coercion (19% reduction), and ULPs directed at individual employees to employees (7% reduction) (Riddell, 2001). As well, reductions in certification success are associated with captive audience speeches, small group meetings held by the employer, distribution of anti-union literature, employer promises of increased wages and benefits, tightening of work rules, threats against union supporters, and interrogating workers (Thomason and Pozzebon, 1998). Examining representation

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<sup>5</sup> OLRA, s. 8(5).

elections for private sector units in BC during the 1987-98 period, encompassing both CBC and MVC, one study found that that claims of employer ULPs had at least twice the negative effect on certification success under mandatory vote as card-based procedures, reducing certification success by 12 percentage points under the mandatory vote procedure and six percentage points under card-based certification (Riddell, 2004). The author also concluded that approximately five of the 20 percentage point reduction associated with imposition of the MVC procedure was due to the heightened effect of employer opposition as measured by ULP claims against employers.

Research suggests that employer ULPs during certification are not only common but are intentional. A multi-jurisdictional survey of Canadian managers in workplaces that had recently experienced union organizing reported that “overt opposition to union certification was the norm” and that 80% of employers in the sample admitted to actions that the author characterized as open opposition to certification (Bentham, 2002, p. 172). This study found that 60.4% of respondents engaged in activities the researcher classified as overt resistance, and 12% of respondent managers freely admitted to having engaged in what they believed to have been illegal ULPs (pp. 171-172). This study also found that long term negative effects on bargaining relationships are associated with employers’ union-avoidance activities. Parties were less likely to obtain a first collective agreement where an ULP complaint was made against the employer, and the likelihood of parties requiring third party assistance to reach a collective agreement increased, as did the probability of early decertification (Bentham, 2002).

A study of private sector, non-construction OLRB bargaining relationships established through certification or voluntary recognition between 1985 and 2012 examined the long-term effects of conflict occurring prior to settlement of the first collective agreement on the likelihood of dissolution in the form of decertification, plant closure or the lapsing of the bargaining relationship (Weinberg, 2016). ULP complaints and first contract arbitration applications were used as measures of conflict. This study found that the existence of a ULP complaint was associated with approximately a 27 to 31 percent greater likelihood of bargaining relationship dissolution. These effects were not found to vary over time, indicating that the negative effects of ULP filings early in the

bargaining relationship permanently damage the relationship and lead to a persistently greater chance of dissolution. The presence of an application for first contract arbitration was associated with approximately a 55 to 60 percent increase in the likelihood that the relationship would dissolve. Unlike with early stage ULPs, the effect of FCA applications varies over time. However, the study was unable to determine whether this reflected improvement of these relationships over time, or whether the association appears to diminish over time as these affected relationships fail.

An earlier study found that the number of ULP complaints rose under the Ontario NDP government and under Bill 40, with the latter effect attributed to the broader remedial powers introduced by Bill 40. Given that certification numbers and likelihood of certification rose during these periods, the author concluded that this suggested that declines in certification in Canada did not result from aggressive, illegal, employer opposition (Martinello, 2000, p. 30). Notably, the study was unable to distinguish ULPs arising during organizing from post-organizing ULPs; therefore, it includes all ULP complaints. A later study also using similar OLRB data, but over a longer time period, 1983 to 2006, challenged these results (Bartkiw, 2008). Although also unable to distinguish organizing and post-organizing ULPs in the data, this study found that disposition of ULPs dropped significantly under the Bill 7 period. This study concludes that the better interpretation of the observed drop in ULP activity is not that employer resistance declined, but that unions were less likely to file ULP complaints under the Progressive Conservative government and under Bill 7 because of the greater scope for lawful employer union avoidance activities and more limited ULP remedies available, compared to earlier periods (Bartkiw, 2008, p. 120).

### **2.1.4 Decertification**

Few studies of decertifications in Canada exist and US research on this topic is very limited. In addition to the Martinello (2000) and Bentham (2002) studies addressed above, there is an interview-based descriptive study examining the 43 termination of certification and raid cases (which the authors group together as “decertification” cases) that occurred between 1974 and mid 1976 in BC (Chafetz and Fraser, 1979). Units that decertified were typically small units of low-skilled workers that had been certified to relatively large local unions. The firms were generally small, low-wage operations and



mostly owner-operated. These characteristics suggest that the employees in these units had little power or influence with either their employer or the union.

The study also explored the reasons for decertification, focusing on three categories: employee expectations of costs and benefits of certification; role of a cohesive element in the unit; and union withdrawal of representation. The study concluded that employer actions and union responses were key factors (Chafetz and Fraser, 1979, p. 68). Common employer tactics included: raising costs of servicing units to prolonging strikes; increasing grievances; taking a long strike; or actions such as changed work assignments and procedures to make the work environment much less hospitable or to punish union leaders (pp. 63-64). In terms of destroying cohesion, employers were found to have removed union leaders from the unit through explicit dismissal, constructive dismissal or promotion out of the unit (p. 65).

Note that the authors did not indicate how many decertification applications were filed or disposed of by the labour board during this period; did not identify those cases which had been subject to first contract arbitration; and that the study included two different types of termination cases: both decertifications and raids.

Bentham's (2002) study involved a survey of employers involved in a certification application between 1991 and 1993 across eight provinces (excluding PEI, Quebec and the federal jurisdiction), and produced 420 responses. Surveys were distributed in 1996 and 1997. It found that the following factors were associated with a greater chance of decertification within the first two open periods post-certification: employer monitoring of employees (up to 20 percentage point), objections to the unit in the certification process (8 percentage point), and employer admission of engaging in conduct it believed to be an ULP (46 to 57 percentage points) (2002, pp. 176-180).

## **2.2 Union Access to Employees During Organizing**

An extensive body of literature identifies the workplace as a critical location for organizing, recognizing the significant disadvantage unions are at compared to employers in this regard. This imbalance arises because, unlike a union, the employer can exercise its property and managerial rights to control union access to employees, has constant access to and control over employees in the workplace, has information to contact employees outside the workplace, and controls employees' economic welfare

(Macklem, 1990; White, 1991, pp. 143-148; Doorey, 2009). This allows employers relatively greater opportunity to influence employees, leading to information asymmetries depriving employees of information about options and consequence of unionization, thereby disadvantaging unions (Hirsch, 2010, p. 1104; Korn, 1984, pp. 382-383). This imbalance in access between employers and unions gives rise to two issues addressed in the academic literature: access to the workplace for organizers and union access to employee information and lists.

### **2.2.1 Access to the Workplace**

Statutory limits on the ability of employees to engage in organizing in the workplace, and on non-employees' access to the workplace for the purposes of organizing, have been applied such that employers can refuse non-employee organizers workplace access at any time, save for a statutory exception in cases where employees live on the worksite.<sup>6</sup> Employees may not engage in organizing during working hours, but may do so at the worksite outside of working time, although employers may refuse if the activity interferes with managerial rights to maintain production and discipline (Macklem, 1990). Thus, distinctions are made, first, on the basis of whether the individuals are employees or non-employees; second, for employees, whether the activity is during working time or non-working time.

Alternatives to on-site organizing, such as home-visits and other off-site contact or electronic communication, are criticized by numerous commentators on the US labour law system, as poor and ineffective substitutes for personal interaction with workers at the workplace, debate, discussion or information (Getman, Goldberg and Herman, 1976; Gresham, 1983-1984, pp. 158-161; Bierman, 1985, pp. 9-13; Macklem, 1990, p. 77; Hirsch, 2010, pp. 1107-09). However, Felice Martinello and Charlotte Yates (2004) found that home visits were a common and relatively effective union organizing strategy in Ontario.

Several proposals have been made to address this perceived imbalance. Non-employees could be treated as employees for the purposes of workplace organizing activities, such that employers could prohibit non-employee access if it interferes with

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<sup>6</sup> See OLRA, s.13 (persuasion during working hours), s. 77 (exception for employees residing on employer property).

actual maintenance and discipline (Gresham, 1983-1984). Patrick Macklem agreed that this proposal removes the substance-less distinction between employee and non-employee activity and requires actual rather than theoretical interference. However, he contended that it did not address why employer interests ought to prevail over worker's interests (1990, p. 104). Macklem proposed that these access restrictions be virtually eliminated, with limited interference with production being an acceptable cost of doing business to employers. Only where employers could demonstrate that the interference would be such as to harm the interests of society or that the enterprise was essential, should workplace organizing be prohibited (1990, pp. 106-107).

Sarah Korn proposed that a better balancing of interests would be achieved by restricting organizing activity to non-sensitive areas of the workplace (1984). Karl Klare proposed that the law should protect the maximum level of organizational activity in the workplace that is consistent with reasonable restrictions relating to "time, manner, and place", based on "considerations such as productivity, safety, customer service, and privacy", but no weight should be given to employers' abstract property interests or desire to oppose unionization (1988, p. 48). David Doorey suggests that the International Labour Organization's Committee on Freedom of Association's interpretation of Convention 87 may require that a right of union access in some form should be read into the *Charter's* s. 2(d) protection of freedom of association, such as permitting unions to communicate with workers in the workplace (2009, pp. 36-37). However, he concluded that, at least at the state of the development of *Charter* jurisprudence existing at the time, it was not clear these arguments would succeed, possibly resulting in the odd outcome that the *Charter* would effectively provide less protection than Convention 87 (2009, pp. 47-48).

### **2.2.2 Access to Employee Lists**

Union access to employee lists of names and addresses is the subject of extensive academic commentary in the US, but does not appear to have been addressed in the Canadian context.

Under the US *National Labor Relations Act* (NLRA), the "Excelsior doctrine" provides that within seven days after a representation election is ordered for a private sector unit the employer must file an election eligibility list, containing names and

addresses of all eligible voters, and the National Labor Relations Board (NLRB) makes this information available to all parties in the matter.<sup>7</sup> The NLRB regarded this as necessary for unions to be able to communicate effectively with employees in the proposed unit.<sup>8</sup> Critics contend that this doctrine provides union access to employee information too late in the process (Gely and Bierman, 1999, p. 180), and offer anecdotal evidence of employers intentionally providing incomplete, out-dated and misleading information, and warning employees that disclosure to the union could lead to their privacy being violated with home visits from organizers (Logan, 2002, p. 200).

Proposals to provide more effective union access to employee information include the following. First, extending the doctrine such that unions could obtain a list of employee names and addresses from the NLRB on demand at any time during an organizing campaign. To facilitate this, employers would be required to regularly provide such information to the NLRB (White, 1991, pp. 161-164). Another suggestion is to extend the doctrine to allow unions access to the information earlier in organizing, encouraging use of mailings, targeted advertising and other less intrusive union contact with employees, but prohibiting home visits by either unions or employers, regarding it as unwarranted intrusion on employees' privacy (Bierman, 1985, p. 237; Bierman, 1993, pp. 28-30). Finally, Mica Wissinger (2003, p. 348) proposes using technology as a "neutral party" to allow effective union contact with employees by providing unions with employees' private email addresses or requiring employers to post notice of organizing on web sites at an early stage of organizing, thereby maintaining employer sovereignty over its corporate email systems and possibly fostering employee discussion and debate.

### **2.3 Alternative Representation Election Formats**

The difficulties of holding a fair election, including ensuring a reasonable opportunity to participate, the potential distorting effects of employer or union scrutiny of voters, and the potential influence of holding votes in the workplace, is widely recognized in the literature and has prompted proposals both for holding votes off-site and through electronic, telephone and internet elections (IETV).

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<sup>7</sup> United States, National Labor Relations Act, 29 U.S.C. §§ 151-169.

<sup>8</sup> *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), pp. 1239-1241.

Off-site voting proposals include: expanding and modifying the use of mail-ballot elections (Slinn, 2005, pp. 443-445; Estreicher, 2009; Gould, 2009, pp. 14-17; Sachs, 2010, pp. 725-726); off-site manual polling stations administered by the labour board (Slinn, 2005, pp. 443-445); voting at regulated off-site polling sites at any time during organizing where the administering neutral third party agency would not inform the employer of the existence of the campaign or polling site (Sachs, 2010, p. 724); and off-site internet voting kiosks (Slinn, 2005, pp. 443-445).

Use of IETV for representation elections, a form of off-site voting, has widespread support in the literature (Herbert, 2005; Estreicher, 2009; Sachs, 2010; Slinn and Herbert, 2011), with some advocating for the use of electronic cards in addition to votes (Malin and Perritt Jr, 2000). IETV has had a long and successful history of use in US certification elections. The National Mediation Board (NMB) adopted telephone voting in 2002 and added internet voting in 2007 as its primary election format. Recent experiences of the US Federal Labor Relations Authority (FLRA) which introduced IETV elections in 2010 as the regular format for elections, and the Canada Industrial Relations Board (CIRB) which began holding IETV elections on a case-by-case basis in 2009, are also encouraging (Slinn and Herbert, 2011).<sup>9</sup>

The most detailed examination of IETV considered the IETV experiences of the NMB, FLRA and CIRB, up to 2010 (Slinn and Herbert, 2011). Among the findings were: boards' primary reason for adopting IETV was as a cost effective substitute for mail ballots; there had been no findings of interference, privacy breaches or technology security breaches regarding IETV<sup>10</sup>; the NMB had had no complaints about lack of accessibility of the telephone voting option; and, interviewees had fewer privacy and security concerns about IETV than mail ballots. While US unions preferred to have a third party administer the IETV vote; it appeared that the CIRB's role in monitoring the vote throughout the process, and its ability to periodically audit and test the system, gave parties confidence in the integrity of the process.

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<sup>9</sup> The NMB administers labour legislation covering the railway and airline industries. The FLRA administers labour law for non-postal federal agencies.

<sup>10</sup> At the time of the study there was an outstanding complaint at the NMB that an employer had interfered with an IETV election. The NMB subsequently ruled that there had been no employer interference (AVA and Delta Airlines, 39 NMB No. 8 (2011)).

Given that mail ballot elections suffer from low voter participation in the US and at the CIRB (82% participation rate compared to 65% for the CIRB in 2008-2010) (Slinn and Herbert, 2011, p. 14), one concern is that IETV might lead to lower representation vote participation rates. However, that concern could not be answered by this study, due to lack of access to NMB data and the very few IETV votes held to that point by the other boards. In the two CIRB IETV votes addressed in the study, participation rates were comparable to on-site rates, at 74.2% and 88%.

The authors suggested that more experimentation with IETV formats was in order, in particular an IETV kiosk in the form of a portable electronic voting booth, which could be situated on-site or off-site at a location supervised by a labour board representative (Slinn and Herbert, 2011). This format offers many of the advantages of an NMB-style IETV election: fewer spoiled ballots, greater employee privacy in voting, and some reduced agency costs resulting from electronic ballot tallying. At the same time, labour board staff present at an IETV-kiosk election could educate and assist voters with the process.

### **2.4 Broader Implications of Representation Procedures**

Researchers have investigated relationships between the choice of certification and decertification procedures and labour relations stability and economic effects on firms. Empirical research indicates that card-based certification procedures have a stabilizing rather than destabilizing effect on firms' labour relations. A study examining certification applications (excluding raids and decertifications) filed between 1975 and 1992 in Ontario, BC and the federal jurisdiction, using monthly closing stock prices and dividends for the relevant firms, concluded that certification had no substantial effect on shareholder returns under the card-based procedure, but had a negative effect under the mandatory vote procedure. The authors attributed this difference to limits on employer opposition that exist under the card-based process, and describe this as providing a "positive feedback cycle" contributing to industrial relations stability (Martinello, Hanrahan, Kushner, et al., 2001).

Pearce, Groff and Wingender (1995) analyse the effect of 153 NLRA decertification applications for units of over 100 employees between 1963 and 1986. They expected that decertifications would lead to stock price increases since the

literature they cite finds that certifications lead to stock price declines because of higher labour costs and costs associated with union restrictions. They do find that where the union is decertified, there is a stock price increase on the date of application but this effect disappears within a week. Similarly, in cases where the union is not ultimately decertified, there is a stock price drop on the application date, but this also dissipates. For the long-run, however, they find a substantial and lasting stock price increase associated with failed decertification applications. They interpret this as a market reward to firms for avoiding instability and uncertainty associated with decertification outweighing any labour cost savings from decertification. (This sample excluded cases where other major events surrounding the decertification application may have affected prices).

Contrary results were found in an earlier study, of stock price changes for 203 firms involved in a decertification election for units of 250 or more employees between June 1977 and May 1987 (Huth, 1990). Successful decertifications were associated with significant positive stock price increases, while the opposite was found for unsuccessful decertifications. Notably, unlike the Pearce, Groff and Wingender study, this study did not exclude cases where other contemporaneous events may have influenced stock prices (Huth, 1990). No such study has been done on the effects of decertification using Canadian data.

### ***Options for Consideration:***

- *Reintroducing card-based certification.*
- *Identify and reduce sources of delay in the certification process.*
- *Impose greater penalties for employer union-avoidance tactics, including but not limited to ULPs, during union organizing.*
- *Greater use of imposed first contracts in the case of illegal employer union-avoidance tactics. This practice and that of reducing delays and other penalties for illegal union-avoidance tactics merit particular attention in voting regimes*
- *Alternative formats or locations for certification elections, including internet and telephonic elections (IETV), off-site kiosks for manual or IETV voting.*

- *Increasing worker access to union information and organizers during organizing, including adjusting restrictions on workplace access for organizers, and providing unions with means to contact employees at an early stage of the organizing.*

### 3.0 Bargaining Unit Determination

The OLRA, like all general collective bargaining legislation in Canada, focuses on recognition of bargaining relationships at a single location workplace, between a single employer and single bargaining agent for a bargaining unit of employees with a “community of interest” that is “appropriate for collective bargaining.”

The great majority of non-construction certification applications under the OLRA are from non-manufacturing industries. Over the three most recent years for which OLRB annual data is available, 596 of 618 certification applications have been from outside the manufacturing industry, overwhelmingly from health and welfare services (87 applications) and other non-manufacturing industries (450 applications) (See table at Appendix B, OLRA Non-Construction Certifications by Industry for Fiscal Years 2011-12 to 2013-14).<sup>11</sup>

Bargaining units certified under the OLRA are predominantly for small units. Over the five most recent years for which OLRB annual data is available, almost half of the non-construction units certified have been for units of less than 20 employees (48%) and 70% are for units of fewer than 40 employees (See table at Appendix C, OLRA Non-Construction Certifications by Unit Size for Fiscal Years 2009-10 to 2013-14).

Quantitative empirical studies have examined the relationship between unit size and likelihood of certification. A study of Ontario and Quebec certification cases over the 1987-1991 period under a CBC procedure found a U-shaped relationship between unit size and support for unionization as measured by the proportion of cards signed or votes in favour of certification (Thomason and Pozzebon, 1998). Riddell’s (2001) study of 1987-1988 BC certification cases under a MVC procedure, found that the negative

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<sup>11</sup> As of the 2011-12 fiscal year the OLRB Annual Reports provide only the number of certification applications by industry, not the number of certifications granted by industry.



relationship between unit size and likelihood of certification existed only in the absence of employer ULPs.

### 3.1 The Employee and the Employer

The OLRA is oriented towards employment fitting the model of a bilateral employment contract and an uncomplicated legal form of the corporation. In such arrangements identification of the employer and employee is straightforward. However, increasingly complex work relations have undermined the legal concepts of employer and employee, which are determining the scope of labour law protection (Fudge, 2006a, p. 610). Three aspects of addressing this problem are considered here: (1) legislative provisions extending the collective bargaining coverage; (2) revising the definitions of employer and employee; (3) reconceptualising the allocation of labour obligations.

Statutory mechanisms can extend the existing definition of employee. These include recognizing dependent contractors and related employers, and giving the labour board discretion to designate workers as employees. The OLRA incorporates dependent contractors within its definition of “employee”, such that the effective dividing line between OLRA coverage and exclusion became that between dependent and independent contractors.<sup>12</sup> The scope of this intermediate category is difficult to predict in a given case, particularly regarding whether the concept should include contractors who themselves hire workers (Fudge, Tucker and Vosko, 2003, p. 208). Moreover, the OLRA explicitly provides that the default is to put dependent contractors in a separate unit, which will be deemed to be appropriate, although the OLRB may include them in a unit with other employees if the majority of dependent contractors indicate that preference.<sup>13</sup> This arose due to concern over a potential lack of community of interest with other employees. Labour legislation in other provinces does not have a default separation of dependent contractor units (Fudge, Tucker and Vosko, 2003, p. 208). Fudge, Tucker and Vosko (2003) suggest that recognizing a third category, dependent contractor, makes determining the line between employee and independent contractor even more difficult (p. 208-209).

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<sup>12</sup> OLRA, s. 1(1).

<sup>13</sup> OLRA, s. 9(5).

The OLRA also permits recognition of related employers.<sup>14</sup> Based on a review of the case law, Judy Fudge & Kate Zavitz (2006-07, pp. 139-140) characterize this provision as capable of flexible application to a variety of circumstances and conclude it is directed at protecting the integrity of the bargaining process and targets situations of “common management across separate legal entities that are engaged in the same enterprise”, but does not address situations where control is spread across multiple units not under common control, or outsourcing situations. However, reflecting the fundamental purpose of preserving integrity of bargaining, the OLRB’s application of this provision does not seek to prevent employers from transferring employment obligations. The exception is where the purpose of the arrangement, such as subcontracting, is to undermine bargaining, in which case the OLRB may make a remedial related employer declaration (pp. 140,142). Conversely, the OLRB will not make a related employer declaration where doing so would permit the union to avoid the certification process to expand its bargaining rights (p. 142). The authors suggest that this provision goes some distance towards overcoming the limits of traditional approaches to employment relationships and corporate legal forms, but needs to provide for a wider conception of group responsibility for employment obligations in complex organizations.

Legislation in some provinces gives the labour board authority to designate workers as employees within the meaning of the legislation, emphasizing the question of whether collective bargaining is appropriate rather than whether the worker is an employee.<sup>15</sup> This approach explicitly poses coverage as a policy question rather than an exercise in adjudicating among categories. However, it does not appear that this approach has produced substantially different outcomes than in other jurisdictions (Fudge, Tucker and Vosko, 2003, pp. 206-207).

Guy Davidov proposed a purposive approach to determining access to labour legislation, based on three “axes of employment”: democratic deficits, psychological dependence and economic dependence. They support an intermediate category of dependent contractor, and, in the case of agency workers if the “true employer” cannot

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<sup>14</sup> OLRA, s. 1(4).

<sup>15</sup> See, for example: Manitoba, Labour Relations Act, C.C.S.M. c. L10, s. 1; Saskatchewan, The Saskatchewan Employment Act, S.S. 2013, c. S-15.1, s. 6-1(1)(h)(iii).

be discerned according to the above rules, liability is to fall on the agency and client as “joint employers” with joint and severable liability (Davidov, 2002, 2004, 2005, 2012). Fudge (2006a, pp. 631-633) is critical of this “rehabilitative” approach, and Bartkiw (2009, p. 183) points out that, applied to the Canadian unionization context, this approach would “reinforce the central tendencies of *ex post* and *ad hoc* determination of the employer identity and bargaining unit structure”.

Another approach is to provide rules for particular groups. Bartkiw addresses the recommendations of the 2003 Quebec Bernier Report for proposed bargaining units of agency workers providing permanent work to clients (2009, pp. 185-186; Government of Quebec, 2003a (the “Bernier Report”)). The Bernier Report proposed that, for a unit of agency-supplied workers at a client with a pre-existing unit of client employees, the labour tribunal should have power to declare the agent and client a single employer. For a combined unit of agency and client employees, the tribunals should declare the combined unit appropriate and the client as employer. Finally, for a distinct unit of agency workers where no client unit exists, the tribunal should be able to use its existing authority to declare the unit appropriate and the agency and client the single employer. Bartkiw characterizes these proposals as “rather limited” noting that it isn’t evident that labour tribunals in Canada don’t already possess these discretionary powers, and he suggests that the source of the problem lies in the practices and procedures of unit determination (2009, p. 186). These include: “the case-by-case approach to determining the “true” employer and appropriate bargaining units; the *ex post* timing in determining these issues; the resulting uncertainty for union strategy; the lack of deference toward union preference over “whom” it can organize; the lack of support for triangular or multi-employer bargaining; and the lack of any other tailored rules or processes informed by the uniqueness of triangular employment...” (Bartkiw, 2009, p. 186).

The Bernier Report (Government of Quebec, 2003, Recommendations 1, 3), which was a committee of experts report to the Quebec Ministry of Labour on the needs of non-standard, self-employed workers, also proposed extending coverage of the Labour Code, more generally to workers in employee-like situations. First, the definition of “employee” in the legislation would be revised to entail factors: the person works for another for remuneration, and is obliged to personally do the work such that he or she is

economically depended on the legal or natural person they work for. It would not be necessary to prove the existence of an employment contract. A simple presumption of an employee-employer relationship be made for a person who demonstrates that he or she is personally working for another for remuneration.<sup>16</sup>

However, many commentators contend that simply seeking to revise, elaborate or clarify definitions of employer and employee have not and will not address the inadequacies of basing labour law coverage on concepts rooted in treating employment as a personal bilateral contract between unitary entities, compared to concepts and the assumption that independent contracting reflects economic independence; instead, a principled reconception of the scope of coverage is needed (Fudge, 2006a, p. 611; Fudge, Tucker and Vosko, 2003, pp. 208, 229; Hyde, 2012 p. 85).

Some commentators propose that labour law cover all workers who depend on selling their capacity to work, and only where a competing public policy reason exists should such workers be excluded, an approach consistent with ILO goals of decent work (Fudge, Tucker and Vosko, 2003, p. 230).

Similarly, a proposal targeting self-employed workers suggests these workers be included under labour legislation, although specific groups could be excluded if they would gain undue advantage from their ability to reduce competition. Again, this approach accords with ILO Freedom of Association committee decisions, and the commentator also notes that this reflects the designated extension provisions noted earlier (Cranford, Fudge, Tucker and Vosko, 2005, p. 177).

Another proposal is founded on the idea that labour law should address collective action problems creating market failures. Thus its boundaries should be determined by whether the public interest is served by a particular group gaining collective bargaining rights. The motivating question would be “what kinds of market failures disserve the public, and whether the practices of labour law would, on balance, better serve the public” (Hyde, 2006, p. 60).

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<sup>16</sup> The Bernier Report (Government of Quebec, 2003, Recommendation 45), for instance, recommended a detailed three-tiered framework of “gradated” collective representation system targeting own-account, self-employed workers intended to protect these workers’ freedom of association rights.

Simon Deakin proposed a functional approach to identifying the employer and locating employment responsibilities, which departs from a purely contractual approach, based on three criteria: coordination, risk and equity (Deakin, 2001, pp. 79-82). For the purposes of employee representation and health and safety laws, a managerial control test should be used to identify the employer so that “the scope of the employer is extended as widely as possible in order to ensure that the scope of employee protection is coterminous with the exercise of centralised managerial coordination” (Deakin, 2001, p. 80). For certain economic and social risks such as unemployment, worker health and safety, the integration and economic reality tests should be applied. In the case of agency workers, the coordination and risk functions of employers are separated between the agency and client. Deakin proposes that one option is to legislate that these two functions be applied to the agency and client: the coordination function and responsibilities fall on the client and the risk functions and liabilities on the agency. The final identifying function, equity, a principle of equal treatment, follows coordination. Therefore, in the agency situation equity obligations would fall on the client (Deakin, 2001, pp. 80-82).

Finally, Judy Fudge offers a conceptual “matrix” for determining the scope of employment, based on conceiving the enterprise as an activity not a particular organizational form (Fudge, 2006a, pp. 636-642, 646) (See Figure 1, below). The matrix is designed along three dimensions. The first dimension is composed of Deakin’s (2001) three functions of the legal concept of employer; the second reflects the labour employment arrangement (Davies and Freedland, 2004; Fudge and Zavitz, 2006-2007); and, the third dimension reflects labour law subfields: economic governance, social justice and social insurance.

**Figure 1: Matrix for Attributing Responsibility to Employing Enterprises (Fudge, 2006a)**

<b>Organizational Form of the Enterprise</b>	<b>Dispersed management Common control</b>	<b>Dispersed management No control</b>	<b>Management not dispersed No control Close functional integration</b>
<b>Basis for attributing responsibility</b>	Management/coordination Risk Absorption and spreading Equity	Management/coordination Risk Absorption and spreading Equity	Risk Absorption and Spreading
<b>Method for attributing responsibility</b>	Joint and several liability	Joint and several liability	Joint and several liability Contract compliance
<b>Labour law subfields</b>	Economic governance Social justice Social insurance	Economic governance Social justice Social insurance	Economic governance Social justice Social insurance

### 3.2 Exclusions and Separation of Units

To a greater extent than many other jurisdictions in Canada, the OLRA provides for a range of occupation-based exclusions of certain employees from coverage of the legislation, and a preference for separate units for groups such as craft workers, professional engineers and dependent contractors.<sup>17</sup> In addition, the OLRB has traditionally applied community of interest and appropriateness tests to separate full and part-time workers and certain occupations into different bargaining units (Vosko, 2000, p. 264). As a result, the OLRA is structured and applied to produce narrow, highly fragmented bargaining units. The effect has been to produce a highly gendered system which precarious and vulnerable workers have great difficulty accessing, and which reduces unions' bargaining power (Forrest, 1986, p. 847; Fudge, 1993; Forrest, 1997, pp. 92-93; MacDonald, 1998).

Cranford, Fudge, Tucker, and Vosko (2005) identify the traditional justifications for OLRA exclusions and denial of freedom of association as based on concerns about conflict of interest and competition policy. The former applying to managerial exclusions, and the latter to certain professions regarded as akin to entrepreneurs. They contend

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<sup>17</sup> OLRA, ss. 3, 9.

that the legitimacy of these rationales are of questionable application to these groups, given flatter management structures and the reality of alternate forms of professional collective representation and bargaining. Regarding self-employed workers, they conclude that conflict of interest cannot justify wholesale exclusion from the OLRA, although the competition consideration is more ambiguous (Cranford, Fudge, Tucker, and Vosko, 2005). However, it must be also be recognized that certain types of workers, including some occupational groups, may have sufficient capacity to exercise freedom of association in the workplace that they may not require access to a statutory labour law framework in order to have a reasonable opportunity to exercise this freedom.

### **3.3 Dual role of the bargaining unit**

The dual role of the bargaining unit, as both the electoral district for the representation vote and the negotiation unit creates a tension between union and employer strategic choices about the preferred unit for the purposes of representation questions and bargaining. As Keith Ewing and John Hendy note, “a trade union recognition strategy is not the same as a trade union collective bargaining strategy” (2013, p. 33). Unions typically prefer smaller, more homogeneous, easier-to-certify units but would prefer a larger unit at the bargaining stage, while employer strategic preferences run in the opposite directions (Langille, 1980, p. 539; Colvin, 1998, pp. 421, 452). This exacerbates other tendencies in the legislation and board application towards small, fragmented, single location units, and individual workplace or enterprise rather than broader-based bargaining, and converts unions from participants in regulating working life and into agents for defined groups of workers (Colvin, 1998, pp. 452-453; Ewing and Hendy, 2013, pp.33, 40).

Generally labour boards treat unit boundaries as static, and unchanging post-certification, in what is termed a “unified-static” model (Colvin, 1998, p. 422). Under the OLRA, post-certification changes to the scope of the bargaining unit are a matter for parties to negotiate, or a union may seek a new certification for an expanded unit. In contrast, the BC *Labour Relations Code* contains a variance provision, authorizing the BC Labour Relations Board (BCLRB) “on application by any party or on its own motion,

may vary or cancel the certification of a trade union or the accreditation of an employers' organization".<sup>18</sup>

Alexander Colvin (1988) proposes a new approach to bargaining unit determination, a "separated-dynamic" model, allowing for post-certification modification of the unit, separating electoral district and negotiating functions. It draws upon the BCLRB "Woodward" principle applied to traditionally difficult-to-organize industries, in which a small representation unit is established, with explicit provision that the unit may be expanded into a broader bargaining structure as bargaining becomes established and support is gained among new groups of employees. It also draws on provisions permitting combinations of units that briefly existed in the OLRA in the early 1990s, as well as NLRB decisions (Colvin, 1998, pp. 466-471). Three elements are contemplated in this model. First, at the certification stage, the labour board focus is on identifying a unit with "coherent and defensible boundaries", with explicit recognition that the structure may change as the nature of the bargaining relationship changes. This approach would be available in all cases, not just in difficult-to-organize industries. Second, provisions for unit mergers would be added to the legislation. Third, full scope for bargain unit modifications would be established. Colvin suggests that this model could make unionization more accessible to the service sector and new work organizations, and foster broader-based bargaining.

Brian Langille (1980, pp. 548-549) also suggests that the first element of this model, application of the "Woodward" or "Amon" principle, may reconcile the dual functions of units in circumstances where considerations of broader bargaining structures and access to representation are in tension, and that this could produce broad based, stable bargaining structures.

The OLRA focuses on recognition of bargaining units at the individual workplace level, between a single employer and single bargaining agent, for a defined group of employees sharing a community of interest and that is appropriate for bargaining, with these boundaries generally remaining static for the life of the bargaining relationship. This has produced highly decentralized, fragmented collective representation and bargaining. This Wagner Model orientation to determining representation may be

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<sup>18</sup> British Columbia, Labour Relations Code, R.S.B.C. 1996, c. 244, s. 142.



effectively, though not explicitly, excluding more vulnerable workers, including women, racialized, and new immigrant workers from statutorily protected collective bargaining. These features of the OLRA merit reconsideration, particularly given the recently expanded scope of *Charter* protection for access to collective bargaining representation.

### 3.4 Non-Majoritarian Representation

Non-majoritarianism (or “minority”) unionism refers to a labour relations regime based on three basic principles: non-majoritarianism, non-exclusivity; and freedom of association. That is, any two or more employees may form a union and bargain collectively with the employer despite the absence of majority support; no union has exclusive bargaining rights with the employer and multiple unions may co-exist in collective bargaining relationships with the employer alongside individual, non-represented employees; and, employees are free to join or leave a union based on their membership and representation preferences. Another research report addresses minority unionism in detail. Therefore this section is limited to a brief treatment of select aspects of this issue.

Several authors contend that non-majoritarian systems are consistent with ILO principles, while majoritarian systems may be in conflict with these principles (Adams, 1995; Adams, 2008; Harcourt and Haynes, 2011, pp. 118-119), and that the Supreme Court of Canada decision *Ontario (Attorney General) v. Fraser* has “opened the door” to minority unionism by not requiring exclusive majoritarianism (Braley-Rattai, 2013, pp. 328, 330-331). One argument in favour of non-majoritarian systems is that it may provide broader access to collective representation. Harcourt and Lam offer a basic logistic regression analysis, estimating that if majority support was required for union representation in New Zealand, then 23% of existing union members would not have representation. The authors inferred that, if the same proportions applied to the US, adoption of a non-majority system might increase union membership by about 30%, although acknowledging this may be an overestimate (Harcourt and Lam, 2009). Although the sample used involved 10% of New Zealand employees, the method of constructing the sample did not likely ensure representativeness, and there are many unaccounted for influences that make simple application of the New Zealand results to the US or Canada problematic. In addition, the authors assumed that if a majority of

employees in a workplace were unionized then that unit would win a representation vote under a majoritarian system. However, this also assumes that the representation procedure, among other differences between the systems, would have no influence on outcomes. Therefore, this study should not be regarded as a reliable estimate of the effects of a change in system.

### ***Options for Consideration:***

- *Reconsider occupational exclusions and provisions for separate units for certain types of workers.*
- *Provide a more inclusive approach to “community of interest” and “appropriateness requirements” for bargaining units*
- *Provide mechanisms for post-certification modification of bargaining unit boundaries, including consolidation of units and variance of unit boundaries.*
- *Consider alternative approaches to the definition of “employee” as a threshold requirement for OLRA coverage.*
- *Consider a role for non-majoritarian worker representation in workplaces.*

## **4.0 Successor Rights**

Section 69 of the OLRA, the successor rights provision, provides for protection of bargaining rights upon sale of a business, such that bargaining and collective agreement obligations of the original employer attach to the successor employer, although the OLRB has some authority to amend or terminate these rights. Therefore this section addresses both statutory successorship provisions and literature addressing labour relations considerations in geographic relocation decisions of firms, as a backdrop to successorship issues. Note that little academic research addresses Canadian successorship provisions, in contrast with the extensive literature on outsourcing, which may be a topic meriting further attention.

### **4.1 Labour Relations and Geographic Relocation Decisions**

Another research report addresses labour relations and geographic relocation decisions in detail. Therefore this section is limited to a brief treatment of select aspects of this issue. Researchers have explored the influence of labour relations factors on firms' location and relocation decisions, much of it involving quantitative and qualitative

empirical research. These studies indicate that some firms may be efficiency-seeking (that is, seeking lower cost inputs including lower labour costs), while others are market-seeking (that is, seeking to obtain access to a market). Most studies address international relocation decisions; few focus on relocation within the source country, particularly for firms initially located in Canada. Some studies indicate that market-seeking outweighs labour relations considerations in firms' location decisions. For instance, Bognanno, Keane and Yang (2005) used industry level data to examine production location decisions of US multinational corporations (MNCs) in seven manufacturing industries and 22 countries over the 1982 to 1991 period. Regression estimates indicated firms preferred to locate in low-wage foreign host countries with decentralized bargaining structures and with minimal restrictions on employers' ability to layoff workers. Other significant factors included cultural openness, corruption, geographic distance, and tax and tariff rates. However, the most important factor determining location was the host country's market size (Bognanno, Keane and Yang, 2005).

In contrast, Patrice Jalette's (2011) study of the Quebec manufacturing sector concluded that efficiency-seeking in the form of lower production costs was the driving force for firms in the study. This study surveyed Quebec manufacturing union locals to identify factors affecting the likelihood that an employer would threaten to relocate and, separately, the likelihood that relocation would occur, between 2004 and 2007. The study took into consideration firms' capacity to relocate and unions' responses to threats of relocation. Both threats and relocation were found to be pervasive: 63% of the 158 local unions experienced a relocation threat, and 66% of locals threatened with relocation experienced actual job relocation (Jalette, 2011, p. 853). Logistic regression estimates indicate that the most important factors associated with a relocation threat were that the company had other plants producing similar products; and downstream functional integration of the target plant (or, interdependence of plants). No significant difference was found for different degrees of technology, between Canadian and foreign-owned firms; location of foreign sites; or, managerial attitudes towards unions (2011, pp. 854-855). The author concluded that relocation threats arise from business

decisions about the availability of viable production alternatives, not from labour relations considerations or the firm's presence in low-wage countries (2011, p. 855).

Analysis of the subgroup of locals which had received relocation threats identified several factors significantly associated with actual relocation. Firms with facilities in low-wage countries were 1.5 times more likely to relocate, suggesting labour costs were important or access to new markets were the motivating consideration. Although downward integration of the plant was positively associated with threats of relocation, this feature was found to be strongly negatively related to actual relocation. The likelihood of such plants actually relocating was about 3.9 times less likely, probably reflecting the disruption that relocation would cause in integrated production systems, and that these plants may have been in higher value-added parts of the production system which would be more difficult to relocate given the skills and technology that would be necessary (Jalette, 2011, pp. 855-856). These results suggest that firms may threaten relocation even when their structural capacity makes the threat unlikely to be realized (p. 857). Managerial attitude to the union was negatively related to actual relocation, and where the union agreed to concessions, actual relocation was significantly less likely. Compared to plants where no concessions were made, relocation was 5.3 times less likely where the local accepted concessions, (p. 857).

This study also examined the effects of two categories of concessions on the likelihood of relocation occurring: wages and benefits, and employment levels. Where unions conceded on only one of these categories, relocation was much more likely to occur. Although not statistically significant, the results suggest that in cases where the union conceded on both categories relocation may be less likely. This outcome may be due to the fact that even where firms did relocate the union had conceded on both matters. The results also suggest that another form of concession that was not directly captured by the variables used in this study was influential (Jalette, 2011, pp. 857-858).

### **4.2 Implications of Successorship Regimes**

A comparative study of successorship in Canadian labour legislation and under US federal law as they existed at the time of the study in the early 1990s, concluded that the US successorship doctrine in federal legislation is more flexible and therefore more advantageous to multi-national corporations (MNCs), such that the author advised

that foreign MNCs should pursue takeovers in the US instead of Canada (Schreiber, 1991).<sup>19</sup> The US approach involves a two-part test: a test for continuity of the workforce and a test for continuity in the identity of the character of the enterprise which is applied as a multi-factor, contextual test (Schreiber, 1991, pp. 582-585).

Among the key US-Canada differences was the focus on the composition of the new employer's workforce. The first prong of the US test, continuity of the workforce, arises from the notion of majority rule. The particular test differs under different legislation, asking whether a majority of the new employer's workforce consists of the predecessors' employees, or whether a majority of the predecessor's employees is employed by the new employer (Schreiber, 1991, p. 594). Schreiber suggests that "If the majority of the employees in the new work unit were organized workers under the predecessor, then it follows that a majority of the new workplace supports a union" (1991, p. 594). Although Canadian successor provisions vary, Schreiber concludes that they focus on the issue of whether a business entity in whole or part transfers to a new employer, or is it simply a case of asset transfer, without focusing on workforce composition (1991, pp. 594-595). Second, Schreiber regards the US continuity of the character of the enterprise test as applying to fewer circumstances than the Canadian approach of finding successorship where the "employer merely has to accept a broad abstract notion of the predecessor's business" (1991, p. 596). Schreiber concludes that it is more likely that successorship will be found under Canadian than US legislation in a given case as he regards the two-part US test as more difficult to establish than the Canadian approaches.

Schreiber also concludes that the consequences of a successorship finding are more onerous to business under Canadian legislation. Unlike under Canadian laws, except for Ontario, a successor employer in the US is not bound by the collective agreement unless it chooses to adopt it. It is simply bound to negotiate with the union, giving the new employer wide flexibility to restructure, change the workforce, and providing freedom from restrictions that may have led to the sale. Alternatively, where

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<sup>19</sup> Note that the NLRA does not explicitly provide successorship rights protection. However, the NLRB and courts have developed a successorship doctrine applicable where unions seek to compel bargaining under the NLRA. State successorship legislation exists, and may provide greater protection.

the collective agreement contains advantageous concessions or a “no strike” clause, the new employer may find it advantageous to adopt it (Schreiber, 1991, pp. 596-597). The OLRA provides a limited exception to this, permitting any person to apply within 60 days after the successor employer becomes bound by the collective agreement to terminate the bargaining rights if the OLRB is of the opinion that the purchaser has changed the character of the business “so that it is substantially different from the business of the predecessor employer”.<sup>20</sup>

In Quebec, prior to 2001, the *Labour Code* successor provisions were applied broadly, and the functional interpretation applied did not require a direct contractual relationship exist between the original and successor employer, such that subcontractors were generally found to fall within the provision (Fudge, 2006b, p. 308). Notably, this resulted in building services contracting cases in Quebec being captured by this successorship provision, even where no legal relationship existed between the subcontracting parties (Fudge, 2006b, pp. 308-309). This differs from the OLRA successor rights provision, which required a finding of a legal relationship between the original and successor employers, with the result that most forms of subcontracting will escape successor liability. As Judy Fudge points out, service contracting, in which only labour not capital is contracted for, will fall within the OLRA successor rights protections (2006b, p. 309). Amendments in 2001 removed this distinction.<sup>21</sup>

Jalette’s (2004) comparative study of sub-contracting in Quebec and Ontario manufacturing explored whether the Quebec *Labour Code* successor right provision was a greater deterrent to contracting out in the manufacturing industry than the OLRA provision (2004, p. 73). The study involved a 2003 survey of 440 Ontario and 405 Quebec manufacturing firms from four subsectors: primary, secondary, labour-intensive tertiary and capital-intensive tertiary manufacturing. Based on questions eliciting the firms’ motives for why they do or do not subcontract or do not do so more often, the author concluded that labour regulations, including the collective agreement, minimum standards and labour legislation, were of little significance in outsourcing decisions,

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<sup>20</sup> OLRA, s. 69(5).

<sup>21</sup> Quebec, An Act to Amend the Labour Code, to Establish the Commission des Relations du Travail and to Amend Other Legislative Provisions, S.Q. 2001, c. 26, ss. 32, 33.

across provinces and manufacturing activities. However these considerations were mentioned more often in unionized than non-union firms. Respondents indicated that they valued having skills available in-house, were concerned about losing skills, or that retaining the activity in-house is more beneficial. (2004, pp. 81-84).

Among Ontario firms, the most common motives given by unionized companies for not subcontracting or not engaging in more subcontracting for machining activities were that the company did not consider subcontracting (83.2%); the skills were available in-house and the firm did not want to lose them (48.4%), and it would lead to difficulties with employees (38.8%). Similarly, non-union firms most often cited that they had not considered subcontracting (83.6%); they didn't want to layoff employees (39.7%) and they had in-house skills that they did not want to lose (48.6%). That labour legislation or labour standards make subcontracting difficult was mentioned by 13.3% and 10% of unionized firms respectively, and 20% and 13% of non-unionized firms. That the collective agreement doesn't allow it was cited by 35.5% of unionized and 11.1% of non-union firms, although the author does not explain this latter finding. Among Quebec firms, the same questions regarding machining activities produced similar responses: labour legislation was cited by 13.9% of unionized and 5.6% of non-union firms; labour standards was identified by 14.6% of unionized and 4.6% of non-union firms; and 36.7% of unionized firms and 2.9% of non-union firms said the collective agreement does not allow subcontracting (Jalette, 2004, pp. Tables 8, 9). Not explained in this study was the concern non-union firms expressed about collective agreement restrictions.

Surveys asking participants to recall the motives for decision-making for past events may suffer from faulty recall, or lack of truthful responses, but this survey offers some insight into the relative importance of restrictive work regulation and other factors on manufacturing firms' decision-making in Ontario. As well, the study explicitly cautioned that it is not seeking to establish a causal link between the Quebec successorship provision and the relative volume of subcontracting, but did note that subcontracting practices in the two jurisdictions was similar, and speculated that the legislative difference did not seem to be important (Jalette, 2004, p. 85).

### 4.3 Contractualization of Successor Rights

Gilles Trudeau characterized the 2001 amendments to the Quebec *Labour Code* successor provisions (s. 45) as an example of active contractualization of labour law (Quebec, 2001, ss. 32, 33; Trudeau, 2003).<sup>22</sup> In addition to setting a fixed time for the union to apply to the tribunal for application of the previously automatic provisions, the amendments provided that, where part of an undertaking is transferred, the union and employer may reach a special agreement on the transfer including an election not to request that the tribunal apply the successor provision. This converts successorship into a negotiable protection. Further, in partial transfer cases, the maximum duration of application of the collective agreement on the new employer was set at 12 months (Trudeau, 2003, pp. 144-145). According to Trudeau, these amendments “relativize the compulsory character of the law and transfer into the sphere of private decision making aspects of successor rights that, in the past, were strictly a matter of a mandatory legal provision. This also represents a contractualization of a dimension of labour relations law that was due to the effectiveness of employer lobbying for more flexibility in the management of the labour force” (Trudeau, 2003, p. 145).

One study suggests that where statutory successorship protection may be ineffective, such as in industries subject to substantial extra-jurisdictional relocation, unions will seek such protection through bargaining. John Holmes analysed union responses to restructuring in the North American auto industry in the 1990s as these changes dismantled labour’s ability to use pattern bargaining to avoid wage competition (Holmes, 2004). He identified the Canadian union’s key response to modular manufacturing and outsourcing as bargaining successor rights into collective agreements, providing that the master and local agreements would apply to purchasers. The study did not address statutory successor rights provisions, presumably because in the particular circumstances of this industry such provisions were of little practical application.

#### ***Options for Consideration:***

- *Additional research would be beneficial to formulating options regarding OLRA successorship rights.*

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<sup>22</sup> These provisions were further amended in 2003 (c. 26, ss. 4-6.).



### 5.0 First Collective Agreement Arbitration

First contract arbitration (FCA) procedures were developed in Canada to address what Paul Weiler (1980, p. 50) called “stubbornly anti-union employers who, in spite of certification, refuse to accept the right of their employees to engage in collective bargaining”. It was and was intended to end the immediate dispute, engage the parties in a “trial marriage”, via an imposed agreement, to try to establish a mature and enduring relationship, and operate as a deterrent (Weiler, 1980, pp. 53-54). Anne Forrest regards FCA as a mechanism to address power imbalances created by unit-by-unit bargaining structures, the difficulties of applying the concept of good faith bargaining, and the lack of adequate remedies for bad faith bargaining (1986, p. 846-7).

Reflecting these views, early FCA provisions were introduced as remedial responses to bad faith bargaining in the context of first contract negotiations, which were recognized as having a different character than renewal negotiations.. As statutory FCA models have evolved; however, more recent legislation has shifted the role of FCA into an instrument for supporting collective bargaining through early intervention with mediation and away from operating as a remedy.

#### 5.1 Characteristics of First Collective Agreement Negotiations

Evidence suggests that first agreement and renewal collective bargaining are significantly different experiences, with different outcomes. Few estimates of the settlement rate for first contracts exist. However, a recent study matching certification and first contract records calculated the first contract success rates in Ontario to have been: 64% between 1991-93, 76% between 1993-1995, and 59% between 1995-1998 (Riddell, 2013, p. 714).

Work stoppages in first negotiations are more common than in renewal bargaining (Walker, 1987, p. 7-8; Gunderson et al., 2001; Rose, 2006, p. 203). For first contracts settled in Ontario between 1999 and 2002, 7% involved a work stoppage, and first contract work stoppages were more prevalent in larger units (16.4%; 200 or more employees) than in smaller units (6.3%; 200 or fewer employees) (Rose, 2006, pp. 205, Table 212.202).

Fewer first contracts are reached through direct bargaining, and frequent resort is made to third party assistance, compared to negotiations in general. Joseph Rose

(2006, pp. 205, Table 12.2) documents that 9.5% of cases settled only after a work stoppage or arbitration, 30.1% during or after conciliation, 19% with mediation, and only 41.6% settled through direct bargaining. He concluded that this suggests that first negotiations are particularly difficult, and supports involving mediators at an early stage in first negotiations (2006, p. 206).

A study of federal jurisdiction cases in 1979 and 1980 found appointment of a conciliator was associated with a greater likelihood of reaching a contract. Consequently, Norman Solomon (1985) recommended conciliation to assist first contract formation, perhaps as a matter of course in first negotiations, either at the point of impasse or earlier.

### **5.2 First Contract Arbitration Models**

Four models or approaches to FCA have developed in Canadian labour legislation: the “fault”, “no fault”, “automatic access” and “mediation-intensive” models. The key features of each are set out below. Although it differs among jurisdictions, some features are typically found: work stoppages must cease upon FCA application, conciliation must be exhausted, and arbitrators must accept provisions parties agree upon.

The “fault” model of FCA requires that the applicant demonstrate that the other party has engaged in bad faith bargaining, or that there has been an irreparable breakdown in negotiations. Thus, FCA is treated as form of remedial award. This model was in use in BC between 1973 and 1992; Manitoba from 1982 to 1984; Newfoundland and Labrador from 1985 to 2011, and has been in use in the federal jurisdiction and Quebec since 1978. The second characteristic of the fault model is a “double screen” mechanism: the Minister of Labour decides whether to refer applications to the labour board, which then decides whether to order arbitration. In Quebec the Minister performs both roles. The Federal jurisdiction and Quebec (and until recently Newfoundland) apply the legislation more liberally than originally conceived, such that they are not true “bad faith” or “fault” approaches and, in effect, approach the “no fault” model discussed below (O'Brien, 2001; Slinn and Hurd, 2011).

Under the “no fault” approach the labour board decides whether to order FCA. There is no ministerial screening process and neither bad faith bargaining, nor

bargaining impasse, are necessarily required. In the other provinces (Ontario between 1986 and 1992, and 1995 to present; Saskatchewan since 1994; and, Nova Scotia since in 2013), the board must find that negotiations have not succeeded, and that one or more statutory conditions are met. This model is applied differently among the provinces that use it. Saskatchewan's approach requires bargaining to have failed to conclude an agreement, and that at least one of the following circumstances exists: a successful strike vote, a lockout declaration, the board has found bad faith bargaining, or 90 or more days have elapsed since certification. The board may direct parties to conciliation if they have not already exhausted that process. Arguably, the 2005 addition of the 90 day time limit makes this into a hybrid automatic access – no fault system.

Ontario's approach, applied between 1986 and 1992, and 1995 to present, has the OLRB apply a two-step test to determine whether to direct arbitration. First, the applicant must prove bargaining was "unsuccessful" in the totality of circumstances which may, but does not necessarily, include bad faith bargaining. Bargaining is not unsuccessful simply where the parties have failed to reach agreement. Second, this must be attributable to one or more of the reasons set out in the statute: the employer's refusal to recognize the union's bargaining authority; the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification; the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement; or any other reason the OLRB considers relevant. Where this test is satisfied, the OLRB has no discretion to decline to direct arbitration. The OLRB must decide within 30 days of receiving the application. The Nova Scotia FCA provision is similar to Ontario's except that, unless parties agree to arbitration, the board may either direct arbitration or direct parties to resume negotiations.

The "automatic access" model has two preconditions to first contract arbitration: that sufficient time has elapsed since certification and that the conciliation mechanism has been exhausted. There is no screening process, and no finding of bargaining breakdown or fault is required. Where parties fail to agree on an arbitrator, the labour board may require the parties to continue negotiating, possibly with a conciliator. However a first contract will be imposed if negotiations fail. Manitoba has employed automatic access FCA since 1985. Two other provinces briefly experimented with this

model: Ontario from 1993 to 1995, and Nova Scotia from 2011-2013.

In 1993, BC adopted a “mediation-intensive” approach, which regards FCA as part of the collective bargaining process and not as a remedy (Yarrow Lodge, 1993, p. 29-30). An application can be made once parties have bargained and a successful strike vote has been held. Parties must provide a list of disputed issues and their positions. Upon application a mediator is appointed. If mediation-assisted bargaining does not succeed after 20 days, the mediator reports to the BCLRB, recommending either first contract terms for parties’ consideration, or a settlement process, including one or more of: mediation-arbitration, arbitration by an arbitrator or the BCLRB, or, permitting parties to engage in a work stoppage. The BCLRB set out a detailed policy for applying this provision in an early decision in which it emphasized that the mediator’s role is to “facilitate and encourage the process of collective bargaining and to educate the parties in the practices and procedures of collective bargaining” and that if a first contract is to be imposed that it should happen before the relationship is irreparably damaged (Yarrow Lodge, 1993, 30). BC’s mediation-intensive model has attracted particular interest from researchers, as discussed below (O’Brien, 2001; Vipond, 2011; Dobbelaere and Lutens, 2013).

In 2012 Newfoundland and Labrador adopted a FCA process similar to BC’s “mediation intensive” model. Upon application, the Minister of Labour appoints a “first collective agreement mediator” to assist the parties. If the parties fail to settle after 30 days of mediation or after conciliation is exhausted, then a party may apply to the labour board, which decides whether it is “advisable” to set the first contract terms.

### **5.3 First Contract Arbitration Applications**

Although unions file most FCA applications, in most jurisdictions employers also make substantial use of this process either as a sole or joint applicant. Recent studies consistently find employers are responsible for almost a third of applications under BC’s mediation-intensive model (O’Brien, 2001; Slinn and Hurd, 2011; Vipond, 2011) and under Manitoba’s automatic access model (Black and Hosea, 1994), and about 16% of applications under the Quebec fault model (Sexton, 1991; Marotte and Paré, 2002; Slinn and Hurd, 2011). Grant Mitchell has suggested that Manitoba employers apply for FCA to avoid effective strikes (Mitchell, 1992, p. 297). Similarly, the BCLRB has

indicated that "...employers often apply [for FCA] to avoid a strike. But once they are in the mediation process, employers are willing to participate in a meaningful way" (O'Brien, 2001, p. 79). Currently, Ontario appears to be the exception in this regard. Between 2001 and 2009 employers were responsible for only 2.9% of FCA applications (Slinn and Hurd, 2011).

FCA applications typically arise from smaller, private sector bargaining units. Recent studies of BC, Manitoba and Quebec FCA applications report mean unit sizes of 30 or fewer employees (Slinn and Hurd, 2011, for 2001-08); Marotte and Paré, 2002, for 1978-2001). A study of 1982 to 1991 Manitoba data reported that many applications were from very small units of three to five employees (Black and Hosea, 1994). In contrast, Melanie Vipond's BC study, covering the 1993 to 2009 period, suggested that relatively larger units were most often granted access to the FCA process, reporting that certifications resulting in FCA applications involving units of 61-70 members made up 21 percent of all certifications over the period (Vipond, 2011, pp. 155,156). This is a difficult ratio to interpret, and Vipond did not provide median or average unit size, nor report the number of applications in each unit category. However, the relationship between FCA applications and unit size may require more investigation for this province.

Private sector units make up about 88% of applications under BC's mediation intensive model, but only 12.8% of applications under Manitoba's automatic access model (O'Brien, 2001; Slinn and Hurd, 2011; Vipond, 2011). Unfortunately data on neither unit size nor sector was available for recent Ontario cases and earlier Ontario studies did not report unit size (Slinn and Hurd, 2011).

### **5.4 Encourage or Discourage Collective Bargaining**

A recurring question in the literature is whether FCA encourages or discourages collective bargaining and settlement. An early study of BC FCA applications between 1974 and 1979 concluded that none of the 11 arbitrated contracts would have been achieved in the absence of the FCA procedure (Cleveland, 1982). Only one detailed quantitative empirical study examines the relationship between the existence of FCA legislation, including the particular FCA model, and the first contract settlement rate. Riddell (2013) examined Ontario certification data from the OLRB for 1991 to 1998,

matched it to first contract data from the Ministry's Office of Collective Bargaining, and used a jurisdiction without FCA at the time, Nova Scotia, as a control. The data spanned Ontario's use of no-fault FCA between 1991 and 1993, and from 1995 to date; and of the automatic access model between 1993 and 1995. The study concluded that although first contract imposition rates were only two to four percentage points higher under the automatic access model compared to when the no-fault model applied, the rates of first contract settlements were eight to 14 percentage points higher. Note that this study examined all first contract settlements under the OLRA, not just the subset of cases involved in the FCA process. The author notes that the FCA statutory changes were accompanied by changes to other labour law provisions, which may be relevant to first contract outcomes. Therefore, the study cannot claim a causal effect of the different FCA models on first contract settlement (Riddell, 2013, p. 734).

The question of what effect FCA has on collective bargaining and settlement has also been addressed by considering how often FCA provisions are accessed and the frequency of arbitrated, voluntarily settled, and other bargaining outcomes. Descriptive statistics on the rate of FCA applications indicate that these applications are uncommon, overall, although rates vary among FCA models (Johnson, 2010, pp. 597-598; Slinn and Hurd, 2011, pp. 73-75).

Susan Johnson, in a study of the ten Canadian jurisdictions that introduced FCA between 1976 and 2005, found higher rates of FCA application under automatic access and mediation-intensive models compared to under fault or no-fault models during this period (2010, p. 597).<sup>23</sup> Descriptive statistics relating to direction to first contract arbitration indicated that this was also uncommon. Looking at the number of FCA applications granted relative to the number of certifications granted during the same 12-month period, Johnson's study found that this ratio was generally higher where the FCA application rate was also high, although BC was an exception. In BC the ratio of FCA applications to certifications granted was low although it had a high rate of FCA applications, suggesting that an arbitrated outcome was less likely under its mediation-

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<sup>23</sup> Johnson calculates application rate as the number of FCA applications filed in a jurisdiction in a 12-month period relative to the number of newly certified units that in that jurisdiction in the same period.

intensive model. Johnson speculated that this might reflect either the influence of the mediator or of the potential for a work stoppage (2010, p. 599).

Few jurisdictions provide information about the number of first contracts that are actually arbitrated. Sometimes the only information available is the number of cases sent to arbitration. Recent studies provide the following snapshot of FCA outcomes. For Ontario, between 2001 and 2009, of 70 FCA applications, 18.4% were granted, 8.5% dismissed, and 73.1% withdrawn, adjourned, terminated or closed for administrative purposes. For Manitoba between 2001 and 2008, of 47 applications: 44.7% reached voluntary agreement; 44.6% resulted in a labour board-imposed contract; and, 10.6% were withdrawn (Slinn and Hurd, 2011). For Quebec over the 1978 to 2009 period, 84.6% of applications admitted into the process either settled or had an arbitrated award. Among all applications 74.5% reached agreements; 49.6% voluntary agreements; and 24.9% receiving an arbitrated award. Gregor Murray and Joelle Cuillerier (2009, p. 84) conclude that FCA in Quebec “is associated with powerful incentives to reach some form of agreement and that the policy objective of ensuring effective access to associational rights for the vast majority of workers concerned is attained”.

Between 2001 and 2008, there were 116 applications in BC. Fifty-six percent settled, including: 8% settled adopting mediator’s recommended contract; 7% agreed to mediation/arbitration or binding mediator’s recommendations; 10.3% settled after a work stoppage was permitted; 5.2% withdrew; 1.7% businesses closed during the FCA process; and, 6.9% had a first contract imposed by Board or arbitrator (Slinn and Hurd, 2011). Similar results were found in a study of BC data from the 1993 to 2000 period (O’Brien, 2001).

### **5.5 Enduring Bargaining Relationships**

Studies have also addressed whether FCA produces enduring relationships by tracing decertification and negotiation of subsequent agreements among bargaining relationships that had engaged with the FCA process. Given the first contract context, higher rates of decertification and bargaining failure are not unexpected. All studies acknowledge significant data limitations. Studies of early FCA experiences concluded that it had not produced enduring bargaining relationships (Cleveland, 1982; Walker,

1987, p. 29; Macdonald, 1988; Patterson, 1990). More recent studies reach more positive conclusions, particularly with regard to the BC mediation-intensive model (O'Brien, 2001; Murray and Cuillerier, 2009; Slinn and Hurd, 2011; Vipond, 2011).

A BC study, covering the 1993 to 2000 period, found that 25% of unions involved in FCA applications ultimately decertified. Of those cases ending in decertification, 23 of the 66 occurred during the FCA process (O'Brien, 2001:71-72, Table 12). Similarly, a study of BC bargaining units involved in FCA applications between 2001 and 2008 found approximately two thirds of the units remained active at the end of the study, and about 20% had decertified (Slinn and Hurd, 2011). For Quebec, fewer than 10% of applications resulted in decertification or union withdrawal (Slinn and Hurd, 2011).

Examining the 218 cases where a first contract was imposed under the Quebec legislation between 1978 and 1998, Josée Marotte and Francine Paré (2002, pp. 19-21) found that in 47.2% of cases, parties subsequently negotiated a collective agreement, and 52.4% of these resulted in a negotiated renewal agreement. Among Manitoba FCA applications over the 2001-2008 period, of the approximately 50% of cases that could be traced, two-thirds were still involved in a collective bargaining relationship at the end of the study period, and there was no evidence of decertifications among unions applying for FCA (Slinn and Hurd, 2011). However, an earlier study of 1982 to 1991 data for Manitoba had found: 23% of applications subsequently decertified; 31% of imposed contract cases decertified; 15% of voluntarily settled cases decertified; 7% were out of business or inactive; and 66% had agreements in effect or being renegotiated (Black and Hosea, 1994). No recent information was available regarding contract renewal for bargaining relationships that had been involved in Ontario's FCA process between 2001 and 2009, but about 20% of these units decertified over the period of the study (Slinn and Hurd, 2011).

### **5.6 Effects on Work Stoppages**

As legislation typically provides that any work stoppage in progress must cease upon an FCA application being made, FCA provisions clearly achieve Weiler's (1980) initial goal: that of ending any current dispute. Therefore researchers' attention has typically focused on other instances of work stoppages when evaluating this legislation such as work stoppages following denial of first contract arbitration; in renewal



negotiations; in first contract negotiations generally; and, the general rate of work stoppages in the jurisdiction.

A multi-jurisdictional study found that, over the 2001 to 2008 study period, bargaining that produced a FCA application involved a work stoppage in about 10 percent of cases in BC and Quebec, and about 23 percent of cases in Ontario (Slinn and Hurd, 2011, p. 79). In contrast, no Manitoba FCA case clearly involved a strike or lockout. This suggested that jurisdictions with more restrictive access to FCA may experience more first contract disputes. For those bargaining relationships that could be traced to future rounds of bargaining, work stoppages were not common in any of these four provinces.

Jan O'Brien (2001, p. 77) noted that between 1997 and 2000 there were 50 first contract bargaining strikes in BC. Thirty-one resulted in an FCA application, and 16 of these strikes occurred prior to an FCA application. Contracts were ultimately settled in all but one of these cases. Only five of the 15 cases in which the strike commenced after the FCA application settled agreements, indicating failure of mediation-arbitration.

Johnson (2010) examined Canadian work stoppage data from 1976 to 2007 to explore whether and how FCA legislation affects the incidence and duration of first agreement work stoppages. Johnson concluded that the presence of FCA provisions in a jurisdiction substantially reduced incidents of work stoppages by 65 per cent in the public and quasi-public sector and by 50 percent in the private sector (2010, pp. 592-593). However, she found no evidence that the existence of FCA legislation influences work stoppage duration (p. 602).

It is difficult to provide an overall assessment of many, predominantly descriptive studies of FCA, which often employ incomplete data across different models and different time periods. However, a few key points are discernable. First, FCA applications are uncommon, and few of these applications are directed to arbitration. Second, in many jurisdictions (with the exception of Ontario) employers exercise the FCA option relatively frequently. Studies generally suggest that FCA provisions neither discourage bargaining, nor produce bargaining units that are incapable of functioning. Although a substantial proportion of these bargaining relationships fail, a greater proportion appears to persist and negotiate subsequent agreements. Moreover, there

does not appear to be evidence that FCA provisions contribute to work stoppages. Notable is recurring support for mediation as a key element of an FCA procedure, appearing in a number of studies over a variety of years and jurisdictions. In particular there is strong support for BC's mediation-intensive FCA model, which approaches the process as a means of fostering collective bargaining prior to bargaining breakdown, rather than as a remedial tool. Mediation is not a part of the OLRA's current FCA provision.

### ***Options for Consideration:***

- *Provide support for first collective negotiations that is available prior to the point that negotiations have become “unsuccessful”.*
- *Introducing mediation as part of the first contract arbitration procedure.*

## **6.0 OLRB Remedial Jurisdiction**

This section addresses basic principles commentators have identified to guide labour boards' approaches to remedial awards, including research on deterrence-based optimal remedy design in the labour relations context. It then reviews the literature on labour board remedies, focusing on studies most relevant to the OLRA. A recurring theme among these studies is the ineffectiveness of labour board remedial awards. Lack of deterrent effect is generally identified as the key weakness of these remedial responses.

Although violations can occur at any stage of the bargaining relationship, the majority of research focuses on the early phases: organizing, certification and first contract negotiations. Adams notes that “a right can acquire substance only insofar as it is supported by effective remedies is nowhere more true than in a labour relations environment, and this relationship is best illustrated by cases arising out of the conflict stemming from the organizing efforts of trade unions” (Adams, 1983, p. 56). Of contextual interest, therefore, is research concluding that employer organizing and certification ULPs are common, intentional and effective. For instance, Bentham's (2002) multijurisdictional Canadian study, outlined earlier in this report, found that overt employer opposition and ULP commission during organizing was prevalent and it

significantly discouraged unionization and had negative effects on bargaining relationship. Riddell's studies of BC certification cases, described earlier in this report, also found that ULP complaints significantly negatively affected the likelihood of certification (2001, 2004). A later study of decisions on complaints of ULPs in BC during organizing between 1990 and mid-2007 found that 78% of all complaints and 88% of all ULP findings were made against employers. Illegal terminations and illegal employer communication with workers produced the most ULP complaints and findings against employers, and more than 90% of both ULP complaints and findings involved one or both of these forms of misconduct (Slinn, 2008). Therefore, remedies for ULPs during organizing and certification, and particularly for ULPs involving illegal communication or termination, are crucial parts of the OLRB's remedial offerings.

### **6.1 Remedial Principles in Labour Law**

George Adams (1983) and Constance Backhouse (1980) offer guidance on remedial principles applicable to labour law. Adams (1983, p. 59) indicates that effective remedies must be fair, compensatory and sensitive to the principle of deterrence. Backhouse (1980, p. 501) suggests that effective remedies would achieve the following: deprive the breaching party of the benefits of the unlawful conduct; prevent future breaches; and, compensate the parties harmed by the unlawful actions.

Broad remedial jurisdiction is necessary because legislatures cannot foresee all remedial responses necessary to meet future violations and novel solutions may be required for effective enforcement (Adams, 1983, pp. 56, 58). While substantive provisions should be applied as predictably and uniformly as possible, Adams suggests that different considerations apply for remedies. Some degree of unpredictability in remedial consequences may have a deterrent effect, and to "accept that parties plan their conduct in expectation of particular remedial awards is to sanction planned illegal conduct" (Adams, 1983, p. 60).

Adams (1983, pp. 57, 59) also recommends limits in that remedies cannot and should not create employee support for unions or substitute for good judgment by unions. Both "draconian" and insufficiently compensatory sanctions can undermine the integrity of the law, diminish respect for the tribunal and discourage parties' self-ordering. Adams emphasizes the legitimacy and importance of general and specific

deterrence as remedial considerations, and that deterrence is one purpose of compensation. Expeditious board procedures are potentially strong deterrents and may reduce reliance on remedies (Adams, 1983, pp. 59-61).

### 6.2 Deterrence-Based Design of Labour Board Remedies

Morris Kleiner and David Weil (2012) developed a deterrence theory-based approach to designing remedies in the context of US NLRB back-pay remedies. Compensatory remedies, such as in labour law, can be analysed as penalties within deterrence theory because they impose costs on violators. Designing penalties to reflect some facet of the wrongdoing can apply one of two rationales: basing the penalty on the benefits received from noncompliance or on the harms inflicted. Where costs to society are greater than costs to the wrongdoer of complying, a *benefits-received* penalty will be sub-optimal from a deterrence perspective and the penalty should, instead, reflect the *harms caused* to society by noncompliance. For instance, a labour board back-pay award for illegally termination of an employee reflects a *benefits-received* approach not a *harms-inflicted* approach because that remedy does not address the chilling effect of the termination on other workers (Kleiner and Weil, 2012, pp. 14-17). Where remedies are not sufficient to deter violators, the effect is to encourage unlawful conduct. Therefore, optimal deterrence-based remedies will set a penalty that reflects the harm caused by the wrongdoing (Kleiner and Weil, 2012).

Other studies adopting deterrence-based or rational choice approaches to labour law remedies identify categories of harm arising from violations, and, consistent with Kleiner and Weil (2012), emphasize the importance of aligning harm and remedy. Focusing on employer violations, three categories of harm have been identified as potentially resulting from an ULP, with a single violation capable of producing more than one kind of harm. These include harm to: the interests of individual employees, collective employee interests, and union interests. Individual employees have a substantive interest in their job and workplace; as well as a collective interest in their work and workplace: an interest in the opportunity to engage in collective activity in the workplace whether or not the employee decides to support unionization. Finally, unions as institutions have interests that may extend beyond a single workplace or group of workers, and some of these may conflict with individual employee interests. This

analytical framework – and the ability of individual and multiple remedial elements to address these harms – has been proposed as a useful set of criteria for assessing the adequacy of remedial awards in individual cases (Slinn, 2008, pp. 696-702). What could be regarded as a fourth category of interest susceptible to harm has also been identified: the public interest in consistent enforcement of public rights such as labour law (Murphy, 1980, p. 70; Adams, 1983, pp. 58-59).

A study of BCLRB decisions applied the three category of harm framework described above to assess remedial awards in published decisions issued between 1990 and 2007 for cases involving ULP complaints of illegal termination or employer communication during organizing (Slinn, 2008). With regard to termination ULPs, the typical remedy was reinstatement with or without back-pay (71% of cases). Rarely did remedies address harm to collective employee or union interests awarded, and these were most often communication orders (p. 720). In illegal speech cases, 79% addressed collective and union harm; 5% addressed all three categories of harm; and 16% were non-compensatory remedies, declarations or directions by the board to the parties to negotiate remedies. The overall findings suggested that termination and speech ULPs during organizing commonly resulted in unremedied harm, and that violators were not held responsible for the full extent of the harms caused. Therefore these remedial awards were unlikely to deter, and may encourage, violations. The study attributed this, in part, to the board's reluctance to impose significant remedies out of concern that wrongdoers would not find the remedial award acceptable (pp. 725-28). These deficient remedial responses create incentives for wrongdoers and disincentives for harmed parties to file ULP complaints, and "This discounting of the price for ULPs operates as an incentive to misconduct for a rational employer by making misconduct more "affordable" than if subject to a truly compensatory remedy. Subsidizing rogue employers in this manner also tempts otherwise law-abiding employers to engage in wrongdoing, as they see these other employers gaining an unfair advantage" (pp. 731-2).

### **6.3 Remedial Certification and Second Vote Remedies**

The limited amount of empirical research regarding remedial certification and second vote remedies under the OLRA is striking. This may reflect the difficulty of

obtaining such information and of analyzing the effects of non-monetary remedies. Most existing works are commentary by informed observers, based on reviewing published OLRB decisions.

Two articles address the removal of remedial certification from section 11 of the OLRA by Bill 31 in 1998, which left a second vote as the most substantial remedy available (Lebi and Mitchell, 2003; Mitchell, 2004).<sup>24</sup> These authors contend this change had a number of negative effects, including causing a drop in s.11 OLRA applications, encouraging unions to abort organizing where serious employer misconduct occurred early in the campaign, and removing an important deterrent to employer misconduct (Lebi and Mitchell, 2003; Mitchell, 2004, pp. 201-202). Lebi and Mitchell also point to the small number of OLRB remedial certification awards issued (28 over the 1990 to 1997 period) as evidence of these effects (2003, p. 479). However, there is no objective standard for assessing this volume of awards to support this impression.

These authors concluded that the OLRB issued some interesting, innovative, but ineffective remedies following Bill 31. Except for the construction industry (where the union can continue to represent the employees on other jobs between the first and second vote), the cases did not suggest that the OLRB was capable of providing effective relief in cases of serious employer ULPs during organizing (Lebi and Mitchell, 2003; Mitchell, 2004). Writing in 2003, Ron Lebi and Elizabeth Mitchell found that in only two cases did certification result from a second vote, and these involved small construction units (p. 481).

Judith McCormack has critiqued the OLRA second vote remedy, suggesting that such votes will likely reflect the ULPs that have occurred, and raised concerns about the timing of the vote. She suggested that the distorting effects of ULPs on votes may be greater under a quick vote system because of the proximity of the violations to the vote, although she also raised concerns about second votes being held after too long a delay (1997, pp. 351-352, 356).

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<sup>24</sup> Ontario, Economic Development and Workplace Democracy Act, 1998, S.O. 1998, c. 8, s.5 (Bill 31). Note that in 2005 remedial certification was reintroduced to the OLRB, in a more limited form (Ontario, Labour Relations Statute Law Amendment Act, S.O. 2005, c. 15, s. 2).

Joseph Rose and Gary Chaison (1997) assessed the application of labour statute amendments in 1993 in both Ontario and BC to four types of ULP remedies: expedited hearings for improper discipline or discharge during organizing; interim relief for dismissal; “just cause” protection from improper discipline or dismissal post-certification and before a first contract is settled; and, remedial certification. This study relied on published decisions and information from the boards. The authors acknowledged that the data was often incomplete, aggregate, fragmentary, or somewhat impressionistic (1997, pp. 664, 667). Regarding expedited hearings and interim relief, the authors concluded that these measures provided timely relief in Ontario, that the OLRB was able to meet the statutory deadline for holding hearings, and that these remedies may encourage settlements and avoid the need for formal hearings (1997, p. 667). In 1993 and 1994 fifty-six applications were filed with the OLRB under the just cause provision, but almost 60% of these were withdrawn, three applications were granted and two were dismissed (Rose and Chaison, 1997, p. 669).

Regarding remedial certification, the requirement that the union have adequate membership support was removed from the OLRA in 1993, but the provision continued to require findings that the employer had contravened the law and that employee true wishes were not likely to be ascertained. Fifteen remedial certifications were granted under this OLRA provision in 1993 and 1994, an increase from four in the two years prior. Of the nine cases reviewed, most involved unskilled and semi skilled workers in units of six to 60 members, and employer misconduct typically involved terminations and a concerted anti-union campaign. The authors noted that the employer misconduct was generally the same day or within a few days of finding about union organizing (Rose and Chaison, 1997, p. 670).

An older US study offers some insight into the effectiveness of remedial certification remedies. Under the US NLRA the “Gissel bargaining order” is the rough analogue to an OLRA remedial certification order, but arises from the NLRB’s general authority rather than from a specific statutory provision. Wolkinson, Hanslowe and Sperka (1989) sought to assess the remedial efficacy of Gissel bargaining orders by determining the likelihood that a union would subsequently achieve a negotiated first collective agreement. Using NLRB data and interviews with union organizers for all

Gissel orders issued between January 1981 and July 1984, the study found that 42 of the 49 cases involved illegal termination, and five involved threats. First collective agreements were achieved in 39% of the cases. The type of ULP significantly influenced whether contracts were reached: 80% of cases involving threat ULPs settled, but only 35% of those involving termination ULPs settled first contracts (Wolkinson et al., 1989, p. 515). The study also examined whether illegally terminated employees returned to the workplace. Among the 32 of the 42 termination case for which information was available, contracts were reached in 44% of the 16 cases in which some or all employees returned to the workplace; but contracts were settled in only 25% of the other 16 cases in which employees did not return. The authors concluded that the failure of terminated employees to return to the workplace communicated to other employees the danger of supporting the union, demonstrating that the union was not able to protect employees (Wolkinson et al., 1989, p. 516). This study concluded that this indicated that bargaining orders must be combined with other remedies to be effective, and recommended greater use of injunctions to return discharged employees to the workplace and of awards of costs of organizing.

### 6.4 Monetary Remedies

NLRB back-pay orders have attracted significant academic attention among US researchers. In this regard it is important to recognize the greater reliance by the NLRB on monetary compensation as a remedy as part of a “make whole” approach, compared to Canadian labour boards’ much more limited use of monetary compensation and “make whole” remedies. Most relevant among the US back-pay studies are those by James Brudney (2010) and Kleiner and Weil (2012).

Brudney (2010) examined all NLRB illegal termination ULP cases closed in 2006 to assess the effectiveness of the NLRB’s back-pay and reinstatement remedies. The main finding was that a substantial proportion of workers awarded back-pay did not receive full compensation. In 15 to 20% of settled cases, and 39 to 43% of cases litigated at the NLRB or courts, employees did not receive the full amount of back-pay that the NLRB had determined was owed as a remedy for illegal termination.<sup>25</sup> Brudney

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<sup>25</sup> Unlike the OLRB, the NLRB, and Regional Officers and General Counsel exercise a degree of oversight over settlements. For instance, for one category of settlement, even



calculated that employees received 53 to 58% of the full amount owed, among settled claims, but only received 38 to 43% among litigated claims. The author attributes this largely to the effects of delay (Brudney, 2010, pp. 669-671).

Applying their model for optimal deterrence remedies, outlined above, Kleiner and Weil (2012, pp. 217) assert that the NLRB's approach to its remedial authority implies a "benefits-received" model, which leads to *de facto* penalties that are lower than what is required to realize the policies of the legislation. The harms caused by ULPs are not limited to workers directly affected by the employer action, yet the typical remedies (in this case, back-pay awards) apply only to employees directly affected by the violation. Consequently, the authors judged NLRA remedies to be poorly oriented to a deterrence-based objective of reducing conduct interfering with employees' free choices about unionization (p. 233).

To test this conclusion, Kleiner and Weil (2012) examined NLRB remedial back-pay awards for a variety of types of employer and union ULPs decided between 2000 and 2009 to assess the special or general deterrence effects of these remedies. The key finding regarding employer ULPs was that, for violations relating to discrimination for union activity by employees, anticipated costs to an employer to defeat organizing were approximately \$200,000 USD. However, the benefits of defeating the union, measured as expected cost savings arising from continued as a non-union enterprise, were much greater, including the present value of future compensation increases and other transfers of surplus from shareholders and owners of the firm to the workforce resulting from unionization. The authors offered an illustrative example of a 200-person firm with \$30,000 annual compensation per employee, where thwarting unionization might result in annual compensation increases of 2% instead of 5% if unionized. If the firm remained non-union the firm could anticipate \$6.8 million savings over a decade (Kleiner and Weil, 2012, p. 230). Regarding union violations, the results were less clear, but still suggested potential benefits outweighed anticipated costs of ULPs. During the

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though it is a private agreement between the employer and terminated employee or union, the charging party may withdraw the NLRB case only if the NLRB's Regional Office considers that the agreement is not repugnant to public policy. See Brudney (2010, pp. 662-664) for detailed explanations of various forms of settlement of meritorious termination ULPs under the NLRA.

study period unions were under heightened government scrutiny, leading the authors to conclude that this difference is likely explained by a lower incidence of violations rather than less recourse to the NLRB (Kleiner and Weil, 2012, pp. 233).

### 6.5 Timeliness, Interim Remedies and Expedited Hearings

Examining NLRB ULP termination cases over the 2004 to 2008 period, Brudney (2010) found that the time from termination to resolution of meritorious back-pay cases was lengthy and substantially longer for litigated than for settled cases.<sup>26</sup> Looking at individual NLRB charges, this study found that resolution times ranged from nine months to more than 18 months for cases that settled, and, for claims resulting in litigation decisions, the elapsed time ranged from nearly five years for NLRB decisions to seven years for court decisions (Brudney, 2010, pp. 668-669).<sup>27</sup> The author notes that not only does lengthy delay in back-pay payments deny the illegally terminated employees a return to *status quo*, but also dissuades other employees from supporting organizing (p. 673-674).

Similarly, Kleiner and Weil's (2012) study of several types of NLRB ULPs resulting in back-pay remedial awards found significant delays in ULP processing. Calculating the time from complaint filing to NLRB final decision as median of 4.8 to 5.7 years for different categories of employer ULPs; and 3.3 to 4.7 years for categories of union ULPs (pp. 234-236).

Brudney proposed a system of mandatory minimum back-pay awards as a means of creating an incentive for employers to make timely back-pay payments, and to operate as a deterrent (2010, pp. 647,674).<sup>28</sup> This "two-tiered" approach provides that illegally terminated employees would be awarded at least three months of back-pay where the matter settles. Where liability or back-pay is litigated, successful employees

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<sup>26</sup> These elapsed time calculations excluded board-settled claims and payments made in compliance with Administrative Law Judge decisions due to the very small number of cases in these categories.

<sup>27</sup> The author also calculated the elapsed time using the individual employee, rather than the individual charge, as a unit of analysis. Average elapsed times for each category of resolution were longer under the latter calculation. The author speculates that this difference may reflect the greater complexity, and therefore likely greater time to resolution for cases involving multiple employees (Brudney, 2010, p. 669).

<sup>28</sup> The notion of minimum mandatory back-pay awards was explicitly modeled on the NLRB's approach to remedies for violations of the good faith bargaining obligation.

would be entitled to a minimum of one year of back-pay. These awards are to be made without regard to mitigation. Brudney explicitly based these back-pay periods on the average times to receiving back-pay, and the two-tiered nature of the significant differences in delay between settled and litigated cases (2010, p. 647-648). Kleiner and Weil regard this mandatory minimum back-pay proposal as possibly effective, but question whether it would increase expected costs to employers sufficiently to be an effective deterrent, given what they call the “yawning gap between the benefits and the costs of noncompliance” (2012, pp. 234).

Based on the findings of their study, Kleiner and Weil (2012) proposed a remedial approach targeted at reducing time between ULP complaints and rulings. One option would be to find administrative mechanisms to sort and resolve ULP cases more expeditiously, or the NLRA s.10(j) authority for the NLRB to seek an interim injunction to temporarily prevent ULPs to restore status quo.<sup>29</sup> They were skeptical of the potential efficacy of this, but suggested that strategic use of injunctions may have a deterrent effect. Strategic use of this power could signal that the NLRB is serious about enforcement. This approach may be particularly useful in cases of repeated serious violations or cases of importance to other or future violations (Kleiner and Weil, 2012, pp. 237).

Similarly, commentators on Canadian labour law emphasize the importance of interim remedies – particularly interim reinstatement – as a remedial tool. Cornish, Simond and Turkington (1996) reviewed OLRB decisions issued under the Bill 40 interim remedy provision and commented on its application and effects. For ULP cases the OLRB assessed the balance of harm according to the stage of the bargaining relationship during which the alleged violation occurred (organizing, certification process, first contract negotiations or during the life of a collective agreement) and was most willing to award interim relief during the earliest stages than in mature relationships. Notably, most applications arising from organizing or certification cases involved discipline or discharge of union organizers (p. 52). The likelihood of interim relief appeared to relate to the importance of the institutional or public interest at issue

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<sup>29</sup> In contrast with the OLRB the NLRB lacks jurisdiction to make interim orders, and is limited to seeking injunctions issued by a federal court.

in the main application, and the OLRB appeared less likely to intrude on employer interests in the absence of significant institutional or public interest (p. 83). Although the OLRB did not accept the argument that interim reinstatement necessarily caused employers serious harm by temporarily eroding managerial authority, neither did it award compensation in conjunction with interim reinstatement, finding interim relief was not designed for that type of harm (pp. 56, 68). The authors suggested that posting notices in the workplace in interim reinstatement cases increased the effectiveness of the order to offset any chilling effect of the termination, while recognizing that reinstatement might be reversed (p. 68).

In the authors' view the Bill 40 interim relief power significantly increased parties' ability to enforce OLRA rights, and this was most apparent regarding organizing and first contract negotiations (Cornish et al., 1996, p. 40). They credit interim reinstatement with reducing the occurrence of such terminations; increasing settlements, thereby reducing the need for hearings by putting unions in a better negotiating position with an employee returned to the workplace (pp. 40, 81-83). Overall, the authors concluded that the interim relief power substantially reduced the advantages to employers of engaging in ULPs (p. 82). They also attributed the effectiveness of this power to interaction with other remedial tools such as just cause protections, and expedited hearing procedures (pp. 82-83).

Lebi and Mitchell (2003) attributed the substantially longer ULP processing times that existed between 2001 and 2002, compared to between 1994 and 1995, in part to Bill 7's removal of the expedited hearing process requiring hearings to continue day-to-day and of interim reinstatement. They conclude that union applicants were not likely to obtain timely and effective relief, discouraging unions from making legitimate complaints (pp. 478-479). These conclusions accord with Bartkiw's (2008) interpretation of changes in ULP dispositions over this period, addressed in an earlier section of this report.

Finally, Elizabeth Mitchell, writing in 2004, concluded that the Charter protected freedom of association, as outlined in *Dunmore v. Ontario* (2001) would likely be found to have been violated by the Bill 31 removal of remedial certification from the OLRA, and in a manner that would not be justifiable under s.1 of the Charter (pp. 191-204). She points to the subsequent decline in both the number of certifications applied for and

granted, and what she concludes are ineffective alternative remedies, as compelling evidence of the negative effects on employees' freedom of association of removal of the remedial certification option (pp. 196-203). Although the article relies on limited data and simple tallies of case numbers, the argument is compelling, particularly in light of post-*Dunmore* developments in Charter freedom of association jurisprudence.

### **Options for Consideration:**

- *Explicitly incorporate the anticipated deterrent effect of a remedy as a factor the OLRB considers in formulating remedial awards, focusing on the “harms caused”, not on the “benefits received” by the violation.*
- *Adopt a “benefits-received” rather than a harms-inflicted approach*
- *Better align remedies with harm caused by ULPs by explicitly incorporate full compensation for all forms of harm as a factor the OLRB considers in formulating remedial awards.*
- *Give the OLRB authority to impose specified financial penalties, in addition to compensatory remedies, including OLRB discretion regarding whether the penalty is payable to the government, the employer, the union, or one or more employees, or any combination of these.*
- *Introduce mechanisms such as expanded scope for interim relief and expedited ULP hearings for complaints of ULPs arising during union organizing with the goal of providing effective remedies prior to a representation vote.*
- *Reintroduce a greater scope for remedial certification awards.*

## **7.0 Broader-Based Collective Bargaining Structures**

This section reviews existing and proposed statutory broader-based collective bargaining structures. These include the Quebec decrees system, the Ontario *Industrial Standards Act*, the federal *Status of the Artist Act*, the Ontario construction bargaining system, and the Quebec home childcare workers' bargaining legislation. Then, three comprehensive proposals for broader-based bargaining legislative regimes are

reviewed: the Baigent-Ready small workplace proposal, a low-wage service sector proposal, and a proposal directed specifically at domestic and garment industry workers.

There is confusion and lack of common understanding about the meaning of “sectoral”, “multi-employer” and “broader-based” bargaining (Eaton, 1994; MacDonald, 1988, 1987; Lanyon, 1998). This report uses the term “broader-based bargaining” to refer to systems providing collective representation and bargaining rights beyond a single workplace, and encompasses multi-employer and sectoral bargaining structures. As discussed below, some broader-based bargaining approaches include both sectoral and multi-employer bargaining features.

### 7.1 Quebec Decrees System

The Quebec decrees system is a system permitting “juridical extension” of certain collective agreement provisions to cover employers and workers in a given geographic and industrial “sector” who were not parties to the original collective agreement was established in Quebec by the 1934 *Collective Labour Agreements Extension Act* and is now set out in the *Act Respecting Collective Agreement Decrees* (CAD).<sup>30</sup> The CAD predated the Quebec *Labour Code*, the general certification and collective bargaining legislation in the province, which was not introduced until 1944, and which replaced the voluntarist *Trades Disputes Act*.<sup>31</sup> Thereafter, at least until 1996, the CAD and *Labour Code* operated in parallel as independent systems. The purpose of the CAD was to reduce unfair competition on wages and working conditions among unionized and nonunionized firms (Jalette, Charest and Vallee, 2002, p. 35; Government of Quebec, 2014 p. 3).

This report primarily addresses the pre-1996 CAD system because this is the version of the CAD that is most useful to consider in terms of a possible model. In 1996, the CAD was significantly amended, changing the nature of the CAD system. These amendments are briefly outlined below. The post-1996 CAD is addressed insofar as academic research evaluates the effects of these statutory changes.

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<sup>30</sup> Quebec, *Collective Labour Agreements Extension Act*, S.Q. 1934, c. 56; Quebec, *An Act Respecting Collective Agreement Decrees*, CQLR c D-2.

<sup>31</sup> Quebec, *Labour Relations Act*, S.Q. 1944, c. 30, now the Quebec *Labour Code*, CQLR c C-27; Quebec, *Trades Disputes Act*, S.Q. 1901, c. 31.

At its height, in 1959, 120 decrees existed under the CAD, in a variety of industries, covering 33,000 employers and 250,000 workers (Quebec Ministry of Labour, n.d.a.). This accounted for about 15% of the non-agricultural labour force, with the majority of these employees also subject to union collective agreements (O'Grady, 1992b, p. 165; Bergeron and Veilleux, 1996, p. 140). The CAD system declined thereafter. In 1968 the *Construction Industry Labour Relations Act* removed the construction industry from the CAD system, and into a separate labour relations regime.<sup>32</sup> This contributed significantly to the decline of the CAD, resulting in 16 decrees and over 100,000 construction industry workers leaving the CAD system (Eaton, 1994, p. 320-321 citing Grace 1992, p. 3). Decrees tended to exist in highly competitive, low-wage sectors, with labour intensive production, and in small and medium size firms (Déom and Boivin, 2001, p. 489). In 1995, there were still 120,420 workers and 13,428 employers operating under decrees (Quebec Ministry of Labour, n.d.b.). Otherwise, the CAD system remained essentially unchanged until 1996, when it was significantly, and controversially, amended to narrow its scope.<sup>33</sup> The key changes are addressed later in this section. By 2010, 16 decrees existed, involving 8,839 employers and 75,478 workers, mostly in service industries (14 decrees and 74,214 workers), particularly in automotive services, and with only 21.6% of employees covered by a decree also unionized under the *Labour Code* (Quebec Ministry of Labour, n.d.a, n.d.b., n.d.c.).

### 7.1.1 The Pre-1996 System

Under the CAD the government may proclaim by “decree”, an order-in-council, that certain terms of an agreement or collective agreement be extended beyond the parties that negotiated it, to cover all employers and employees doing the same kind of work, in a sector, which is a specified “trade, industry, commerce or occupation” in a particular geographic area which may be the entire province, or a defined region. That is, it extends application of a collective agreement to all enterprises and their workers across an occupational and geographical sector. The emphasis is on regulating a type

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<sup>32</sup> Quebec, Construction Industry Labour Relations Act, S.Q. 1968, c. 45.

<sup>33</sup> Quebec, An act to Amend the Act respecting collective agreement decrees, S.Q. 1996, c. 71.

of work rather than on regulating workers. Such “juridical extension” applies to both union and non-union employees. An array of provisions could be included in an extension. These included wages, hours of work, working days, paid vacation, social security benefits, classification of operations, classes of employees and employers and a provision for including provisions “in conformity with the spirit of the act”. The scope of extendible provisions was narrowed in 1996.

Therefore, the first step was for a collective agreement to be reached by one or more employee associations and one or more employers or employer associations. Even “conditional agreements” which come into force only when and if a decree is proclaimed, can be the basis for a decree extension (Eaton, 1994, p. 324 citing Bernier, 1992, p. 1-2). It was not necessary that the employee association be certified or that it demonstrate majority support; therefore even agreements reached with nonunion employee associations were eligible for extension. (These features of the CAD changed in 1996). Thereafter, any party to a collective agreement could to apply to the government for a decree.

Jean Bernier (1993) noted that the CAD provided no procedure for negotiation of extension of an agreement, but generally a two-round procedure occurs. Typically the largest unionized firms in a sector negotiated a collective agreement as usual under the *Labour Code*. Then, a second round of voluntary negotiations is held among those employers and unions that are interested in seeking extension to determine the terms that would be subject to the extension, as well as the geographic and occupational scope of the decree that will be requested (p. 748). Typically, these will be “conditional agreements”, which come into effect when and if the degree is granted. This protects parties in case the decree is not granted or the Minister amends the agreement (p. 738).

The Minister has the discretionary power to issue a decree. Prior to the 1996 amendments, this depended on whether the Minister deemed that the provisions of the agreement have acquired a “preponderant significance and importance for the establishment of conditions of labour, without serious inconvenience resulting from the competition of outside countries or the other provinces”, taking into consideration the economic conditions of the relevant region. Thus the geographic reach of the decree depends on the scope of competition: local, regional, or, if competition is national or



international the decree will be province-wide (Jalette, Charest and Vallee, 2002, p. 35). (More detailed economic criteria apply post-1996). The “preponderant significance” criterion operated as a representational threshold. Though not defined in the CAD, the Minister would consider the numbers of employers and employees subject to the agreement and the economic importance of the establishments that would fall within the requested decree (Eaton, 1994, p. 325, citing Grace, 1992, p. 10).

The Minister publishes requests and draft decrees, seeking any objectors. Upon expiry of the notice period the Minister may recommend that the decree be issued, but has the power to amend the decree as he or she deems expedient. Decrees are not of indefinite length. The government may extend the term of a decree, or, after consulting with the parties and giving notice for objections the government may repeal or amend a decree. If a decree is repealed or not renewed, all the individual units legally revert to the status of being independent and may engage in voluntary sectoral bargaining, but can no longer compel the employers to do so.

When a collective agreement is first extended, a “parity committee” is established, including employer and employee representatives, which is responsible for overseeing and enforcing the decree, and advising parties of the decree’s terms and conditions. Committees are funded by employer levies. The CAD does not specify how renewal decrees are to be negotiated, but parity committees operate as the natural forum for subsequent negotiations (Bernier, 1993, p. 750).

It is important to note that juridical extension is only one aspect of the CAD system, and that it is not necessary for a party to an agreement to seek a decree for juridical extension. Where a decree is not sought or is denied, then the other parts of the CAD, such as those relating to parity committees and employee claims, may still apply. Thus the CAD was not only a juridical extension mechanism, but it also provides a framework for collective bargaining that, prior to the 1996 amendments, did not require majority support or certification.

### 7.1.2 The 1996 Amendments

The CAD was extensively amended in 1996.<sup>34</sup> Key changes included addition of detailed economic criteria the Minister will consider in deciding whether to recommend a decree be issued or whether to renew or amend a decree. These criteria require the Minister to consider, and to take into account, whether a decree will or has negatively affected the industry's competitiveness outside of the province.<sup>35</sup> This introduced a new focus on the economic repercussions of collective agreement extensions (Vallée and Charest, 2001, p. 85). The scope of provisions eligible for extension was also significantly narrowed. In addition, the definitions of "association", "agreement" and "collective agreement" were amended such that now only collective agreements within the meaning of the *Labour Code*, and made by one or more associations certified under the *Labour Code*, can form the basis of a juridical extension under the CAD.<sup>36</sup> Other changes included revisions to the operation of parity committees and removal of the possibility of overlapping decrees.

### 7.1.3 Assessment

There are two streams of academic literature addressing the CAD. First, are general assessments of the system's strengths and weaknesses as a possible framework for constructing a new statutory broader-based bargaining regime,

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<sup>34</sup> Recommendations of a recent report and review of the CAD include, among other changes, suggest reversal of some of the key 1996 amendments (See: Government of Quebec, 2014; Bernier and Fontaine, 2012).

<sup>35</sup> Section 6 criteria now include whether the Minister considers that the provisions of the agreement:

- (a) have acquired a preponderant significance and importance for the establishment of conditions of employment;
- (b) may be extended without any serious inconvenience for enterprises competing with enterprises established outside Québec;
- (c) do not significantly impair the preservation and development of employment in the defined field of activity; and
- (d) do not result, where they provide for a classification of operations or for various classes of employees, in unduly burdening the management of the enterprises concerned.

Section 6 also permits the Minister to "give proper consideration to the particular conditions prevailing in the various regions of Québec." In deciding whether the proper field of activity is defined in the application.

<sup>36</sup> See CAD, ss. 1, 10.

particularly for precarious workers. This literature deals with the pre-1996 system. The second stream assesses the operation of the CAD, particularly after the 1996 amendments, addressing how the system may interact with employer competitive strategies; the nature of developments in the decree system; and, the effects of removal of decrees on particular sectors.

Jalette (2006) catalogues the advantages of decrees that have been generally identified. (Though he noted that these assertions are generally not based on empirical evidence and are not in reference to specific sectors). These advantages include: it reduces wage-based competition; makes it possible for vulnerable workers (a largely female, multi-ethnic, and low skilled work force in some sectors) of small and medium firms to access better work conditions and to participate in determining their work conditions in parts of the private sector where unionization is difficult; offers a less conflictual approach than traditional labour relations; involves ongoing dialogue between participants, including government; and, fosters employer consultation and coordination. Because the CAD (prior to 1996) did not require formal certification before an association can negotiate an agreement and seek extension, the system was accessible to vulnerable workers for whom formal majority certification procedures are a significant barrier (Intercede, 1993, p. 40; Eaton, 1994, p. 323).

Some concerns about the CAD system include that higher wages and work conditions may hamper competitiveness, particularly internationally. For sectors with local competition, the concern is about a decree's effect on local competition and barriers to entry (Jalette, 2006). Also, because extensions include a limited array of matters, and workers under extensions do not become union members, there is a concern that it is akin to minimum standards legislation (MacDonald, 1997, pp. 272-273). Some object to the CAD on the grounds that workers covered by extensions chose neither collective representation nor the extended terms (MacDonald, 1997, pp. 272-273). Finally, although there is no formal certification requirement, the "preponderant significance" criterion functions as a representational threshold, introduces uncertainty into the system, and may be a barrier in sectors experiencing significantly declining unionization (Intercede, 1993, p. 40, 42).

The study that is perhaps the most useful for understanding the benefits and

limitations the CAD system can offer to employers and employees, and in what circumstances, is Patrice Jalette's 2006 case study of the building services sector. The study asks whether institutional advantages to employers arising from decrees outweigh their costs. The theory underpinning the study is that of varieties of capitalism. That is, that firms can compete within a variety of different institutional contexts, and that there is not a single form of capitalism. This study examined economic indicators for the industry, comparative wage data, and interviewed employers and major actors in the sector for the 1992 to 2004 period.

In addition to finding a high degree of satisfaction with the system among those actors most involved with it, economic performance indicators over the 1992 to 2004 period show that this sector experienced significant growth. Significant increases were seen in: the number of employers (61%), number of employees (30%) and wage bill (30%) over the period (Jalette, 2006, p. 339). Comparison of Decree wage rates over the study period with the Montreal CPI and the provincial statutory minimum wage found that wage increases under the Decree (13.1%) were substantially lower than both the CPI increase (20.7%), and increases in the minimum wage (30.7%). Therefore there was a proportional decrease in the gap between the decree rates and the market minimum wages and a loss of purchasing power for workers. However, the Decree wage rate was higher (\$12.95), in absolute terms, than the statutory minimum wage (\$7.45) (pp. 339-340).

The study also found, for 2004, Decree wage rates (\$13.15 heavy maintenance; \$12.75 light maintenance) were lower than in-house building services rates paid by large firms in either the private sector (\$16.11 mean) or public sector (\$13.28 mean) (Jalette, 2006, p. 340). However, Jalette notes that this wage differential may arise because larger firms typically pay higher wages and most firms in the building services sector are very small (2006, p. 340). The study concluded that although the CAD reduced managerial discretion in wage setting, employers continued to have significant control over labour costs and rates, and "the Decree system seems to control wages better than if they were market- or State-regulated" (pp. 340-341). Finally, the annual cost of building services per square foot (a labour efficiency indicator) for 2002 in Montreal was less than for Toronto for both the private and public sectors. The author

concluded that the prices paid for building services in Quebec don't seem to penalize employers (p. 341).

This study discerned four institutional advantages to employers of the decree system, in addition to industry-level wage coordination: a stable work force with low turnover; a large and valuable pool of workers leading to reduced competition for skilled labour; promotion of productivity factors other than labour costs, including increased employee productivity (although firms may experience an initial "shock effect"); and, the positive role of the parity committee (Jalette, 2006, pp. 342-343). Notably, whether employers supported or disliked the decree system, Jalette reported that each employer respondent "spontaneously identified concrete advantages of the decree system" during interviews (pp. 342-343).

Jalette, Charest and Vallée (2002) undertook a case study of clothing industries after the repeal of decrees in this industry, analyzing the effects of these changes on the conditions of employment of workers who were previously covered by decrees - within the largest sector affected – the clothing industry, and the resulting changes in the process of regulating conditions of employment. Comparing the situation in 1996 to that in 2001, the number of decrees fell from 29 to 18 in all sectors, and from 12 to 3 in the manufacturing sector. Between 1996 and 2001 the number of employers covered by decrees in manufacturing fell from 4,262 to 179 and the number of employees covered declined from 53,540 in 1996 to 1,956. For all sectors, the decrease in decree coverage over this period was from 120,420 employees to 71,235. However, the number of decrees in the service sector remained fairly stable. There were 15 decrees in 2001 compared with 17 in 1996, and the number of workers covered rose from 67,080 in 1996 to 69,279 in 2001, but the number of employers fell from 9,166 to 8,836 (pp. 36-37).

The authors explored how employees previously covered by decrees in the clothing industry were now regulated. At the time of this study, regulation of these workers was governed by an extended statutory transition period during which the government introduced sector-specific standards and the Minister sought input from representative bodies in the industry on permanent standards for employees previously covered by the decree. The study found that parties were neither negotiating

agreements nor participating in setting statutory regulations. Employers took a consultative approach while unions sought to negotiate standards. The authors noted that, in the absence of decree obligations to negotiate jointly, unions are “virtually incapable” of pressuring employers to do so (Jalette, Charest and Vallée, 2002, p. 40).

The study concluded that, at least during this transition period, simple deregulation had not occurred. Rather, it was reregulation characterized by sectoral state intervention in the field of minimum labour standards. Power and responsibility had been taken from parties by removing the sectoral negotiation system and relocating it in the state, giving it a new role. Not yet clear was whether the final form of this reregulation would be “negotiated law”, a stopgap measure, or a “soft” or gradual form of deregulation in the industry (p. 41). The key to the old system, the obligation to negotiate on a sectoral basis, was replaced with an ineffective voluntary concertation process accompanied by transitional measures. Failure of voluntary sectoral negotiations to set new industry standards due to employer unwillingness to engage with unions has left the state having to regulate employment standards. The open question was whether this reregulation would be permanent (Jalette, Charest and Vallee, 2002, p. 44).

Overall, commentators regard the decree model as a possible starting point for conceiving of a new model, particularly for small workplaces and nonstandard workers, rather than an approach capable of wholesale application to another context (O’Grady, 1992, pp.165-166; McDermott, 1993; Vosko, 2000, p. 268).

### **7.2 Ontario Industrial Standards Act**

The Ontario *Industrial Standards Act* (ISA), passed in 1935 and repealed in 2001, provided a means for sectoral regulation of wages and working conditions by way of “schedules” which bound all employers and employees in a specified industry in a specified geographic zone.

The ISA was intended to introduce fair trade practices, including curbing excessive competition based on wages and working conditions, particularly in the “sweated” trades and in the commercial-industrial segment of construction (Government of Ontario, 1963, p. 6; Fudge and Tucker, 2000, p. 272). Legislation from other jurisdictions providing for development of trade codes and standards developed in

conjunction with employee associations influenced the ISA (Government of Ontario, 1963, pp. 4-6).<sup>37</sup> However, the ISA underwent extensive amendments in the two years following its introduction, which had the effect of reorienting the ISA from “fair wage” to “minimum wage” legislation (Cox, 1987, p. 572-73).<sup>38</sup>

The ISA employed a type of juridical extension mechanism, but was much weaker and was legislation of a “distinctly different character” than the (Government of Ontario Report, 1963, p. 3). The ISA was more voluntarist, and was designed to involve more government control over the system, than the CAD (Cox, 1987, p. 560). It has been characterized as a “compromise enactment”, containing no explicit encouragement of trade unionism or of collective bargaining” (Government of Ontario, 1963, p.7).

Under the ISA the Minister of Labour could designate the province or any part of it as a zone or zones for industry, and could change or divide designated zones. Province-wide zones applied to inter-provincially competitive industries. Certain industries were excluded from the scope of the ISA: mining or agriculture; and restrictions applied to schedules for the retail gasoline service industry. Employees or employers in an industry could petition the Minister to call a conference of employers and employees in the industry to negotiate a “schedule” of minimum standards including wages, hours of work, working days, vacation pay and overtime limits and overtime. Negotiated schedules were submitted to the Minister who had the discretion to approve schedules agreed to by a “proper and sufficient representation of employers and employees”.<sup>39</sup> Approved schedules were enacted as regulations in force “during pleasure”, and applied throughout the designated industry and zone. Although the ISA did not explicitly address or encourage unionization or collective agreements, in practice the resulting schedules and regulations were commonly based on collective agreements

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<sup>37</sup> These statutes included: United States, National Industrial Recovery Act, 1933, 48 Sta. 195; Alberta, Department of Trade and Industry Act, 1934, S.A., c. 33; United Kingdom, Cotton Manufacturing Industry (Temporary Provisions) Act, 1934, c. 30.

<sup>38</sup> Ontario, An Act to amend The Industrial Standards Act, 1935, S.O. 1937, c. 32; Ontario, An Act to amend The Industrial Standards Act, 1935, S.O. 1936, c. 29. It was substantially amended for the final time in 1964, following the extensive recommendation reforms identified in the Bora Laskin’s 1963 Committee of Inquiry report (Ontario, An Act to amend The Industrial Standards Act, S.O. 1964, c. 46).

<sup>39</sup> ISA, s. 10(2).

(Brennan, 1993, p. 93). The Director of Labour Standards had authority to unilaterally amend schedules.

For each zone or group of zones for which a schedule applied, the Minister could establish an advisory committee composed of up to five members. The ISA did not specify the proportion of employer and employee representatives. Advisory committees were charged with carrying out the schedule, and could hear complaints from employers and employees as well as hire inspectors to investigate compliance. Appeals from advisory committee decisions went to the Director of Labour Standards for final decision.

The ISA prohibited discharge or threats of discharge or discrimination against employees for testifying in ISA proceedings or investigations or providing information about employees' hours, days, earnings or working conditions to the Director. An additional penalty for breach of these prohibitions was an order to reinstate the employee, and which could include compensation for lost earnings and other employment benefits. These orders could be filed in superior court for enforcement purposes. Reinstatement orders were not to be stayed where the employer appealed the order.

Government industrial standards officers were primarily responsible for enforcing schedules, although advisory committees could assist. Enforcement was financed by levies on employers. Schedule violations were offences, with a maximum fine of \$50,000 for employers and \$2000 for employees upon conviction. Employers that defaulted on fines could be imprisoned for up to six months, although consent for prosecution was required from the Director. Employers convicted of failing to pay minimum wage rates would be ordered to pay the Director the full amount of unpaid wages as an additional penalty. The Director had discretion to decide whether to direct all or part of that amount to be forfeited to the Crown or to the relevant employee. The Director could file a copy of an order for payment of wages in superior court or small claims court.

At its zenith, in 1956, the ISA supported 149 schedules, 70 of which were in the building trades, 64 in barbering, four in clothing, and 11 in other industries (Government of Ontario, 1963, Table 1). Over time, the ISA receded in relevance and importance in



light of other statutory regimes. Particularly influential in this regard were introduction of the Employment Standards Act and removal of the construction industry from the scope of the ISA in the 1970s. By 1994, for example, only two advisory committees were operating: the Committee for the Ladies' Dress and Sportswear Industry and the Committee for the Ladies' Suit and Cloak Industry, and the wage schedules in these industries had not been updated since 1982. Only about 2,000 employees were covered by these schedules, and were mostly located in the Toronto region (Eaton, 1994, p. 343, 345).

The ISA had several key strengths. First, the ISA's broad definition of "employee" as "a person who is in receipt of or entitled to wages" was likely capable of including nonstandard workers (Eaton, 1994, p. 344). The ISA also contemplated the possibility of the same person being deemed to be both an employee for one purpose and an employer for another. Non-union employees and nonstandard workers therefore had the benefit of input into developing standards, and the benefit of union participation in standard-setting and enforcement (Intercede, 1993, p. 34). However, Eaton contended that worker participation would be better ensured by a system that applied collective agreements (such as the CAD), rather than substitutes for collective agreements, as the ISA did (1994, p. 346-47).

Finally, common, enforceable, standards across industrial sectors likely reduced pressure to compete on wages and working conditions in these highly competitive sectors, and avoided the problem of putting employers providing decent standards at a competitive advantage. Consequently it may also have reduced employer opposition to unions (Intercede, 1993, p. 34; Eaton, 1994, p. 345). However, writing in 1963, Bora Laskin concluded that insofar as the ISA had been effective, it was mostly attributable to the foundation of established collective bargaining structures (Government of Ontario, 1963, p. 1).

The ISA also had some important weaknesses. First, the definition of employer, included only the party directly or indirectly responsible for paying wages to a worker, and the ISA lacked mechanisms for imposing joint liability on producers. Consequently, it was incapable of addressing complex production chains and subcontracting that characterizes some industries, and the final purchaser of services, the party with

greatest control over working conditions, was not regulated by this system (Intercede, 1993, p.34; Eaton, 1994, p. 344).

One of the ISA's greatest weaknesses was that it was voluntary, lacking any means to require employers to participate in establishing schedules. Consequently, schedules were established in few sectors, primarily the garment and construction industries, where joint regulation was regarded as desirable by employers (Fudge and Tucker, 2002, p. 272).

Another key shortcoming was the ISA's limited capacity for enforcement and inspection, which was weaker than that of the ESA, and relied heavily on inadequately funded government inspectors. The resulting lack of enforcement encouraged employers to violate the Act (Government of Ontario, 1963; Intercede, 1993, p. 34). This was exacerbated by short, 6 month, limitation periods and the requirement for consent to prosecute (Intercede, 1993, p. 34).

Other criticisms focus on the advisory committee mechanism and schedules. Not only did the ISA not address the proportion of employer and employee representation to be on committees, but it did not address how to resolve deadlocks (Intercede, 1993, p. 33). The ISA gave the Minister of Labour too much discretion, including over the content of schedules (Eaton, 1994, p. 346). Commentators contend that there was a history of the Minister imposing lower standards in schedules that had been recommended by advisory committees, without consulting with the committees. Moreover, there were lengthy delays in approving schedules. As a result, schedules were sometimes out of date by the time they were finally approved (Intercede, 1993, p. 33).

Finally, the ISA is criticized as having had the effect of reinforcing gendered fragmentation of wages and working conditions, such as with the garment industry schedule, which put women workers at the bottom of the skill hierarchy (Steedman, 1998; Fudge and Tucker, 2002, p.272).

Despite the shortcomings of the ISA, it has been regarded as a credible starting point for developing a system of broader-based bargaining in Ontario (Eaton, 1994, p. 345; Brennan, 1993, p. 94).<sup>40</sup> However, these views were expressed in the early and

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<sup>40</sup> As addressed below, the ISA appears to have strongly influenced the proposal for a garment and domestic worker bargaining structure.

mid-1990s, when the ISA was still in operation. Now that the ISA has been defunct for a decade and half, the system as a whole does not seem to hold much promise as a model for broader-based bargaining, although a few elements of the ISA, such as its broader definition of employee, may be useful considerations in constructing a new broader-based bargaining framework.

### 7.3 Federal Status of the Artist Act

The federal *Status of the Artist Act* (SOA) provides a collective bargaining framework for self-employed professional artists and producers under federal jurisdiction within the arts and culture sector.<sup>41</sup> The regime was administered by a specialized independent agency (the Canadian Artists and Producers Professional Relations Tribunal) composed of members with expertise in the arts from the Act's inception until 2012, when this responsibility was transferred to the Canada Industrial Relations Board (CIRB). The CIRB has three major functions under the Act: defining the arts sectors under federal jurisdiction appropriate for bargaining; certifying national artists associations to serve as bargaining agents for their respective sectors; and, hearing and deciding ULP complaints on behalf of artists, artists' associations and producers and issuing remedies.

The SOA applies to a broad array of self-employed professional artists including: authors, performers and directors of artistic, dramatic, literary, musical or audio-visual works, along with all those who "contribute to the creation of a production," including professional creative categories as lighting, costume and makeup, and set design, among others. Self-employed professional artists that contract through an organization are also covered by the SOA. The SOA applies only to professional artists as opposed to hobbyists and the CIRB may seek to distinguish between the two by considering three issues: whether an artist is paid for a production or presentation and is recognized as an artist by other artists; is in the process of becoming an artist according to the practices of the artistic community; and is a member of an artists' association. In addition, the SOA excludes several categories of non-artist workers who may contribute

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<sup>41</sup> Canada, Status of the Artist Act, S.C. 1992, c. 33. Quebec is the only province, to date, that has enacted legislation providing access to collective bargaining for artists.<sup>41</sup>

to a production, including accounting, legal, publicity or administrative workers, among others. Also excluded are artists who qualify as “employees” under federal or provincial labour legislation (Bernstein, Lippel and Lamarche, 2001, p. 137).

An artists’ association must meet certain pre-requisites for certification, including having bylaws dictating membership requirements and the right of members to access the association’s certified financial statements. If duly authorized by its members, an association may subsequently apply to the CIRB for certification within one or more sectors.

In making a certification determination, the CIRB will consider whether the sector is appropriate for bargaining as well as whether the applicant organization is the “most representative” in the proposed sector. In deciding the latter question, the CIRB considers a number of factors, including the size of the sector, the size of the association’s membership and whether there are any competing applicants. Only members of the artists’ association seeking certification and other artists’ associations may intervene on the issue of representativeness as a matter of right. All others, including producers, may only intervene on this issue with the permission of the CIRB. The term “sector” is not defined in the SOA and the tendency has been to certify craft-based units that are national in scope, with the only exception being artists in sectors where language is an essential part of artistic expression (MacPherson, 1999, p. 363).

The voluntary formation of producers’ associations is also contemplated under the SOA. The only requirements to form a producers’ association are that the association must file a membership list with the Board, keep it up to date and send a copy of the membership list to every artists’ association with which it deals.

Certified artists’ association have exclusive authority to negotiate agreements on behalf of artists within a defined sector. Artists’ associations are certified for a fixed-term lease of three years with automatic renewal, except where an application for revocation or for a replacement artists’ association is filed.

The primary goal of certified associations is negotiation of a “scale agreement”, which is defined in the SOA as “an agreement in writing between a producer and an artists’ association respecting minimum terms and conditions for the provision of artists’

services and other related matters.”<sup>42</sup> A scale agreement thus differs fundamentally from a collective agreement insofar as it serves only as a “minimum labour standard” that is tailored to a particular sector of the arts community (MacPherson, 1999, p. 368). The SOA permits individual artists to negotiate private personal services contracts on terms greater than those minimums set out in a scale agreement.

The SOA provides for use of “pressure tactics” in bargaining disputes, which term is defined similarly as in the *Canada Labour Code*. Pressure tactics are prohibited except within a certain defined window of thirty days after the expiration of a scale agreement and prior to entering into a new scale agreement, or 60 days after an artists’ association is certified, but prior to the date that a scale agreement has been entered into. A mediator may be requested from the Minister of Labour at any time, in order to assist the parties to reach an agreement, although this request does not derogate from the right of either party to utilize pressure tactics. The SOA also contains an extensive list of ULPs and possible remedies that also mirror those found in the *Canada Labour Code*.

Vosko (2005, p. 148) singles out three key features of the SOA system that help overcome barriers of traditional collective bargaining legislation: workers need not demonstrate that they are “employees”; it exempts self-employed artists who are members of artists’ associations from liability under the *Competition Act* for acting in combination; and, minimum term scale agreements simultaneously protect artists with lesser bargaining power while not depriving artists with greater bargaining power from being able to bargain better terms

Several key weaknesses of the system have also been identified. First, producers are not required to form associations for bargaining and few have voluntarily formed. Consequently, artists’ associations must bargain with individual producers, rather than producer associations, which is time consuming and costly for associations (MacPherson, 1999, pp. 370-373; Vosko, 2005, p. 153). Second, the legislation contains no mechanism to encourage or require federal producers to bargain in association (Government of Canada, 2002). Further, the SOA’s narrow application to professional artists, the requirement to demonstrate professional status, and its focus

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<sup>42</sup> SOA, s.5

on creation of artistic works may be barriers to participation for some artists and may lead to an inequitable two-tier system among artists (Cliche, 1996, p. 7; Vosko, 2005, p. 145). In addition, the SOA may conflict with other labour, copyright and competition legislation (Vosko, 2005, p. 148).

A 2002 federal government report concluded that the SOA had led to greater organization among artists' associations, but had had little effect on artists' working conditions and socio-economic circumstances (Government of Canada, 2002). It attributed these shortcomings to the fact that many larger associations had scale agreements in place prior the legislation, at the time of the report many smaller associations had not yet completed negotiations, and, most artistic and cultural production falls within provincial jurisdiction and, therefore, outside of the SOA.<sup>43</sup> Notably, artists surveyed indicated that the legal right to collective bargaining was of less importance to improving their economic circumstances than were a variety of direct measures such as tax exemptions, income averaging, and access to social programmes. The report authors concluded that artists regarded the SOA as a *necessary* but not *sufficient* mechanism for improving their socio-economic circumstances (Government of Canada, 2002).

Elizabeth Macpherson (2015) is sceptical about the prospects for successful application of the SOA model to other industries. Like the construction industry, the arts and culture industry has distinctive characteristics that suit the statutory model, and which may not apply in many other industries. In this industry artists' associations developed prior to the legislation, sectors are effectively craft-based and largely self-identifying, there is a strong community of interest among individuals within sectors, and, even in the absence of the legislation, artists had to earn recognition and membership as artists (Macpherson, 2015). As the SOA model depends substantially on these industry characteristics, it may be difficult to successfully transplant this model to other industries, particularly involving vulnerable workers where established worker associations, clear sectoral organization and identity, and worker occupational identity, are weak or absent.

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<sup>43</sup> The report's recommendation that a first contract arbitration provision be incorporated into the SOA has not yet been adopted (Government of Canada, 2002, Recommendation 4).

### 7.4 Ontario Construction Industry

In the 1970s most Canadian jurisdictions imposed mandatory centralized bargaining in the construction industry in response to widespread and significant industrial instability in the forms of extremely high strike activity and wage settlements. This instability primarily arose from economic factors. First, a sustained period of rapid economic growth was a strong influence on industrial relations in the sector. Second, the nature of work in the construction industry, characterized by mobility of work, short-term project-based employment that is often irregular and seasonal, labour intensive production, specialization, intense competition among employers, and extensive and complex subcontracting of work. The transient nature of the work and hiring hall system have led unions to be of central importance to workers, with workers often having more connection to these than to an employer (Brown, 1979, pp. 541-43). A final source of instability was, the nature and structure of construction industry collective representation and bargaining, characterized by fragmentation, and unions that enjoyed much stronger bargaining power than employers.

Ontario construction labour relations pre-1976 was highly fragmented and dominated by local bargaining. Unions were regarded as having disproportionate bargaining power over poorly coordinated employers, and voluntary employer associations had the recurring problem of defecting employers undercutting other employers through wage competition. Union tactics of “selective” or “whip-saw” strikes, targeting the most vulnerable firms and demanding other firms agree to the same terms, were common and effective. Such strikes could be long-lasting as unions could support striking members by levying assessments on working members. The industry saw very rapid increases in wage rates, and high work stoppage activity, which were viewed as threats to the national economy (Brown, 1979, pp. 544-49). Policymakers concluded that it was necessary to address this imbalance in bargaining power, and that was intrinsically linked to bargaining structure in the industry (Rose, 2011, p. 104).

Ontario reconfigured construction bargaining in 1977, with subsequent amendments, establishing a system of mandatory, single-trade, multi-employer bargaining in one of the seven sectors of the construction industry: the industrial, commercial and institutional sector (ICI sector). Certifications cover all of an employers’

operation in the province or region, and the CBC process is available. Voluntary recognition is also common because general contractors' provincial agreements contain non-union subcontracting provisions, providing strong incentive for subcontractors to voluntarily recognize the union (Eaton, 1994, p. 349). Negotiations take place between employer and employee provincial bargaining agents. Bargaining agents are either determined by the Minister or through certification, after initial designation. Employer bargaining agents represent all unionized employers in the province for a given trade. Off-site employees may be included in a bargaining unit with on-site employees if they share a "community of interest". Only one collective agreement is permitted between bargaining agents for each trade, which also binds all employers and unions in the trades that subsequently certify. Agreements have three-year terms, expiring on a common date, reducing the opportunity for leap-frogging while providing an opportunity for voluntary coordination across trades (Adams, 1993, p. 15.14(iii)). Non-ICI sectors are subject to regional bargaining between one or more trades and employers.<sup>44</sup> Work stoppages occur at the provincial level. Some other provinces have adopted different approaches to construction industry bargaining structures, still effectively adopting multi-trade centralized bargaining in the industry.

Statutory centralized construction bargaining schemes had two goals: reducing work stoppages and moderating wage increases. Studies map two phases of development in Ontario construction bargaining against these goals. First, there was an extended period of upheaval as parties, and employer and union structures, adapted to the new bargaining regime, where relative strike frequency declined, but the relative severity of strike activity (e.g. person days lost) increased (Rose and Wetzel, 1986, p. 268). This was attributed to having fewer, but larger bargaining units, disruption of historical bargaining structures, and a change in the cause of strikes. The influence of the bargaining structure on wage issues, rather than union security or jurisdiction, became the main source of strikes (Rose and Wetzel, 1986, p. 268). Regarding nonwage outcomes, the greatest standardization among agreements was found among those trades that voluntarily adopted provincial bargaining and had practiced it for longer. However, for most Ontario trades, little standardization among terms was

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<sup>44</sup> OLRA, ss. 151-168.



discernable (Rose and Wetzel, 1986, p. 275).

In the longer term, the legislative goals appear to have been realized. In general, measures of strike activity in the industry declined substantially, and wage settlements fell in line with general private sector settlements. Rose attributed this to increasing non-union competition, greater employer association cohesion, parties adapting to the new structure, use of alternative dispute resolution measures, and flexible collective agreements (Rose, 2013, 2011, 1992). A study covering the 1989 to 2008 period concluded that strike activity was significantly lower in jurisdictions employing multi-trade structures and where there is substantial non-union competition, compared to jurisdictions such as Ontario with single-trade bargaining and no formal multi-trade coordination (Rose, 2011).

The main advantages of this bargaining structure to workers and unions are that its broad units permit workers to maintain the same terms and conditions even while moving among different worksites, and that it provides unions with significant bargaining leverage. Province-wide strikes prevent employers from moving work to unaffected sites, and common collective agreement expiry dates allow unions to coordinate negotiations and job action (Eaton, 1994, p. 349, 351). The experience of the Ontario construction industry, for example, also demonstrates that employers will support broader-based bargaining regimes when it is in their interest to do so (Intercede, 1993, p. 57).

The organization of work in the construction industry has some features in common with precarious workers in other industries. In particular they share complex systems of sub-contracting, transitory employment, movement of workers among worksites and employers, and a prevalence of small workplaces (MacDonald, 1998, p. 16; Intercede, 1993, p. 51). However, there are also crucial differences which would likely make it difficult to successfully apply the construction bargaining structure to industries involving more precariously situated non-standard workers. Even within the construction industry, Rose (1996, p. 17) cautions that adopting a particular bargaining structure is not sufficient to produce stable bargaining outcomes. Key differences between construction and other industries include the relatively high visibility of construction work and workers, the traditionally strong craft affiliation in the industry,

historically strong union presence and worker affiliation with unions, a strong union hiring-hall system, and high union density in the industry (MacDonald, 1998, p. 16; Eaton, 1994, p. 353). The skilled nature of some construction work, in conjunction with the strong craft and union structures, provided construction workers with leverage to obtain union recognition and good compensation (MacDonald, 1998, p. 16). Moreover, voluntary multi-employer bargaining, and regional agreements (at least in some jurisdictions) was an established feature of construction labour relations prior to statutorily imposed centralized bargaining (Brown, 1979, pp. 544-545). This was a very different backdrop for introduction of a statutory broad-based bargaining structure than exists for many other non-standard workers.

Nonetheless, some features of this statutory system may be applicable to other types of non-standard work, particularly sectoral designation of bargaining agents, province-wide certification of units, off-site employee provisions, and provision for portability of worker rights and benefits, particularly if a mechanism such as a hiring-hall is employed (Eaton, 1994, p. 353).

### 7.5 Quebec Home Childcare Workers

Quebec's 2009 *Home Childcare Providers Act* (HCPA) merits consideration as an example of sectoral bargaining for vulnerable workers, although this occupation is in the broader public sector.<sup>45</sup> It is included in this report, which otherwise focuses on private sector bargaining, because it illustrates a sectoral regime for vulnerable, self-employed workers in a highly gendered service industry.

The HCPA has its genesis in court decisions concluding that Quebec home childcare workers were employees for collective bargaining purposes (Bernstein, 2012).<sup>46</sup> The government responded with legislation establishing a separate collective bargaining regime for these workers.<sup>47</sup> Adopting Justice L'Heureux-Dubé's dissent in the *Dunmore v. Ontario (Attorney General)* (2001) decision, and recognizing occupation

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<sup>45</sup> Quebec, Act Respecting the Representation of Certain Home Childcare Providers and the Negotiation Process for their Group Agreements, CQLR c R-24.0.1

<sup>46</sup> Confédération des syndicats nationaux v. Quebec (Attorney General), 2008 QCCS 5076.

<sup>47</sup> Quebec, An Act to Amend the Act Respecting Childcare Centres and Childcare Services, S.Q. 2003, c. 13.

as an analogous ground of discrimination, the Quebec Superior Court held that the legislation violated workers' Charter freedom of association and equality rights. The Court found that the intent of the legislation was to bring an end to these workers' efforts to unionize, and to restrict their bargaining power.

In 2009 the Quebec government replaced the struck-out legislation with the HCPA. Stéphanie Bernstein describes the HCPA as having diverging purposes: containing government's spending on public daycare and meeting the requirements for recognition of collective bargaining rights for these workers (2012, p. 214).

The HCPA established a new sector-based collective bargaining regime for home childcare workers in the province. Associations are certified, based on majority support, as exclusive bargaining agents for home childcare workers (who are deemed to be "own-account self-employed" workers) in a given territory who are affiliated with the same home childcare coordinating office. Certified associations' rights and obligations include defending and promoting "the economic, social, moral and professional interests of home childcare providers" and bargaining a "group agreement" under the HCPA, and they may bargain in groups of associations.<sup>48</sup>

Negotiations take place between the Minister Responsible for Childcare Services and associations, and may be initiated by either side. A duty to bargain in good faith applies. Group agreements may cover the following topics: the government childcare subsidy grant; leave and holiday days; procedures for resolving dispute under the group agreement; establishing committees; and, indemnification of home childcare providers when permits are improperly suspended, revoked or not renewed. Agreements may not address matters under the *Educational Childcare Act* and its regulations, or mandatory service agreements between parents and home childcare providers.<sup>49</sup> Additional matters can be negotiated if the associations have sufficient bargaining power (Bernstein, 2012, p. 222). Group agreements are binding on all member and affiliated associations in the group, including any new member association or affiliated association.

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<sup>48</sup> HCPA, s. 18.

<sup>49</sup> Quebec, Educational Childcare Act, CQLR c S-4.1.1.

Bargaining dispute resolution mechanisms including mediation and arbitration are available, and workers may strike. Limited protection is provided for interference in the formation or activities of associations and for reprisals.

Notably, the effect of the HCPA is that minimum standards protections of the *Labour Standards Act* and the *Occupational Health and Safety Act* do not apply to these workers, who must also cover their own premiums for coverage by industrial accidents and occupational diseases legislation. These workers are explicitly excluded from the early childhood centre employees' pension plan and from pay equity legislation - both explicitly and because of their deemed self-employed status (Bernstein, 2012, p. 224).<sup>50</sup> Consequently, these home childcare workers must now negotiate for basic protections automatically afforded to other employees and workers and, to a degree, this sets the terms of compensation negotiations and makes bargaining more difficult for these workers (Bernstein, 2012, pp. 224, 226). The HCPA has shifted costs of social risk from the state and home childcare providers to these workers (Bernstein, 2012, p. 226). These workers have secured little control over their terms and conditions of work through bargaining as their work is highly regulated by law and these matters are not negotiable.

By 2012, 30 associations had certified, and three group agreements had been bargained, involving limited strike action, covering most of the approximately 15,000 home childcare providers in Quebec (Bernstein, 2012, pp. 227-28).

Bernstein (2012, p. 228) concludes that establishment of this unique sectoral bargaining regime for these workers has reinforced gender segregation in this labour market, including the discrimination these workers suffer based on gender and the occupational status of care work. She queries whether this regime will deepen the divide between home childcare workers and more protected and privileged workers in the childcare sector. However, Bernstein allows that subsequent negotiations rounds may demonstrate that this regime ultimately will allow these workers to negotiate substantial gains and "level the playing field" (2012, p. 228).

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<sup>50</sup> Quebec, An Act Respecting Labour Standards, C.Q.L.R. c. N-1.1; Quebec, An Act Respecting Occupational Health and Safety, CQLR c S-2.1; Quebec, Pay Equity Act, CQLR c E-12.001.

## 7.6 Baigent-Ready Proposal

In 1992 a majority of the sub-committee of three special advisors to BC's Minister of Labour recommended adoption of a modified form of sectorial bargaining for small enterprises where employees have been historically underrepresented by trade unions (Government of British Columbia, 1992). This proposal (the "Baigent-Ready" model) was included in the sub-committee's Proposed Draft Labour Relations Code but was not incorporated into the new legislation.

The Baigent-Ready model is based on "sectors", which are defined geographic areas, such as a neighbourhood, city, metropolitan area or province, containing similar enterprises with employees performing similar work. An example of such a sector would be "employees working in fast food outlets in Burnaby" (Government of British Columbia, 1992, pp. 31). This model would apply only to sectors the labour board declares to be "historically underrepresented by trade unions"<sup>51</sup>, and when the average number of full-time employees, or the equivalent number of part-time employees, at all work locations within the sector is less than 50.<sup>52</sup> Therefore, the model targets small workplaces with low rates of unionization.

Initial sectorial certification would operate as follows. If a union had support from at least 45% of employees at each work location within an eligible sector, the union could apply for certification of that multi-workplace bargaining unit. If the board declares the sector historically underrepresented, is satisfied that requisite support exists, and that the unit is appropriate for collective bargaining, then it would order a representation vote of all employees in the unit. The general BC *Labour Relations Code* representation vote provisions would apply: a vote held within 10 days of the application and the outcome of the vote determined by the majority of ballots cast. The board would hold a

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<sup>51</sup> "Historically underrepresented by trade unions" is defined as "means with respect to a sector a percentage of employees represented by trade unions within the sector that, in the opinion of the board, is significantly lower than the percentage of employees represented by trade unions in all industries in British Columbia" (Government of British Columbia, 1992).

<sup>52</sup> "Full time employees" are "employees who work an average of 40 hours each week"; and "equivalent number of part time employees" means a number of employees whose combined hours of work each week equal the hours of work of 50 full time employees", (Government of British Columbia, 1992).

hearing before making a declaration of historical underrepresentation, which would then also apply to any subsequent application within that sector. Parties, other employers in the sector, and at the board's discretion, interested unions could participate in the hearing. The Baigent-Ready model contemplates that multiple unions may be certified within a single sector, each union administering its own collective agreement. The majority of the sub-committee explained: "This feature has several advantages. It ensures that unions who are certified within a sector are not granted a monopoly on representation rights while offering employees within a sector the option of choosing from more than one union" (Government of British Columbia, 1992, p. 31).

The board would be given broad powers to deal with a situation where the union is already certified to a bargaining unit in the proposed sectoral unit and one or more collective agreements exist. The board would have wide discretion to take actions to facilitate establishment of the sectoral unit, including: determining that no agreement is in effect; extending the provisions of one or more agreement that are in effect to any or all employees and employers in the sector; and, settling the terms of a new agreement based in whole or in part on one or more of the existing agreements.

The Baigent-Ready model provides for new workplaces to be "varied" into established sectoral units. Where a union holding a sectoral certification has not less than 55% support at a new work location in that sector, the Board would "vary", or amend, the union's certification to include the new workplace automatically; or following a representation vote, if support is between 45 and 55%. Following variance, the sectoral collective agreement in force applies and is binding on the union and employer at the new work location. These units would be deemed appropriate for collective bargaining. In variance situations, either employers or the union may apply to the board for direction on the interpretation and application of the agreement affecting varied employees, and, where the employer demonstrates to the board's satisfaction that one or more terms of the sector agreement are unworkable at a work location, the board may modify or restrict the operation or effect of any provision of the agreement other than its term. Once the sectoral agreement expires, all covered employers would be able to participate in renewal negotiations.

The Baigent-Ready model would likely increase access to union representation for vulnerable workers and employees in small workplaces, who typically experienced difficulty accessing union representation due to the well-canvassed shortcomings of traditional labour relations legislation based on the Wagner model (MacDonald, 1997, pp. 267-268). The Baigent-Ready model also addresses the inefficiencies unions face in certifying, bargaining, and enforcing agreements for each individual small unit separately (MacDonald, 1997, p. 271). Other commentators regard the model as having more modest prospects (Intercede, 1993, p. 50).

In terms of access to collective representation, the model's concept of sector is likely sufficiently flexible to permit a labour board to develop policy as needed to achieve the goal of increasing unionization in small work places with traditionally low union density (McDermott, 1993, p. 60). However, the ceiling of an average of fifty employees per workplace in a sector is an unnecessarily strict requirement, which may exclude significant groups of precarious or contingent workers employed in larger workplaces (MacDonald, 1997, pp. 273-274). Ideally the model would have targeted both small workplaces and vulnerable workers (MacDonald, 1997, p. 274). As drafted, the Baigent-Ready model would exclude vulnerable workers in sectors with larger average sizes of workplace, and temporary help workers moving among large firms in a sector, or among sectors, in a single geographic area (Vosko, 2000, p. 269). This model does not directly address the problem of hard-to identify, "invisible" workers, such as homeworkers (Eaton, 1994, p. 377). A further limitation is that, unlike the Quebec CAD system, this model would not permit inclusion of non-union employees (Vosko, 2000, p. 269).

Regarding concerns about the ability of very small workplaces to unionize, MacDonald has proposed that once a majority of employees in a sector have opted to be represented, the collective agreement would then be extended to all employees in the sector (MacDonald, 1997, pp. 280-281). She also suggests that the problem of possibly unwilling participants could be solved by mandating joint employer and union bargaining in good faith (MacDonald, 1997, p. 282).

The Baigent-Ready model does not include the potentially insurmountable hurdle of requiring agreement from each individual employer, which was a weakness of earlier forms of statutory broader-based bargaining that had previously existed in BC

(MacDonald, 1997, p. 272). However the model does require that employees in each workplace support representation, described as a “double majority” process (Schenk, 1995, p. 206). Workers must go through the same majoritarian representation vote certification system as required under regular collective bargaining legislation. In this regard the model does not remove barriers to access. The “double majority” feature would overcome one criticism of the Quebec decree system: that it is undemocratic because it imposes agreements on workers who have not consented either to the agreement or to union representation (MacDonald, 1997, p. 273). However, this requirement may encourage employer resistance to avoid a union or coalition of unions from representing all workplaces in a sector since it would simply require that some workplaces reject certification. In particular, it creates an incentive for employers to organize to strategically defeat unionization in a few small workplaces (Intercede, 1993, p. 50).

Nonetheless, this model’s mechanism for varying certifications to include employees in new locations helps to overcome limits of the single-workplace traditional model and may increase workers’ bargaining power and ability to enforce labour rights and agreements (MacDonald, 1997, p. 271).

The Baigent-Ready model may also have positive effects on bargaining. By permitting additional locations to be varied into a certification, it grants these workers immediate coverage by the sectoral agreement, thereby eliminating some of the difficulties of achieving first collective agreements (McDermott, 1993, pp. 62, 64, 65). It may increase union bargaining power by permitting multi-location strikes, which may be more effective than a small location striking individually against a large employer (McDermott, 1993, pp. 63-64).

Although the Baigent-Ready model would not directly remove wages from competition, it may reduce wage competition and may promote standardization of wages and working conditions within sectors. In turn, this may foster greater employment equity and stability, compelling employers to compete on the basis of productivity and efficiency rather than on wage costs, and may protect employers who pay fair wages and offer good working conditions from being undercut by employers relying on low wages and poor working conditions to compete (MacDonald, 1997, pp.



271-272, 282-283). Flexibility and responsiveness to local needs is not inconsistent with this model. It contemplates the possibility of local agreements, in addition to a sectoral agreement, though only explicitly gave that power to the labour board. In this regard, MacDonald noted that parties need some ability to negotiate local terms and this is an element of the Baigent-Ready model that could be improved (MacDonald, 1997, pp. 280-281).

### **7.7 Proposal for Low-Wage Service Sectors**

Howard Wial (1992-93, pp. 713-733) has proposed a two-part approach to broader-based bargaining, drawing elements from mandatory multi-employer bargaining, and juridical extension models, as well as geographic/occupational and associational organizing strategies. This proposal is intended to reduce wage competition in the low-wage service sector and foster collective representation among these difficult to organize workers. Although this proposal was formulated with the NLRA system in mind, it is readily applicable to the OLRA context.

The Wial proposal consists of two parts, which can operate both in sequence and independently. The first is a structure for development of pre-bargaining consultative associations, which may evolve into certified bargaining agents with exclusive representation rights. The second part is a set of options for providing mandatory multi-employer bargaining applicable where certified bargaining units exist. In some instances Wial recommended that this be accompanied by a slightly modified form of the CAD juridical extension mechanism, applicable to a limited range of collective agreement terms.

Wial suggested aligning formal regulation and support for non-certified worker associations with the geographic/occupational pattern that is developing in low-wage service worker organizing. Thus the first part of this proposal involves granting pre-collective bargaining associations of workers recognition and accompanying legal rights to require employers to provide information, and to consult regularly with the association about human resources information and working conditions for employees in the association's jurisdiction. Consultation would entail only an obligation to meet and confer, and may, though would not be required to, result in an agreement on an issue. Employer failure to provide information or consult on these "mandatory subjects of

consultation” would constitute an unfair labour practice. Consultation on other subjects would be voluntary. Consultation could occur at one or both of the single- or multi-employer levels, based on whether or not the subject affected multiple employers within the association’s jurisdiction. Associations could use this information to help workers enforce their existing legal workplace rights, and employees would have a right to this information (Wial, 1992-93, pp. 727-29).

Recognizing the incongruity between optimal organizing election units and optimal negotiating units, Wial has suggested that the labour board apply a set of presumptions about appropriate jurisdictions in different labour markets. “Petitions” meeting those criteria would automatically be approved. Those not presumptively appropriate would be entitled to recognition upon demonstrating good cause for organizing on a different basis. Where petitions for overlapping jurisdiction were made, the labour board then could select the jurisdiction most closely reflecting the ideal for bargaining purposes. Alternatively, noting that exclusive jurisdiction is a less compelling value for associations that don’t engage in bargaining, the board could recognize associations with overlapping jurisdiction, requiring them to share information and consult jointly (Wial, 1992-93, p.730). Similarly, majority status would not be necessary for recognition, as these associations would not have any coercive authority over workers. Therefore, Wial recommended that the threshold of necessary support be ten or 20 percent of workers in the relevant group. Employers would be entitled to challenge the recognition process, and workers would be entitled to challenge only the validity of petition signatures (1992-93, pp. 731-32).

The second aspect of Wial’s proposal outlines options for introducing multi-employer bargaining with the goal of eliminating wage competition in the low-wage service sector (1992-93, p. 724). The second stage applies to conventionally certified bargaining units. It contemplates that some groups of workers represented by pre-bargaining associations may eventually seek to become certified, likely but not necessarily, by the pre-bargaining association. Other such groups of workers may choose to continue with the association-consultation system. Although requiring multi-employer organizing can impede organizing, mandatory multi-employer bargaining can benefit unions (Wial, 1992-93, p. 713).

This proposal offers three alternatives for achieving mandatory multi-employer bargaining: mandatory multi-employer bargaining across the relevant labour market, encompassing unionized and non-union workers and employers once a “triggering” proportion of workers in the labour market are unionized; mandatory multi-employer bargaining of only unionized workers and employers, regardless of union density; or, providing for aggregation of unions for bargaining either upon union application or by board direction in conjunction with providing for voluntary aggregation by employers for bargaining purposes, requiring board permission to withdraw from this multi-employer structure.<sup>53</sup>

If either of the last two options for multi-employer bargaining structures were adopted, Wial contended that these must be accompanied by a mechanism for collective agreement extension in order to effectively combat wage competition (1992-93, pp. 724-32). Looking to Quebec’s CAD as a model,<sup>54</sup> he proposed that one or more employers or unions could petition the labour board to extend a collective agreement. The board would have discretion about whether to grant extension and on what terms. Wial suggested that, unlike under the CAD, and to reflect the principle of majority support, the board could require that a majority of workers in the relevant labour market be covered by a single multi-employer collective agreement as a condition for extension. In such a case at least the basic wage and hours conditions would be extended. In another departure from the CAD model, there would be a requirement that non-union workers and employers subject to the extension would also have representation on the committee administering the extended agreement. Pre-bargaining associations would be responsible for administering the collective agreement, including grievances.

Although this two-part set of options is somewhat complicated, it would provide flexibility. Workers may decide to participate in pre-bargaining associations, and may or may not choose to later seek conventional certification (Wial, 1992-93, p. 733).

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<sup>53</sup> This final option is explicitly drawn from the British Columbia law and practice permitting creation of councils of unions, either by BCLRB order or upon application by unions, and employers’ ability to voluntarily join employers’ bargaining associations, which employers must obtain board permission to withdraw from (See Wial, 1992-93, pp.722-723, citing Weiler, 1980, pp. 159-78).

<sup>54</sup> As the CAD existed prior to the 1996 amendments discussed earlier.

Meanwhile, conventionally certified units would be able to engage in multi-employer bargaining. Together, the elements of this proposal would likely increase collective representation, consultation and negotiation among low-wage service workers, and reduce employer resistance to unionization as it reduces the competitive disadvantage of unionization and the overwhelming influence of competition based on wages and working conditions (Weil, 1992-93, p. 733; Schenk, 1995, p. 208). This model may also foster stability by supporting worker organizing and multi-employer bargaining; makes collective bargaining more economically efficient for small groups of workers; and permits portability of benefits which employers can pay into a jointly administered fund, which benefits highly mobile workers (Weil, 1992-93, p. 733; Eaton, 1994, p. 385).

### 7.8 Domestic and Garment Industry Proposal

In 1993 a detailed proposal for a form of sectoral regulation under the Ontario *Employment Standards Act* (ESA) for garment workers and domestic workers was made by Intercede, a group representing Toronto domestic workers, and the International Ladies' Garment Workers Union (Intercede, 1993, 58-76; Eaton, 1994; Fudge, 1997).<sup>55</sup> This proposal appears to draw substantially from the ISA and the garment industry's experience under that system, and union hiring halls in the construction industry. It also explicitly adopts unit designation and union council features of Ontario's construction bargaining structure (Intercede, 1993, p. 73). This proposal targets the particular challenges faced by domestic and garment workers, including: invisibility of this type of worker (live-in domestic workers and homeworkers, for example, are difficult for unions and organizers to identify or contact); complex subcontracting practices; and, the gender, education and racial characteristics of workers in these industries. This proposal is seen to offer a means for collective employee input into minimum standards that would not likely otherwise be available to these workers.

This proposal consists of two phases. The first entails sectoral negotiation and regulation of minimum standards through the ESA for each of the domestic service and garment industries. The second phase provides for different routes to certification and broader-based bargaining for subgroups of the two industries, apparently regulated by

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<sup>55</sup> Ontario, Employment Standards Act, 2000, SO 2000, c 41.

the OLRA. The proposal intends that first phase, sectoral regulation, would ultimately be superseded by the second phase, province-wide mandatory broader-based bargaining (Intercede, 1993, p. 71).

### **7.8.1 Sectoral Regulation under Employment Standards Legislation**

In the first phase, this proposal envisions designation of two sectors composed of all workers and employers in each of the two sectors: the domestic service and garment industries. Tripartite committees would be established in each sector, chaired by a government official, with equal employer and employee representatives. These committees would establish minimum standards through negotiation, taking into account wages and conditions in unionized workplace in the sectors. These standards would include minimum standards for wages, hours of work, overtime, paid and statutory holidays, and additional benefits could be negotiated. Negotiated standards would be enacted as government regulations, and the government would have limited discretion to alter agreed-upon standards. Negotiations would take place either at specified intervals or at one party's request (Intercede, 1993).

Workers and employers would be required to register with central registries including, in the garment sector, all entities in the chain of production, with fines for failure to register. This information would be used to monitor and enforce standards. Registries would provide workers with copies of standards. In the case of domestic workers, the government would provide employer names to the registry, and registries could contact domestic workers to inform them of relevant laws and of the registry and its purposes. The central registry would also provide domestic workers with representation in disputes with employers, benefits such as counseling and group insurance, and would provide other services to all sector workers. In the case of homeworkers, the central registry would operate as an agent for workers. Employers must apply to the central registry for a permit to hire. Permits would set out sectoral terms and conditions (Intercede, 1993).

Tripartite committees would also administer relevant parts of the legislation and be responsible for enforcing standards, including investigation and prosecution of registry and standards violations. Unions and other advocacy groups would also be permitted to prosecute violations, as well as to inspect employer records to ensure

compliance. For the garment industry, ESA amendments would impose joint and several liability throughout the production chain (Intercede, 1993, pp. 58-69).

This proposal would foster employee mobility and portability of benefits, as workers would be deemed continuously employed for ESA purposes if they continued to work within the sector, and employers would pay a levy pro-rated by hours worked, into the employment standards benefit fund (Intercede, 1993).

### 7.8.2 Sectoral Bargaining

This proposal explicitly contemplates that ESA-based sectoral regulation is a preliminary stage intended to be superseded by a second phase: mandatory broader-based bargaining. These bargaining structures would be tailored to each sector, without limits on the topics of negotiation, and would be accompanied by protections such as just cause termination typically provided by collective bargaining legislation (Intercede, 1993, p. 71).

In the domestic worker sector, two separate units of domestic workers could be certified in each geographic region: live-in and live-out domestic workers. A mandatory union hiring hall would operate in any unionized region, possibly through expanding the functions of the central registry. Certification would be granted upon support of a majority of registered workers in a region. When a “preponderance of regions” becomes unionized,<sup>56</sup> the Minister of Labour would call a conference of employer and union representatives to extend the collective agreements throughout the province (Intercede, 1993, p. 72). It is not clear how the various collective agreements would be reconciled (Eaton, 1994, p. 388).

For the garment industry, a two-part approach to broader-based bargaining was contemplated (Intercede, 1993, p. 73-75, 79). First, employing the joint liability principle, individual bargaining units would include all entities in the production chain. The proposal appears to contemplate organizing homeworkers and inside workers separately. To obtain certification the union would have to obtain support from a majority of workers in the production chain. Recognizing that a worker may work in more than one production chain, signing that worker would count towards a majority for

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<sup>56</sup> The authors suggest two large urban areas could meet this requirement (Intercede, 1993, p. 72).

all production chains the worker operates within. Production chains and relevant workers could be identified through the central registry. Collective agreements would apply to all workers in the chain of production (Intercede, 1993).

In terms of sector-wide bargaining, sectors would be defined by the Minister of Labour calling a special public meeting of the Council of Employers and Council of Unions, and would reflect the particular characteristics of different parts of the industry (Intercede, p. 74). Once a preponderance of workers, defined as 45%, (including home and inside workers) are unionized in any sub-sector of the garment industry (such as women's wear), then collective bargaining would be extended throughout the sector. Once a "preponderance of workers" within a sector are organized, the union or unions could apply for an extension of the collective agreement to a province-wide agreement for all workers within the particular sector (Intercede, 1993, pp. 73, 75). As in the Ontario construction industry, a council of unions would be the bargaining agent.

As Eaton (1993, p. 390) notes, the complicated nature of aspects of this proposal – particularly relating to garment workers – is likely necessary given the elaborate structure of subcontracting characterizing this industry.

### **7.9 Conclusion: Broader-Based Bargaining**

Several distinctly different forms of statutory broader-based bargaining structures have developed in Canada, generally as attempts to regulate unfair competition, and generally targeting groups of vulnerable workers. In the case of the construction industry, unions, rather than employers, were the source of unfair competition. These regimes have met with differing degrees of success.

It is difficult to draw general conclusions from the experiences of these very different bargaining regimes. However, it is clear that any broader-based bargaining system must be structured in light of the particular features of the work, workers, and established bargaining practices in the industry. However, several features of these systems merit consideration as potentially useful components of a new broader-based bargaining structure. These include: providing for inclusion of workers not meeting the standard definition of "employee"; providing recognition rights to "most representative" organizations; including a mechanism for extending certain negotiated provisions beyond the original scope of recognition; and, either providing incentives for, or

mandatory, employer joint bargaining. Providing support for pre-bargaining associations and central agencies may be particularly helpful for less visible workers in very small workplaces.

Several detailed broader-based bargaining structure proposals have been developed, each targeting a different group of workers or different set of challenges for traditionally unorganized or difficult to organize workers, and the particular features of each proposed model reflect the particular challenges of the target constituency.

Given the greater degree of *Charter* protection for access to collective representation and bargaining, it may be that exercise of freedom of association rights in the workplace for some groups of vulnerable workers requires the type of support that a carefully tailored inclusive bargaining structure could offer. The example of the Quebec home childcare worker bargaining regime offers a caution that a broader-based system, if improperly structured, could have the effect of depriving workers of collective representation and bargaining.

### ***Options for Consideration:***

- *Key features that may be appropriate to incorporate in statutory broader-based bargaining structures, depending on the particular characteristics of the relevant industry or occupation, include: providing for inclusion of workers not meeting the standard definition of “employee”; providing recognition rights to “most representative” organizations; including a mechanism for extending certain negotiated provisions beyond the original scope of recognition; and, either providing incentives for, or mandatory, employer joint bargaining. Providing support for pre-bargaining associations and central agencies in industries characterized by very small workplaces or homeworkers.*

## **8.0 Ontario Labour Relations Data**

Accurate, detailed and available data are necessary in order to assess the effects of collective bargaining laws. This includes determining whether changes to the legal-regulatory framework have achieved the intended goals or, perhaps, have had unanticipated or negative effects. This section of the report identifies some needs that



exist regarding OLRA data and potential research questions that could be addressed with OLRA data.

Data relevant to the OLRA are collected by the OLRB and the Ministry of Labour's Office of Collective Bargaining (OCB). The OLRB publishes paper bi-monthly, and electronic annual reports. Bi-monthly reports contain individual case-level data. The annual reports contain aggregate data on the OLRB's caseload, and for particular types of applications. The data in these reports is drawn from information the OLRB collects on individual applications. The OCB collects individual case level information about collective bargaining disputes, dispute resolution and settlement, including whether it relates to a first collective agreement or renewal.

Two key difficulties exist with OLRA data. First, in mid-2014 the OLRB adopted a new data collection computer system. This change may bring some benefits to data for research, but it may also impose limits on what data is available from before mid-2014. It may be that none of the earlier data is now accessible. This significantly limits potential research for several years until sufficient data has accumulated to permit meaningful analysis.

Second, the OLRB and the OCB collect data on an individual case basis. Individual case data cannot readily be linked either within or between these two organizations. For instance, it would be very difficult to study whether pre-certification ULPs are associated with ULPs at later stages in the relationship, with decertification, or other matters. Similarly, it would be extremely difficult to accurately trace the longer-term outcomes of units that applied for, or were granted, first contract arbitration, in terms of whether these are associated with later ULP complaints, decertification, or other matters. Researchers must resort to trying to find associated cases by hand, through comparing parties' names and dates. Given that party names are often recorded differently, this means of matching cases can be difficult and inaccurate.

This contrasts with the way in which the BCLRB, for example, collects and organizes case data. An important feature of this system is that each current or pending collective bargaining relationship is assigned a unique Collective Bargaining Relationship identifier number (CBR). This permits the BCLRB and researchers to obtain data on select, or all, BCLRB applications involving a particular CBR or set of

CBRs. For example, all certification applications filed in a particular year could be identified. Then, using the CBR, all ULP complaints, unit variance applications, and decertification applications relating to those certification applications could be identified, as well as information about the bargaining unit such as occupation, industry, size, and active status.

It appears that this shortcoming in OLRB and CBO data organization is not remedied by the new OLRB computer system. The lack of a CBR-type identifier for OLRB makes it very difficult for research to examine long-term outcomes and interrelationships among different matters.

If it is the case that electronic individual-level OLRB data is not available for prior to mid-2014, then the potential for individual case-level research is extremely limited. It would be possible, but extremely time consuming, to input the limited individual case-level data that is available in published paper bi-monthly reports into electronic format for analysis. Moreover, this would not entirely replicate the more extensive information that was collected, and was once available, from the OLRB.

Using only data that might be available under the new computer system, the following questions might be addressed, depending on whether the OLRB now collects this information, and can make it available:

- What are the characteristics of proposed and certified units in terms of a combination of unit size and other demographic, industrial and occupational features?
- What were the characteristics of units in which ULP complaints arise during organizing?
- How frequent, and what type, of ULP complaints arise pre-certification?
- What is the long-term experience of bargaining units which experienced ULPs during organizing?
- What are the characteristics of units seeking FCA?
- What are the long-term experiences of bargaining units which applied for, or were subject to FCA?
- Did cases that were denied FCA require other forms of bargaining intervention? What were the characteristics of these cases?

- What is the long-term experience of bargaining units that sought, or obtained successorship rights protection?

## ***Conclusion and Options***

This research project reviews and evaluates the academic literature relating to obtaining and maintaining collective bargaining rights under the OLRA.

Several studies suggest that procedural changes to representation processes introduced by Bill 7, including the mandatory representation vote (MCV), significantly reduced the likelihood of certification, and that these effects were concentrated in more vulnerable units. Research also suggests that part of this effect may be due to greater opportunity for delay and employer resistance under MCV. The research also indicates that delay has significant effects on certification outcomes, as do ULP complaints and employer resistance tactics. Moreover, such activities appear to cause long-term harm to bargaining relationships, resulting in difficulties in bargaining and early decertification. Research also suggests that employer resistance is common and often intentional.

Relatively little research on decertification exists, and the one study examining reasons for decertification arises from BC in the 1970s and suffers from methodological problems. It suggests that employer actions contribute significantly to decertification, and suggests that decertification is concentrated in smaller, low-skill, low-power units.

Alternative representation election formats, primarily electronic, telephone and internet (IETV), off-site manual or IETV kiosks, have been studied and recommended by researchers, as alternatives that may offer greater privacy to employees and relieve them of union and employer scrutiny and improper influence. Notably the Canada Industrial Relations Board recently embarked on IETV votes, and it is a long-standing practice at two US labour relations boards. Research on these experiences suggested that this alternative format has potential for other labour boards in Canada.

Research regarding union access to employees during organizing focuses on the imbalance between employer and union access to workers and how to address the disadvantage to unions. This research is in the nature of informed opinion, and offers several proposals for revising rules governing union access to the workplace for

organizing and for providing unions with a means of contacting workers. Proposals for the former suggest that restrictions on union access to the workplace should be unlimited, or limited only to sensitive areas. One commentator suggested that international labour rights may require some form of workplace access. Suggestions about employee lists focus on providing contact information to unions earlier in the process or by electronic means. This latter set of research is entirely from the US, so reflects some features of US labour law that differs from the Canadian context.

Finally, Canadian research on certification and US research on decertification found that stock prices of firms involved reflected concern over labour relations instability. MCV elections were found to negatively affect prices, while card based certification had no substantial effect. That is, the particular certification procedure rather than certification *per se*, appeared to be key. For the US decertification cases, failed applications led to stock price increases, which the researchers interpreted as a market reward for avoiding instability arising from decertification.

Overall research on representation procedures highlights several issues that may merit further consideration: distorting effects of delay and ULPs on representation outcomes; alternatives to manual ballots; relative ability to communicate with employees; and the influence of procedural choices on broader labour relations stability and the long-term bargaining relationship.

Several features of legislation and board practice applying to bargaining unit determination are regarded as highly problematic. Primary among these are the occupational exclusion provisions, provisions for separate units for certain workers, and the boards' development and application of community of interest and appropriateness tests. These features tend to produce narrow, fragmented, homogeneous units. Some researchers contend these effects align with and reinforce workplace inequities relating to gender and other characteristics, and that these exclusions are not justifiable. Although this research is mainly in the nature of informed opinion and theoretical deduction rather than empirical work, researchers' criticisms align with observed labour relations outcomes.

The dual role of the bargaining unit as both electorate for representation and negotiation unit, also creates distorting incentives in the direction of small,

homogeneous units, which unions may find easier to certify but which may be less desirable for bargaining and contributes to overall fragmentation. Limited ability to modify units post-certification aggravates this situation. A proposal for a “unified-dynamic” approach to unit determination proposes decoupling the two roles of the unit by permitting smaller units to certify, which can then combine with other groups of supportive workers at a later date as the bargaining relationship matures.

The definitions of employer and employee as the basic parties to a certification also pose a significant barrier to non-standard workers obtaining representation. Proposals addressing this range from essentially providing that the default rule is that all workers are to have access to labour legislation, except where there is good reason, such as a public policy reason, for exclusion; to suggestions for identifying characteristics to help identify any workers’ true employer and, failing that, to recognise multiple entities as a joint employer; to possibilities for inclusion provisions targeting particular groups of workers; to nuanced reconceptualizations of how to locate labour obligations which don’t rely on bilateral personal service contracts with unitary employer entities.

Finally, non-majoritarian collective representation, permitting any two or more employees to bargain collectively with their employer, has also been posed as a solution to problems of access to the existing system, and one that may be supported by current Charter interpretations. There does not appear to be substantial empirical research on the effects of such a system were it to be applied in a Wagner model jurisdiction.

Research on first contract arbitration (FCA) is largely descriptive and the key questions about the effectiveness and long-term effects on the bargaining relationship have not been completely answered, largely due to limited available data. However, the research suggests that FCA is a sparingly sought and sparingly used mechanism and the research does not clearly indicate that it is associated with negative effects. There is some evidence of positive effects in jurisdictions in which it exists, and, for the mediation-intensive model in particular, a high degree of satisfaction among parties with the process. One clear lesson from the research on this topic is that the four existing FCA models operate differently and any assessment of FCA legislation must be made

with reference to the relevant model. The one substantial empirical study suggests that the FCA provisions in place in Ontario under Bill 40 operated differently than those in place prior and subsequently. There is some evidence to suggest that the mediation intensive FCA model introduced in BC (and a modified form adopted recently in Newfoundland) may offer improvements over other, older models.

The key features of this model are that it reconceptualizes FCA as part of the bargaining process; not as a remedial response, and that it includes an extensive mediation programme initiated early in the process, with the goal of constructively assisting parties before irretrievable breakdown in bargaining. Further exploration of the mediation-intensive model may be warranted.

Although much of the academic literature on OLRA remedies is in the nature of informed opinion, it is consistent with the theoretical and empirical studies which conclude that labour boards have jurisdiction to award remedies gauged to deter violations, but that existing remedial awards are not sufficient to achieve a deterrent effect. The studies consistently regard deterrence as a legitimate, compatible and desirable goal for labour board compensatory remedies. The research suggests that deterrent effect depends crucially on timely intervention, such that interim remedies, including interim reinstatement, and expedited hearings are important. These procedural aspects of remedies are regarded as particularly important if remedial certification is not available or is restricted. Remedial certification is seen to carry a deterrent effect. Some studies suggest that a deterrent effect could be achieved through combining more remedial elements in awards, others suggests that monetary awards or penalties must be higher to achieve a deterrent effect. Several commentators regarded labor boards as overly cautious and reluctant to exercise their full remedial jurisdiction, suggesting that in some cases mandatory remedies may be desirable.

Most of the quantitative empirical research in this area arises from the US, reflecting better data availability from the NLRB than from Canadian labour boards, as well as differences in the NLRB system for oversight of certain ULP remedies. Although the limited board data likely precludes it, it would be valuable to study the effects of different remedies on certification success and the longer-term bargaining relationship.

Most of the research on remedies addresses ULPs in the organizing context. This likely reflects the relative importance and frequency of such violations. Therefore it would be helpful to have more research insight into post-certification OLRA violations, remedial awards, and the effects of these awards.

The examples of existing and proposed statutory, broad based representation and bargaining structures reviewed in this report are examples of systems which seek to relieve against one or more of the recognized barriers to access to collective representation and / or effective collective bargaining under the OLRA. However, each approach also has significant limitations. Rather than regarding any of these examples as models to be adopted, it may be more useful to consider the particular elements of each model and how they may be configured into a regime that is appropriate for the characteristics of workers, work and established bargaining practices in the industry.

Research indicates that corporations' international relocation decisions may be efficiency-seeking (that is to say, cost-reduction), in which case labour costs are important, or market-seeking (that is, seeking access to new product markets), in which case labour costs are not of primary importance. The research provides little guidance on which motivation will be determinative in any particular case or industry, reflecting the large scale of these studies, but it is clear that labour costs are not always the driving factor in relocation decisions, although their exact importance is difficult to ascertain. Studies of Quebec manufacturing firms and local unions found that relocation threats and decisions were primarily motivated by efficiency-seeking (e.g. cost reduction). Union concessions, if made on labour costs and employment levels may deter relocation threats from being carried out, although these results were not significant. However, a study of contracting out decisions by manufacturing firms in Quebec and Ontario, suggests that labour law, employment standards and collective agreement constraints were not among firms' main reasons for limiting or not contracting out. This study examined a period during which Quebec *Labour Code's* successor provision was broad enough to capture some contracting out activity. This suggests that practical considerations are of more importance to firms' decision-making than legal constraints.

It is difficult to draw conclusions on the limited research available. However, it is clear that relocation and contracting out decisions are complex, and related to firms' structural capacity. There is little evidence that legal or collective agreement constraints were regarded as significant inhibitors of contracting out. The Quebec experience and a study of the auto industry suggest that where firms' preference for less restrictive successorship legislation is satisfied, or existing statutory protections are ineffective, the default may be that unions will seek to negotiate successor rights with employers. Clearly the effectiveness of this strategy will differ among industries and types of workers.

Little academic research addresses successorship, in contrast with extensive research on the broader phenomenon of contracting out, which was not a topic addressed in this research project. Given the importance of contracting out to labour law issues, this issue may merit more attention.

It appears that significant limitations exist with respect to the existence, accessibility and usability of Ontario labour relations data, which limits the scope for research. Ideally historical labour relations data would continue to be accessible, newly collected data would incorporate a reference variable permitting tracking of bargaining relationships, and data from the OLRB and Ministry of Labour relating to the same bargaining relationship could be linked, again perhaps with a reference variable.

A set of options for the Changing Workplace Review to consider are set out below.

### **Options for Consideration:**

#### ***Certification and Decertification Procedures - Options for Consideration:***

- *Reintroduce card-based certification.*
- *Identify and reduce sources of delay in the certification process.*
- *Impose greater penalties for employer union-avoidance tactics, including but not limited to ULPs, during union organizing.*
- *Greater use of imposed first contracts in the case of illegal employer union-avoidance tactics. This practice and that of reducing delays and other penalties for illegal union-avoidance tactics merit particular attention in voting regimes*



- *Provide alternative formats or locations for certification elections, including internet and telephonic elections (IETV), off-site kiosks for manual or IETV voting.*
- *Increase worker access to union information and organizers during organizing, including adjusting restrictions on workplace access for organizers, and provide unions with means to contact employees at an early stage of the organizing.*

### **Bargaining Unit Determination - Options for Consideration:**

- *Reconsider occupational exclusions and provisions for separate units for certain types of workers.*
- *Provide a more inclusive approach to “community of interest” and “appropriateness requirements” for bargaining units*
- *Provide mechanisms for post-certification modification of bargaining unit boundaries, including consolidation of units and variance of unit boundaries.*
- *Consider alternative approaches to the definition of “employee” as a threshold requirement for OLRA coverage.*
- *Consider a role for non-majoritarian worker representation in workplaces*

### **Successorship Rights - Options for Consideration:**

- *Additional research would be beneficial to formulating options regarding OLRA successorship rights.*

### **First Collective Agreement Arbitration - Options for Consideration:**

- *Provide support for first collective negotiations that is available prior to the point that negotiations have become “unsuccessful”.*
- *Introducing mediation as part of the first contract arbitration procedure.*

### **OLRB Remedial Jurisdiction - Options for Consideration:**

- *Explicitly incorporate the anticipated deterrent effect of a remedy as a factor the OLRB considers in formulating remedial awards, focusing on the “harms caused”, not on the “benefits received” by the violation.*
- *Better align remedies with harm caused by ULPs by explicitly incorporate full compensation for all forms of harm as a factor the OLRB considers in formulating*

*remedial awards.*

- *Give the OLRB authority to impose specified financial penalties, in addition to compensatory remedies, including OLRB discretion regarding whether the penalty is payable to the government, the employer, the union, or one or more employees, or any combination of these.*
- *Introduce mechanisms such as expanded scope for interim relief and expedited ULP hearings for complaints of ULPs arising during union organizing with the goal of providing effective remedies prior to a representation vote.*
- *Reintroduce a greater scope for remedial certification awards.*

### **Broader-based Bargaining - Options for Consideration:**

- *Key features that may be appropriate to incorporate in statutory broader-based bargaining structures, depending on the particular characteristics of the relevant industry or occupation, include: providing for inclusion of workers not meeting the standard definition of “employee”; providing recognition rights to “most representative” organizations; including a mechanism for extending certain negotiated provisions beyond the original scope of recognition; and, either providing incentives for, or mandatory, employer joint bargaining. Providing support for pre-bargaining associations and central agencies in industries characterized by very small workplaces or homeworkers.*

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## ***Appendix A – Summary of Selected Research Studies***

<b>Author (year)</b>	<b>Jurisdiction &amp; Timeframe Studied</b>	<b>Major Findings</b>
Bentham (2002)	Eight provinces, excluding PEI and QU, 1991-1993.	Survey of employer conduct during organizing concludes that employer resistance to unions is prevalent and specific forms of employer resistance have significant negative effects on certification success, early decertification, first contract settlement, and likelihood of third party assistance in first contract negotiations.
Brudney (2010)	US 2006	Concluded that illegally terminated employees had long delay before payment; and tended to receive less than full amount of back-pay due. Proposed a mandatory minimum two-tier back-pay remedy to deter illegal terminations.
Campolieti, Riddell & Slinn (2007)	Ontario 1993-1998  British Columbia 1986-1998	Unfair labour practice (ULP) complaints against the employer appear to reduce the likelihood of compliance with the time limit for certification votes in Ontario. Election delay has a strong, negative correlation with certification success. Overall, the results suggest that enforced time limits on elections coupled with expedited ULP hearings may substantially reduce the adverse effects of delay.
Chafetz & Fraser (1979)	1974-1976, BC	Examined decertified units and concluded that most were small units of unskilled labour certified to large locals. Employer interference was a key factor in reasons for decertification.

Author (year)	Jurisdiction & Timeframe Studied	Major Findings
Jalette (2011)	Quebec (2004-2011)	Quebec manufacturing unions surveyed. Finds that production cost considerations drive relocation threats; structural and labour costs considerations drive actual relocation. Union concessions on either employment levels or labour costs are not sufficient to affect relocation; possibly combined concessions have effect.
Johnson (2010)	1976-2005 BC, AB, SK, MB, ON, QU, NB, NS, NL, PEI, Federal.	Studies the effects of first contract arbitration (FCA) legislation. Concludes that presence of FCA legislation: (1) significantly reduces the incidence of first contract work stoppages and this reduction is not due to resort to FCA; (2) appears to encourage collective bargaining; and, (3) there is no evidence that it influences the duration of first agreement work stoppages.
Kleiner & Weil (2012)	US (2000-2009)	Applies models of optimal penalty design to assess the NLRB's remedial approach, concluding that it fails to deter ULPs. Proposes improving the deterrence effect by administratively reducing procedural delays or strategic uses of injunctions.
MacDonald (1997)	BC 1992	Assesses BC Sectoral Bargaining Proposal; suggests strategies and recommendations for future adoption of the Proposal.

Author (year)	Jurisdiction & Timeframe Studied	Major Findings
Mitchell (1992)	1982-1991, MB	Examines the history, rationale and application of private sector interest arbitration in MB, including FCA. Expresses concern over high usage of FCA, subsequent use of final offer selection arbitration, and bargaining relationship dissolution. Concludes that FCA affects both parties' incentives in bargaining but does not clearly favour labour or employers.
Murray & Cuillerier (2009)	1978-2008, QU	Limited descriptive statistics on FCA in Quebec. Detailed analysis of the Wal-Mart first contract arbitration dispute.
Riddell (2013)	ON and NS 1991-1998	Using NS as a control, this study assessed first contract success rates during three legislative first contract regimes in Ontario. It concludes that success rates were 8-14 percentage points higher under the 'automatic access' compared to 'no fault' regimes.
Rose & Chaison (1997)	BC (1993-1996?); ON (1993-1995)	Assessed the application of changes to ULP remedies made in 1993 in both Ontario and BC: expedited hearings for improper discipline or discharge during organizing; interim relief for dismissal; employee protection from improper discipline or dismissal post-certification and before a first contract is settled; and, remedial certification.
Vipond (2010)	1993-2009, BC	Qualitative study employing labour board data, interviews and survey of unions to obtain very complete data on first contract arbitration experiences in BC. Finds high level of party, mediator, board satisfaction with process.

<b>Author (year)</b>	<b>Jurisdiction &amp; Timeframe Studied</b>	<b>Major Findings</b>
Wolkinson, Hanslowe & Sperka, (1989)	US (1981-1984)	Unions frequently fail to reach first contracts following Gissel orders.

## Appendix B – OLRA Certifications by Industry

Non-Construction Certification Applications under the OLRA by Industry, 2011-12 to 2013-14

	CERTIFICATION APPLICATIONS IN FISCAL YEAR		
INDUSTRY	2011-12	2012-13	2013-14
<b>All Industries</b>	204	206	208
<b>Manufacturing</b>	14	5	3
Clothing	1		
Chemicals			1
Food, Beverages	6	1	1
Machinery		1	
Paper	1		
Other Manufacturing	4	3	1
Electrical Products	2		
<b>Non-Manufacturing</b>	190	201	205
Accommodation, Food Services	3	5	2
Education, Related services	7	4	2
Health, Welfare Services	34	24	29
Hospital	4	2	7
Local Government	1	1	2
Municipal		1	2
Personal Services		2	
Real Estate, Insurance Agencies		1	
Recreational Services			1
Retail Trade		2	1
Transportation		1	1
Other Services	135	150	150
Other Non-manufacturing	6	8	7
Mining, Quarrying			1

Source: Ontario, *OLRB Annual Reports*, 2011-12, 2012-13, 2013-14, Figure 5.

Notes: Different industry categories are reported in different years, as indicated by shaded cells.

Due to a change in reporting of industry-specific certification case data in fiscal year 2011-12, comparable data is not available from OLRB annual reports for prior years.

## Appendix C – Non-Construction Industry Certifications by Unit Size

Non-Construction Certifications Granted under the OLRA by Size of Bargaining Unit, 2009-10 to 2013-14

	FISCAL YEAR									
	2009-10		2010-11		2011-12		2012-13		2013-14	
UNIT SIZE	Cases	Employees	Cases	Employees	Cases	Employees	Cases	Employees	Cases	Employees
2-9 employees	38	193	60	364	42	241	42	226	72	394
10-19 employees	48	665	61	835	42	599	46	626	39	522
20-39 employees	41	1,167	59	1,599	49	1,427	43	1,274	31	861
40-99 employees	26	1,692	44	2,642	38	2,399	39	2,552	27	1,506
100-199 employees	11	1,574	23	3,132	19	2,549	11	1,454	19	2,660
200-499	7	1,991	11	2,967	9	2,646	8	2,299	6	1,448
500+ employees	1	626	2	2,700	2	2,466	5	3,727	3	2,301
<b>TOTAL</b>	172	7,908	260	14,239	201	12,327	194	12,158	197	9,692

Source: Ontario, OLRB Annual Reports, 2009-10, 2010-11, Table 9; 2011-12, 2012-13, 2013-14, Figure 6.